



[1] The plaintiff, Zixin Wei, is the former wife of the first defendant, Jiacy Wu. Their family home was a property at 1 Chapeltown Drive, East Tamaki, Auckland (the property) that was registered in the name of Mr Wu.<sup>1</sup> Mr Wu signed a mortgage agreement with the second defendant Xiangyu Chen (the Chen loan). Because Ms Wei is not a registered owner of the property, she was not included as a party to the loan from Mr Chen.

[2] Payments owing under the loan to Mr Chen were not made. He attempted to enforce a mortgagee sale of the property. This was resisted by Ms Wei who obtained an interim injunction on a without notice basis from this Court halting the forced sale.<sup>2</sup> The injunction was subsequently extended.<sup>3</sup>

[3] Ms Wei asserts she has a relationship property claim over the property under the Property (Relationships) Act 1976. She contends she has enforceable rights against Mr Chen under the Credit Contracts and Consumer Finance Act 2003 (the CCCFA) and/or the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 which warrant the mortgagee sale being stopped until these proceedings are substantially determined.<sup>4</sup> The question for me to determine is whether the injunction should be continued.

[4] Mr Wu has not responded to the proceedings nor has he given any evidence. The third and fourth defendants, Peng Xie and Bogong Zheng, have caveats registered on the title of the property. They too have not participated in the proceeding.

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<sup>1</sup> Ms Wei states the property was registered solely in Mr Wu's name due to her then visa status.

<sup>2</sup> *Wei v Wu* HC Auckland CIV-2022-404-534, 31 May 2022 [Minute of Moore J].

<sup>3</sup> *Wei v Wu* HC Auckland CIV-2022-404-534, 8 June 2022 [Minute of Downs J]. (Extended by consent).

<sup>4</sup> The Credit Contracts and Consumer Finance Act 2003 (CCCFA) was amended in 2021. Reforms to secondary legislation, regulations and the Responsible Lending Code (RLC), were made in June 2022 and came into force 7 July 2022. Further proposed changes to the regulations and RLC are presently being considered. These amendments do not affect the present application.

## **Factual background of the mortgage**

[5] Ms Wei deposes that the property was initially purchased using a loan from her parents of \$800,000 and a loan of \$500,000 from ANZ which was registered on the title on 17 August 2018.<sup>5</sup>

[6] Mr Chen deposes that he was introduced to Mr Wu by Tony Wang. Mr Wang is the owner of Big World Internet Café, which Mr Wu frequented. Mr Chen learnt via Mr Wang that Mr Wu was looking for someone to loan him funds secured against the property. Mr Chen was looking to invest in property at that time but could not find a suitable investment. He decided to make the loan secured against the property as it seemed “low risk and able to provide a stable return compared to directly investing in property at that time”. Mr Chen deposes that the interest rate was “a few percentage points above what most major banks were offering” and had a 25 per cent penalty interest clause.

[7] On 8 July 2021 the ANZ mortgage was discharged. On the same day, 8 July 2021, \$1,124,000 was transferred from Mr Chen’s lawyers to lawyers acting for Mr Wu and the mortgage in favour of Mr Chen was registered. It is common ground that the ANZ loan was repaid using funds Mr Wu borrowed from Mr Chen.

[8] The loan agreement for the mortgage describes Mr Chen as a “business consultant”.

[9] The principal sum for the loan was originally approximately \$1.1 million. The lower interest rate was seven per cent per annum with a higher interest rate of 25 per cent per annum (payable as penalty interest). The loan was dated 7 July 2021 and the repayment date was six months from the date of the loan advance. The interest commencement date was from the date of the loan advance and the interest dates were monthly from the date of the loan advance. The loan included a lending fee of 5 per cent (\$60,000), a valuation fee (\$2,000), and legal and accounting fees (\$5,000 and \$2,000 respectively). There was a default fee of \$500 for each default event.

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<sup>5</sup> A subsequent caveat and later mortgage in favour of the fourth defendant, Mr Bogong Zheng were then registered. The caveat was withdrawn on 13 June 2019 and the mortgage was discharged on 8 June 2021.

[10] On 6 December 2021 a variation was executed with the principal increasing to \$1,320,000 and the lower interest rate to eight per cent per annum.<sup>6</sup> This was done to cover Mr Wu's failures to make payments under the loan. The mortgage priority amount was increased to \$1.5 million. This variation included a five per cent application fee of \$66,000 and an administrative fee of \$5,600.

## **Law**

[11] There are two questions relevant to the Court when determining an application for an interim injunction.<sup>7</sup> First: does the evidence before the Court disclose an arguable case to be tried? Second: where does the balance of convenience lie? However, these questions are not exhaustive, and the ultimate consideration is where the overall justice lies.<sup>8</sup>

[12] The purpose of an interim injunction is to protect the plaintiff from a loss of their rights that could not be adequately compensated for by damages if the substantive case goes in their favour.<sup>9</sup> However this must be weighed against the defendant needing to be protected from injury resulting from an inability to exercise their rights that could not be compensated for by an undertaking for or award of damages.<sup>10</sup>

[13] A conflict of evidence given on affidavit for the interim injunction application should not be resolved by the Judge without the benefit of testing the evidence at trial, unless the evidence giving rise to the conflict is prima facie implausible.<sup>11</sup>

### *Credit Contracts and Consumer Finance Act 2003*

[14] Ms Wei's application for an interim injunction is premised on her having an arguable case that the mortgage should be unenforceable because it offends against provisions of the CCCFA.

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<sup>6</sup> It appears this may have been a refinancing of the outstanding interest into the principal.

<sup>7</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

<sup>8</sup> *Harvest Bakeries Ltd v Klissers Farmhouse Bakeries Ltd* [1985] 2 NZLR 129 (CA).

<sup>9</sup> *American Cyanamid Co v Ethicon Ltd*, above n 6, at 321.

<sup>10</sup> At 321.

<sup>11</sup> *Eng Mee Yong v Letchumanan* [1980] AC 333 (PC) at 338 and 341.

[15] The primary purpose of the CCCFA is to protect the interests of consumers in connection with credit contracts.<sup>12</sup> It also intends to, inter alia, support informed decision-making by consumers and prevent oppressive credit contracts and conduct by creditors.<sup>13</sup> For these purposes the CCCFA requires lenders to meet lender responsibility principles and provides for the disclosure of adequate information to consumers.<sup>14</sup>

[16] The protections of the CCCFA only apply to “consumer credit contracts”. A credit arrangement will be a consumer credit contract if all the following conditions apply:<sup>15</sup>

- (a) the debtor is a natural person;
- (b) the credit is mainly for personal, domestic or household use;
- (c) the loan is subject to interest or credit fees, or there is a security for the loan; and
- (d) the lender is someone who provides credit in the course of their business, or the creditor and the lender were introduced by a paid adviser or broker.

[17] If a lender breaches the lender responsibility principles, the Court may make compensation or other orders or grant an injunction.<sup>16</sup>

[18] The lender responsibility principles require all lenders, inter alia, to make reasonable enquires so as to be satisfied that the credit provided meets the borrower’s requirements and the borrower will not suffer substantial hardship by making repayments; assist the borrower to reach an informed decision and be reasonably aware of the full implications of entering into and varying the agreement; treat the

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<sup>12</sup> CCCFA, s 3(1).

<sup>13</sup> Section 3(2); and see *Burke v Advanced Securities* [2008] NZCA 93 at [41].

<sup>14</sup> Section 3(3).

<sup>15</sup> Section 11.

<sup>16</sup> Sections 9A, 93(aa), 96(1)(aa), 98A, 98B and 107A.

borrower and their property in an ethical manner and ensure the agreement is not oppressive.<sup>17</sup> These principles are elaborated on in the Responsible Lending Code.<sup>18</sup>

[19] Every creditor under a consumer credit contract must ensure that disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every debtor under the contract before the contract is entered into.<sup>19</sup> The creditor must also make ongoing disclosure statements relating to payment, balance and fees.<sup>20</sup> Debt collection disclosure obligations do not apply if the creditor has complied with s 119 of the Property Law Act 2007.<sup>21</sup>

### **The present case**

[20] Ms Wei's case under the CCCFA hinges on whether the loan between Mr Wu and Mr Chen is a consumer credit loan, and if it is, whether she as a non-party to that loan can bring a legal claim for the harm/loss she says she will suffer if the mortgagee sale proceeds.

[21] At the hearing Mr Chen's counsel accepted that for the Chen loan the CCCFA's information disclosure requirements were not met.

#### *Is there a consumer credit loan?*

[22] Whether Mr Chen's mortgage over the property is a consumer credit loan turns on s 11(1)(b) and (d) of the CCCFA. It is accepted that Mr Wu is a natural person (s 11(1)(a)) and security, in the form of the property, was provided for the loan (s 11(1)(c)). The remaining questions are first, whether the loan was intended by the borrower, Mr Wu, for mainly personal, household or domestic use, and second whether Mr Chen is an applicable lender.

[23] Under s 11(1A), the predominant purpose for which the credit is to be used is (a) the purpose for which more than 50% of the credit is intended to be used; or (b) if

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<sup>17</sup> Section 9C.

<sup>18</sup> See ss 9E and 9F.

<sup>19</sup> Section 17.

<sup>20</sup> Section 19.

<sup>21</sup> Section 132A.

the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used. The reference to intention is to the debtor's intention.<sup>22</sup>

[24] Section 11(1)(d) sets out who is an applicable lender:

(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):

(ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:

(iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:

(iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

[25] Ms Wei's position is that Mr Wu obtained the loan for purchasing land, which was a personal venture. There is no further elaboration of the proposition that it was a personal venture. However, Ms Wei points to s 13 of the CCCFA which provides:

### **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.

Accordingly Ms Wei submits that the onus is on Mr Chen to prove the contract was not a consumer credit contract.

[26] Ms Wei refers to *Xiao v Sun*, where in the context of s 11(1)(d) Davison J highlighted that there is no definition of "business" under the CCCFA.<sup>23</sup> The Judge referred to the definition of "business" under other consumer protection legislation:<sup>24</sup>

**business** means any undertaking —

(a) that is carried on whether for gain or reward or not; or

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<sup>22</sup> Section 11(1B).

<sup>23</sup> *Xiao v Sun* [2016] NZHC 454.

<sup>24</sup> Consumer Guarantees Act 1993 and Fair Trading Act 1993.

(b) in the course of which —

(i) goods or services are acquired or supplied; or

(ii) any interest in land is acquired or disposed of — whether free of charge or not

[27] Ms Wei also submits that Mr Chen was in the business of providing credit because:

- (a) Mr Chen provided a formal loan to Mr Wu and was therefore providing a service.
- (b) Mr Chen obtained legal advice and completed the loan formally through solicitors.
- (c) The loan was a large sum for a short period of time.
- (d) The interest incurred at a moderate to high rate on the loan.
- (e) The loan had security over “real property” having a personal use rather than a commercial use.
- (f) Mr Chen purports to have conducted “due diligence” of Mr Wu prior to making the loan, such as checking bank statements.
- (g) Additional fees were charged on the loan, including valuation fees, legal fees, lending fee and accounting fee totalling \$69,000 and for the variation an administrative fee totalling \$71,600.
- (h) Mr Chen and Mr Wu barely knew one another, having only met in person in December 2021, and there has been no evidence that this was a “handshake” or informal type of loan made between parties who had a personal relationship with each other.

[28] In her reply affidavit dated 16 June 2022 Ms Wei attaches screenshots of Mr Chen’s LinkedIn profile which shows he is a director and shareholder of several

companies which provide financial services and he presents himself as having extensive involvement in financial services and related matters.

[29] Mr Chen contends that Mr Wu was using or intending to use the loan for investment rather than personal, household or domestic purposes. Section 12 of the CCCFA provides that “investment by the debtor is not a personal, domestic or household purpose”.

[30] In *Southland Building Society v Austin* Associate Judge Bell found that the s 13 presumption was rebutted where the debtor was applying the loan to purchasing properties for resale.<sup>25</sup> In *ASB Bank v Stevens* Associate Judge Doogue found that a “personal loan” was in fact part of the defendant’s business arrangements.<sup>26</sup>

[31] Mr Chen’s understanding was that Mr Wu was using the loan to finance the purchase of investment properties through his family business. To support this he relies on Ms Wei’s statement at paragraph [17] of her affidavit dated 7 April 2022 that on 6 December 2021 Mr Wu told her he had:

... borrowed just tens of thousands of dollars from Chen temporarily and will pay back the money by February 2022, he told me he had invested in two sections in West Auckland, and did not have enough money to pay for the land before settlement, so the company had to help him to pay for it and needed to mortgage the house to Chen, and the mortgage would be cancelled once he repays the loan when the project complete in Feb 2022 (sic).

[32] Counsel for Mr Chen submits that insofar as the loan funds were used to settle the ANZ mortgage (which did comply with the CCCFA’s requirements for a consumer credit contract) that does not establish the funds were used for a domestic or household purpose. Mr Chen argues that the repayment of the ANZ mortgage was part of Mr Wu’s business arrangements to enable him to obtain finance to complete the property investment project, which is similar to what happened in *ASB Bank Ltd v Stevens*. Further, s 11(1A) and (1B) of the CCCFA provide that the predominate purpose for which the credit is to be used is the purpose for which more than 50 percent of the credit is intended to be used based on the debtor’s intention. Here, because the

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<sup>25</sup> *Southland Building Society v Austin* [2012] NZHC 497 at [24].

<sup>26</sup> *ASB Bank v Stevens* HC Auckland CIV-2011-202-1621, 11 November 2011.

ANZ loan was for \$500,000 its repayment (being less than 50 percent of the Chen loan) cannot be deemed to have been the predominate purpose of the Chen loan.

[33] In relation to s 11(1)(d)(i) and (ii), Mr Chen contends that he is not in the business of lending money. In *King v Woods* loans from an employer to an employee did not fall under the CCCFA because:<sup>27</sup>

[82] There is no evidence in this case that either of the plaintiffs carry on any sort of credit business, let alone one of making consumer loans. The fact that they are not generally interacting with the market in which consumers seek credit points away from the fact that any of the loans that were made to the defendant were within the scope of the Act. The number of loans involved shows that the making of loans was a sporadic occurrence and certainly not one with the extent of systemisation and repetitiveness that one would associate with a business.

[34] As mentioned above, Mr Chen says that he intended to use personal funds to buy an investment property but, given difficulties with that option, he opted for lending the money for what he thought would be a prompt reasonable return. The source of the loan was Mr Chen's personal funds, which he had borrowed from Westpac Bank. Mr Chen deposes that "I have never lent money to anyone before in which I was to charge interest and have a loan formally documented". Additionally, there was only one advance from Mr Chen to Mr Wu, the term loan agreement was described as "non regulated", and Mr Chen was not generally interacting in the market in which consumers seek credit.

[35] Mr Chen contends that s 11(1)(d)(iv) does not apply. He deposes that Mr Wang was acting only as a friend and no commission or money was paid for him introducing Mr Chen and Mr Wu.

[36] Finally, Mr Chen emphasises that in any event the contract was between him and Mr Wu; Ms Wei is not a party to the contract and there is no consumer credit contract between her and Mr Chen.

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<sup>27</sup> *King v Woods* [2013] NZHC 3467.

*Does Ms Wei have standing to bring a claim under the CCCFA?*

[37] Ms Wei did not expressly address her standing to bring a claim under the CCCFA. However, her counsel's submissions deal with remedies for non-compliance and refer to s 93 of the CCCFA which provides that:

**93 Court's general power to make orders**

The court may make all or any of the orders referred to in section 94 if the court finds that a person (whether or not that person is a party to any proceedings) has suffered loss or damage by conduct of any creditor, creditor's agent, lessor, transferee, buy-back promoter, paid adviser, or broker that constitutes, or would constitute,—

(aa) a breach of any of the provisions of section 9C (lender responsibility principles) or of sections 9J and 9K:

[38] Ms Wei's counsel, Mr LaHatte, also refers to s 94 which provides a list of orders that the Court may make against the person who has engaged in conduct referred to in s 93(aa). Specifically counsel refers to s 94(1)(d) which provides for "an order for any consequential relief that the court thinks fit."

[39] In addition I note that s 94(1)(b) provides for:

an order directing the person to pay to *any person who has suffered loss or damage by that conduct an amount* not exceeding the amount of the loss or damage (to the extent that any statutory damages that are to be paid do not adequately compensate the person for the loss or damage).

(Emphasis added).

[40] Mr La Hatte submits that ss 93 and 94 give wide powers to the Court to award penalties and damages including to persons who are not parties to the credit contract, which here are Ms Wei and her parents. He acknowledges that how damages are to be applied to non-compliance with the CCCFA are not identified in the Act, but argues that nonetheless the Act provides that damages are a remedy. He submits therefore the test is that if actions by the lender and the borrower cause loss to other parties then those persons can claim damages. Further, the CCCFA does not restrict a claim for damages to the parties to the lending. Accordingly, the test to be applied is whether the breaches of the CCCFA have caused damage and, if so, what is the quantum of such damage.

[41] Mr LaHatte accepts it is for Ms Wei to prove non-compliance with the CCCFA has actually caused damages to her and her parents. In this regard Ms Wei contends that when the requirements of the Responsible Lending Code are applied to the facts in this case the lender (Mr Chen) would not have responsibly advanced money to the borrower (Mr Wu) and therefore Ms Wei's equity in the property would not have been diminished by the lending. Further, that failure to comply with the Responsible Lending Code has enabled Mr Wu to deal with the funds in a way that has caused loss to Ms Wei's parents. Accordingly, Mr LaHatte submits the appropriate order is one which recognises the loss and damages suffered by Ms Wei and therefore an order preserving her equity in the property must be made to take priority over Mr Chen's mortgage.

[42] On the other hand, counsel for Mr Chen, Mr Mitchell, submits the advance was to Mr Wu, who has the contractual obligation to repay the loan, and there was no contract between Ms Wei and Mr Chen. Further, Ms Wei is not a debtor of Mr Chen. Therefore there is no credit contract, and as a result there cannot be a consumer credit consumer between them either. The implicit argument is that Ms Wei cannot sue for any deficiencies under the CCCFA when she is not a party to the credit contract.

## **Analysis**

*Is the Chen loan a consumer credit contract?*

[43] In *Xiao v Sun Davison J* stated:<sup>28</sup>

Section 13 imposes an evidentiary onus upon the creditor to rebut the presumption and establish that the credit contract is not a consumer credit contract. Unless and until it has been rebutted, the presumption remains in effect and may be relied upon by any party to a credit contract who claims that it is a "consumer credit contract". The presumption is consistent with the general scheme of the Act which is designed to protect the interests of consumers in connection with credit contracts and to promote transparent markets for credit.

[44] When it comes to consider whether s 13 applies and whether there is evidence to rebut the presumption the focus must be on the relationship and dealings between Mr Chen and Mr Wu.

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<sup>28</sup> At [100].

[45] I first consider s 11(1)(b) and the purpose of the loan. *Burke v Advanced Securities* is not especially helpful on the facts because in *Burke* there was a declaration by the debtors that the loan was commercial (albeit imperfect as it was signed following the loan). Additionally, in *Southland Building Society v Austin* the debtor was a company, not a natural person. The fact the company was purchasing properties for resale needs to be considered in that context.

[46] However, here it seems relatively clear on the evidence of both Ms Wei and Mr Chen that the Chen loan was to be applied by Mr Wu to purchase or assist in purchasing investment property. This is consistent with the circumstances of the loan, which show that Mr Wu borrowed well in excess of funds required to repay the ANZ loan. The original loan of approximately \$1.1 million means there was a \$600,000 surplus. Given Mr Wu already had a family home a sum of \$600,000 is consistent with borrowings for commercial purposes. This circumstance supports Ms Wei's account of the reasons Mr Wu gave to her for borrowing from Mr Chen.

[47] I acknowledge the evidence in Ms Wei's affidavit of 7 April 2022 about Mr Wu's explanation for the Chen loan is hearsay. However, the account she gives is an admission against her interests as it goes to rebut the s 13 presumption on which she relies. She is hardly likely to relate something in evidence that is not reliable when it would be against her interests to do so.

[48] Further, if she thought Mr Wu's explanation was neither reliable nor credible it is difficult to see why it would have been included in her evidence. Something that is not reliable or credible is irrelevant. The affidavit was prepared and filed before the without notice injunction application was made. There is no suggestion Ms Wei has disclosed Mr Wu's explanation in accordance with the obligations that require an applicant for interim relief without notice to disclose to the Court any facts that are adverse to their case.<sup>29</sup>

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<sup>29</sup> High Court Rule 7.23(3)(d) and (4).

[49] Under the common law a hearsay admission could be used against the person by whom it was made.<sup>30</sup> This principle is helpful for evaluating the reliability of Ms Wei's hearsay evidence of Mr Wu's explanation for the Chen loan under s 18(1)(a) of the Evidence Act 2006. I consider the circumstances she outlines in the 7 April 2022 affidavit provide reasonable assurance the statement is reliable. I am also satisfied the maker of the statement (Mr Wu) is unavailable as a witness (see s 18(1)(b)) of the Act because he is the first defendant in this proceeding, and therefore it would be unreasonable to expect Ms Wei to call him as a witness for the plaintiff. The hearsay explanation Mr Wu gave to Ms Wei provides insight into Mr Wu's intentions regarding the loan. Mr Wu's explanation to Ms Wei and the sum Mr Wu borrowed from Mr Chen are both consistent with someone borrowing funds to finance commercial investments. Accordingly, the available evidence supports the loan falling squarely within s 12 of the CCCFA. This tells against Ms Wei having a seriously arguable case for the application of s 11(1)(b).

[50] I next consider whether Mr Chen was in business as a lender per s 11(1)(d).

[51] In *Xiao v Sun*, Ms Sun advanced a series of loans to Ms Xiao totalling several hundreds of thousands of dollars for Ms Xiao's gambling ventures. The pair had met at SkyCity Casino. The loans were usually paid out in a mixture of cash and gambling chips. Ms Sun argued that she was not in the business of providing credit because the loans were in her own name; she made the loans to Ms Xiao because she felt sorry for her friend; Ms Sun borrowed money from her friends in order to give the loans; she has given loans in the form of casino chips to other friends not exceeding \$10,000; and she claims no interest was ever required to be or was paid.

[52] Davison J found it was seriously arguable that Ms Sun was in the business of providing credit at the relevant times. There was a lengthy period of lending (between April 2014 and March 2015) with a high frequency of lending. Additionally, a "very high" interest rate was charged for commercial gain. Ms Sun insisted on interest payments being made strictly on time, and overdue sums of interest and principal were calculated in an "inflexible" manner, consistent with a commercial lending operation

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<sup>30</sup> ME Casey and JME Garrow *Garrow & Casey's Principles of the Law of Evidence* (8th ed, Butterworths, Wellington, 1996) at [8.2].

rather than informal lending to her friend. Ms Sun committed time, money and effort in arranging funding from various third-party friends to on-lend a sum of \$800,000 to Ms Xiao, which Davison J considered inconsistent with a motivation to help a friend. The Judge thought it was implausible Ms Sun would do so with no expectation or agreement to receive any reward or benefit. Further, there was evidence of lending to at least two other people. Finally, Ms Sun was a stay-at-home mother who received minimal child support payments of \$200 a week and disclosed no other form of income. There was evidence Ms Sun was using the interest on the loans as a source of income.

[53] In coming to this finding, Davison J did not solely consider the definition of business in the Fair Trading Act and Consumer Guarantees Act referred to by the plaintiff. The Judge also referred to the Court of Appeal's approach to the definition of "business" in the income tax legislation context:<sup>31</sup>

The decision whether or not a taxpayer is in business involves a two-fold inquiry: as to the nature of the activities actually carried on - including the period over which they are engaged in, the scale of operations and the volume of transactions, the commitment of time, money and effort, the pattern of activity and the financial results - and as to the intention of the taxpayer in engaging in those activities.

[54] In *Carolán v New Zealand Real Estate Credit Ltd*, Fogarty J considered an agreement between two business associates in which Mr Kerr through his company provided Mr Carolán with a series of loans totalling \$1,650,000 to buy a \$5 million house in Auckland in consideration for Mr Carolán providing financial services.<sup>32</sup> The Judge stated that the "black letter" of the s 11 provisions applied, but without regard to the purpose of the statute:

[78] The argument for Mr Carolán to be a "consumer" is that subparagraphs (a), (b), (c)(i), (iii), (d)(i) of s 11(1) apply.

[79] On the black letter reading of this section, they do apply. By black letter I mean reading the provisions without regard to the purpose of the statute. Not by any measure is this case examining a market transaction for credit by consumer who is at arm's length of the supplier of the finance. Rather, the setting is of two experienced bankers forming a business relationship and one banker providing the other with finance via corporate entity he controls.

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<sup>31</sup> *Calkin v Commissioner of Inland Revenue* [1984] 1 NZLR 440 (CA) at 446; and *Grieve v Commissioner of Inland Revenue* [1984] 1 NZLR 101 (CA).

<sup>32</sup> *Carolán v New Zealand Real Estate Credit Ltd* [2016] NZHC 1757.

[80] Counsel before the Court argued respectively that the CCCFA would be turned on its head if either it was not applied or if it was applied.

[81] I favour the latter proposition. Mr Carolan simply does not fall within the range of consumers whose interests are protected by this Act.

[82] Further, for Mr Carolan to argue that the CCCFA applies flies in the face of his evidence which lies on the strong relationship of mutual confidence between the two men, the handshake character of the deal, and details such that Mr Kerr had been the best man at Mr Carolan's wedding, and was the godfather or one of his children.

[55] Mr Chen's evidence is that he is not in the business of providing credit or has a practice of providing credit in the course of his business. He states he initially wanted to invest directly into property but decided on the loan as an alternative when no suitable properties arose. The formalisation of a loan and acquisition of legal advice (including due diligence on the borrower) does not indicate much as these factors should be expected to be done by any prudent lender whether in business as a lender or not.

[56] Unlike in *Xiao v Sun*, there was only one loan (albeit varied once). The sporadic frequency of loans was held in *King* to be a factor pointing away from the lender being in business as a lender. Additionally, Mr Chen says has not previously made loans of this type. The quantum of interest charged is clearly different from *King*, being seven<sup>33</sup> per cent per annum, compared to Ms Sun's five per cent per week (260 per cent per annum).

[57] Although Mr Wu and Mr Chen did not have a close business or personal relationship, as was the case in *Carolan*, the situation was similar in that it was an agreement between two professional businessmen, Mr Wu being a former real-estate agent and involved in his family business and Mr Chen being a business advisor, that came about through the introduction by a third person, who was known to both Mr Wu and Mr Chen. The loan was made personally in Mr Chen's name and not through a business entity.

[58] On the other hand there are the screenshots of Mr Chen's business activities that Ms Wei has provided in her 16 June 2022 affidavit. These are consistent with

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<sup>33</sup> Varied to eight.

Mr Chen providing finance to others. Also it is difficult to understand why Mr Chen would use his own borrowings from Westpac Bank to fund a loan to Mr Wu if Mr Chen was not in a business of providing finance. His LinkedIn website is not consistent with the evidence he gives describing himself as a personal investor looking to make a short term investment with funds at his disposal. Similarly, the fact that the funds he advanced were borrowed from Westpac Bank is not consistent with him making a one-off loan to someone. Borrowing funds to on-lend to someone else is more likely to be done by a person who is in the business of providing credit to others. There are also the factors Ms Wei identified in her submissions as proof Mr Chen was in the business of providing credit.<sup>34</sup>

[59] I consider whether Mr Chen falls within s 11(1)(d)(i) or (ii) cannot be determined at an interlocutory stage. There is disputed evidence which warrants testing at a substantive hearing before a decision can be made on whose evidence the Court will accept.

[60] Finally, I am satisfied s 11(d)(iv) does not apply because although Mr Wang introduced the debtor and creditor there is no evidence he is a paid adviser or broker.

[61] In conclusion, I note the well-established tests for the granting of an interim injunction, which were not in dispute. I am satisfied the evidence Ms Wei has filed is sufficient to support her having a serious case to be tried on the question of whether Mr Chen falls within s 11(1)(d) (i) or (ii). However, for the reasons already given I consider the available evidence displaces the s 13 presumption, which is all Ms Wei relies on to establish her case under s 11(1)(b). Thus, I find she has not provided sufficient evidence to show that the intended purpose of the subject loan falls within s 11(1)(b). This means she does not have a serious case to be tried in relation to s 11(1)(b). For interim relief to continue based on alleged non-compliance with the CCCFA, Ms Wei must provide sufficient evidence relevant to both s 11(1)(b) and s 11(1)(d) before she can show she has a serious case to be tried. As she cannot do so in relation to s 11(1)(b) it follows that the interim injunction should not be further extended.

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<sup>34</sup> See [21] herein.

[62] I further note that Ms Wei's substantive case insofar as it relies on the CCCFA being capable of voiding the mortgage or prioritising her (potential)<sup>35</sup> equity in the property runs into further difficulties given that Mr Chen's interest is registered on the title and thus indefeasible.<sup>36</sup> Nothing in the CCCFA's enforcement provisions explicitly overrides the Land Transfer Act 2017.<sup>37</sup> Ms Wei has not provided the grounds upon which this Court at trial would grant a remedy which would prevent sale of the property (as opposed to damages or reducing the amount payable under the loan). Extending the interim injunction would thus put Ms Wei in a better position than it seems she is likely to be in even if her CCCFA claim is successful. That counts against the interim injunction being in the interests of justice.

*Does Ms Wei have standing to bring a claim under the CCCFA?*

[63] The CCCFA does not specifically refer to a third party to a consumer credit contract being entitled to bring a claim under the CCCFA for non-compliance with the Act's requirements.

[64] Ms Wei is not a party to the contract. She has a claim to a property interest in the property by virtue of the Property (Relationships) Act 1976. However, this does not in my view qualify her as a privy under s 10 of the Contract and Commercial Law Act 2017.

[65] I acknowledge ss 93 and 94 empower the Court to give relief to third parties who have been damaged by a creditor's non-compliance with the Act's requirements. However, it is not clear to me whether this ability to provide remedies to third parties is merely ancillary to relief granted to a debtor who has successfully brought a case to enforce the CCCFA's requirements, or a recognition of a third party's discrete entitlement to bring a case for remedial relief. If it is the latter it is odd that there is

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<sup>35</sup> A claim or potential claim under the Property (Relationships) Act 1976 does not give rise to any equitable or proprietary interest in the property and conventional property principles apply until an order under that Act is made: *The Fish Man (in liq) v Hadfield* (2017) 19 NZCPR 83; *Walker v Walker* [1983] NZLR 560I; and *Smith v Smith* (1978) 1 MPC 197. Accordingly Ms Wei would have to establish an interest on some other basis.

<sup>36</sup> Land Transfer Act 2017, s 51(1).

<sup>37</sup> See CCCFA, Part 4. Section 75 does not apply here as the agreement is not a buy-back transaction (see s 8).

no reference elsewhere in the CCCFA of a third party's rights against the creditor of a non-compliant loan.

[66] Further, at the time the Chen loan was executed Ms Wei and Mr Wu were still in a relationship. Their marriage did not end until Mr Wu left the family home in February 2022. Whether a spouse or partner who is not party to a consumer credit contract can subsequently at the end of the relationship claim a creditor's non-compliance with the CCCFA has caused harm by diminishing the value of his or her relationship property entitlement raises general questions of public policy that are relevant to the interpretation of the CCCFA.

[67] I have found Ms Wei has failed to establish a sufficient case under s 11(1)(b) to have the interim injunction continue. I see no purpose in the context of an interlocutory application like the present to reach a decision on Ms Wei's standing to bring a proceeding against Mr Chen, given the far reaching legal issues this would engage, and because I have not had the benefit of full argument from the parties on this topic.

#### **Anti-Money Laundering and Countering Financing of Terrorism Act 2009**

[68] Ms Wei argued that the Chen loan did not comply with the requirements of the AMLCFT Act. However, she did not identify precisely in what way there was such non-compliance. Nor did she identify how any non-compliance could be relied on to prevent Mr Chen obtaining recovery of his loan by a mortgagee sale. I cannot see any ground for the Court to act on this basis. Accordingly, I am satisfied she has not established a serious case to be tried based on non-compliance with this legislation.

#### **General comments**

[69] In the interlocutory application Ms Wei advanced grounds based on Mr Wu fraudulently diminishing her claim under the Property (Relationships) Act by use of the Chen loan. No such allegations are made in the statement of claim. In this regard Ms Wei may have responsibly recognised that fraud is not something to be pleaded without a proper basis for doing so. Given the absence of a pleading based on fraud I have not paid any attention to its assertion.

[70] I acknowledge that the evidence of Ms Wei points to her and perhaps her parents having claims against Mr Wu for his dealings with the family home. However, that is a separate issue from whether there is any liability as between Mr Chen and Ms Wei. This is particularly so when Ms Wei makes no allegations in her proceeding that Mr Chen has acted in concert with Mr Wu to deprive Ms Wei of her interest in the subject property.

**Result**

[71] The application to continue the interim injunction is declined.

[72] The parties have leave to file memoranda on costs.

Duffy J