NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF ANY REFERENCE TO THE TERMS OF AN INSURANCE SETTLEMENT AGREEMENT REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA404/2018
[2019] NZCA 16

BETWEEN	FTG SECURITIES LIMITED Appellant
AND	BANK OF NEW ZEALAND First Respondent
	STEPHEN JOHN TUBBS AND COLIN ANTHONY GOWER AS RECEIVERS OF TUAM VENTURES LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Second Respondents
	ROBERT BRUCE WALKER AS LIQUIDATOR OF TUAM VENTURES LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Third Respondent

Hearing:	14 November 2018
Court:	Asher, Lang and Moore JJ
Counsel:	A J Forbes QC, H M Weston and G W Smith for Appellant K M Paterson and J D Silcock for First Respondent No appearance for Second Respondents K C Francis for Third Respondent
Judgment:	20 February 2019 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

C The appellant must pay the third respondent costs for a standard appeal on a band A basis and usual disbursements.

D The court file is not to be searched without leave of a judge of this Court.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The issue that arises in this appeal is whether a failure to comply with a clause restricting assignment prevents the appellant, FTG Securities Ltd (FTG), from pursuing proceedings against the first respondent, Bank of New Zealand (BNZ). FTG seeks declarations against BNZ under the Declaratory Judgments Act 1908 as to the interpretation of a deed of priority purportedly assigned to it. In an interim judgment issued on 24 July 2018, Gendall J held that FTG had not obtained a valid assignment of the debt and securities, including the deed of priority, and was unable to enforce the deed of priority against BNZ.[1]

Background

[2] In 2005 a company, Tuam Ventures Ltd (in receivership and liquidation) (Tuam), was involved in property development in Christchurch. Tuam was a subsidiary of another company, Property Ventures Ltd (PVL). PVL was one of the principal business vehicles of a property developer, Mr David Henderson.

[3] On 7 October 2005 Tuam entered into a term loan agreement with Canterbury Finance Ltd (CFL) and CFL registered a security interest in all of Tuam's present and after acquired property on the Personal Property Securities Register. Tuam also executed a general security agreement in favour of CFL and CFL registered first ranking mortgages against Tuam's titles over a property at 179 Tuam Street, Christchurch.

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[1] *FTG Securities Ltd v Bank of New Zealand* [2018] NZHC 1516 at [107]. We note that the judgment was originally issued on 22 June 2018, but was later re-issued under r 11.10 of the High Court Rules 2016.

[4] On 7 May 2007 Tuam executed a general security agreement in favour of BNZ and BNZ registered mortgages over Tuam's titles to 179 Tuam Street. On 17 May 2007 BNZ advanced funds totalling $7.5 million. It was agreed between CFL and BNZ that BNZ would have priority. To that end, on 20 July 2007 Tuam, BNZ and CFL entered into a Deed of Subordination and Priority. A replacement Deed of Subordination and Priority was entered into on 25 February 2008 containing some variations to the priority arrangements, but being the same as the previous deed in all material terms. This deed provided BNZ with a priority amount over CFL of $7.5 million plus two years' interest and costs. CFL had security and priority for a subsequent $10 million plus interest and charges. This is the critical document for the purposes of these proceedings. We will refer to it as the Deed of Priority.

[5] Clause 15 of the Deed of Priority prohibited transfer or assignment by either BNZ or CFL of their securities over Tuam to any person without approval from the other secured party of the form of the deed or contract of transfer or assignment. This appeal turns on the effect of this clause.

[6] Tuam defaulted on the terms of its facilities and on 27 July 2009 the second respondents, Stephen Tubbs and Colin Gower, were appointed receivers by BNZ.[2] Ultimately Tuam was placed into liquidation on 9 February 2012. The liquidator is the third respondent, Robert Walker.[3]

[7] On 1 October 2008 CFL had amalgamated to become part of South Canterbury Finance Ltd (in receivership) (SCFL), with SCFL later changing its name to FCS Loans Ltd (in liquidation) (FCS). FCS struck financial difficulties. On or about 1 June 2012 FCS purported to assign its debt and security interest in Tuam to Crown Asset Management Ltd (CAML). We refer to this as the First Assignment. CAML was a company set up by the government, and one of its functions was to manage the assets of what had been SCFL. When FCS assigned the Deed of Priority to CAML, no consent was sought from BNZ.

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2 The second respondents did not appear at the appeal hearing.
3 Mr Walker was joined to this appeal by consent on 28 October 2018.

[8] On 15 June 2015 CAML purported to assign its debt and security interests in Tuam to FTG for $100,000. We will refer to this as the Second Assignment. The Deed of Transfer stated that FTG would be bound by the provisions of the Deed of Priority.

[9] Mr Henderson appears to have had a central role in FTG. His wife, Kristine Buxton, is the director of that company. He has sworn an affidavit in support of the position of FTG outlining the steps it has taken.

[10] During the course of the discussions that led to the Second Assignment to FTG, CAML raised with FTG the issue of the need to obtain BNZ's acknowledgement of the assignment. FTG advised, however, that it wished to keep the transactions strictly confidential. It resisted any approach being made to BNZ for its consent or approval to the assignment. As the High Court Judge noted, counsel for BNZ and the liquidator both contended that FTG had full knowledge throughout of the clause requiring BNZ's consent or approval of the assignment.[4] The Judge accepted that there was some force in this.[5] On appeal FTG contends that responsibility to obtain the requisite approval lay with CAML. In any event, FTG contends that the lack of consent or approval does not invalidate the assignment as against BNZ.

[11] In the years following the receivership of Tuam in 2009 there were significant recoveries by BNZ. These included insurance recoveries following the Canterbury earthquakes and a mortgagee sale of 179 Tuam Street. The Judge recorded that along with the mortgagee sale net proceeds of about $3.4 million, BNZ had received distributions arising out of Tuam's assets of over $12 million.[6]

The High Court proceedings

[12] On 1 August 2016 FTG issued proceedings against BNZ and the receivers. FTG asserted that BNZ had received more distributions than it was entitled to given its priority position under the Deed of Priority. Indeed the Judge recorded that the effect of FTG's claim is that BNZ has received $3.5–4.9 million more than it should

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4 *FTG Securities Ltd v Bank of New* Zealand, above n 1, at [44].
5 At [95] and [105].
6 At [12].

have under the Deed of Priority, and that this money should have gone to CFL and is now owed to FTG as the second assignee and the present holder of CFL's securities.[7]

[13] On 19 July 2017 FTG's lawyers wrote to BNZ's lawyers, and without any admission by FTG that BNZ approval was required, requested that BNZ approve the form by which CAML and FTG respectively agreed to be bound by the Deed of Priority in respect of the First and Second Assignments. BNZ refused to do so. No immediate steps were taken to challenge that refusal.[8]

[14] FTG's claim for declaratory relief turns on the interpretation of the Deed of Priority, as signed by BNZ and CFL in 2008. FTG seeks orders against BNZ and the receivers requiring them to give effect to what FTG considers to be the priority position under the Deed of Priority. FTG relies on the First and Second Assignments as giving it standing to bring these claims.

[15] In its statement of defence BNZ denied the substantive claims and pleaded as a defence that it had not consented to or approved the assignment of the benefits and obligations under the Deed of Priority to CAML, or subsequently to FTG. Its position is therefore that FTG has no legal standing to enforce the Deed of Priority against BNZ and seek the declarations sought.

[16] When the matter came before Gendall J it was agreed that this affirmative defence should be determined as an important preliminary issue.[9] His judgment therefore dealt with this preliminary question only, which he stated as "whether FTG is properly a party to the Priority Deed and otherwise from a technical viewpoint entitled to enforce it against BNZ".[10] The Judge observed that the issue required consideration of the validity of the purported assignments of the debt and security interests in Tuam.[11]

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7 At [91].
8 At [70].
9 At [10].
10 At [14(a)].
11 At [14(a)].

[17] The Judge determined this preliminary question by answering it in the negative. He held that the requirements of cl 15 of the Deed of Priority had not been met. Neither CAML nor FTG had obtained a valid assignment of the debt and securities. Therefore FTG was not properly a party to the Deed of Priority and from a "technical viewpoint" was not entitled to enforce it against BNZ.[12] It had no standing to seek the declarations.[13] FTG challenges that finding on appeal.

The issue

[18] Broadly put, the issue is whether the failure to obtain BNZ's consent to the First and Second Assignments means that FTG lacks standing to bring its proceedings against BNZ. Both parties focussed their submissions on the Second Assignment from CAML to FTG. However, it is important to note that BNZ does not accept, and has never accepted, that the First Assignment was valid or enforceable. FTG could only take an assignment of such rights and interests that CAML had. Given the lack of consent to the First Assignment, BNZ contends that CAML could not effect a valid transfer of the rights and interests in the Deed of Priority to FTG in the Second Assignment in any event.

[19] FTG asserts that the Second Assignment (and the First) are valid notwithstanding that BNZ did not give approval under cl 15. It submits that the commercial purpose of cl 15 was to ensure that any assignment was subject to the Deed of Priority, and no more. Given that FTG agreed to be bound by the Deed of Priority and was so bound, the commercial purpose of cl 15 has been fulfilled. Moreover, given that FTG agreed to be bound by the Deed of Priority, there was no basis on which BNZ could have reasonably withheld consent under cl 15. Additionally, it was submitted that FTG acquired indefeasible legal title to the mortgage in Tuam, which was assigned to it by CAML, when this interest was registered against the title of 179 Tuam Street. No in personam exception was available. That places FTG in a position of standing to bring these proceedings against BNZ.

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12 At [107].
13 At [107].

[20] BNZ, on the other hand, submitted that without its approval the First and Second Assignments were a nullity. Clause 15 is clear in its requirement for consent. It was not complied with. Whether or not consent could have been reasonably withheld is irrelevant. Alternatively, if it is relevant, BNZ would have been reasonably entitled to withhold consent.

[21] BNZ's submissions were supported by the liquidator, Mr Walker. Mr Francis for Mr Walker also submitted that the principle of indefeasibility does not assist FTG because:

(a) the mortgage and its status under the Land Transfer Act 1952 are irrelevant because 179 Tuam Street was sold at auction and the mortgage was discharged; and

(b) the provisions of the Land Transfer Act do not interfere with personal contractual obligations separate from the mortgage, such as cl 15.

Analysis

The leading authorities

[22] It is long-established in New Zealand that legal and equitable assignments of a thing in action in New Zealand are lawful and effective.[14] The leading decision on the effect of prohibitions on assignment is the judgment of Lord Browne-Wilkinson in the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*.[15] New Zealand courts have applied this decision and we turn to it first.

[23] A had contracted B to remove asbestos from A's premises. A was not permitted to assign the contract without B's consent. The prohibition was to not assign "without written consent" from B. However A purported to assign the contract to C without obtaining B's consent. The question was whether C could sue B for failing to remove the asbestos correctly. At first instance the Official Referee had found that, as the

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[14] See ss 40–51 of the Property Law Act 2007. For the history in New Zealand see John Burrows, Jeremey Finn and Stephen Todd *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2017) at [17.1.1]–[17.1.9].

[15] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL).

assignment lacked the necessary consent, it was ineffective. The plaintiff assignee, C, therefore had no rights against defendant, whose consent to the assignment had been required but was not given. The Court of Appeal reversed that decision, holding that, despite the lack of consent, the C could enforce contractual rights against B.

[24] The House of Lords allowed the appeal and restored the Official Referee's decision. It rejected the submission for C that, since contractual rights are a species of property, a prohibition against assigning such rights was void as being illegal.[16] Lord Browne-Wilkinson, with whom the other Law Lords agreed, noted that in the context of rights in the land, the law does not favour restrictions on alienability, but "even in relation to land law a prohibition against the assignment of a lease is valid".[17] It was held that there was no policy reason why a contractual prohibition on the assignment of contractual rights should not be upheld.[18]

[25] Lord Browne-Wilkinson recognised that the legal effect of a prohibition on assignment depends on its construction, and observed:[19]

> [A] prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent the transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy … *[T]he existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights … If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz, to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.*

[26] His Lordship went on to consider a submission that, even though the assignment was in breach of the relevant contract, it was effective to vest the assignor's rights under the contract in the assignee and damages were the only appropriate remedy for the failure to obtain consent. His Lordship concluded, having noted differences in the law applicable to the assignment of contractual rights and the assignment of leases:[20]

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16 At 106.
17 At 107.
18 At 107.
19 At 108 (emphasis added).
20 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*, above n 15, at 109.

> [I]n my judgment an assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee. It follows that the claim by Linden Gardens fails and the *Linden Garden* action must be dismissed.

[27] At another part of his judgment he referred to the situation of a prohibition giving rise to a claim for damages only as "very unlikely to occur".[21]

[28] This reasoning has been adopted in England[22] and in New Zealand.[23] *Linden Gardens* was followed by this Court in *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd*.[24] This Court was concerned there with a clause stating that neither party shall assign "without the prior written consent of the other party". Unlike this case, the reference to prior written consent was not limited to the form of the contract by which the assignee agreed to be bound by the document. The clause was of a wider ambit. However, as in this case, the prohibition on assignment occurred in a contract reached between commercial parties. The issue was put in this way by Tipping J for the Court:

> [21] The question becomes what effect this absence of necessary consent has on the assignment and hence the position of NZPSS in relation to this appeal. What effect does a purported assignment have against a party whose consent was required but has not been given?
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> [22] *In principle the question can be looked at in terms of the law relating to breach of contract. The Crown's purported assignment without the consent of AMS was a breach of the contract between those parties*. Should the breach be compensated in damages or should the Court treat the assignment as if it had never occurred, that is, as being invalid and of no effect — a kind of setting aside or retrospective injunction against its taking place?
>
> (Emphasis added).

[29] He went on to state later:

> [26] … An agreement, express or implied, not to assign contractual or other rights in personam, or not to assign them without consent, *should generally be specifically enforced as between the immediate parties*, unless there is some strong reason why that course should not be adopted. (Leases, as Lord Browne-Wilkinson pointed out, raise different issues because they involve interests in land as well as contractual rights.) A non-assignability

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21 At 104, referring to the situation posed in R M Goode "Inalienable Rights?" (1979) 42 MLR 553.

22 *R v Chester and North Wales Legal Aid Area Office (No 12)* [1998] 1 WLR 1496 (CA) at 1501.

23 *Grain Processors Ltd v Bluebird Foods Ltd* (1999) 6 NZBLC 102,879 at 102,883–102,884.

24 *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd* [2003] 3 NZLR 1 (CA).

> clause has a clear commercial purpose. The parties do not wish, without consent, to be obliged to deal with a party not of their own choosing. The identity of the other party matters to them, so they expressly or implicitly agree to reverse the general rule that contractual rights may be assigned. As Lord Browne-Wilkinson said in *Linden Gardens* at p 108, *if the law did not enforce such an agreement the legitimate commercial reason for agreeing not to assign would be defeated. Similarly the legitimate commercial expectations of the parties would be defeated*.
>
> (Emphasis added.)

[30] We agree that there is no policy reason against treating assignments as invalid as against the other original party when it is contrary to the terms of the contract between the original parties.

[31] Mr Forbes QC for FTG did not suggest that this Court should not follow *Linden Gardens* or *New Zealand Payroll Systems*. Rather, he sought to distinguish them on two key bases.

[32] First, Mr Forbes submitted that, unlike in the cases referred to, the purpose of cl 15 was not to give BNZ a measure over control over who it found itself in contractual relations with. Its purpose was to subordinate and arrange priorities as to its securities. The identity or personal attributes of the other secured party were irrelevant. This is supported by the limited nature of this assignment, which refers only to approval of the "form" of the assignment; it does not prohibit assignment without consent generally.

[33] Second, Mr Forbes submitted that the cases referred to recognise the different position with respect to assignments of interests in land. In particular, in *New Zealand Payroll* this Court acknowledged, referring to *Linden Gardens*, that leases raise different issues because they involve interests in land as well as contractual rights.[25] The original mortgage to CFL, which was subsequently transferred by SCFL (FCS) to CAML and by CAML to FTG and registered was an interest in land. Different considerations therefore apply.

[34] We deal with these submissions in the course of the discussion below.

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[25] At [26].

The limited nature of this prohibition on assignment

[35] Clause 15 of the Deed of Priority reads:

> Neither Secured Party will transfer or assign any interest or right in or to that Secured Party's Securities to any person unless that person has entered into a deed or contract in a form approved by the other Secured Party (which approval will not be arbitrarily or unreasonably withheld or delayed) by which that person agrees to be bound by the Document.

[36] The usual rules of contractual interpretation apply. The starting point is always the ordinary meaning of the words used. The surrounding factual material may also be relevant.[26] The starting point here is cl 15, which is in mandatory terms. Neither secured party "will" transfer or assign any interest in the securities, and any interest is not to be transferred or assigned "unless" the other secured party approves the "form" of the deed or contract "by which [the third party] agrees to be bound by the Document". The "Document" must be the Deed of Priority.

[37] There are therefore two requirements embedded in cl 15. First, there must be a deed or contract between assignor and assignee by which the assignee is bound by the Deed of Priority. Second, approval of the form of that deed by the other secured party, in this case BNZ, must be obtained. A prohibition on assignment not being contrary to public policy, and being a matter of contract, the parties are free to create such restrictions on their conduct as they wish, including prohibiting or restricting assignment. If commercial parties chose to regulate their transaction by imposing such a prohibition, we see no need to give it a restrictive construction.

[38] FTG argued that cl 15 was not a clause which prohibited an assignment and could be seen as a clause which "conditionally permitted such an assignment". Such a starting position is wrong. Clause 15 is not expressed to be a permission to do something if the condition is fulfilled, and it should not be construed in that way. It is a prohibition, not a permission; a prohibition which is lifted if consent is obtained or cannot reasonably be withheld. Moreover, even if cl 15 was worded on the basis that CFL could proceed to assign providing it obtained consent, a failure to obtain consent would still mean that any assignment was not in accordance with the contract.

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[26] *Vector Gas Ltd v Bay of Plenty Energy* [2010] NZSC 5, [2010] 2 NZLR 444 at [119] and [122].

[39] The Deed of Priority is a commercial document governing the priority of securities that are competing with each other as to who gets paid first out of the available securities. The importance of priority is demonstrated by these proceedings, where many millions of dollars turn on the issue. It is not surprising that the secured parties wanted to be able to be satisfied as to the terms on which any transferee or assignee would be bound by those arrangements.

[40] As drafted, under cl 15 the non-assigning secured party can withhold its consent, after reasonably assessing the terms on which the third party agrees to be bound by the Deed of Priority. The word "form" in cl 15 indicates that the legitimate area of interest in deciding whether or not to approve for BNZ will be the words by which the assignee agrees to be bound, rather than the identity of that assignee. The purpose of the clause does not appear to have been concern, as there often is in prohibitions on assignment, that unwelcome third parties will come into the arrangement. The words indicate concern as to the "form" of the agreement to be bound only. We do not agree with Ms Paterson's submission for BNZ that approval as to form includes approval as to identity. That is ignoring the natural meaning and limits of the word "form".

[41] However, this limited function does not mean that the prohibition is unimportant. BNZ wants to be sure that the assignee is properly bound, and in the process of giving approval, it will become aware of the details of the assignment. The consent process will also fully inform BNZ should it consider making further advances. BNZ has a legitimate wish to be involved in the way in which this third party, not of BNZ's choosing, becomes involved in its security arrangements. The other party unilaterally executing its own agreement to be bound by the Deed of Priority, without getting BNZ's consent, is not enough. On the plain words of cl 15, consent, as well as the agreement to be bound, is an essential prerequisite to valid assignment. As has been stated, "[i]t cannot be correct to conclude that when parties incorporate a clause that expressly prohibits assignment they do not really mean that. Clearly they do."[27]

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[27] G J Tolhurst and J W Carter "Prohibitions on Assignment: A Choice To Be Made" (2014) 73 CLJ 405 at 416–417.

[42] Thus although cl 15 is, as prohibitions on assignment go, a clause of narrow ambit, we see no reason as a matter of contract to adopt a restrictive interpretation of it, or to ignore or water down the requirement for consent. The clause means what it says. Therefore, FTG's agreement to be bound by the Deed of Priority is insufficient to meet the terms of cl 15. Clause 15 also required BNZ's consent to the form of the assignment. Consent was neither sought nor obtained.

Could consent have been reasonably withheld?

[43] The fact that, if BNZ had refused approval of an assignment to CAML, or indeed assignment to FTG, that may or may not have been unreasonable, is irrelevant. The process of seeking approval was never undertaken.

[44] This issue was addressed in *Hendry v Chartsearch Ltd*.[28] In that case the clause stated that the assignment would be prohibited without the other party's prior written consent "which shall not be unreasonably withheld". A consent was never sought. Millett LJ for the majority said:[29]

> [I]t is essential that the lessor's consent is sought before the assignment is made. Consent cannot be said to be withheld or refused if it is not asked for … . It is no answer that no reasonable objection could have been made if consent had been sought; the proviso has no application unless it is. … Consent is not withheld if it is not asked for; and if it is not withheld it cannot be said to be unreasonably withheld.

[45] Henry LJ put it this way:[30]

> The suggestion that the assignor can validly assign in breach of his contract without ever seeking prior consent by asserting that, as such consent could not reasonably be refused, so it is unnecessary, seems to me to be a recipe to promote uncertainty and speculative litigation. I prefer the simple certainty that prior consent never applied for is never withheld or refused (whether reasonably or otherwise).

[46] Mr Forbes argued that the only proper concern of BNZ was that FTG would be bound by the Deed of Priority, and since it had agreed to be bound, there could be no bar to the assignment. But as Mr Francis observed, FTG's effective submission

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28 *Hendry v Chartsearch Ltd* (1998) CLC 1382 (CA).
29 At 1393–1394.
30 At 1393.

that a consent that cannot be reasonably withheld need never be sought would undermine the recognised legal approach, by permitting the procedure required by the contract to be circumvented. The assessment of the reasonableness of a refusal to grant consent is intended to take place after consent has been refused. There is no basis for suggesting that assignment should be deemed to be permitted by some retrospective counter-factual analysis of whether consent could have reasonably been withheld.

Indefeasibility

[47] Mr Forbes argued that, given that the assignment in question concerned a registered interest in land in the form of a mortgage, FTG obtained an indefeasible interest in the debts and securities by reason of the purported assignment. He submitted that, irrespective of the failure to comply with cl 15, FTG acquired legal title to Tuam's mortgage to CAML, and that the title "remained conclusive" until FTG's mortgage was removed following a mortgagee sale of 179 Tuam Street by BNZ. The mortgage was a second mortgage, and FTG's rights "are preserved".

[48] We are unable to accept this argument. In our view it is based on a wrong assumption as to the effect of the indefeasibility of title provisions in the Land Transfer Act. Section 97(1) of the Land Transfer Act provides that a registered mortgage or lease may be transferred by memorandum of transfer, and under s 97(2), upon registration of such a memorandum of transfer all rights, powers and privileges thereto pass to the transferee (and the transferee has the right to sue upon the mortgage under s 97(3)). However, FTG is not seeking to sue a third party upon the mortgage. This claim is not based on the mortgage, and is against a party against whom FTG has no legal relationship capable of sustaining a cause of action, without the consent of BNZ required by cl 15. Indeed unsurprisingly the mortgage itself is not pleaded as the basis for FTG's claim. FTG is relying on the Deed of Priority in its claim.

[49] In the High Court of Australia's decision in *Queensland Premier Mines v French*, which considered the equivalent language in the Land Title Act 1994 (Qld),

the Court held that monies owed under a loan agreement, separate from but secured by the mortgage, were not assigned by operation of the section.[31] Kiefel J held:[32]

> The words of the section are plain. Neither the historical reason for the provision nor its purpose, of effectuating a transfer of both the security interest and the right to moneys arising from the mortgage transaction, supports a construction which extends the section to obligations arising otherwise than under the terms of the mortgage. It is no part of the purpose and function of a statute such as the *Land Title Act* to rewrite the bargain between transferor and transferee.

[50] In a concurring judgment, Kirby J observed:[33]

> Because the personal obligations that derive from the loan are legally separate and distinct from the obligations arising, as such, "under the mortgage", they are not automatically transferred with the mortgage that is registrable. Unless included in the mortgage instrument itself, to be transferred they require separate and specific agreement by those who are parties to the loan agreement.

[51] In *Duncan v McDonald* Blanchard J for a full bench of this Court stated that registration does no more than confer an interest in land, and that where an otherwise void instrument becomes part of the register it is effective only as is necessary to uphold and protect the title but no further.[34]

[52] Here, a finding that the assignment is ineffective against BNZ does not mean that the mortgage was not valid and enforceable against other parties by the assignee. Yet it could have no effect on the personal contractual obligations between BNZ and CFL, including the requirement in cl 15. We respectfully agree with the observation of Thomas J in this Court in *CN and NA Davies Ltd v Laughton* that:[35]

> [I]ndefeasibility of title does not interfere with the personal obligations of a registered proprietor, and the principle that contracts, or trusts, or any personal equity can be enforced against the registered proprietor merely serves to indicate the limits of the doctrine.

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31 *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53, (2007) 235 CLR 81 at 53.
32 At 101.
33 At 91.
34 *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at 681. See also *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704 (HC) at 713–714, per Barker J.
35 *CN and NA Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) at 712.

[53] We also note that FTG's mortgage was extinguished following a mortgagee sale by BNZ in 2016. The mortgage cannot possibly operate as some sort of prospective indication of a right to sue on separate contractual documents, and its previous existence cannot somehow circumvent the contractual prohibition on assignment without consent.

Other submissions

[54] The Judge found that cl 15 prevented FTG from taking a valid assignment of Tuam's debt, as well as Tuam's securities.[36] FTG submitted that cl 15 only referred to the "Secured Party's Securities" and therefore did not apply to a transfer of debt. It says this is material because FTG holds a third ranking perfected security interest over Tuam, being a separate all obligations general security agreement. Therefore, FTG must at least have the status of an unsecured creditor of Tuam.

[55] BNZ objects to this argument as it was not raised by FTG in the High Court, and no evidence has been produced by FTG to support its claim to a third ranking perfected security interest. The argument was not pursued in any detail in oral submissions. There is no evidence that the transferred property included a relevant loan agreement. In any event, that loan agreement would not give FTG status to bring this proceeding in relation to the Deed of Priority. FTG must have a valid legal interest in relation to the Deed of Priority for it to have any standing to seek declarations as to the interpretation of the Deed of Priority. It has no such standing, for the reasons we have set out.

[56] Sections 48–53 and 84 of the Property Law Act 2007 do not assist FTG. While these sections plainly endorse the legality of the assignment of choses in action, we do not see them as having any relevance to the issue before us. The issue before us is one of contract. Clause 15 places a contractual restriction on such an assignment, which is plainly lawful and unaffected by the Property Law Act.

[57] All that we have said appears to apply to the first assignment from FCS to CAML. However the submissions before us focused on the second assignment from

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[36] *FTG Securities Ltd v Bank of New* Zealand, above n 1, at [93], [104] and [107].

CAML to FTG, and there was no appearance before us or at the High Court by CAML, so our reasoning is directed to that second assignment.

Remedy

[58] When the question was asked in *New Zealand Payroll Systems* whether a breach of a prohibition on assignment should be compensated in damages or whether the courts should treat the assignment as if it had never occurred, this Court held that the agreement not to assign without consent should generally be specifically enforced as between the immediate parties.[37] Therefore, as a consequence of the failure to comply with cl 15, the First and Second Assignments are invalid as against BNZ. FTG consequently lacks standing to bring these proceedings against BNZ.

Conclusion

[59] A prohibition on assignment works between parties A and B as a contractual term between A and B. When B assigns the contract to C in a breach of a prohibition on assignment, C may well acquire rights including proprietary rights, but it can acquire no contractual rights against A. C cannot, relying on B's rights under the original contract, seek to enforce the beneficial terms of that contract without also incurring the effect of the burdensome terms, such as a requirement for consent to assignment. That is what FTG seeks to do in this case, by arguing that it can enforce the Deed of Priority notwithstanding that cl 15 was not complied with.

[60] Gendall J stated that FTG does not have title to the debt and security interests,[38] and that the assignments were ineffective.[39] Insofar as those statements may be read as meaning that the assignments were ineffective against all parties and in all circumstances, the Judge did not need to go that far. What is clear is that the assignments are ineffective against BNZ. We do not agree, respectfully, with any wider statements about the effect of the breach that were made by the learned Judge,

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37 *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd*, above n 24, at [26].
38 *FTG Securities Ltd v Bank of New* Zealand, above n 1, at [103(d)].
39 At [103(g)].

in particular that the assignments were in all respects ineffective.[40] There may still be an enforceable contract between the assignor and the assignee.[41]

[61] It follows that we agree with the ultimate decision reached by the High Court insofar as the preliminary question is answered by saying that FTG is not able to enforce or rely on the Deed of Priority against BNZ. We agree with the conclusion that FTG consequently has no standing to seek the declarations sought against BNZ. But we do not need to go further, and do not do so.

[62] We observe that this is not a harsh outcome. FTG has not failed on a technicality. FTG knowingly took a risk in participating in an assignment that was contrary to the express prohibition on assignment without the consent required by the contract, which was for the benefit of BNZ. FTG cannot now seek to rely on the same contractual arrangement against BNZ. There is no unfairness in it being prohibited from doing so.

Result

[63] The appeal is dismissed.

[64] Costs followed the event. The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[65] As to the costs of the third respondent, Mr Walker, we were assisted by those submissions and Mr Walker had a legitimate interest in the outcome of the appeal. Therefore the appellant must also pay the third respondent costs for a standard appeal on a band A basis and usual disbursements.

[66] The court file contains documents referring to a settlement agreement, the terms of which are confidential to the parties. We therefore order that the court file is not to be searched without leave of a judge of this Court. We also note that the

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40 At [100] and [103].

41 See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*, above n 15, at 108, reproduced above at [25].

High Court order prohibiting publication of any reference to the terms of the settlement agreement remains in force.

Solicitors:
Canterbury Legal, Christchurch for Appellant
Buddle Findlay, Christchurch for First Respondent
No appearance for Second Respondents
Meredith Connell, Auckland for Third Respondent