IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-7186
[2012] NZHC 12

BETWEEN	PARNELL PROPERTY INVESTMENTS LIMITED First Plaintiff
AND	ST STEPHENS INVESTMENTS LIMITED (IN LIQUIDATION) (DISCONTINUED)
AND	STEPHEN OSBORNE Third Plaintiff
AND	BANK OF NEW ZEALAND Defendant

CIV-2011-404-3643
[2012] NZHC 12

AND BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	PARNELL PROPERTY INVESTMENTS LIMITED (IN LIQUIDATION) First Defendant
AND	ST STEPHENS INVESTMENTS LIMITED (IN LIQUIDATION) Second Defendant
AND	FIFER RESIDENTIAL LIMITED Third Defendant
AND	STEPHEN OSBORNE AND JULIE MARGARET ALEXANDER Fourth Defendants
AND	JULIE MARGARET ALEXANDER Fifth Defendant

Hearing: 8 December 2011

Appearances: A M Swan for Fifer Residential Ltd, Stephen Osborn and Julie Margaret Alexander
Z G Kennedy and N A Chamberlain for Bank of New Zealand

Judgment: 25 January 2012 at 4:00 PM

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on ***25 January 2012*** *at* ***4:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

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Introduction

[1] These two cases have been heard together as they relate to similar facts. In CIV-2011-404-3643 the Bank of New Zealand is the plaintiff and seeks judgment against five defendants. The proceeding CIV-2010-404-7186 relates to similar facts but in this the bank is the defendant whilst one of the named defendants in the first proceeding is the plaintiff. Taken together there are three matters for decision:

(a) In CIV-2011-404-3643 the Bank of New Zealand seeks:

(i) summary judgment against Stephen Osborn and Julie Alexander (as trustees of the Alexander Family Trust) and Julie Alexander personally, for $8,405,767.50 plus interest under a guarantee dated 7 December 2007; and

(ii) summary judgment for $187,023.68 plus interest against Mrs Alexander under another guarantee given in 2007.

(b) Again in CIV-2011-404-3643, the Bank of New Zealand seeks summary judgment for vacant possession of the property at 43, 45 and 47 St Stephens Avenue, Parnell, Auckland.

(c) In CIV-2010-404-7186 the Bank of New Zealand seeks summary judgment against Mr Osborn, or an order striking out Mr Osborn's claim.

[2] By consent evidence from both proceedings has been used for all applications.

The Bank of New Zealand's claims

[3] In proceeding CIV-2011-404-3643 the bank has four causes of action:

(a) Against Parnell Property Investments Ltd (Parnell) and St Stephens Property Investments Ltd (St Stephens) for $10,144,752.65 plus interest as the sums payable under a number of banking facilities and for vacant possession of the property at St Stephens Avenue under powers in a mortgage. It also seeks the last order against Fifer Residential Ltd;

(b) Against Julie Alexander judgment on a guarantee of the obligations of Parnell and St Stephens under a facility called an asset finance agreement;

(c) Against Stephen Osborn and Julie Alexander (as trustees of the Alexander Family Trust) and Julie Alexander personally, for $6,600,000 plus interest under a guarantee of the indebtedness of Parnell and St Stephens; and

(d) Against Fifer Residential Ltd (Fifer) and other occupants an order for vacant possession of the St Stephens Avenue property.

[4] In CIV-2011-404-3643 the bank has already obtained summary judgment against Parnell and St Stephens for $9,063,788,11. Those companies are now in liquidation. The liquidators have advised that they do not oppose the orders for vacant possession.

[5] In CIV-2011-404-3643 Mr Osborn is sued on a guarantee given by him as trustee of the Alexander Family Trust. It is common ground that his liability under the guarantee is limited to the assets of the trust. He does not face personal liability for any judgment against him under the guarantee.

[6] On 16 December 2011 the bank advised that it no longer wished to pursue Mrs Alexander on her personal guarantee of the asset finance facility. This was not a release from the guarantee of 7 December 2007 given as trustee of the Alexander Family Trust . That claim against her remains alive.

Mr Osborn's claims

[7] In CIV-2010-404-7186 the statement of claim by Stephen Osborn has two causes of action against the bank:

(a) A claim for inducing breach of contract claiming $1,074,100 as wasted expenses, $7,300,000 for loss of profit, $100,000 for stress and emotional harm and $500,000 for exemplary damages; and

(b) A claim for interference with trade by unlawful means seeking the same relief.

[8] In CIV-2010-404-7186 Parnell, St Stephens and Mr Osborn initially sued the bank for breach of fiduciary duty and applied for an interim injunction to stop the bank selling the St Stephens property under the power of sale in a mortgage. Woolford J dismissed that application on 28 February 2011.[1] The liquidators no longer wish to continue the companies' claims in CIV-2010-404-7186. Only Mr Osborn's claims against the bank in his statement of claim remain alive. A third amended statement of claim was tendered for the hearing.

[9] The main questions are:

(a) Were four transfers from an account of Parnell Property Investments Ltd and St Stephens Property Investments Ltd on 30 April and 1 May 2007 amounting to $1,606,000 unauthorised and, if so, what are the effects on the bank's claim?

(b) What is the amount of the bank's claim under the guarantee of 7 December 2007?

(c) Has the bank consented to a lease of the St Stephens property to Fifer Residential Ltd?

(d) Does Mr Osborn have tenable causes of action in his claim against the bank?

Factual Background

[10] The Bank of New Zealand provided a number of loan facilities to entities and persons associated with a Mr Paul Graeme Alexander. Mr Alexander is not himself a

[1] *Parnell Property Investments Ltd v Bank of New Zealand* HC Auckland CIV-2010-404-7186, 28 February 2011.

party to this proceeding and was not a party to any of the loan facilities. At the relevant times he was an undischarged bankrupt for the second time. Bankruptcy is intended to enforce retirement from commercial activity for a time: under s 149 of the Insolvency Act 2006[2] a bankrupt may not without the consent of the Official Assignee enter into, carry on or take part in the management or control of any business, be employed by a relative or be employed by a company, trust, trustee or incorporated society owned, managed or controlled by a relative. Some bankrupts find these restrictions irksome and still involve themselves in commercial activity. They may try to do so through other persons and entities. When that happens, the outcomes are not always happy. This is one such case. Mr Alexander says that he acted as a property consultant for the companies listed below. He was an agent for the defendants and brought about transactions between the bank and the other parties. The bank was aware of his status. I am not required to decide whether Mr Alexander breached the ban under s 62 of the Insolvency Act 1967.[3]

[11] The persons and entities associated with Mr Alexander are:

(a) **Julie Margaret Alexander:** The wife of Mr Paul Alexander. She is a trustee of the Alexander Family Trust with Mr Stephen Osborn.

(b) **Proprius Holdings Ltd:** Its business was property investment. Its director is Mrs Alexander. Its sole shareholder is Musback Corporation Ltd. Proprius has been put into receivership and liquidation and is now struck off.

(c) **Musback Corporation Ltd**: Mrs Alexander is a director and shareholder.

(d) **Fifer Residential Ltd**: Its business was property investment. Julie Alexander is a director. Mrs Alexander and Mr Osborn are shareholders.

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2 Mr Alexander was bankrupted under the Insolvency Act 1967 – the corresponding provision in that Act is s 62.

3 The 1967 Act applies because he was adjudicated before the 2006 Act came into force: s 444(2) 2006 Act.

(e) **Stephen Osborn:** An associate of the Alexanders.

(f) **St Stephens Investments Ltd (in liquidation):** The director is Mr Osborn and the shareholder is Aries Holdings Ltd.

(g) **Parnell Property Investments Ltd (in liquidation):** The director is Mr Osborn and the shareholder is Aries Holdings Ltd.

(h) **Aries Holdings Ltd (in liquidation):** Mr Osborn is a director and shareholder.

(i) **Sarah's Cove Investments Ltd:** The director is Mr Osborn. The shareholder is Aries Holdings Ltd. The company has been struck off.

(j) **Original Car Warehouse (2003) Ltd (in liquidation):** Bruce Mansell, an associate of Paul Alexander, is a director and shareholder. Mr Mansell holds part of his shareholding on a trust for Paul Alexander. Original Car Warehouse (2003) Ltd is in liquidation.

(k) **Marine Ambulance Services (No.2) Ltd:** Mrs Alexander is director and shareholder.

(l) **Great South Property Holdings Ltd:** Mrs Alexander is director. The shareholders are Mrs Alexander and B M Trustee Company Ltd. The company has been struck off. It was previously in liquidation.

(m) **Compark Properties Ltd:** Mrs Alexander is director and shareholder.

[12] This case primarily concerns the bank's loans and facilities to Parnell and St Stephens and guarantees of those loans and facilities. At the same time the bank also entered into other arrangements with other entities associated with Mr Alexander. Those arrangements were often recorded in the bank's letters of offer, which also set out arrangements in question in this case. For this decision it is not necessary to go into the details of the facilities for the other entities.

[13] In 2006 Parnell and St Stephens bought the property at 43, 45 and 47 St Stephens Avenue, Parnell for $7.2 million. The companies in partnership owned the property as tenants in common in equal shares. Although there are three street numbers, the property was on one title. It was planned to subdivide the site into three lots. The purchase was financed in part by the Auckland Mortgage Trust and by an advance from Fifer. The companies also bought a vessel, the "*White Rabbit*", for $500,000. That purchase was in part funded by a loan from a finance company. In March 2007 Parnell and St Stephens entered into an agreement to sell the St Stephens Avenue property for $10.5 million to an Australian purchaser, but the agreement did not settle.

[14] Late in 2006 Mr Alexander approached the Bank of New Zealand to enquire whether the bank would refinance St Stephens and Parnell's borrowings on the St Stephens Avenue property. Ms J E Hart was the bank manager. She had dealt with Mr Alexander since 2003 as the person who requested funding, negotiated facilities and was involved in day to day management of facilities of the companies in [11] above.

[15] The bank had advanced funds to associated companies, which were in default although the subject of temporary overdraft facilities. Proprius was in excess of its overdraft limit by about $1 million. The bank had provided Proprius with funding for litigation. Mr Alexander had given assurances that the debt would be repaid from the proceeds of litigation plus a payment from the IRD, but payment had not been forthcoming. In April 2004 Mrs Alexander and Mr Osborn as trustees of the Alexander Family Trust had given the bank a guarantee for the indebtedness of Proprius with a limit of $2,040,000 plus interest and costs.

[16] Fifer was in excess of its limit by about $330,000. In November 2005 the bank had made an advance of $600,000 to Fifer on the security of a mortgage over an Epsom property. In November 2004 Mrs Alexander had given the bank a guarantee for the indebtedness of Fifer with a limit of $350,000 plus interest and costs. Mr Alexander told the bank that the facility would be repaid in full if the bank agreed to release its mortgage. He wanted to use the Epsom proceeds as part of the funds to buy the St Stephens Avenue property. The bank agreed to release the

mortgage even though it was not repaid in full. Mr Alexander did not deliver on his promises of repayment.

[17] Ms Hart says that when Mr Alexander approached her to refinance the borrowings on the St Stephens Avenue property, she discussed with him that any facility provided would have to be used to repay the Fifer overdraft and the Proprius overdraft. Remaining funds would need to be used to meet servicing commitments to the bank. She says that he acknowledged that the facility would be used to repay the Fifer and Proprius debts. In these discussions, Mr Alexander was clearly acting as agent for the owners of the St Stephens Avenue properties. Mr Alexander acknowledged this in an affidavit sworn on 8 February 2011. Mr Osborn and Mrs Alexander do not deny this. Mrs Alexander simply makes the point that Mr Alexander could not operate a bank account because of his bankruptcy. She says that she was reliant on her husband for advice, as she was inexperienced in property development.

[18] Ms Hart prepared a memorandum to the bank's credit committee asking for approval for a facility to be provided to St Stephens and Parnell for $4.8 million. The memorandum shows that the funding was to refinance the current mortgage to Auckland Mortgage Trust, to clear the Fifer and Proprius debts and to leave a balance in the facility to meet ongoing debt servicing commitments to the bank. The memorandum also sought approval for a term loan for $340,000 to refinance the borrowing on "*White Rabbit*". The memorandum makes no reference to providing funding for other property development, but proposes as a condition of the facility that the bank not give any commitment to fund development. The credit committee approved the proposal.

[19] Ms Hart says that she presented a letter of offer for the facilities to Mr and Mrs Alexander on about 28 November 2006. There is a minor clerical error in that St Stephens and Parnell are identified as "St Stephens Investment and Parnell Investment Trust". It is a case of immaterial misnomer. That letter made offers of two loans:

(a) a "multi-option facility", essentially to refinance the St Stephens Avenue property and meet associated borrowing; and

(b) an "asset finance facility" to cover the refinancing of the vessel the "*White Rabbit*".

[20] I turn first to the multi-option facility. The loan was for $4.8 million. In the letter the purpose of the facility is said to be to meet working capital requirements. Ms Hart explained to Mr and Mrs Alexander that the funds were being provided to refinance the loan on the St Stephens property, to clear the Fifer and Proprius excess and to service ongoing commitments to the bank. Security is to be a registered first mortgage of the St Stephens Avenue property. The letter contains some special conditions including:

> No further excesses are allowed or tolerated...
>
> No commitment to fund development is made by the bank...

[21] Mr Alexander denies that the funds from the refinancing were to be used to pay the Proprius and Fifer debts. He and Mr Osborn say that the balance available after paying the debts on the St Stephens Avenue property could be used on another property investment, Sarah's Cove, at Opito Bay on the Coromandel Peninsula. They give evidence that Ms Hart had been told about this proposed development and knew of their intentions, but they acknowledge that the bank made it clear that it had no appetite for the risk in such a venture.

[22] Secondly, the letter of offer also provided for a term loan, called an asset finance facility, for $340,000. The security was "*White Rabbit*" and a guarantee to be given by Mrs Alexander.

[23] The letter of offer was returned to the bank signed by Mr Osborn and Mrs Alexander on 14 December 2006.

[24] In February 2007 the letter of offer was followed by a letter of advice addressed to Parnell and St Stephens and a loan facility master agreement (a document that sets out general terms and conditions of borrowing) and the formal

documents for the multi-option facility (the February 2007 facility). Ms Hart sent the documents to the companies' lawyer for signing. Mr Osborn signed them for the companies before the defendants' lawyer. The date of signing is not recorded on the documents but Ms Hart says that it was between late February and early March 2007.

[25] Drawdown did not follow immediately. When Ms Hart enquired, Mr Alexander explained that there was a shortfall because the St Stephens Avenue property had a second mortgage. This was news to Ms Hart. She accepted that the refinancing could not proceed unless that mortgage was also satisfied. She prepared another memorandum to the credit committee seeking approval for a temporary facility for $750,000 for two months to cover the shortfall at settlement. The memorandum to the credit committee is dated 30 March 2007. The bank's internal memorandum approving the temporary overdraft is dated 2 April 2007. The letter of offer for the temporary facility has the same date. Ms Hart says that she met Mr and Mrs Alexander in early April 2007, explained the documentation to them and left it with them for signing, including by Mr Osborn. The letter of offer signed by Mr Osborn and Mrs Alexander was returned later in April. The date they are recorded as signing is 14 April 2007. The temporary overdraft facility was to expire on 31 May 2007.

[26] Although the documents for the $4.8 million February 2007 facility were signed in February or March 2007, the documents for the term loan of $340,000 (the asset finance facility) were not signed until later in the year.

[27] While the bank had approved the loan of $340,000 under the asset finance facility and it had been drawn down, the loan documentation, the asset finance agreement, and a guarantee given by Mrs Alexander were not signed until 15 August 2007. The asset finance agreement provides that the "*White Rabbit*" is security for the loan.

[28] Drawdown of the $340,000 and the $4,800,000 took place on 30 April 2007. The bank took a registered all-obligations first mortgage over the St Stephens

Avenue property, with the other mortgages being discharged. The mortgage includes the usual powers to sell and to enter into possession upon default.

[29] Ms Hart says that she discussed the drawdown with Mr Alexander, who confirmed that certain transfers were to be made to reduce other loans incurred by the associated companies. On 30 April and 1 May 2007 the bank made these payments from the account of Parnell and St Stephens:

(a) $20,000 was transferred to reduce the excess on the overdraft by Original Car Warehouse (2003) Ltd to within the approved limit of $500,000;

(b) $162,008 was transferred to clear the overdraft owing by Fifer;

(c) $204,000 was transferred to pay Ms Le Gros who had advanced funds to Proprius; and

(d) $1.22 million was transferred to clear the overdraft of Proprius.

[30] These transfers have since been challenged as unauthorised, but there was no challenge to them at the time. The signatories of the accounts of Parnell and St Stephens were Mrs Alexander and Mr Osborn. Mr Alexander was not a signatory of the account. On 8 May 2007 Ms Hart received an email sent apparently by Mrs Alexander authorising the transfer to Ms Le Gros. For the other transfers she acted on Mr Alexander's word. The validity of the transfers and their effects are in contention. Mr Alexander and the defendants say that he did not have authority to approve the transfers. Mr Alexander says that he, not his wife, sent the email of 8 May. He says that he did not approve the other transfers.

[31] On 27 April 2007 Proprius entered into an agreement with a Mr and Mrs Eden to buy Sarah's Cove, a 61 hectare property at Opito Bay. The purchase price was $8.5 million. The deposit was $450,000. The balance was payable after 180 days. During May, Sarah's Cove Investments Ltd was incorporated. Proprius nominated Sarah's Cove as purchaser under the agreement to buy Sarah's Cove. A cheque for $450,000 was drawn on the Parnell and St Stephens account to

pay the deposit for Sarah's Cove. There were not sufficient funds in the account and the bank did not honour the cheque.

[32] Mr Alexander then approached Ms Hart for a further advance to meet the deposit. The bank was not asked to fund the balance of the purchase price for Sarah's Cove. The bank approved the advance. This brought the temporary overdraft limit up to $1 million and enabled the deposit to be paid.

[33] The defendants accept that the documents referred to above were all signed, but they disagree on the dates they were signed. I have gone by the dates written on the documents when they were signed. There is no reason not to accept those dates as correct. For this case, the dates of signing the documents are not relevant.

[34] By September 2007 the $1 million overdraft had not been repaid as promised. There were discussions between Ms Hart and Mr Alexander about the facility and how it would be cleared. Mr Alexander asked for the overdraft to be increased from $1 million to $1.6 million to cover the servicing of debt, predominantly interest charges. The bank approved that.

[35] In November 2007 the bank decided to convert the temporary overdraft of $1.6 million to a permanent facility. In December 2007 these documents were prepared and signed:

(a) A letter of advice for a committed cash advance facility (the December 2007 facility) to Parnell and St Stephens. The facility amount is stated as $1.8 million, but the bank says that that is a clerical error; the correct amount is $1.6 million. The defendants do not contest this point and nothing turns on it. The end date for the facility was 31 January 2008. The facility is also subject to a loan master facility agreement.

(b) A security amendment agreement recording the securities for the bank's facilities to Parnell and St Stephens:

(i) the mortgage over the St Stephens property;

(ii) Mrs Alexander's guarantee for the loan of $340,000; and

(iii) a new guarantee to be given by Mrs Alexander, Proprius Holdings Ltd, Aries Holdings Ltd and Mrs Alexander and Mr Osborn as trustees of the Alexander Family Trust.

(c) A guarantee for the amount of $6.6 million given by Mrs Alexander, Proprius Holdings Ltd, Aries Holdings Ltd and Mrs Alexander and Mr Osborn as trustees of the Alexander Family Trust (the December 2007 guarantee).

[36] All parties signed the documents, which were returned to the bank. The defendants' solicitor witnessed the signatures.

[37] The term loan (the asset finance facility) fell due on 16 June 2008. Parnell and St Stephens did not repay. In January 2009 the bank made formal demand, after having made earlier informal demand in July 2008. In March 2009 the bank appointed receivers. The receivers sold the "*White Rabbit*". After selling the vessel in December 2009, the receivers paid the bank $247,632.52, leaving a shortfall for the bank. At 8 December 2011 the balance payable under the asset finance facility was $214,285.

[38] The purchase of Sarah's Cove did not settle. Sufficient funds could not be raised, neither from the bank nor other financiers. The defendants say that in addition to a deposit and part payment of the purchase price of $500,000,[4] $574,100 was spent on costs of due diligence. The defendants say that the bank is to blame for the failure of the purchase through the unapproved transfers of 30 April and 1 May 2007. They now make that claim through Mr Osborn's third amended statement of claim. The liquidators of Parnell and St Stephens have no interest in pursuing such a claim.

[39] The December 2007 facility fell due on 31 January 2008. Parnell and St Stephens did not repay. There followed correspondence and meetings between the bank, Mr Alexander and the defendants and their lawyers. The bank made a demand

[4] However, a settlement statement issued by the vendors' lawyers shows that only $450,000 was paid towards the purchase price.

on Parnell and St Stephens as borrowers on 6 May 2009 for $3,186,421.23 including interest, being the total debit balance of the partnership current account (the 00 account). Parnell and St Stephens did not comply with the demand. The bank served a notice under s 119 of the Property Law Act on Parnell and St Stephens, demanding payment of $4,556,279.86 being the total amount due under the partnership current account as at 27 August 2010. The bank also served notices under ss 121 and 122 of the Property Law Act including on Mrs Alexander personally and on Mr Osborn and Mrs Alexander as trustees of the Alexander Family Trust, demanding $4,556,279.86. The notices expired unremedied.

[40] The bank says that the default under the December 2007 facility was a cross-default under the February 2007 facility. It relies on clause 12 of the loan master facility agreement:

> 12.1 If any of the following events occurs in respect of any facility, you will repay, on demand, to our address as noted in the Letter of Advice the total amount owing under that facility, including all principal and interest, any account, activity or other charges that we think are applicable, any costs that we incur in recovering the total amount owing and interest at the rate and accruing in the manner specified in the Letter of Advice or this agreement on all that amount owing from when we make demand until you pay us, and we may immediately cancel that facility and other facilities.

[41] Clause 12.1.1 relevantly provides that defaults in payment on the due date of any amount due under any facility are an event for the purposes of clause 12.1. Clause 12.1 generally gives the bank a power to demand payment of all sums owing under a facility, but the only reference to other facilities is to the power to cancel. In my judgment it is not clear that the power to cancel another facility also gives the power to demand payment of amounts owing under that facility. Instead the power to cancel seems to allow the bank to discontinue advancing funds under other facilities. If the bank had intended to give itself the power to call up amounts owing under other facilities, it would have used words that said as much.

[42] Instead of the cross-default argument raised by the bank, it is necessary to look at the terms of the February 2007 facility. While the document provides for an end date, no such date is given. Instead the document provides for advances for periods up to 365 days and for repayment on the last day of the relevant advance

period. As drawdown was on 30 April 2007, the time for repayment could be no more than one year later. The bank is entitled to claim under that facility now without relying on defaults under other facilities.

[43] The bank says that the total amount owing by Parnell and St Stephens at 8 December 2011 was $11,303.956 made up as follows:

00 account	$6,289,671 (interest rate 17.8% p.a.)
02 account	$214,285 (interest rate 15.1% p.a.)
03 account	$4,800,000 (interest rate 6.2% p.a.)

[44] The 02 account is the term loan (the asset finance facility). The 03 account is the February 2007 facility. Interest on that facility has been charged to the 00 account. The 00 account is the current account. Charges against that account that put it into overdraft include interest on the February 2007 facility, the payment to clear the mortgages on the St Stephens Avenue property, the transfers of $1,606,000 of 30 April and 1 May 2007, the deposit on the Sarah's Cove purchase, other drawings on the account and accumulating interest and bank fees. Interest is capitalised monthly.

[45] In 2010 the bank elected to exercise its powers of sale under the mortgage to sell the St Stephens Avenue property. Even though Woolford J dismissed the interim injunction application to stop a sale, the bank has struck a snag – a lease over the property. The Alexander family is living in the property and will not move out. They say that they are entitled to stay there as they have the consent of a lessee of the property. They did not raise this in the interim injunction application.

[46] When St Stephens and Parnell bought the property in 2006, they leased it for two years to Proprius. At the end of that lease, they entered into a new lease with Fifer and Proprius as lessees. The new lease began on 2 April 2008, is for four years, but has a right of renewal for a further four years, that is, up to 2 April 2016. The annual rent is $36,200 plus GST. Fifer is not paying rent. It says it does not have to because it is a creditor of St Stephens and Parnell for $1,587,850.86 plus interest under a term loan agreement for funds advanced to assist with the purchase of the St Stephens Avenue property. The loan is repayable on demand and demand was not

to be made before 1 April 2007. Clause 15 of the term loan agreement provides that if demand for repayment has not been made by 1 May 2007 the director of the borrowers may issue fully paid shares in satisfaction of the debt, but there is no evidence that this was done.

[47] The bank began by giving notice to Fifer under the Residential Tenancies Act 1986 relying on sections 51 and 58. Fifer's response was that this was not a residential tenancy under the Act. It says that the premises are used for both residential and commercial purposes. The bank now accepts that, but says that as a registered mortgagee it is entitled to sell the property free of the lease. Fifer's response is that the bank consented to the lease by Parnell and St Stephens to Fifer. The bank denies that it did. Fifer relies on a letter by the bank signed by Ms Hart dated 14 December 2007 addressed to Fifer in which consent to a proposed new lease is confirmed. The bank says that the letter is not genuine.

[48] Mrs Alexander says that there was a verbal agreement with the bank that once the subdivision of the St Stephens Avenue property had been completed, the bank would give a discharge over lots 2 and 3, the two rear lots, and would retain a mortgage only over lot 1, which has the house on it. She does not give any details of any such agreement. She does not say that she was involved in any discussions or correspondence that led to such an agreement. She relies on correspondence from the defendants' lawyer asking for confirmation that there is such an arrangement. That in itself is not evidence of an agreement. The bank did not give the confirmation the lawyer sought. The subdivision has now been completed. The bank's mortgage is registered against the titles of all three lots. At the hearing the defendants did not argue that the bank was not entitled to its mortgage over all three lots. Mrs Alexander has not raised an arguable defence on that issue.

[49] It turns out that the building on the St Stephens property is a leaky home. The Alexanders believe that Parnell and St Stephens have a good case against the local authority. They asked the bank not to enforce its rights under its securities and to fund the litigation. The bank was not willing to do so. That decision is not in issue. Not surprisingly land agents have advised the bank that the property will be difficult to sell.

Questions for determination

Were the four transfers on 30 April and 1 May 2007 amounting to $1,606,000 unauthorised and, if so, what are the effects on the bank's claim?

[50] Mrs Alexander and Mr Osborn (the defendants in this part of the judgment) say that the transfers were unauthorised. If correct, that goes to the amounts payable by Parnell and St Stephens and accordingly also to the amounts that can be claimed under the guarantee of December 2007. They say that it goes further. In their notice of opposition they say that it makes the guarantee illegal at equity and unenforceable, that the guarantee would not have been necessary but for the transfers, and that the facility for $1,800,000 was a means of covering up the bank's unauthorised deductions.

[51] As to the authority for the transfers, Ms Hart says that when she made the transfers on 30 April and 1 May 2007 she relied on the discussions that she had had with Mr and Mrs Alexander as to the purpose of the facility, her memorandum to the credit committee outlining the purpose of the $4.8 million facility, a meeting she had with Mr Alexander on 30 April 2007 when she discussed the transfers with him, the email of 8 May 2007 sent in the name of Mrs Alexander confirming the payment to Ms Le Gros, and a meeting with Mr Alexander on 10 May 2007 when she confirmed to him that the transfers had been made. She supports her account with copies of extracts from her diary and a copy of whiteboard notes made in the meeting of 10 May. She says that she had only minimal contact with Mr Osborn.

[52] According to Mr Alexander, although he acted as property consultant for Proprius, Fifer and other companies, and negotiated funding for St Stephens and Parnell, he did not have signing authority for the companies and did not have authority to operate any accounts of those companies. He says there was no good reason why Parnell and St Stephens should agree to pay debts of other companies, because Mr Osborn did not have any interest in those other companies. He describes the meeting on 10 May 2007 as a social occasion and gives corroboration for that, but does not address in detail other meetings and discussions described by Ms Hart. Instead he gives a general denial that there was any requirement that the funds in the facility were to pay debts of Fifer and Proprius. He does not deny that Fifer and

Proprius were overdue in their arrangements with the bank. He says that he did not have authority to approve the transfers in issue. He did not give approval for the payments to the accounts of Original Car Warehouse (2003) Ltd, Fifer or Proprius. As for the email of 8 May 2007 for the Le Gros payment, he says that he sent it in the name of his wife but apparently without her authority. Mrs Alexander does not take issue with Ms Hart's account of the explanation of the facility in November 2006.

[53] In his decision of 28 February 2011[5] Woolford J dealt with the unauthorised transactions issue. He held that whether Mr Alexander had given approval for the transfers was a factual dispute[6] and that the disputed authority for the payments may amount to a serious question to be tried.[7] Taking the hint from Woolford J, the bank did not argue that for a summary judgment application it could establish that the defendants did not have an arguable defence as to the transfers. Technically, Woolford J's findings are not binding for this case. There is no issue estoppel against the bank. The findings as to disputed facts and serious question to be tried were not fundamental to his decision. The bank could not have appealed against them.[8] Nevertheless the bank's concession that there is an arguable defence as to the transfers is sound. The defendants have raised enough to suggest that a hearing on the merits is required to determine exactly what was agreed between the bank and the defendants and what was discussed between Ms Hart and Mr Alexander. They have challenged Ms Hart's credibility, most relevantly referring to a comment by another bank officer that much of the arrangements with Mr Alexander and the entities associated with him were in her head and had not been reduced to writing.

[54] Given the bank's concession, the defendants did not argue the merits on the approval of the transfers. It would therefore not be appropriate for me to give a decision on the issue. However, having read the affidavits, I offer some comments in case they may be of assistance to the parties in resolving the issue later.

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5 *Parnell Property Investments Ltd v Bank of New Zealand* HC Auckland CIV-2010-404-7186, 28 February 2011.

6 At [46].

7 At [64].

8 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 38-39.

[55] So far the issue of the approval of the transfers seems to have focused largely on what was discussed between Ms Hart and Mr Alexander immediately before and after the transfers and whether Mr Alexander had authority then to approve the transfers. Another line of inquiry is to consider whether Parnell and St Stephens approved the transfers when they entered into the February 2007 facility.

[56] As sole director of Parnell and St Stephens, Mr Osborn had the management of the companies and the power to appoint others to undertake tasks for the companies. He allowed Mrs Alexander to be a signatory of the bank account. He has been a very passive director as far as the companies' dealings with the bank are concerned. He left everything to Mr and Mrs Alexander to arrange and simply signed documents for arrangements that Mr Alexander had negotiated. Similarly Mrs Alexander was content to leave her husband to negotiate matters. This situation is not unfamiliar when an undischarged bankrupt involves himself in commercial activities but tries to set up arrangements under which he does not appear to be carrying on a business. It is clear that as director of Parnell and St Stephens, Mr Osborn gave Mr Alexander wide authority to act as agent for those companies. He was content to sign agreements that had been negotiated by Mr Alexander. There is no evidence that he queried anything that Mr Alexander had negotiated. Having allowed Mr Alexander to negotiate arrangements with the bank and having signed agreements giving effect to those arrangements that Mr Alexander had negotiated, Mr Osborn can hardly say that the companies are not bound by those arrangements.

[57] Ms Hart's evidence is that one purpose of the February 2007 facility was to see that the outstanding indebtedness of Fifer and Proprius was addressed and that Mr Alexander knew and accepted that. In response Mr Alexander and Mr Osborn say that it does not make commercial sense for Mr Osborn's companies to agree to pay the debts of companies in which he has no interest. This attempt to put a gap between Aries and its subsidiaries on the one hand and the other companies is belied by the close connections between the Alexanders and Parnell and St Stephens:

(a) Mrs Alexander alone guaranteed the term loan secured over "*White Rabbit*", not Mr Osborn, the sole director of the companies, the person who would typically give a guarantee;

(b) Mrs Alexander is personally liable under the guarantee of 7 December 2007 for the indebtedness of Parnell and St Stephens, whereas Mr Osborn is liable only to the extent of the assets of the Alexander Family Trust;

(c) Although apparently not holding any office or position in the companies, Mrs Alexander had power to operate the companies' bank account (as did Mr Osborn); and

(d) The lease of the St Stephens Avenue property to Fifer gives the Alexander family accommodation and a base from which they carry on business, while paying no rent. Mr Osborn does not live at the St Stephens Avenue address.

[58] The allocation of risks, burdens and benefits to the Alexanders as set against the reduced role and exposure of Mr Osborn points to Parnell and St Stephens having more to do with the Alexanders in a business sense than with Mr Osborn. It is clear that the bank treated Parnell and St Stephens as connected with the Alexanders. The letter of offer of 28 November 2006 also provides for funds to be advanced to other entities connected with the Alexanders: Proprius, Original Car Warehouse (2003) Ltd and Compark Properties Ltd. Both Mrs Alexander and Mr Osborn signed the letter of offer. They must have seen from the letter that the bank treated the companies as connected in a business sense, if not in a legal sense. I see no reason why the bank should not have treated them as so connected.

[59] Once the connection between the Alexanders and Parnell and St Stephens is accepted, then Mr Alexander's general denial of any arrangement for Fifer and Proprius to be paid is lame. He does not address how they were to be paid. It is implausible that the bank would advance fresh funds for refinancing loans on the property in which Mr and Mrs Alexander were living, while not addressing other outstanding debts payable by Fifer and Proprius. In circumstances where he could have described to the court what he negotiated with Ms Hart and where his account leaves payment of Proprius and Fifer unexplained, Mr Alexander's bare denial of those arrangements for the use of the facility does raise a question as to the strength of his evidence.

[60] If Ms Hart's version of the negotiations with Mr Alexander that the $4.8 million facility (the February 2007 facility) would be used in part to pay off the outstanding debt by Fifer Residential and the overdraft of Proprius is accepted, that goes to the content of the parties' agreement. Mr Alexander had the authority of Parnell and St Stephens to negotiate those arrangements. On Ms Hart's account, the "working capital requirements" in the letter of offer of 28 November 2006 meant what Mr Alexander and Ms Hart had discussed – it included the Fifer and Proprius debts. While "working capital requirements" might not ordinarily include using the funds advanced to pay the debts of Fifer and Proprius, that is the meaning the parties adopted in this case. That would be a case of a private dictionary meaning, as Tipping J explained in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:[9]

> A private dictionary meaning is a meaning the words linguistically cannot reasonably bear. It is, nevertheless, open to a party to show that, despite that fact, the parties intended their words to have that special meaning for the purposes of their contract. This represents a consensual parallel with cases in which words have a special meaning by trade custom. It can also be regarded as a linguistic example of estoppel by convention. The estoppel prevents the accepted special meaning from later being disavowed. Estoppels can also arise in interpretation cases not involving a special meaning. They are then normally based on a common assumption or representation as to meaning.

[61] Again, if Ms Hart's version of the negotiations with Mr Alexander is accepted, Parnell and St Stephens agreed under the terms of the February 2007 facility to it being applied to pay the Fifer and Proprius debts. In this case, the signing of the letter of offer in December 2006 and of the letter of advice for the February 2007 facility were the authority to the bank to use funds under the facility to pay the Proprius and Fifer debts. On drawdown, the companies could not object to the funds being applied to pay the Proprius and Fifer debts. If they had, that would cut right across the purpose of the working capital requirements in the letter of offer. The bank would not have to rely on Mr Alexander's disputed say-so for approval of the transfers to pay the Proprius and Fifer debts; it already had authority for those payments.

[62] On the other hand Ms Hart does not say that Mr Alexander agreed in negotiations for the facility to be used to pay Proprius' debt to Ms Le Gros or to reduce the overdraft owing by Original Car Warehouse 2003 Ltd. So Parnell and

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9 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC) at [25].

St Stephens could not have agreed in the facility to those debts being paid. Authority for those transfers appears to turn on the discussions between Ms Hart and Mr Alexander immediately before and after the transfers.

[63] Mrs Alexander is running the defence as to the payments of the Fifer and Proprius debts simply as a stalling device. In November 2004 she guaranteed Fifer's indebtedness to the bank. If she had an arguable defence as to the payment of the Fifer debt and succeeded at a defended hearing, the bank would be entitled to set aside the payment to the Fifer account and to sue Mrs Alexander under her guarantee of the Fifer debt. Either she is liable for the Fifer payment under the claim in this case or she would have to accept liability for the debt under the Fifer guarantee. Her best hope in running the defence is to put off the day when judgment will be given against her, but it cannot be to avoid liability altogether. Similarly, she and Mr Osborn[10] gave guarantees of Proprius' indebtedness to the bank in 2006, early 2007 and December 2007. Again, she will be liable for the Proprius indebtedness under either the claim in this case or in claims under guarantees she gave for Proprius. If she is liable in this case under the guarantee of December 2007, her liability will be limited to the amount of the guarantee. She may face greater liability if sued under the Fifer and Proprius guarantees, because the debts for those companies would be taken out of the claim in this case, leaving her still liable for other debts potentially up to the limit under the guarantee given by Parnell and St Stephen, while also leaving her liable for the Fifer and Proprius debts.

[64] I deal with the effects of the payments of $1,606,000 on the basis that they were not authorised or approved. When a bank makes a deduction from a customer's account without authority, the customer is entitled to require the bank to correct the account by crediting to the account the deduction and to make consequential adjustments for interest and bank charges. That would apply in this case. The adjustments to be made are considered in the next part of this decision.

[65] However, the defendants go further. They say that because of the unapproved transfers they cannot be sued under the December 2007 guarantee. Before

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[10] They gave the guarantees as trustees. Again Mr Osborn's liability under the guarantees is limited to the assets of the trust.

Woolford J, Mr Osborn alleged a breach of fiduciary duty by the bank. Woolford J rejected that.[11] There was the usual creditor-debtor relationship between the bank and its customer and there was nothing in the case that imposed a fiduciary duty on the bank. I respectfully agree for the same reasons.

[66] The defendants allege wrongdoing by Ms Hart. They say that the letter of offer for the temporary overdraft of $750,000 (which would be extended to $1 million and ultimately formalised as the December 2007 facility)[12] was signed in July 2007, not April 2007, and that she got them to sign the documents as a form of cover-up. They miss the point that the effect of the letter of offer was to help them deal with the second mortgage on the St Stephens Avenue property which they had not told her about earlier. (They do not take issue with that part of her evidence). The documents that were signed late were for the asset finance facility for "*White Rabbit*" but nothing arises out of them being signed after the funds were drawn down.

[67] The defendants add to this the transfers of $1,606,000 to say that these make the guarantee of the December 2007 facility illegal at equity. While s 3 of the Illegal Contracts Act 1970 defines an illegal contract as one "that is illegal at law or in equity..." it is clear that there are a number of established heads of illegality encompassing both common law and equity.[13] There is nothing in this case that brings it within any recognised head of illegality.

[68] The defendants also say that it was only because of the payments of $1,606,000 that it was necessary for them to give the guarantee and as they were not authorised, they should not be held to it. However, Mr Osborn and Mrs Alexander gave the guarantee knowing that the contested payments had been made, as Mr Osborn acknowledged in his affidavit of 8 February 2011. In giving the guarantee they did not lose the right to say that the bank had made incorrect

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11 *Parnell Property Investments Ltd v Bank of New Zealand* HC Auckland CIV-2010-404-7186, 28 February 2011 at [38]-[44].

12 See [25], [32], and [34]-[35] above.

13 See the heads of illegality described in John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at [13.4].

deductions from the account of Parnell and St Stephens, but they do not have grounds to avoid the guarantee.

[69] For fullness, the bank also submitted that no set-off provisions in the guarantee were valid and effective and prevented the defendants raising any countervailing claim against the bank as a ground for avoiding payment. That submission was not contested.

[70] In summary then, any argument as to the validity of the payments of $1,606,000 goes only to the amount of the bank's claim against the defendants under the guarantee, but does not give any grounds for avoiding the guarantee in its entirety.

What is the amount of the bank's claim under the guarantee of 7 December 2007?

[71] The terms of the guarantee comprehensively cover all manner of customer indebtedness to the bank. Aside from the disputed transfers, the debts the bank sues on under the guarantee are within its guaranteed amounts. The guarantee is limited to $6.6 million plus additional amounts under paragraph 5:

> (a) An amount equal to one year's interest on the Guaranteed Amounts in respect of which we may make demand, calculated at the highest rate payable by the Customer on any Guaranteed Amounts;
>
> (b) Interest at the rate referred to in paragraph 5(a) above on the Guaranteed Amounts in respect of which we make demand, from the date demand is made to the date we receive payment of the Guaranteed Amounts; ...

[72] The guarantee provides for the guarantors to pay the bank's costs of enforcement, including legal fees and expenses on a solicitor and client basis.

[73] Without making any allowance for the contested transfers the bank says that the total amount owing by Parnell and St Stephens under the various facilities at 8 December 2011 was $11,303,956 made up as follows:

00 account	$6,289,671 (interest rate 17.8% p.a.)
02 account	$214,285 (interest rate 15.1% p.a.)

03 account $4,800,000 (interest rate 6.2% p.a.)

[74] [The bank may however only claim up to the maximum allowed by the guarantee, that being $6.6 million plus any of the additional matters referred to above]. The bank claims that there are debts up to and exceeding this amount and it claims the whole $6.6 million. The defendants claim that the amounts owing are less than the total of the guarantee.

[75] The bank's calculation of the sums claimable under the guarantee is:

The amount of the guarantee	$6,600,000.00
Interest for one year at the default rate of 6.2% per annum for one year	$409,201.50
Interest from 10 February 2011 to 21 November 2011 at the same rate ($1,121.10 per day)	$318,392.40
Total:	**$7,327,593.90**

[76] The defendants did not challenge this calculation.

[77] The bank dealt with the disputed transfers on the basis that the entire $1,606,000 could be triable. It said that even if the sum of $1,606,000 is deducted from the total sums payable by Parnell and St Stephens, the net amount is still clearly more than the amount claimable under the guarantee.

[78] The defendants objected that interest and bank charges attributable to the disputed sum remained part of the bank's calculations and that those would have to be taken into account and deducted, at least for the purposes of summary judgment.

[79] The bank then offered a calculation in an affidavit of Mr Bittle, a bank manager, in which an interest charge was also taken into account as well as the disputed transfers. The interest amount of $1,298,832 was based on a weighted interest rate of 13% per annum. The resulting indebtedness of $8,399,124 was more than the total amount payable under the guarantee. I was uncertain as to the use of a

weighted average to make the interest adjustment. I adjourned the hearing to 16 December 2011 to allow the parties to reconsider the matter.

[80] On 13 December Mr Bittle set out a fresh calculation in a new affidavit. He had deducted $1,606,000 from the 03 account leaving a balance of $3,194,000 and then made monthly adjustments of interest on that sum charged to the 00 account and consequential adjustments to interest charges on the 00 account. His calculation began from February 2008, but he made an allowance for capitalised interest charged from May 2007. He did not take bank charges into account, but gives a reasonable explanation for this. The result is that Parnell and St Stephens would owe $7,762,390 – again more than the amount claimable under the guarantee.

[81] The approach is not necessarily correct. As the original deductions were made from the 00 account, the better course is to add back the deductions and make adjustments to the 00 account for interest charged on the amounts of those deductions. Interest on the 00 account fluctuated between 14.5 per cent p.a. and 19.89 per cent p.a. and was capitalised. These rates are higher than the 6.2 per cent p.a. charged to the 03 account. Given the need to make adjustments by deducting capitalised interest charged at higher rates than the simple interest charged on the 03 account, it is not clear that on a recalculation of the 00 account, the net result would be more than $7,327,593.90. It may be that a final answer may only be found after a full reconstitution of the 00 account. At this stage the bank has not satisfied me that once the 00 account is reconstituted after deducting the disputed transfers and the interest charged on them, the debt under the guarantee will be more than $7,327,593.90, but I am unable to say what the amount is.

[82] The defendants tendered an affidavit by a chartered accountant. Unfortunately he was working from different facts. He was told that the defendants signed documents under duress and has discounted them. He has made no allowance for the deposit of $450,000 on the Sarah's Cove agreement or for the amount owing under the asset finance facility for "*White Rabbit*". He uses different interest rates from those used by Mr Bittle. He says that the total amount owing by Parnell and St Stephens is $4,795,873.99 including interest as at 30 January 2012. While I do not accept that his approach is correct and I believe that the amount payable under

the guarantee is some higher figure which has not been calculated, it does set a basis for calculating a minimum sum for the defendants' liability under the guarantee.

[83] My calculation of the minimum amount of the defendants' liability under the guarantee is:

Amount calculated by defendants' accountant	$4,795,873.99
Advance for deposit on Sarah's Cove (not including interest)	$450,000.00
Amount owing under the "*White Rabbit*" asset finance facility	$214,285.00
Total:	**$5,460,158.99**

[84] There will be judgment for the bank for the amount of $5,460,158.99 as the minimum amount of the defendants' liability under the guarantee. The bank is also entitled to contractual interest on the sum of $450,000 but I have not been given calculations of compound interest at overdraft rates on that sum. Instead the bank will have simple interest at the maximum applicable rates under s 87 of the Judicature Act 1908 from 27 May 2007 to the date of judgment. The above is the extent of relief that can be given on the summary judgment application for this part of the case. The bank is still able to prove the true amount of the liability under the guarantee, including contractual interest on the sum of $450,000, once the 00 account is reconstituted after adjustments for the disputed transfers and it is still able to go to trial on the question of the disputed transfers.

Has the bank consented to a lease of the St Stephens property to Fifer Residential Ltd?

[85] The bank queries the genuineness of the lease of the St Stephens Avenue property to Fifer and Proprius. It says that it was not told of the lease and did not find out about it until the application for interim injunction to stop the mortgagee's sale. The bank has not established for summary judgment purposes that Parnell and St Stephens did not grant the lease to Proprius and Fifer. Mrs Alexander explains the purpose of the lease in her first affidavit when she says that the concern was that if

the first two defendants (Parnell and St Stephens) were to go under they would end up with a new landlord. However, for the Alexanders to be able to continue to live in the St Stephens Avenue property after Parnell and St Stephens have defaulted under the mortgage, they have to show that the bank consented to the lease.

[86] Section 119 of the Land Transfer Act 1952 says that no lease of mortgaged land shall be binding on the mortgagee except so far as the mortgagee has consented thereto. Section 105 says:

> Upon the registration of any transfer executed by a mortgagee for the purpose of exercising a power of sale over any land, the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage *or which by reason of the consent of the mortgagee is binding on him.*
>
> [Emphasis added.]

[87] Similarly under s 138(1) of the Property Law Act 2007, a mortgagee who has consented to a lease may not enter into or take possession of any land subject to a lease, except in the exercise of a power under s 147 (which allows a mortgagee in possession to exercise the powers of a lessor).

[88] In *Cashmere Capital v Carroll*[14] McGrath J, giving the decision of the Supreme Court, referred to earlier authorities and said:

> These decisions indicate that a consent which, under ss 105 and 119, binds a mortgagee to the competing estate or interest in another instrument, requires conduct which affirms the lease. A mortgagee who is aware of a third party's interest, and passively stands by, making no objection, has not consented. For there to be a valid consent the mortgagee must either have been aware of the essential terms of the lease or be shown to have consented to the lease whatever its terms may be. Only then does the mortgagee consent to the terms of the other instrument, in the sense of agreeing to be bound by it. Making an advance as mortgagee, while being aware of the other instrument and another party's interest in it, of itself, does not amount to consent.

[89] For the bank's consent, Fifer and Mrs Alexander rely solely on a letter from the bank dated 14 December 2007. That letter is addressed to the director, Fifer Residential Ltd, and says:

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[14] *Cashmere Capital v Carroll* [2009 NZSC 123, [2010] 1 NZLR 577 at [79].

Dear Julie,

I confirm the consent of the proposed new lease agreement to 43-47 St Stephens Ave property.

Yours sincerely

Josie Hart

Senior Business Manager

[90] The letter is on bank letterhead with Ms Hart's contact details. There were two versions of the letter put in evidence by the parties. The version of the letter attached to Mrs Alexander's second affidavit is a photocopy of the second page of a fax sent on 2 May 2008 at 11.55 am. Another version is attached to the affidavit of Mr Maday, a solicitor with the bank's lawyers. He visited the chambers of counsel formerly instructed for the defendants. He says that he was shown a photocopy, not the original of the letter. He was given an explanation that the defendants had not been able to locate the original. The photocopy of the letter attached to Mr Maday's affidavit is not a copy of a fax.

[91] Ms Hart says that although she was aware that the Alexanders were living in the St Stephens Avenue property, she was not aware that the property was leased out. She denies that she sent the letter. She says that there was not any commercial basis for the bank to consent to the lease, given that the lease would stand in the way of the bank enforcing its mortgage. She notes the absence of a physical address for the delivery of the letter. She says that in her letters she is particular in recording the correct postal address of the addressee. As to the content of the letter, she says that she would have written out the actual parties to the lease, the exact address of the property to be leased and would have referred to the lease document. Those matters are missing in the letter. One aspect that is significant is that Proprius, one of the lessees, is not referred to. No-one familiar with the ownership of the property and reading the letter would understand from it that the bank was consenting to a lease to Proprius. As to format, the letter has a notable gap between the sentence and the sign off, which she does not allow in her letters. While she notes some similarities

between her signature and that on the letter, she says that it is not hers and refers to differences. Ms Hart resigned from the bank in February 2008, so she could not have sent the fax in May 2008.

[92] Mr Bittle, who took this matter over after Ms Hart resigned, confirms what Ms Hart says. He also says that his search of the bank's files has not thrown up any record of a request for consent to the lease or a copy of the letter of 14 December 2007. By April 2008 he was already in discussions with the Alexanders and Mr Osborn. He was well aware of the defaults, as is shown by his internal memorandum of 22 May 2008, in which he recommended recovery action if the bank did not receive a formal proposal for repayment.

[93] The December 2007 facility had been signed just before the disputed letter. It is clear from the documents signed then, especially the short term of the facility, that the bank was keeping Parnell and St Stephens on a tight rein. There was no reason for the bank to consent to the lease at that time. There is no explanation why a letter dated 14 December 2007 was not sent until May the following year. There is no reason for the bank to give its consent in May 2008, as by then Parnell and St Stephens were in default and the Alexanders and Mr Osborn were in discussions with Mr Bittle. The question of the lease and the bank's consent to it were not raised before Woolford J. The letter of 14 December 2007 did not come to light until August 2011.

[94] The bank submits that the letter of 14 December 2007 cannot be genuine. It relies on well-known authority[15] that the court is entitled to scrutinise affidavits to see that they pass the threshold of credibility. It says that that approach applies just as much to documentary evidence as to narrative evidence. Persuasive as those submissions are, in fairness to the defendants I give them a further opportunity to show the court the original document, if it exists. So far the versions of the letter put in evidence are copies of other documents. The original has not been produced. If it were, that would clear this issue up. Accordingly I adjourn the application for vacant possession to *Thursday 16 February 2012 at 2.15 pm*, a summary judgment list.

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[15] *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341;and *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

I direct that by *Friday 10 February 2012* Mrs Alexander is to file and serve an affidavit exhibiting the original letter of 14 December 2007 and the original fax message used for exhibit JMA2 to her affidavit of 12 August 2011. The affidavit is not to address other issues in the case. The parties should bear in mind the inferences that may be drawn from any failure to file and serve the affidavit as directed.

Does Mr Osborn have tenable causes of action in his claim against the bank?

[95] In the second proceeding Mr Osborn has brought a claim against the bank under two heads. The bank applies for both strike out under r 15.1 on the ground that no reasonable cause of action is shown and for summary judgment. It relies on the familiar tests for strike out in *Attorney-General v Gardner*[16] and for summary judgment in *Westpac Banking Corp v MM Kembla NZ Ltd*.[17]

[96] The third amended statement of claim pleads many of the facts already covered in this decision. It also says that there were discussions with the bank in late 2006 and 2007 about financing the purchase of Sarah's Cove, that Ms Hart visited that property, the bank advised that it was not interested in financing Sarah's Cove, and that the facility of $4.8 million (the February 2007 facility) was to repay the first and second mortgages on the St Stephen's Avenue property and a facility fee, leaving $1,224,050.95 which the bank knew would be used to buy Sarah's Cove. Mr Osborn pleads that he entered into the agreement of 27 April 2007 to buy Sarah's Cove through Proprius and he incorporated Sarah's Cove Investments Ltd to complete the purchase and arranged the funding to complete the purchase. After pleading the transfers of 30 April and 1 May 2007, that the bank account went into overdraft as a result, the dishonour of the cheque for the deposit of $450,000 and the reversal of the dishonour, Mr Osborn pleads that he was unable to settle the purchase of Sarah's Cove because of the unauthorised transfers and that the vendor cancelled for failure to settle. He says that he spent $574,100 on due diligence in investigating Sarah's Cove.

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16 *Attorney-General v Gardner* [1998] 1 NZLR 262 (CA) at 267.

17 *Westpac Banking Corp v MM Kembla NZ Ltd* [2001] 2 NZLR 298 (CA) at [60]-[62].

[97] The first cause of action is for inducing breach of contract. Mr Osborn says that the applicable contract is the agreement between himself and the Edens for the purchase of Sarah's Cove. The bank knew that by diverting money without authority it would cause Sarah's Cove Investments Ltd to default under the agreement to buy Sarah's Cove. The bank's actions were intended to make it impossible to complete the purchase of Sarah's Cove. The vendors' cancellation of the agreement for sale and purchase caused losses: the costs of due diligence, the $500,000 paid towards the purchase, loss of profits of $7,300,000 from the development and sale of Sarah's Cove, and stress and emotional harm.

[98] The second cause of action is for causing loss by unlawful means. The alleged unlawfulness was in the unauthorised transfers. In making those transfers the bank interfered with Sarah's Cove Investments Ltd as a third party, knowing that that company was relying on those funds to settle the purchase. In doing so, the bank intended to cause loss to Mr Osborn. As the sole shareholder of Aries Holdings Ltd, itself the sole shareholder of Parnell and St Stephens, and as the person to whom $1,224,050.95 was to be paid from the account of Parnell and St Stephens, he had an economic interest in Parnell and St Stephens. He claims the same losses.

[99] Underlying both causes of action is the complaint that by transferring funds without authority, the bank deprived the purchaser of finance to complete the purchase of Sarah's Cove.

[100] Mr Osborn was not the purchaser under the agreement of 27 April 2007. Proprius was. The purchaser is identified as Proprius and/or its nominee. Under clause 1.3(2) of the agreement for sale and purchase, Proprius remained liable for its obligations as purchaser, notwithstanding the provision for a nominee. At the date of the agreement, Sarah's Cove Investments Ltd was not a party to the agreement as it had not been incorporated. Sarah's Cove Investments Ltd was later nominated, allowing it to enforce the benefit of the agreement for sale and purchase.[18] As a beneficiary under s 8 of the Contracts (Privity) Act 1982, it is entitled to enforce the agreement against the vendors, but it is not subject to the obligations of the

[18] Under ss 4 and 8 Contracts (Privity) Act 1982; and *Laidlaw v Parsonage* [2010] 1 NZLR 286 (CA) (leave to appeal to SC refused).

purchaser. The vendors cannot sue it for the failure to settle. The nomination is the only way by which it can enforce the agreement. There is no pleading and no evidence of any novation under which it became a purchaser, or of any assignment of the benefit of the agreement for sale and purchase to it or of any sub-sale to it. Proprius could not have bought as agent for Sarah's Cove Investments Ltd because it did not exist at the date of the agreement. The agreement does not purport to be a pre-incorporation contract under s 182 of the Companies Act 1993. There is no plea or evidence of ratification of the agreement under s 182. Even though Sarah's Cove Investments Ltd is entitled to enforce the agreement for sale and purchase, that does not make Mr Osborn a party to the agreement. His directorship and shareholding do not give him any standing to sue for alleged losses of the company. There is no evidence that Proprius bought as Mr Osborn's agent or nominated him. There is a good commercial reason why he would not be a party to the agreement for sale and purchase – he would not want to run the risk of personal liability under the agreement, if it did not settle. He does not make any claim for liabilities he incurred to the vendors for the failure to settle. That is because it was not his failure.

[101] In *OBG Ltd v Allan*[19] Lord Hoffmann identified inducing breach of contract as a tort of accessory liability:

> But the important point to bear in mind about *Lumley v Gye* is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party.

[102] That gives a helpful steer to seeing how a claim for inducing breach of contract might be made in this case. The party in breach of the agreement to buy Sarah's Cove was Proprius. The vendors, the party not in breach, were entitled to sue for the purchaser's failure to settle.[20] If there has been conduct inducing the purchaser to breach the contract, the people entitled to sue under the tort are the vendors. In this case Mr Osborn is trying to put himself in the place of the purchaser (but cannot). Even if he could, that does not allow him to sue on this tort. It is the victim of the breach of contract who can sue, not the party in breach, even if induced. If the person induced to breach the contract wants to sue the person who

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19 *OBG Ltd v Allan* [2008] 1 AC 1 (HL) at [5].

20 Sarah's Cove Investments Ltd is a beneficiary of the vendors' promise to settle as the purchaser's nominee, but it is not a beneficiary of the purchaser's promises.

induced him, he must look to some other head of claim. It is clear that a claim for inducing breach of contract is not available to Mr Osborn.

[103] The other head of claim Mr Osborn looks to is intentionally causing loss by unlawful means. Decisions such as *Van Camp Chocolates Ltd v Aulsebrooks*[21] and *OBG Ltd v Allan* have recognised that it is an independent tort. In *OBG Ltd v Allan* Lord Hoffmann said that the essence of the tort appeared to be a wrongful interference with the actions of a third party in which the plaintiff has an interest and an intention thereby to cause loss to the plaintiff. He held that the acts against the third party must be actionable by the third party with one qualification (not relevant in this case). He went on:[22]

> Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against the third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

[104] In *Van Camp*[23] the Court of Appeal held that an intent to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct.

[105] The third party alleged to be the target of the bank's conduct is Sarah's Cove Investments Ltd. However, that is misdirected. Sarah's Cove Investments Ltd does not have any cause of action against the bank for the transfers. The transfers were not an independent wrong against Sarah's Cove Investments Ltd and were not in breach of any contract. The entities that could make a claim about the transfers are Parnell and St Stephens. The unlawful means are the transfers of 30 April and 1 May, which if unauthorised would give Parnell and St Stephens claims against the bank. However, the claim runs into problems when the matter of intention is considered. The alleged intention of the bank was to divert funds from Sarah's Cove Investments Ltd to prevent the purchase of Sarah's Cove settling. The bank could not have had that intention at the time of the transfers because Sarah's Cove

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21 *Van Camp Chocolates Ltd v Aulsebrooks* [1984] 1 NZLR 354 (CA).
22 *OBG Ltd v Allan* [2008] 1 AC 1 (HL) at [51].
23 *Van Camp Chocolates Ltd v Aulsebrooks* [1984] 1 NZLR 354 (CA) at 360.

Investments Ltd had not been incorporated. If the claim were amended to allege an intention to cause loss to Proprius, that would not assist Mr Osborn, because he had no interest in that company. He did not hold any office or shares in Proprius. There cannot have been an intention to divert funds away from Proprius because the transfer on 1 May 2007 was for $1.22 million to Proprius. The effect of the payment was to reduce its liabilities, which would assist it in raising funds for the purchase of Sarah's Cove. That belies claims of an intention to divert funds away from the purchaser.

[106] In this case there is no way that Mr Osborn can validly set himself up as a plaintiff in a claim of interference by unlawful means against the bank. If the bank had an intention to divert funds to prevent the purchase settling, the potential plaintiffs in a claim for interference by unlawful means are those interested in the purchase at the time of the transfers, but that does not include Mr Osborn. If he is trying to make a claim that would otherwise be made by a company of which he was director, that is not open to him. The claim is the company's, not his. The liquidators of the companies have shown no intention of pursuing such a claim and there is no evidence or pleading that any company of which he was director or shareholder has assigned any cause of action to him. Further, at the time of the transfers he did not have any economic interest in the parties to the agreement for sale and purchase. Parnell and St Stephens did not have any interest in the agreement for sale and purchase.

[107] The bank has established that Mr Osborn does not have reasonable causes of action against the bank in his third amended statement of claim and that those causes of action cannot succeed.

Conclusion

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[108] The bank's claim against Mrs Alexander personally under the guarantee of the asset finance facility is withdrawn on the bank's application.

[109] The bank recovers judgment against Mrs Alexander and Mr Osborn (as trustees of the Alexander Family Trust and against Mrs Alexander personally) under the guarantee of 7 December 2007 for liability and for the amount of $5,460,158.99, while keeping the right to prove that it is entitled to a higher judgment, in particular up to the limit of the guarantee, and to show that the disputed transfers were valid. The bank will also recover interest on $450,000 at the maximum applicable rates under s 87 of the Judicature Act from 27 May 2007 to the date of judgment. Mr Osborn's liability under this judgment is limited to the assets of the Alexander Family Trust.

[110] The bank is entitled to solicitor-client costs against Mrs Alexander and Mr Osborn under clause 5.1 of the guarantee. Mr Osborn's liability for costs is limited to the assets of the Alexander Family Trust. If the parties cannot agree costs, I will hear them on *16 February 2012*. The bank should file and serve its memorandum as to costs by *10 February 2012*, the defendants by *14 February 2012*.

[111] At the hearing on *16 February 2012* I will hear submissions and give directions for future case management.

[112] The application for possession is to be called again on *16 February 2012*. For that hearing Mrs Alexander is to file and serve the affidavit directed in [94] above by *10 February 2012*.

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[113] The bank recovers summary judgment against Mr Osborn.

[114] The bank is entitled to solicitor-client costs against Mr Osborn under clause 5.1 of the guarantee. Mr Osborn's liability for costs is limited to the assets of the Alexander Family Trust. If the parties cannot agree costs, I will hear them on *16 February 2012*. The bank should file and serve its memorandum as to costs by *10 February 2012*, Mr Osborn by *14 February 2012*.

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Associate Judge R M Bell