IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-002431

	BETWEEN	WESTPAC NEW ZEALAND LIMITED Plaintiff
	AND	AUCKLAND FINANCE LIMITED Defendant

Hearing: 30 March 2010

Appearances: M A Gilbert SC and M V Robinson for the Plaintiff
B Keene QC and TJG Allan for the Defendant

Judgment: 31 March 2010

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
31.03.10 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
M A Gilbert SC, Gilbert Walker, Auckland - murray.gilbert@gilbertwalker.com
M V Robinson, Simpson Grierson, Auckland – Michael.robinson@simpsongrierson.com
B Keene QC, Barrister, Auckland – brian@keene.co.nz
TJG Allan, Grove Darlow & Partners, Auckland – tima@grovedarlow.co.nz

[1] Auckland Finance Limited (AFL) applies to strikeout Westpac's claim. Westpac applies for further discovery from AFL. Obviously, the latter application will proceed only if the former fails. The parties' issues have been subject to prior consideration by Associate Judge Hole upon Westpac's application for a summary judgment. That application failed after Judge Hole interpreted critical clauses – two in particular – of deeds of priority spelling out the entitlements of Westpac above those of AFL. In overview and for the reasons Judge Hole explained he favoured the view that those priority claims did not prevail in the circumstances when two persons (Mr Spencer and Mr Kroon) purported to effect payment to AFL from funds from the sale of properties that were not directly secured by the securities obligations of Mr Spencer and his interests and Kroon and his interests, to Westpac.

[2] Those obligations were linked to three joint venture partnerships of companies controlled by Mr Spencer and Mr Kroon. Wespac and behind it AFL had provided the funding for those developments. The arrangements involved three joint ventures concerning the development of a coastal property north of Auckland. From a commercial and security point of view they were interlinked. Security for the loans made by Westpac and AFL was provided by deeds of guarantee by Mr Spencer and Mr Kroon. By deed of guarantee each of their three companies guaranteed the others liability to Westpac. Mr Spencer and Mr Kroon provided personal guarantees to AFL in addition. The documentation was complex but prepared with great care as one would expect of lawyers committed to ensuring the protection of their client lender's interests. Those documents included deeds of priority between Westpac and AFL which contained priority arrangements and in addition subordination arrangements. In essence they set out what was to happen in the event of the realisation of any secured assets.

[3] In summary, as Judge Hole noted, Westpac was to have priority over AFL but that priority was limited to a certain sum; AFL would not be repaid until Westpac had been fully repaid. These arrangements went awry with the sale of a joint venture development at Waipu. Spencer and Kroon interests were involved. In the outcome a sum of $1.27M was paid to AFL. Westpac demanded that sum be paid to it, claiming the protection of its security and priority arrangements. At that

time Westpac had not been repaid the amount due to it under its priority arrangements with AFL. Westpac claimed and before Judge Hole asserted that AFL had, pursuant to clause 7.3 of the deeds of priority, agreed to hold on trust any payment it received by or on account of those parties bound by the subordination agreement.

[4] The point of interest in this case is that the Spencer/Kroon interests of Waipu development was not specifically and directly the subject of Westpac loans for which security was taken over the development properties – unlike loans made to the other joint venture developments.

[5] AFL claimed that the payment it received in the outcome of the sale of the Waipu development was not from a party through whom it was required to account to Westpac. Unsurprisingly, Westpac contended otherwise. Hence its summary judgment application.

[6] Much focus is upon the parties' commercial arrangements. These are documented by deeds prepared by Westpac's lawyers.

[7] It is not disputed that none of Westpac's security documents (including the deeds of priority) related to the Waipu land. Also the schedule of securities to each deed of priority did not include the personal guarantees of Mr Kroon or Mr Spencer. In short the Waipu development had nothing to do with the purpose of the funding arrangements of Westpac or AFL. In bringing its summary judgment application Westpac submitted that the payment to AFL from the sale of the Waipu development was "by or on account of" the debtor companies (of Spencer and Kroon) referred to in the deeds of priority. It says the indebtedness of those interests to AFL was thereby reduced and that should not have happened at the expense of the requirement of those interests to reduce their indebtedness to Westpac.

[8] Before Judge Hole it was common ground that the success of Westpac's summary judgment application depended upon Westpac satisfying the Court that AFL did not have an arguable defence. It is apparent from Judge Hole's judgment the two factors impacted upon his decision.

a) An interpretation of clause 7 of the deeds of priority; and

b) A consideration of the impact of available evidence to assist with the interpretation of clause 7.

[9] In the outcome of Judge Hole's reasons upon those factors the parties are sharply divided as to their consequences. Westpac, at first considered Judge Hole was wrong and appealed his refusal to grant summary judgment. Then, Westpac withdrew its appeal and instead filed an amended statement of claim. By that, and by contrast to its original statement of claim Westpac asserted that the payment of $1.27M from the sale of the Waipu land was made to AFL by Anzani 2002 a Kroon company that was bound by the security arrangements and deeds of priority by which the funds received by AFL should have been paid to Westpac.

[10] In opposition to Westpac's summary judgment application AFL asserted that the funds received from the Waipu development sale were received on behalf of Mr Spencer and Mr Kroon and were not thereby subject to the security/deeds of priority arrangements favouring Westpac.

[11] By its original statement of claim Westpac had pleaded, inter alia, that funds received by AFL from the sale of the Waipu development were required to be on-paid to Westpac. AFL's defence position was that the funds paid to AFL came from parties (Mr Spencer and Mr Kroon) i.e. third parties to the arrangements binding Westpac and AFL by the security/deeds of priority agreements.

[12] For present purposes both parties accept that if the funds paid to AFL were not received by it pursuant to an obligation to account to Westpac then Westpac's claim to those funds must fail. Westpac's position is that notwithstanding claims to the contrary, those funds from the Waipu development sale were paid by Anzani 2002 (a Kroon company) to AFL, and not on behalf of Mr Kroon and/or Mr Spencer personally. Even if not, then arguably it was paid to the account of Anzani 2002 in which case, the application for strikeout should fail.

[13] Much then focuses upon Judge Hole's interpretation of clause 7 of the deeds of priority (by which Westpac's entitlements were prescribed), and Judge Hole's observations regarding the prospect of factual evidence to explain interpretation considerations. He said other evidence may provide factual context to his views regarding interpretation and because of that it would be unsafe to support Westpac's claim of an entitlement to summary judgment on the basis that no arguable defence was available.

[14] AFL's strikeout application asserts that for various reasons, Westpac claims by its amended statement of claim to litigate issues already determined, which issues have not been pursued to a successful appeal. AFL's strikeout application invokes arguments of res judicata, issue estoppel and abuse of process. It says Judge Hole has already decided that the payment to AFL was made by third parties that were not subject to the security/deeds of priority binding it and therefore there was no obligation to account to Westpac. If not then, regardless, Westpac has filed an amended statement of claim which advances no different claim or raises any different an issue than was disposed of by Judge Hole's judgment. But if that did not occur then it has lost the opportunity to raise by defence or in issue a claim that was well available to it in submission before Judge Hole. The reason is that there is no more evidence before this Court than there was before Judge Hole.

[15] For my purposes much focuses upon:

a) The evidence;

b) Judge Hole's consideration of it;

c) Clause 7;

d) The changes (if any) effected by the amended statement of claim.

Considerations

[16] AFL claims the payment of the sum of $1.27M came from the sale of land at Waipu by Estuary Estates Limited, a Spencer interest, not captured by the definition

of “securities” in the Anzani 2002 deed, being one of the deeds of priority at issue in the proceedings between the parties. The payment into AFL was made pursuant to the terms of a memorandum of understanding (memorandum) of Mr Paul Davison QC (on behalf of Anzani 2002) and Mr Bruce Stewart QC (on behalf of Spencer interests).

[17] AFL’s clear position is that the payment made in the outcome of the memorandum and was on behalf of Mr Spencer and Mr Kroon and not on behalf of Anzani 2002. Thereby it was not captured by Westpac’s and AFL’s security arrangements.

[18] By his judgment Judge Hole appeared to accept that it was common ground between the parties that the payment to AFL from the Waipu development was made by a third party i.e. by Mr Spencer and Mr Kroon (parties not subject to the Westpac AFL security/priority arrangements).

[19] With respect, Judge Hole’s reasoning in support of this view is correct to the extent that it is based upon his perception of a common agreement between the parties that the payment was made by third parties. Although not pressed in argument before Judge Hole I perceive that any assumption of a ‘common ground’ of payment by a third party to be misplaced, or possibly so.

[20] An analysis of Wespac’s submissions before Judge Hole might not support contention of common ground. I will explain this comment in my assessment, later in this judgment of my reasons why the strikeout application should fail. In short Judge Hole’s reasonable assumption of ‘common ground’ explains not only his well reasoned decision interpreting clauses 7.1 and 7.3 of the deeds of priority but explains also his concerns about the lack of a factual matrix to assist with interpretation of those clauses.

Clause 7

[21] Clause 7.1 provides:-

> **No Repayment of Subordinated Debt**: The Mortgagor shall not (without the prior written consent of the First Securityholder) pay any part of the Second Securityholder's Secured Money to the Second Securityholder unless and until payment in full of the whole of the First Securityholder's Secured Money has been made;

[22] Clause 7.3 provides:-

> **Payments held on Trust**: Any payment made to the Second Securityholder, whether voluntarily or in any other circumstances, by or on account of the Mortgagor (including by way of credit or otherwise howsoever) in breach of the foregoing provisions will be held by the Second Securityholder in trust for and to the order of the First Securityholder.

[23] In brief clause 7.1 provided for Westpac to be paid in priority to AFL. Clause 7.3 had a wider scope because it required AFL to hold on trust for Westpac any payment it received on account of the Spencer and Kroon companies. Judge Hole determined that in the context of those contractual obligations a payment by a third party to AFL may not be captured by the terms of AFL's obligations to Westpac. By its original statement of claim Westpac pleaded that any payment to AFL on behalf of interests owned by Mr Spencer and Mr Kroon would be required for account to Westpac. In short, Judge Hole's judgment determined that third party payments to AFL were not captured by those contractual obligations. Judge Hole went further and said the payments to AFL from the sale of the Waipu development were from third parties i.e. Mr Spencer and Mr Kroon but not in terms of their contractual obligations to Westpac.

[24] In its amended statement of claim Westpac, instead of pleading that AFL was required to account to Westpac for monies it had received on behalf of Spencer interests, it specifically pleaded that AFL had received the monies from the Waipu development from Anzani 2002 – a party that was bound by the securities/deeds of priority arrangements with Westpac.

[25] This claim, by paragraph 26 of the amended statement of claim – as it alters paragraph 25 of the original statement of claim – is at the core of AFL's strikeout application. I earlier noted that the strikeout application invokes claims of res judicata, issue estoppel and abuse of process. Superficially, so it may seem but I think careful analysis of Judge Hole's judgment, and a careful assessment of evidence that did not weigh in a judgment can reasonably persuade a Court to dismiss the strikeout application.

[26] At the core of AFL's position is that the funds from the sale of the Waipu development were not covered by Westpac's securities; it was not a payment made by (as clauses 4 and 7 prescribed), a mortgagor, but was made pursuant to a memorandum of understanding and in settlement of a Spencer and Kroon dispute. Further, to the extent Westpac claims the payment was made by Anzani 2002 as mortgagor, in fact Anzani 2002 was at most a joint mortgagor with Mr Spencer's company Tomarata.

[27] Judge Hole notes that it seemed to be accepted that the payment from the sale of the Waipu development was on behalf of Mr Spender and Mr Kroon. At paragraph 10 of his judgment he noted "It seems to be accepted that the payment by the solicitors was made on behalf of Spencer and Kroon. At paragraph 19 he noted "It is common ground that the funds were received by Spencer and Kroon…".

[28] In summary regarding Judge Hole's decision he notes that the obligations (to account) contained in clause 7.3 are triggered only if there has been a breach of "the foregoing provisions" i.e. of clause 7.1 (relating to the obligations of the mortgagor).

[29] In essence Judge Hole stated that by virtue of the failure of Westpac to demonstrate a mortgagor breach, the claim for summary judgment failed. A claim of rights of subordination cannot stand against a party who is a stranger to the commercial obligations.

[30] Judge Hole's interpretation viewpoint is clearly explained. But, I accept, that conclusions reached therein were upon the assumption that there was no dispute between the parties about whom/on whose behalf, payment was made.

[31] In the background of an appeal and withdrawal of same and upon the filing of an amended statement of claim which asserts the payment to AFL was made by a party bound to Westpac (whereas previously by the original statement of claim there was no pleading about who had made the payment) AFL claims the repleading exercise was an attempt to recover, irretrievably, ground lost in the outcome of Judge Hole's decision. Judge Hole was quite clear in his assessment regarding how clauses 7.1 and 7.3 ought to be interpreted. But he, reasonably, noted it was common ground that the payment to AFL had come from a third party. I accept Judge Hole may have misunderstood any equanimity by Westpac to engage the proposition of 'common ground'. I accept that position was not reasonably supportable by Westpac's submissions before the learned Judge, nor in light of the way in which the claim was originally pleaded.

[32] Westpac's appeal pleaded, not uncommonly, that certain interpretational conclusions were incorrect. But that does not, I consider, preclude a repleading of a claim that the payment to AFL was not by a third party but instead by a party bound by obligations binding Westpac and AFL.

[33] Judge Hole deliberately qualified his interpretation clause 7 by the terms expressed in paragraph 42 of his judgment wherein he stated it was possible that evidence of pre and post contractual matters could lead to a different conclusion. After all, his task was to decide whether or not AFL had an arguable defence. It was not necessary for him in that process to make findings of fact. Rather he was required to look at Westpac's case from the "least favourable viewpoint". His determination that the payment to AFL was made by a third party was expressed without the benefit of reference to the factual matrix. Although the details of that factual matrix were provided by affidavit evidence, Judge Hole was not required to make a decision upon that regarding who had actually made the payment to AFL. Instead, in accordance with Westpac's pleading by its original statement of claim Judge Hole's focus was upon whether, by the fact that AFL had received the payment, it was required to account to Westpac for it. Tenuous though this proposition might seem, it assumes more substance by the specific claim in the amended statement of claim that the payment to AFL was indeed made by Anzani

2002 i.e. a party directly bound by the security/deeds of priority arrangements between Westpac and AFL.

[34] Westpac's case as pleaded by its amended statement of claim is that the payment to AFL was a payment by Anzani 2002 in breach of clause 7.1. Therefore and pursuant to the provisions of clause 7.3 AFL is obliged to account to Westpac.

[35] AFL's protestations of res judicata/estoppels/abuse of process are reasonably made. Judge Hole's concession to factual considerations appear in contrast to his clear vision about how clause 7 ought to be interpreted. But, then he was only concerned about whether or not AFL had an arguable defence. I perceive by the submissions for AFL that the amended pleading contained in the amended statement of claim amounts to little more than window dressing because of AFL's belief that the primary point in issue i.e. whether or not AFL has breached its contractual obligations to Westpac, had been decided by Judge Hole's determination that the payment to AFL came from a third party i.e. one not bound by contractual obligations to AFL and Westpac. But, as I have examined, AFL's position is premised upon the payment to it coming from a third party. Rather, I think there is evidence providing good reason to examine that claim.

[36] The evidence discloses records indicating payment from the sale of the Waipu development to Anzani 2002, to its solicitors, and in that name from its solicitors. Other evidence indicates an attempt to change the record to indicate otherwise. Evidence from the solicitor acting for Anzani 2002 refers to the payment being made on behalf of, rather than by, third parties to AFL. There is much, I think, to support a claim for further inquiry.

[37] The core of Westpac's pleading is that AFL received proceeds from the sale of the Waipu development from Anzani 2002. Although it was purportedly made on behalf of others (i.e. third parties - Mr Spencer and Mr Kroon) it was made by Anzani 2002. AFL says that its mortgagor was not only Anzani 2002 but also Tomarata. Therefore it is unreasonable to assume the payment was made on behalf of Anzani 2002. However it is clear that by clause 1.3.3 of the deeds of priority the obligations of Anzani 2002 and Tomarata are joint and several and notwithstanding

their joint liability each is severally liable for the obligations of the other. Therefore, notwithstanding Tomarata's obligations, Anzani 2002 is liable for the extent of any joint liability to Westpac.

Summary

[38] Judge Hole was firm in his view of the contractual terms but fundamentally those were based upon the assumption that they did not bind payments made on behalf of third parties. Also, Judge Hole indicated the potential difficulties that a factual matrix may have caused to interpretation issues. In the outcome no issue was finally determined by him.

[39] In my assessment the amended statement of claim does materially alter the assessment of issues for decision. For reasons I have identified, no issue of res judicata or issue estoppel or abuse of process arises.

[40] Judge Hole did not decide whether or not the payment to AFL was made by Anzani 2002. The payment to AFL of the sum of $1.27M was made in the context of Anzani 2002 having lodged a caveat claiming an equitable interest in the Waipu land. It claimed its interest was pursuant to a joint venture deed signed by Mr Kroon on behalf of Anzani 2002 and Mr Spencer on behalf of Estuary Estate Limited. In the outcome of discussions between the parties and of a memorandum of arrangement completed by the parties' counsel, a payment was made in consideration of Anzani 2002's caveat being withdrawn. The evidence discloses an "issue" concerning the form of agreement/the balance of interests, resolved in the outcome.

[41] I accept the submission that all relevant facts will need to be explored at trial in order to determine whether the payment was a payment by Anzani 2002 for the purposes of deeds of priority.

[42] Upon its strikeout application AFL asserts there is no material change in the pleading provided by the amended statement of claim. I disagree. I consider there are material differences. The claim is no longer about the fact that AFL received

funds. It is about a claim that Anzani 2002 paid the funds in breach of its obligations under clause 7.1 of the deed. If in the outcome the Court accepts that claim then it will follow that there was a breach of clause 7.1 and AFL will hold the sum of $1.27M on trust for it pursuant to clause 7.3

[43] I accept the submission that in order to determine whether the payment of the Waipu land sale proceeds to Anzani 2002's solicitors' trust account and from there onto AFL's solicitors' trust account amounted to a payment by Anzani 2002 for the purposes of the deed, the Court will need to hear evidence about various matters including:

a) The relevant factual matrix for the purpose of constructing the deed;

b) Anzani 2002's claim for an interest in Waipu land;

c) The basis upon which $1.27M of the Waipu land sale proceeds were paid from Estuary's solicitors to Anzani 2002's solicitors;

d) The agreement between Mr Spencer and Mr Kroon as to the "terms on which payment of the fund is made to Auckland Finance Limited" as contemplated in clause 6 of the memorandum of terms dated 1 November 2005;

e) The basis upon which AFL and the liquidators of Tomarata initially lodged and subsequently withdrew their caveats.

Judgment

[44] The strikeout application is dismissed. Costs will be fixed on a 2B basis.

[45] The application for discovery is granted. I am not prepared at this time to prescribe how that should occur. Any issues arising will be subject to application in due course. AFL's discovery is to be filed and served by 30 April 2010, and inspection is to be completed by 28 April 2010.

[46] The matter is adjourned to a case management conference in June 2010 as arranged by the Registrar. Progress will be reviewed at that time.

Associate Judge Christiansen