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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 27/2019
[2019] NZSC Trans 16

BETWEEN **FTG SECURITIES LIMITED**
Appellant

AND **BANK OF NEW ZEALAND**
First Respondent

AND **STEPHEN JOHN TUBBS AND COLIN ANTHONY GOWER as Receivers of Tuam Ventures Limited (In Receivership and In Liquidation)**
Second Respondents

AND **ROBERT BRUCE WALKER as Liquidator of Tuam Ventures Limited (In Receivership and In Liquidation)**
Third Respondent

Hearing: 25 July 2019

Coram: Winkelmann CJ
O'Regan J
Williams J

Appearances: A J Forbes QC, H M Weston and G W Smith for the Appellant
T C Weston QC and K M Paterson for the First Respondent
No appearance by or for the Second Respondents

K C Francis for the Third Respondent

ORAL LEAVE HEARING

MR FORBES QC:
If Your Honours please, I appear for the appellant with my learned friends, Ms Weston and Mr Smith.

WINKELMANN CJ:
Thank you, Mr Forbes.

MR WESTON QC:
May it please Your Honours, I appear for the BNZ together with my learned friend, Ms Paterson.

WINKELMANN CJ:
Thank you, Mr Weston.

MR FRANCIS:
May it please the Court, counsel's name is Francis. I appear for the third respondent, Mr Walker, the liquidator.

WINKELMANN CJ:
Thank you, Mr Francis. Right, so Mr Forbes.

MR FORBES QC:
Yes, if Your Honour pleases.

WINKELMANN CJ:
So we thought 20 minutes, Mr Forbes.

MR FORBES QC:
Twenty?

WINKELMANN CJ:

Twenty.

MR FORBES QC:

Yes.

WINKELMANN CJ:

All right. I don't imagine that both counsel for the respondents will require 20 minutes but we'll see how it goes.

MR FORBES QC:

Was there any particular approach that Your Honours were expecting or hoping would be adopted by counsel?

WILLIAMS J:

A focused one.

WINKELMANN CJ:

No. If you could just make it clear, thanks, that'd be great.

O'REGAN J:

But focusing on the leave criteria though.

WINKELMANN CJ:

Yes, obviously focusing on the leave criteria and why the existing authorities that are referred to by the respondents are not fatal to your case.

MR FORBES QC:

Well, the position of the appellant is that it is in the interests of justice and there are matters of general commercial importance, and could I just start, Your Honours, please, by summarising those issues in terms of the statutory criteria.

The first is what is the effect and enforceability of a qualified prohibition on the assignment or transfer of debts and securities?

Secondly, what is the effect in this regard of the assignment provisions of the Property Law Act 2007, sections 48 to 52, and the Personal Property Securities Act 1999, section 69?

Thirdly, what is the effect of a transferred security being a mortgage registered under the Land Transfer Act 1952 in accordance with section 97, the indefeasibility provision?

Fourthly, does the assignment of personal property securities or a registered mortgage include any relative priority or subordination agreement?

Fifthly, is the Court of Appeal's judgment in this case inconsistent with decisions and dicta of four Appellate Courts in New Zealand and England as to the assignment of interest in land and property notwithstanding a prohibition on assignment? In this case it's a qualified prohibition.

The sixth point, Your Honours, is what is the effect on these issues when we have in New Zealand a registration system for both interest in land and for personal property securities?

WINKELMANN CJ:
How is the Personal Property Securities relevant?

MR FORBES QC:
Well, section 69 says that on a transfer of a personal property security registered, the priority position of the transferee remains the same as that of the transferor.

My second to last point, seventh, I think it is, Your Honours, what are the appropriate remedies for breach of a qualified prohibition on assignment where the identity, as the appellant says is the case here, of the party in breach is not relevant, that is FTG, in particular when the Court of Appeal held that the party in breach, FTG, cannot enforce and have the benefit of the

priority deed but the other party, that is the Bank of New Zealand, can? And as things presently stand, FTG is not even able to seek a declaration as to the interpretation of the priority deed even though there was no restriction in the priority deed as to the assignment of it, and I'll come to that shortly.

O'REGAN J:

These issues all seem to be sort of doubling up on each other, don't they? I mean really it's what's the effect of a prohibition on assignment. That's the question, isn't it?

MR FORBES QC:

Well, I would submit, Sir, in the context of the various matters that I've put to you.

WINKELMANN CJ:

They're arguments really, aren't they? A lot of the questions are actually arguments.

MR FORBES QC:

Yes.

WINKELMANN CJ:

Right.

MR FORBES QC:

And the final point on this list is are there now today in New Zealand public policy issues as to the assignment of debts, intangibles and other security or other intangibles and securities that need to be considered?

O'REGAN J:

But there wasn't anything stopping an assignment here.

MR FORBES QC:

Sorry, Sir?

O'REGAN J:

There wasn't anything stopping an assignment here. There was just a procedure that had to be followed and it wasn't followed.

MR FORBES QC:

That's right.

O'REGAN J:

So there wasn't any – I mean there's no public policy issue. If you say to someone you've got to fill out a form before you do something, that's not saying you can't do it. It just says you've got to fill out the form to do it.

MR FORBES QC:

That's correct, Sir, yes. At this point I mean by "qualified prohibition on assignment" it was inherently allowed provided you got the consent of the appropriate party.

WINKELMANN CJ:

Can I ask a prior question which is something that arises when anyone reads this, is why hasn't the refusal to consent been challenged on the grounds it's unreasonable?

MR FORBES QC:

Well, it was sought subsequently but there was authority that, in England, that you can't seek the consent after the assignment.

WINKELMANN CJ:

But that's to do with – that authority affects when it's the assignment of the rights as opposed to here what you had to seek consent to was the form, wasn't it?

MR FORBES QC:

The request was made 2016, '17, the request was made and it was refused. Originally the bank asserted some eight reasons why they wouldn't have

agreed to the consent had it been sought before the assignment, the primary one being that the identity of the assignee would not have been acceptable but the Court of Appeal held that that wasn't relevant and Justice Gendall in the High Court said that his tentative view was that that wasn't relevant either.

It was – and if I can go now to clause 15, Your Honours, there's no restriction under the priority deed, clause 15, as to the assignment of rights under it. It's quite limited in its effect. Neither party will assign any interest in that party's securities to any other person unless a deed or contract in a form approved by the other secured party, here the bank, which will not be arbitrarily or unreasonably withheld by the person agreed to be bound by the document, that is the priority deed.

So the purpose of the priority deed was to subordinate and arrange the priorities as between the respective parties. It was a qualified prohibition. The obligation to obtain the required approval of the other secured party was strictly the assignor's. Certainly, FTG had discussions about was it necessary to do so. The primary reason for that was that in both transfer documents, that is as between South Canterbury Finance and Crown Asset Management (CAML) and, secondly, as between CAML and FTG, there was a provision in it, in both assignment documents, that the assignee agreed to be bound by, in the case of the assignment to CAML, any priority deed applicable or relative priority deeds, and in the case of the assignment to FTG the priority deed, the specific priority deed. So they had already agreed to that.

O'REGAN J:
Well, no, they haven't because the deed said they didn't, they'd breached the deed because they didn't get the consent that was required. So you can't say, "I agree to be bound by it," and then not do what it says you have to do, can you?

MR FORBES QC:

Well, that was, I'm just putting it to you, Sir, that that was the reason why Mr Smith said to CAML, "We don't need to because we've already agreed to be bound by it," and CAML –

O'REGAN J:

Well, that's his problem if he got bad legal advice. I mean you have to read the document. It says you have to do it and they didn't do it.

MR FORBES QC:

Well, nevertheless, Sir, it was the strict obligation was that of CAML as the assignor to get the consent and –

O'REGAN J:

Well, sue CAML. If you think they've breached something, sue them.

MR FORBES QC:

But to what end?

O'REGAN J:

Well, you're the one that's saying they're the one that they're in breach. If you say you've suffered some loss because CAML did something wrong, that's not the BNZ's problem.

MR FORBES QC:

No, my point was, Sir, and I'm going to come to the remedies, is that the bank could have sued CAML for the breach of the priority deed and not obtaining the consent of the bank as the assignor.

WINKELMANN CJ:

Is your argument that it's a contractual right? It doesn't prohibit assignment?

MR FORBES QC:

It's a contractual right and the normal remedies for a breach of contract are cancellation, damages or, if it's appropriate, specific performance or an

injunction. But that wasn't considered by either Court. The assumption was that non-compliance with clause 15 rendered the assignment invalid, although the Court of Appeal then said not necessarily between the assignor and the assignee but certainly insofar as FTG could not enforce it against the bank.

WINKELMANN CJ:

So on your argument, and you haven't put it this way but it seems to me the point that you, that lies at the heart of your argument, is that the BNZ is taking the benefit of the deed but it's not taking the burden?

MR FORBES QC:

No, and the converse applies.

WINKELMANN CJ:

It's taking an opportunistic advantage of the fact there's no one there to hold it to the priority?

MR FORBES QC:

And FTG is bound by it, never disputed that, but can't enforce it, and enforce it by which I mean at the moment the bank doesn't acknowledge that the priority cap of 7.5 million plus interest and cost and the like is applicable, and that was intended to be the primary challenge of FTG in the High Court, but we didn't get past the issue of did FTG have standing to do that, and so –

WILLIAMS J:

Well, that's because the other way of framing this is FTG is irrelevant. It doesn't have privity. It's not a player. Whether it took the burden or not is irrelevant because it's irrelevant.

MR FORBES QC:

Well, it got – it appears that the Court of Appeal agree that it got a valid assignment of the debt and securities.

O'REGAN J:

The Court of Appeal said it didn't need to decide that. So you can't say they did decide it when they specifically said they didn't.

MR FORBES QC:

We're not going as far as the Judge did in the – necessarily going as far as the Judge did in, Gendall J, in the High Court, that's correct.

WINKELMANN CJ:

I mean the possibly the problem with how you've formulated this is that your argument is actually that you took the security, BNZ – and are bound, you've agreed to be bound by the priority. If BNZ says, well, you've got no standing under that deed of priority then you just go back to your ordinary security rights and your ordinary security rights place you at first priority, and so you should have possibly just been suing under your ordinary security rights and made the argument that way.

MR FORBES QC:

Well, FTG obtained a registered mortgage, second mortgage, and became the first-ranking security holder under the Personal Property Securities Act because the subordination of the priorities had lapsed. But FTG has never denied that notwithstanding that it currently claims to be first on the PPSA register it is bound by the priority agreement.

O'REGAN J:

Is there any personal property, though, or is it all land?

MR FORBES QC:

Yes, there was GSA, Sir.

O'REGAN J:

Yes, I know, but is there any actual personal property under the security? Wasn't it just a piece of land?

MR FORBES QC:

Well, no, we've got an estimated $3.8 million now in issue.

O'REGAN J:

But if it's the proceeds of land, that's governed by the land mortgage, not the PPSA, isn't it?

MR FORBES QC:

Well, that's the mortgage, yes, but the PP – the GSA would apply to the proceeds of the – that's been received by the bank and by the receivers beyond the cap.

O'REGAN J:

I don't think so.

WINKELMANN CJ:

I don't think so, no.

O'REGAN J:

Not if it was the proceeds of sale of the land. Was it –

MR FORBES QC:

But the bulk – a lot of it, Sir –

WILLIAMS J:

Insurers.

O'REGAN J:

Was there any personal property actually secured? Was there like, you know, furniture or computers or anything like –

MR FORBES QC:

No, no, but –

O'REGAN J:

So the PPSA is a bit irrelevant, isn't it?

MR FORBES QC:

But in the event there were insurance claims.

WINKELMANN CJ:

Was there insurance proceeds?

MR FORBES QC:

Yes.

WINKELMANN CJ:

So you're saying it's through that?

MR FORBES QC:

That's the larger part of the amount in issue but there's about three and a half million from the proceeds of the sale of the property as well, mortgagee sale, and it should –

O'REGAN J:

Yes, but that gets dealt with under the mortgage, doesn't it, the proceeds of sale of a mortgaged property?

MR FORBES QC:

Well, it all went to the bank because the bank was entitled to that until it got to the priority cap.

O'REGAN J:

Yes, no, I'm just trying to distinguish between what is dealt with under the PPSA security and what's dealt with under the mortgage of land, and my understanding is when you have a mortgage of land and you exercise your mortgagee powers and you sell the land, the proceeds are dealt with under the mortgage of land, not under the PPSA.

MR FORBES QC:
That's correct, Sir.

WINKELMANN CJ:
But some of it was insurance proceeds. Is that your point or not?

MR FORBES QC:
Yes, yes, most of it, the bulk of it is insurance proceeds. The greater part of it, is a more accurate way to describe it. And there was other income received by the receivers from rent and the like.

So there is that, if I can put it this way, anomaly that one party gets the benefit of the priority and it's not disputed that it ranks first, but its position in terms of whether the priority cap applies can't be challenged by FTG because it has no status to do so. The bank won't sue for damages because it hasn't suffered any damages, and it certainly isn't going to cancel and never any suggestion that it would cancel the priority deed because it very much wants to adhere to it, and probably in terms of the Contractual Remedies Act 1979 it wouldn't qualify under section 7 to do so.

The important point in terms of clause 15, Your Honours, is that the identity of any assignee couldn't be a matter of any importance, at least in law, to the bank.

WINKELMANN CJ:
It's only to do with the form of the document.

MR FORBES QC:
Yes, only to do with the form of a document, and so who got the excess recovery beyond the cap is irrelevant as far as the bank's concerned. If they may not like some aspect of the directors or shareholders of the assignee, irrelevant. It wasn't approval of that that's required. It was the form of the document by which the assignee agreed to be bound by the priority deed. So it's –

O'REGAN J:

But I mean the problem here is that there's two different assignments that are non-compliant. So –

MR FORBES QC:

No, Sir –

O'REGAN J:

Because the assignment that was from what was South Canterbury Finance to the Crown company, it was also – had suffered from the same problem, didn't it?

MR FORBES QC:

Yes, and that's interesting because the whole South Canterbury book, or just about the whole book, I think one of the, if not the largest, certainly one of the largest collapses from the global financial crisis, was sold by the receivers and the Crown to CAML. No one in that transaction thought it necessary to get the consent of the bank.

WINKELMANN CJ:

Well, what's the significance of that though, Mr Forbes?

MR FORBES QC:

Well, it's because – I have put it in the Courts below, Your Honour, that it has to be assumed that they took the view that the clause in the asset –

O'REGAN J:

Yes, but what their view is is irrelevant. It's the Court's view that matters.

MR FORBES QC:

Well, it goes to the –

O'REGAN J:

The fact is they told your client he needed to get consent so they must have thought they needed it too.

MR FORBES QC:

Well, CAML raised the issue but chose not to accept what Mr Smith said. But the obligation was on it strictly to get it.

So we have FTG now unable to enforce the priority deed when strictly it wasn't the party that was in breach.

O'REGAN J:

Yes, but if CAML was the party at fault you should be suing them.

MR FORBES QC:

Well, that won't be worth much, Sir, I'm afraid.

O'REGAN J:

That's not our problem though, is it?

MR FORBES QC:

Well, it does go to whether the consequence should have been the Court, the Courts below should have held that the remedy for a breach of a qualified prohibition agreement in circumstances like this is the normal remedies of either cancellation, damages or specific performance. That's what you would expect.

O'REGAN J:

But that requires the Court to say a clause that says you cannot assign your securities doesn't mean you cannot assign your securities.

MR FORBES QC:

Well, of course, and I have referred to them in the submissions, there are a number of authorities if it relates to property or land that say you can. You can assign it. It does vest in the assignee. And even in the decisions that the Courts below have relied on, the leading one in New Zealand being *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd* [2003] 3 NZLR 1 (CA), Justice Tipping said that the parties are

free to impose a prohibition and reversed the normal rule that contractual rights are assignable.

O'REGAN J:
And that's what they did.

MR FORBES QC:
Yes, but that's because the – he says that's because where the identity of the assignee doesn't matter to the person would be one such circumstance. But if it does matter then that's a reason why the right, the interests being transferred, don't vest.

O'REGAN J:
But why is this an important public point? Because every other assignee in the world would read the clause and say, "Oh, I need to sign the proper form and get the other party to agree to it," and that's what they'd do. So why is it important that we deal with a situation where your client just made a commercial call that he didn't want to reveal himself and decided not to do what every other party in the world would have done? I mean this is a standard document. Everybody does this. It's just absolutely clear what you have to do. He decided not to do it.

MR FORBES QC:
Well, you're then visiting that breach on FTG. It's not on FTG really.

O'REGAN J:
It doesn't matter who it's by. The fact is everyone was on notice of what the clause said. It wasn't overlooked. It's a very clear clause. It's a standard document that everyone else complies with. What's the problem? Why do we need to deal with it?

MR FORBES QC:
But why should the consequence be in the circumstances where all that's –

O'REGAN J:

But I'm asking you why is it an important point, because it's a point that just would never arise normally because people actually read documents and do what they say.

MR FORBES QC:

But there are quite a number of cases, Sir, where the issue of what's the consequence of not getting a required consent, for instance to a transfer of a licence, a decision of –

O'REGAN J:

Yes, but that's different. I mean this is a very particular document with a very particular clause that is routinely applied in priority arrangements. I just don't…

MR FORBES QC:

And there are cases –

O'REGAN J:

And there's never been a previous case about a deed of priority where this hasn't been complied with, has there?

MR FORBES QC:

Sorry, Sir?

O'REGAN J:

There's never been a case where a deed of priority of this form has, hasn't been complied with and there's been a dispute between the parties about it, because everybody does comply with it.

MR FORBES QC:

But, Sir, there have been cases where there are absolute prohibitions and nevertheless it's been held.

O'REGAN J:

Yes, I know, but they're different. They may raise points of public importance, I don't know, but that's not this case, is it?

MR FORBES QC:

But they can't both be right, Sir, that in a qualified prohibition with very limited effect, that is that the form of the consent by which the assignee agreed –

O'REGAN J:

Look, I'm not trying to deal with the merits at the moment. I'm just trying to get to why is this an issue that requires a second appeal when in fact it's a point that arises every day and everyone just deals with it and there's –

MR FORBES QC:

I'm trying to say –

O'REGAN J:

And so the consequences of not complying are just sort of almost irrelevant to me.

MR FORBES QC:

But they don't deal with it every day. There are several cases in New Zealand and overseas where parties have assigned rights, in particular in respect of securities, property and securities, where it's been held that the interest does vest. Now here we have –

O'REGAN J:

Yes, but we're being asked to interpret a particular clause in a particular document that wasn't complied with, and what I'm saying to you is why is that important when in fact the clause is completely clear. Compliance is absolutely simple and your client just made a commercial decision not to comply.

MR FORBES QC:

Well, it's still, I submit, Your Honour, a strange consequence that the party that's effectively being treated as if it is in breach, that is FTG, can't enforce its rights under the priority deed but the bank can and that the bank isn't limited to its normal rights for breach of contractual rights, there was no restriction on the assignment of the priority deed in the deed, the restriction was solely in respect of property and securities – sorry, of securities and debt. So it didn't apply to the assignment of the priority deed. It's just a contractual – it's a lesser restriction than existed in *Payroll*.

O'REGAN J:

The priority deed says you can't assign your securities, doesn't it?

MR FORBES QC:

Yes, that's right.

O'REGAN J:

The actual assignment of the priority deed would presumably have required BNZ to be a party to the assignment, wouldn't it?

MR FORBES QC:

Well, that was –

O'REGAN J:

So there's two different things. One is the validity of the assignment of the securities. The other is the validity of the assignment of the rights under the priority deed.

MR FORBES QC:

Well, I didn't – don't understand – well, the priority deed was recorded in both transfer documents as being part of what was assigned to each respective assignee.

O'REGAN J:

Yes, I know, but BNZ wasn't party to the assignment.

MR FORBES QC:

No, it wasn't.

O'REGAN J:

But it was the affected party. It had to be.

MR FORBES QC:

But how is it affected other than to find – to establish that the assignee is going to be bound by the terms of the priority deed?

O'REGAN J:

You don't assign a contract in the absence of the other party to it, do you?

MR FORBES QC:

Well, **(inaudible 10:26:02)** – leases have –

WINKELMANN CJ:

This isn't the deed of priority that's – your point is that this is not the deed of priority that's been assigned. It's the mortgage.

MR FORBES QC:

Well, the deed of priority was assigned.

WINKELMANN CJ:

Okay. But the point that's been taken is not the assignment of the deed of priority. The point that's been taken is the assignment of the mortgage.

MR FORBES QC:

Well, yes, that – what happened – what's the consequence of that becoming a registered interest? Indefeasibility.

WINKELMANN CJ:

Are you arguing that this is not a prohibition on assignment? Because what is being argued, undertaken, simply is not to transfer unless, so it's not saying "may not", just saying "won't". It's a contractual undertaking.

MR FORBES QC:

It is and it's – but it's limited as to what's required.

WINKELMANN CJ:

Okay, so Mr Forbes, is there any authority which is on a similar kind of scenario to those because most of those authorities are where the asset isn't in fact a – the Courts take the approach the assets are impaired by the prohibition on assignment because it's in fact the contract setting up the – creating the asset, say lessor/lessee, so it's the direct parties who agree not to assign, but here it's not the direct parties to the mortgage, both parties to the mortgage. It's in fact the mortgagee, only one party, who's undertaking not to assign. So it's a third part – it's at a remove.

MR FORBES QC:

Well, it's –

WINKELMANN CJ:

Are there any authorities which are similar to this?

MR FORBES QC:

No, not involving a separate contract that imposes the restriction, or at least I haven't come across one. The restriction is normally in the document between parties A and B, not in a separate agreement with A, B and C, which is what happened here. All three original parties to the debt and securities which were the subjects of securities to the bank and to FTG were parties to the priority deed, including Canterbury Finance.

So you've got – I mean the Court of Appeal has said if it's an interest in properties, *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1

AC 85 says if it's an interest in property then the security vests. Why should it matter that the restriction is imposed contractually in a different document to the interest that's being transferred? And in circumstances where all that's happened is that the benefit of the priority deed still remains as far as the bank is concerned but FTG can't take advantage of the priority cap which was obviously a very important part of it in agreeing to the subordination of the, well, the original parties to the subordination of the Canterbury Finance securities as between the bank and originally South Canterbury Finance. Well, it was Canterbury Finance, in fact. Became part South Canterbury Finance. So…

WINKELMANN CJ:
Another couple of minutes, Mr Forbes.

MR FORBES QC:
Right. Well, I – *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506 we submit says that if you assign a personal property security it takes with it the relative subordination agreements inherent in it, Justice Stevens speaking for the Court there.

O'REGAN J:
We're not going to decide the merits now. We just want to know why we should be dealing with it.

MR FORBES QC:
Well, I mean, the overriding criteria, Sir, and you know better than me, in the Act is that it's in the interests of justice with the specified requirement indicated that it's of general commercial importance, and there are a range of issues that impact, if this assignment is to be treated as one where it has the effect that it's invalid completely as between the bank –

O'REGAN J:
But it's a circumstance that only arises because of this very specific provision. It's not – the general points you're making all depend on the particular

contracts being assigned and the way they're assigned. This arises out of a particular clause in a particular document, doesn't it?

MR FORBES QC:

Yes, and my case is, Sir, that there are cases where the issue's arisen and it's been held that the interest vests, and here it must have vested originally because there was a registered mortgage.

WINKELMANN CJ:

Yes, but Justice O'Regan is asking you is this clause, is it a standard clause, is it significant, is the proper interpretation and a decision as to its effects commercially significant across a broader range of cases, or is it a very bespoke case?

MR FORBES QC:

No, no, I don't think so. The usual clause is that the assignee agrees to be bound and that's what happened here. But this case there's a requirement that a third party, namely the party with priority, had to agree but only as to form by which FTG agreed to be bound. So I mean it's, as I say, anomalous that it should end up in a situation where it can't enforce its rights but it is bound by – the bank can. And –

WINKELMANN CJ:

Well, you might very well have an argument. This is a distinguishable case from those cases which – such as lessor and lessees prohibiting assignment without consent – you might have an argument that consent still can't be unreasonably withheld. But that's not the argument you pursued.

MR FORBES QC:

Well, the request was made after the event, after the assignment had taken place and it was refused. It's hard to see how it could be refused.

WINKELMANN CJ:

But that's not what we've got in front of us.

MR FORBES QC:

No, I know. I understand that, Your Honour, but it's not a broad restriction at all. It's a qualified one, consent required to the form of the document, and that's what had actually happened in the agreement but the consent wasn't sought. And my case is that the bank should've, should be left with its remedies for breach of contract.

WILLIAMS J:

Your point then is that this is a unique case?

MR FORBES QC:

No, my point, Your Honour, is that if you've got a breach of a qualified or an absolute prohibition and it's of no concern to the party whose consent is required as to the identity or any other factor, personal attributes or personal confidence and the like, which was what was important in *NZ Payroll*, then the interest vests and you're left with your remedy and damages. That's the –

WILLIAMS J:

Yes, but thrust of the last couple of questions was why is this important to the New Zealand commercial community and you said the standard clause really is that the assignee must agree to be bound, and that's what happened here. You said your clause is unusual. Doesn't then that mean your case is unique as Justice O'Regan suggested and not of general importance?

MR FORBES QC:

Well, I…

WILLIAMS J:

And you're really arguing for miscarriage, not a matter of general –

MR FORBES QC:

Well, yes, the interests of justice. With respect, it can't be right that that consequence occurs.

WINKELMANN CJ:

Thank you, Mr Forbes.

MR FORBES QC:

Thank you, Your Honour.

MR WESTON QC:

May it please Your Honours, as you know we oppose leave. We say, as you will have seen, that there is nothing special about this case, its particulars or the parties. There is no general commercial significance. Justice Williams, as you said, is FTG the right party? And essentially our case is no. It's not to say that someone else mightn't be able to raise these, it's just not FTG. The assignment to it was not sufficient to give it standing to challenge the BNZ. It may well be that the assignment to FTG in other respects does have validity but, as Justice O'Regan noted, that was left to one side by the Court of Appeal in paragraph 60 of its decision, deciding simply that the party that challenges under the deed of priority cannot be FTG, and we submit, with respect, that that is entirely orthodox. It's what the authorities show. *Linden Gardens*, the House of Lords, followed by the Court of Appeal in *New Zealand Payroll*, Justice Tipping's decision, all of that's entirely orthodox, we say with respect. The *Gibbston Downs* argument we say fails for reasons we've set out in our written submissions.

WINKELMANN CJ:

So how does it end up though that the BNZ gets this windfall situation where it's able to enforce the deed against FTG but FTG – so FTG's left with a burden, but it can't take the benefit? How does that happen? That doesn't normally allow – that's not normally allowed in the law.

MR WESTON QC:

No. Well, that's why said, Your Honour, there may well be other parties who have the status of the challenger. It's just not FTG. FTG took its chances, and it does seem counterintuitive but when you dig in to *Linden Gardens* and *New Zealand Payroll* and also the English Court of Appeal decision of

Hendry v Chartsearch Ltd [1998] CLC 1382 (CA) with Lord Justice Millett's useful judgment in that, there is this distinction made as to whether the party that is the assignee is – sorry, whether the transaction is effective to assign to an assignee in some respects but not others, so that distinction is made. It may be a valid contract as between the assignor and assignee but it's not effective against the third party who should've given consent to that assignment.

WINKELMANN CJ:

It's your position, is it, FTG is bound by the deed of priority, the priority conceded?

MR WESTON QC:

No, to that effect but I would word it slightly differently, Your Honour, is that if you take an assignment you can't take better than the assignor can assign to you. So if the assignor is limited in some respect, the assignment has to take subject to that. You have to bear in mind, with respect, Your Honour, that the BNZ didn't create this problem. It all happened because parties stage left, as it were, were assigning things one to the other.

WINKELMANN CJ:

Well, it has created the problem in the sense it's standing on its rights in a very strict sense, isn't it? It's taking the benefit of the failure, of the other party's failure to comply.

MR WESTON QC:

As I've said –

WINKELMANN CJ:

Well, is that not right? Can you tell me if it's not right that the BNZ is in a better position than it might have been if this minor technical provision had been complied with?

MR WESTON QC:

Well, I guess I'm trying to answer it by submitting, Your Honour, that there may be other parties in all of this that have the standing to do it without making any concessions about the validity of that because those matters haven't been tested.

WINKELMANN CJ:

Yes, but that doesn't really answer my question. Has the BNZ currently received more under its arrangements, security arrangements, than it would have if there was this other party there to enforce it?

MR WESTON QC:

Well, of course it says not. It has an argument based in fact upon a decision of Your Honour given a few years ago now when sitting in the Court of Appeal in the *ASB Bank Ltd v South Canterbury Finance Ltd* case, [2011] NZCA 368, [2011] 3 NZLR 798, where it says that where the Court there distinguished between moneys received through what was called a forced sale and they were subject to the priority and if you took moneys outside that. So the argument is that the insurance proceeds sit outside that. Now my learned friend says that argument is wrong and in fact that argument was advanced and argued in front of the High Court Judge, and he determined that he was going to deal with what he called the preliminary issue of standing. So when it all was served up to the High Court Judge, it was assumed that he would be dealing, A, with standing and, B, with whether the BNZ was right, but he cut it off at the pass and dealt just with this standing issue.

Now just, I may have exhausted myself, Your Honour, but just this lease exception that my learned friend refers to and the cases make is clear that land leases are not – are readily assignable and restrictions on alienability will be looked at very dimly. So what my friend says there was a mortgage here and that falls into the lease category, and we've said in our submissions, with respect, that's just not right, that the lease exception is a lease exception, doesn't entitle a mortgage to be swept up in the same way of thinking. But in any event, the mortgage was discharged. The claim that is now sought to be

advanced by my learned friend is not brought under a discharged mortgage. It's brought under the deed of priority. So the argument ultimately fails just on the facts.

Policy. Well, policy reasons for giving effect to these clauses, they were addressed by the House of Lords in *Linden Gardens*, said no problem. Justice Tipping didn't think there was a problem. So the two articles that are in this bundle, Your Honour, there's a couple of articles there that my friend refers to, tabs 10 and 11. There is some talk in there about other policy issues when you're dealing with factoring, and my friend has referred to those in his submissions. Well, factoring is a little different from what we're talking about here so we would submit, with respect, that's really got nothing to do with it.

But coming back to the legal standard, general commercial significance. No, with respect, we say this is not a case of that.

So unless I can help you further, those would be my submissions.

WINKELMANN CJ:
Thank you, Mr Weston. Mr Francis.

MR FRANCIS:
Thank you, Your Honour. I wasn't proposing to use anything like my time limit. We have a slightly subsidiary role in this case. I was going to briefly address two or three points.

The first is in relation to Your Honour The Chief Justice's question regarding what is the position if consents could not unreasonably have been withheld, and that was the point that was discussed by the English Court of Appeal in *Hendry v Chartsearch* and the Court of Appeal in this case. There was a slight division. That is contained at tab 5 of the bundle of authorities, and the dispute in that case arose because there was a similar non-assignment provision, or my learned friend, Mr Forbes, would call a qualified prohibition on

assignment requiring the consent of the other party before assignment took place. An assignment was nevertheless given effect to without consent and subsequently in order to remedy that position the assignor went to the counterparty and asked for its consent and argued that it could not be validly withheld and therefore it had a valid assignment. The decision of two of the Judges in that case, and in particular Lord Justice Millett, was to consider whether it is open for an assignor or assignee to argue that they didn't need to seek consent because consent could never reasonably have been withheld, and the relevant passages are over at, from page 12 of that transcript from Lord Justice Millett's arguments which deals in his first paragraph and in the rest of his very short judgment with the proposition, with his view that, "I regard it as fatal to the validity of the assignment on which the" –

WINKELMANN CJ:
Sorry, what page?

O'REGAN J:
Twelve.

MR FRANCIS:
This is page 12 of the transcript. "I regard it as fatal to the validity of the assignment on which the plaintiff relies that the defendants' consent was not sought before the assignment was made. The hypothetical question whether if their consent had been sought it could reasonably have been refused is in my opinion irrelevant and is not a proper subject of inquiry." And similarly just above that, and this is the…

WILLIAMS J:
What paragraph on 12?

O'REGAN J:
This is the first paragraph of Lord Justice Millett.

MR FRANCIS:

Yes, Your Honour.

WILLIAMS J:

"I regard…"

WINKELMANN CJ:

Because they're both for *Hendry*.

O'REGAN J:

You're right, sorry, it's on page…

MR FRANCIS:

And similarly just above that and this is in the short –

WILLIAMS J:

I suppose it must follow that if the second assignee, if that's what the facts in *Hendry*, had procured the first assignee to either attempt to obtain consent or sue to obtain consent, that argument would be met.

MR FRANCIS:

Well, if there had been a position where consent had been sought prior to the attempted assignment –

WILLIAMS J:

So it's the prior versus post?

MR FRANCIS:

Yes, yes, Your Honour, because the position expressed there is the simple – and this is quite well expressed in the paragraph just above from Lord Justice Henry. This is the first full paragraph of page 12. "The suggestion that the assignor can validly assign in breach of his contract without ever seeking prior consent by asserting that, as such consent could not reasonably be refused, so it is unnecessary, seems to me to be a recipe to promote uncertainty and speculative litigation."

WINKELMANN CJ:

But isn't this – this is distinguishable because it's dealing with rights that are compromised at their creation. They're impaired rights. So they're impaired by the – in the sense that they are non-assignable and so distinguishable from a case such as this which is a third party contracting that they may not be assigned.

MR FRANCIS:

It's a point of distinction which hasn't really been argued in the Courts below.

WINKELMANN CJ:

But isn't that because these Courts aren't dealing with the situation?

MR FRANCIS:

These Courts being the *Hendry v Chartsearch* situation, Your Honour.

WINKELMANN CJ:

Yes. I mean, they're not dealing with it all, are they, because not on my reading, they're not dealing with a situation where it's a third party who said, oh, he's extracted a contractual undertaking from one of the parties creating the rights that they won't assign those rights.

MR FRANCIS:

Well, in this situation the deed of priority was between, not just between BNZ and originally Canterbury Finance but also and necessarily Tuam Ventures as the debtor. While that clause, while clause 25 was, sorry, clause 15 was plainly primarily for the benefit of BNZ, Tuam was also a bound party and was also both bound by the deed of priority and obliged to give effect to it. So it is – in terms of the analysis that is generally carried out that the – any invalidity in assignment will generally only occur as between the parties to the actual non-assignment provision and not necessarily as between assignor and assignor between which the relationships are separate, Tuam is certainly one of those parties that are originally – that are party to the deed of priority.

WINKELMANN CJ:

And what about the argument that you're actually arguing, you're contending for too much for this clause because it has a legitimate scope which is to ensure that any assignee of the rights is bound by it so that BNZ is not prejudiced by the assignment. Why should you be able to take what seems a reasonably technical point, to take what on one view, not the other, I freely accept, is a windfall, because all it needs is to be assured that any assignee is bound and that's plainly the purpose of the clause, so why shouldn't a later documentation which reassures the BNZ that it is bound, why shouldn't it be accepted? Which is different to this situation.

MR FRANCIS:

I entirely accept Your Honour the Chief Justice's point, but this clause does provide a very fettered discretion to the other secured party.

WINKELMANN CJ:

No, that's not my point. My point is that it has a very limited purpose.

MR FRANCIS:

It does have a limited purpose but the purpose is nonetheless satisfied, and this is according to the terms agreed by the parties, that can only be served by the consent being granted. It is a limited – BNZ's discretion is limited to an agreement to the form of the assignment, and it was noted by the Courts below that probably didn't extend to the identity of the assignee. They could not say, "We are not dealing with that potential assignee."

What they could potentially have done is said if the proposed assignee is not someone – the assignee may be another bank or financial institution in which case all we would be seeking is their assurances that we're bound by the deed. We deal with these banks or financial institutions all the time.

But if the proposed assignee is a related party, a related company, someone who had other securities, that permission for the BNZ to give consideration to the form of the assignment would probably extend to seeking additional

assurances as to how its rights would interact with those of the proposed assignee, resolve any potential issues, and at that point the Court could, with the benefit of whatever correspondence took place between the parties at that point, the Court could then, or the parties and the Court could make the assessment whether or not BNZ's consent was unreasonably withheld, and there's nothing in the Court of Appeal's judgment as I read it that would prevent the BNZ being able to suggest additional protections or, for that matter, preventing FTG or the proposed assignee at that juncture before an assignment had taken place seeking clarification before the Court.

WINKELMANN CJ:

Yes, but can you, are you taking the point that they can't obtain consent afterwards, that the timing of the consent is a drop-dead point because it just seems to me that there is no – there seems to be no reason why BNZ should have that contractual advantage.

MR FRANCIS:

Yes, Your Honour, that's the position that was taken below and which is supported by the respondents.

WINKELMANN CJ:

All right, and why should the law take that approach, because what's the harm to BNZ if it's able to – what's the harm to BNZ if that undertaking is given later?

MR FRANCIS:

Perhaps one more for my learned friend, Mr Weston, but I would rely on the comments of such as of Lord Justice Henry. The ability to attempt to assign without consent and then try and retrospectively justify that would promote uncertainty, undermine clarity. It would strip intended non-assignment provisions which have a very, can have a very clear commercial purpose of their effect.

WILLIAMS J:

Sure, well, it establishes a nice black and white rule, that's true, but it establishes at the cost potentially of injustice to the other party, and potentially substantial injustice, if the advantage that's really being secured is beyond the intent of the clause.

MR FRANCIS:

Arguably, Your Honour, but I think the response would be the point raised by Justice O'Regan that these are clauses that commercial parties are aware of. Whether or not – whoever the primary obligation rests on to obtain consent, in practical terms it will be the assignee who will wish to assure themself that they have obtained a good title to the asset. Different parties would have dealt with a similar non-assignment provision to this in different circumstances. For whatever reason on the facts of this particular case and its unusual circumstances, BNZ's consent was not sought.

Unless Your Honours had any further questions on that point, the only final point I just wanted to briefly address was in relation to my learned friend Mr Forbes' arguments around the benefits and the burdens and the suggestion that somehow FTG is taking the burdens without having the benefits of any deed of priority.

In terms of conceptual approach, at least for my part I submit that the correct approach is slightly different. If an assignee does not obtain a proper assignment then it obtains nothing at all. It obtains no benefits, it obtains no burdens. But if it does obtain a proper assignment then it is, by its very nature, must take subject to the equities. It must be obliged to – it can obtain no better title than its assignor and this is similar to the principles applied in the *Gibbston Downs* case, for example. So there's no conceptual difficulty with an alleged assignee taking subject to the equities and obtaining no better title than its assignor.

And that's particularly the case in the special – and in the very special circumstances of this case, my understanding was that there was evidence

below that this was a very unusual clause, it departed from the usual forms of the New Zealand Bankers Association deeds of priorities. There was evidence the BNZ had had little or no dealings with any similar clauses before. So in those circumstances and leaving aside any suggestion of miscarriage of justice, my submission is that there is no issue of general commercial significance that would arise before the Court. FTG has reserved its rights as the parties agreed prior to the High Court hearing that certain other remedies that it may wish to pursue, those rights remain unaffected should the Court of Appeal judgment be upheld. And for those reasons I respectfully submit that leave to appeal should be declined.

WINKELMANN CJ:
Thank you, Mr Francis.

MR FRANCIS:
Thank you, Your Honour.

WINKELMANN CJ:
Mr Forbes, anything in reply?

MR FORBES QC:
I don't think there is anything else. The context, so to speak, is clear. Would you allow my junior to add a couple of minutes because that's…

WINKELMANN CJ:
Yes.

MR FORBES QC:
Yes, thank you. He's got the understanding of the commercial implications of, aspects of it, better than I was able to put to you.

MR SMITH:
Thank you, Your Honours. I'll try to be very quick. Just on the consent issue, the background to that is that the view was taken, I think, that retrospective

consent was not an option. It was nevertheless sought and the BNZ refused to engage. So taking Your Honour's point, we could, of course, be here arguing today three years after the case was first filed about the consent issue but that's not what we've ended up. We may yet end up there.

In terms of the commerciality of it, it's a standard clause in the deed of priority at the time. There's nothing unusual about the clause for the deed of priority used at the time. It was in 2008, I think, is it? The…

O'REGAN J:
Is that a matter of evidence or are you just telling us that from the bar?

MR SMITH:
I think it is a matter of evidence, actually, Sir. Certainly, what is undoubtedly a question of evidence, and this cuts both ways, is that since that time the deeds of priority, this Bankers Association form, deeds of priority have been changed and the equivalent clause actually doesn't require consent. It requires that the assignee, sorry, the assignor get the agreement of the assignee to abide by the terms of the deed of priority, but it doesn't require that to be referred back to the other party at that point in time, the other mortgagee party. So effectively we're arguing for interpretation of this clause that is now the standard clause in the form of deed of priority used by the Bankers Association, and that comes back to the question of commercial purpose and, of course, the – and this comes back to *Linden's*. So *Linden's* is…

O'REGAN J:
Hang on. Are you saying this used to be the standard clause and now it's not the standard clause?

MR SMITH:
That's right, yes.

O'REGAN J:

Well, doesn't that mean that it's not –

MR SMITH:

No, and I'll say it cuts both ways, but we'll come to that, in the sense that having said that, there's no – notwithstanding the fact that it is a clause that is particularly limited from the standard non-assignment clauses, it has effectively been treated as having the same effect as a standard non-assignment clause. So the fact that it only relates to the identity of – sorry, the identity is not relevant, the identity of the assignee is not relevant under this clause – hasn't altered the way in which the lower Courts have interpreted it. They effectively interpret it consistently with *Linden's*.

O'REGAN J:

You're meant to just be replying here.

MR SMITH:

Sorry, sorry. So all I was going to say in *Linden's* in relation to the commercial purpose is that *Linden's* refers with approval to Goode, the comments made by Professor Goode, and our view is that, from a commercial perspective, this – the categories of interpretation of non-assignment provisions 1 to 4 in that, this will be a category 1 based on the commercial purpose of the clause.

WILLIAMS J:

Which was category 1? I don't have them sitting in my head.

MR SMITH:

Category 1 is one where the assignment is fully effective but there is the contractual rights for breach of contract.

WILLIAMS J:

Right, okay, yes, good.

MR SMITH:

The discharge of mortgage point, the mortgage is significant if at least for a practical and perhaps policy-driven reason. The mortgage, obviously the transfer of mortgage was registered so the second mortgagee as it would have been, FTG, has the normal rights as a registered second mortgagee through indefeasibility. Those include inaction if the mortgagee sale was conducted in a manner that was in breach of the first mortgagee's duties. This isn't academic. There is actually a – this proceeding is on foot. I don't believe the intention would be that it wouldn't have status to bring that proceeding as a registered second mortgagee notwithstanding this non-assignment clause. You'd be making a new exception to indefeasibility. What you get –

O'REGAN J:

But that's a different case. I mean if…

MR SMITH:

No, I understand, Sir, but what it ends up meaning from a policy perspective is FTG can sue saying there should be more money in the kitty, but it can't sue to get that money under the priority deed. That's the effect of the status as it is at the moment.

Yes, I've addressed the question of whether it's an unusual clause or not.

The benefit and the burdens issue was simply that the – as it stands at the moment FTG is registered holding the first registered security. That's on the register. Anyone, third party looking at the register sees that. Notwithstanding that –

O'REGAN J:

Is this the PPSA register or –

MR SMITH:

PPSR – yes, PPSA register. It holds the first registered security now. No challenge has been made to that. No one's tried to reverse the registration process. The receivers who are not parties to the priority deed, appointed by the BNZ, hold significant funds of money. They paid out significant funds of money up to the total debt owed by the BNZ, presumably in reliance on the priority deed, because if you look at the register, FTG's first.

O'REGAN J:

I'm just not – is there evidence of this? I want to – we seem to be just wandering down a path here which is –

MR SMITH:

Sorry, sorry, okay, Sir, I –

WINKELMANN CJ:

Yes, why are we talking about this?

O'REGAN J:

– a long way from this case.

WINKELMANN CJ:

I think we have the point anyway.

MR SMITH:

I was just – I suppose I was making the point they're not academic issues as much as anything in terms of commercial – they are practical commercial issues.

Thank you.

WINKELMANN CJ:

Thank you. Well, thank you, counsel, for your submissions. We'll take some time to consider the arguments and we'll let you have our decision in due course in the usual manner.

We'll now retire.

COURT ADJOURNS: 11.00 AM