IN THE SUPREME COURT OF NEW ZEALAND

SC 75/2009
[2010] NZSC 36

BETWEEN	TOTARA INVESTMENTS LIMITED Appellant
AND	CRISMAC LIMITED First Respondent
AND	ULSTER LIMITED Second Respondent

Hearing: 16 March 2010

Court: Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ

Counsel: C T Walker and N Khouri for Appellant
P J Dale and N Campbell for Respondents

Judgment: 16 April 2010

JUDGMENT OF THE COURT

The appeal is dismissed with costs of $15,000 to the respondents together with their reasonable disbursements to be fixed by the Registrar.

REASONS

(Given by Blanchard J)

Introduction

[1] This appeal is about the interpretation of clauses in a number of separate loan agreements and accompanying mortgages of personal property entered into to provide securities for the loans. The agreements and the mortgages form part of the documentation of arrangements made for the purpose of providing tax advantages to

the borrowers. It transpired that the Commissioner of Inland Revenue was able successfully to challenge the arrangements as a tax avoidance scheme. Anticipated deductions therefore were not available. The borrowers have brought proceedings against certain parties whom they blame for the losses they have suffered in this debacle. Meanwhile the lenders are attempting to recover the loans from the borrowers. We were told that the assets over which the mortgages were originally granted may now be worthless. For this reason, it seems, as part of the recovery attempt, the lender has purported to exercise a power said to exist under the mortgages enabling the lender to obtain further security. This has been done by resort to a power of attorney clause in the mortgage. By that means the lender has caused general security agreements to be executed over the assets of the borrower companies, followed immediately by demands for payment and the appointment of receivers. The borrowers say that those actions were not authorised by the terms of the loan agreements and the mortgages and are consequently invalid.

[2] In this appeal the appellant, Totara Investments Ltd, is the party which now holds mortgages from the respondents, who are two representative borrower companies.

The loan agreements and the mortgages

[3] With that general introduction, we can move to a description of the salient portions of the loan agreements and the mortgages. The documents were all in relevant respects virtually the same. As counsel did, we will refer to the documents pertaining to the loan to the second respondent, Ulster Ltd.

[4] The form of loan agreement begins with a recital that the lender has agreed to advance to the borrower a loan on the terms and conditions contained in the agreement (that is, the loan agreement) "in relation to the entry [sic] by the Borrower to purchase 500,000 fully paid shares in the capital of Digi-Tech Communications Limited". Under a heading "Operative Part" it is provided as follows:

> The Lender agrees to advance to the Borrower the Loan of NZ$480,000 (as hereinafter defined) by advancing the drawdown amount of US$307,200 on the terms and conditions and subject to the security specified in this

> Agreement and the parties covenant and agree with each other as set out in this Agreement and the schedules hereto, including the obligation under clause 4.1 to repay on the Expiry Date the amount of NZ$1,400,000.

Clause 1 contains definitions which include:

> **"Security"** means the mortgage over the Policy and the Share Acquisition Agreement to be given to the Lender by the Borrower.

Clause 2.2 states that the loan is to be used by the borrower for the purpose of paying a loss of profits insurance premium in respect of a policy to be effected with a specified insurance company covering loss of profits on share dealings in relation to the shares (that is, the Digi-Tech shares). Clause 2.3 makes the loan available to the borrower upon provision to the lender, inter alia, of the security in a form satisfactory to the lender and complying with all reasonable requirements of the lender's solicitors.

[5] The date of the loan agreement and the mortgage was 16 March 1995. The loan agreement, in cl 4.1, provided for the borrower to repay the loan in full to the lender on the expiry date (31 March 2005 or such other date as might be agreed in writing by the parties) together with interest in one amount "in New Zealand dollars specified on page 1 as being repayable on the Expiry Date" (that is, NZ$1,400,000 in total).

[6] Clause 5 provided for events of default, including non-payment on due date, breach by the borrower of other obligations and the enforceability or enforcement of any present or future security or charge over or in respect of any of the assets of the borrower (or its holding company or subsidiary), whereupon the lender might at its discretion demand immediate repayment. Clause 6.2 permitted the lender to certify to the borrower that by reason of certain specified events or perils it was impracticable to maintain the loan, with the lender then having the discretion to terminate its obligations under the loan agreement, upon which the loan was to be cancelled and the borrower was immediately to make repayment of the Moneys Owed (that is, the principal, interest, capitalised interest, default interest, fees, costs, etc).

[7] Among general provisions found in cl 10 of the loan agreement are the following:

> 10.3 **Remedies Cumulative:** The rights, powers and remedies provided in this Agreement are cumulative and are not exclusive of any rights, powers or remedies provided by law or pursuant to any other agreements or securities granted either before or after the date of this Agreement.
>
> ...
>
> 10.8 **No Merger:** Nothing contained or implied in this Agreement shall merge, extinguish, postpone, lessen or otherwise prejudicially affect any other security now or in the future held by the Lender granted by the Borrower on any account or any rights or remedies which the Lender may have against the Borrower or any other person now or in the future nor shall any security now or in the future held by the Lender in any way prejudicially affect the powers and provisions, contained or implied in, or the rights or remedies of the Lender under this Agreement.

That clause also provides for the agreement to be governed and construed in accordance with Swiss law and for the Courts of the Canton of Geneva to have exclusive jurisdiction with respect to any dispute in connection with the agreement. Counsel informed us, however, that the parties are content to have the present dispute determined in New Zealand and in accordance with New Zealand law.

[8] Finally, so far as the loan agreement is concerned, there was the following provision which is one of central importance in the present proceeding:

> **11 LIMITED RECOURSE AND PROFIT PARTICIPATION ARRANGEMENTS**
>
> 11.1 Notwithstanding any other term or provision of this Agreement, in consideration of the profit participation arrangements contained in clause 11.2, the Lender acknowledges that this Agreement and the liability of the Borrower hereunder is limited to the value of the Security provided, namely the Policy and the Share Acquisition Agreement, to the intent that the Borrower can apply or assign all monies received thereunder or other value received thereunder, including but not limited to the benefit of the rights of the Borrower under the Policy and or the Share Acquisition Agreement, in full satisfaction of the obligations of the Borrower hereunder, and if the Borrower so applies or assigns all such monies, value or benefit this shall relieve the Borrower from any further or personal liability.
>
> 11.2 The Borrower, in consideration of the limitation of recourse contained in clause 11.1, hereby covenants with the Lender that if it

> sells the Shares either directly or by way of sale of the entity which holds the Shares at any time during the term of this Agreement or within 10 years of the date of final repayment of the Moneys Owing and realises a sale price in excess of NZ$3 per Share, (such excess being hereinafter referred to as the "Excess"), then the Borrower shall pay 10% of the Excess to the Lender as an additional return to the Lender.

[9] The mortgage of personal property, which is the security contemplated by the loan agreement, begins with a recital that the mortgagee (Totara) at the request of the mortgagor (Ulster), has agreed to advance to the mortgagor a loan on the terms and conditions contained in a loan agreement of even date (which is called the "Contract") upon terms and conditions:

> ... including the requirement that the Mortgagor grant to the Mortgagee security over certain personal property (being a contract for the purchase of 500,000 fully paid ordinary shares in the capital of Digi-Tech Communications Limited, and a Loss of Profits Insurance Policy), being in the form of this Deed to secure to the Mortgagee the performance by the Mortgagor of the terms and provisions of the Contract.

Under "Operative Part" the mortgagor grants to the mortgagee security over defined "Property" property and covenants with the mortgagee as set out in the deed. Among the defined terms in cl 1.2 are:

> **"Property"** means:
>
> (i) the rights of the Mortgagor as purchaser under a contract ("Share Purchase Contract") between the Mortgagor as purchaser and n-Tech Limited of Auckland New Zealand as vendor and pursuant to which the Mortgagor is bound to acquire the number of fully paid ordinary shares ("Shares) in the capital of Digi-Tech Communications Limited of Wellington New Zealand specified on page 1 on 31 March 2005; and
>
> (ii) loss of profits insurance policy terms which are set out in Schedule A hereto.
>
> **"Moneys Hereby Secured"** has the meaning assigned to it in Clause 3.1 of this Deed.

Clause 3.1 provides:

> 3.1 THE Mortgagor acknowledges that these presents shall provide security for the Principal Sum interest and other monies payable under the Contract all of which are herein referred to as "the Moneys Hereby Secured".

[10] In the mortgage there are covenants for performance and for lodgement with the mortgagee of documents evidencing title and of a share transfer. There are also standard representations, warranties and covenants by the mortgagor, a default provision and a provision dealing with realisation of the security upon default. There is also a provision by which the mortgagor assigns, transfers and sets over to the mortgagee by way of first fixed mortgage the defined property as a continuing security for the timely payment of the Moneys Hereby Secured, with provision for reassignment upon repayment. There is also, in cl 11.3, an agreement that the mortgage deed is collateral to every other security for the time being ("whether before or after the execution of this Deed") held by the mortgagee for the purpose of securing payment of the Moneys Hereby Secured.

[11] The provision in each mortgage deed which is of the most present significance is as follows:

> 9.1 THE Mortgagor shall if so requested by the Mortgagee do all such acts and execute all such documents and securities as the Mortgagee may in its absolute discretion require to further secure to the Mortgagee its title as mortgagee of the Property and the payment of the Moneys Hereby Secured AND the Mortgagor in consideration of the Mortgagee providing the financial accommodation referred to in Recital B to the Mortgagor DOTH HERBY IRREVOCABLY APPOINT the Mortgagee and each director, secretary, officer and solicitor for the time being of the Mortgagee severally to be the true and lawful attorney of the Mortgagor with full power and at the expense of the Mortgagor in the name of the Mortgagor and on behalf of the Mortgagor:
>
> (a) To do, execute and perform all and every act, deed, matter or thing which the Mortgagor by this Deed covenants or agrees to do or which in the opinion of the Mortgagee is necessary or expedient for more fully and perfectly transferring assigning and securing the Property or which the Mortgagee may deem necessary for the protection of its security or the preservation of its interest in the Property;
>
> (b) To demand, sue for, recover and receive the Property from all and every person whatsoever and to give effectual receipts for all or any parts of the Property and to commence, prosecute, settle and compromise all actions, suits and proceedings at law or in equity for obtaining or enforcing the same and to proceed to judgment, decree and execution or discontinue the same or become non-suit therein and to act in all respects therein as the processes of the court or occasion may require and to receive money out of court for any such action, suit or proceedings;

(c) To exercise all or any of the powers of the Mortgagor with respect to the Property and to do, execute and perform any act, deed, matter or thing with respect to the Property as fully and effectively as the Mortgagor could;

(d) *Generally to do, execute and perform all such further acts, deeds, matters and things which may become necessary or be regarded by the Mortgagee or the said attorney as necessary for more satisfactorily securing the payment of the Moneys Hereby Secured as effectually as the Mortgagor could and for all or any of such purposes from time to time to appoint a substitute attorney and remove such substitute –*

AND the Mortgagor hereby agrees to ratify and confirm whatever the said attorney or substitute shall lawfully do or cause to be done pursuant to this power of attorney.

9.2 THE Mortgagor in consideration of these premises hereby acknowledges that the possession of this Deed by the Mortgagee shall be complete and sufficient proof of the Mortgagee's authority to withdraw or otherwise deal with the moneys represented by the Property notwithstanding that the Mortgagor may dispute or purport to countermand such withdrawal or dealing, and no person dealing with the Mortgagee, attorney or substitute attorney shall be concerned to see or enquire as to the propriety or expedience of any act, deed, matter or thing which the Mortgagee, attorney or substitute may do, execute or perform by virtue of these presents.

9.3 IN the event of the exercise by the Mortgagee of any power of withdrawal in respect of the Property or any part thereof, the Mortgagor shall do everything in the Mortgagor's power to give effect to such power of withdrawal. [emphasis added]

[12] The appellant mortgagee relied, and continues to rely, only upon cl 9.1(d) as its authority for the action it took in executing in the name of each mortgagor a further security in the form of a general security agreement over all of the assets of each mortgagor. It freely concedes that its purpose was thereby to obtain security over the rights of action which the mortgagors claim to have, and wish to enforce, against third parties in relation to the tax-driven arrangements which fell foul of the Commissioner of Inland Revenue. As has already been mentioned, having purportedly obtained the general security agreements from the respondents, Totara has made an appointment of receivers for each of the respondents. That was done prior to the expiry date of each loan, that is, before 31 March 2005 in the case of Ulster Ltd. The validity of those appointments, it is accepted, depends upon whether Totara actually had power under cl 9.1(d) to act as the attorney of the respondents to execute the general security agreements.

[13] Each of the borrowers/mortgagors is said to have repudiated its share purchase agreement. Totara has purported to accept each repudiation. Those events, the significance of which is in issue in this litigation but which is not required to be presently determined, occurred before the expiry date of the loans. We record only that it is said by Totara that the alleged repudiation has destroyed the value of the shares and the insurance policy in each case because the share purchase contract no longer exists and there is therefore no longer any ability to make any claim on the insurance policy.

The High Court judgment

[14] In the High Court[1] Venning J began his analysis by examining the arguments of counsel directed to cl 9.1 of the mortgage, including the undisputed proposition that a person seeking to exercise a power of attorney, as Totara had done, must show that on a proper construction the authority is to be found within the instrument, either in express terms or by implication.[2] The Judge rejected a submission from Mr Dale, for the present respondents, that the power in cl 9.1(d) was limited to supporting a mortgage of the defined property. He pointed to the words "and the payment of the Moneys Hereby Secured" which appear in the opening portion of the sub-clause. He said that cl 9.1(a), (b) and (c) supported the objective of further securing the mortgagee's title to the property, while cl 9.1(d) was directed at the objective of further securing payment of the principal sum, interest and other moneys payable under the loan contract.[3] He also emphasised the mortgagee's "absolute discretion" and the breadth of the words "to do all such acts and execute all such documents and securities" in that opening portion. Other references to the property in the general provisions of the mortgage were directed at the principal security over the share purchase contract and insurance policy but those general clauses did not purport in any way to restrict cl 9. The Judge also rejected an argument that cl 9.1(d) was a "belt and braces" provision:[4]

---

1 *N-Tech Ltd v Abooth Ltd (in rec)* HC Auckland CIV–2006–404–003362 and CIV–2007–404–000990, 3 September 2008.

2 *Bryant, Powis and Bryant Ltd v La Banque du Peuple* [1893] AC 170 (PC) at 177.

3 At [28].

4 At [32].

> ... clause 9.1(d) properly refers back to such further acts which may be necessary (or regarded by the mortgagee as necessary in its absolute discretion) to secure payment of the moneys secured, as referred to in the introductory words of clause 9.1 itself and repeated in clause 9.1(d).

[15] Venning J then turned to cl 11 which he dealt with quite briefly:

> [34] Clause 11.1 provides that the liability of the borrower (mortgagor) is limited to the value of the security provided, namely the share purchase contract and the insurance policy and that the borrower (mortgagor) may satisfy their obligations under the loan by applying or assigning all monies received thereunder or other value received thereunder and that if the borrower (mortgagor) so applies or assigns all such monies, value or benefit that shall relieve the borrower (mortgagor) from further or personal liability under the loan agreement.

The Judge said that cl 11.1 could support an argument that there was no need for further security if the borrower (mortgagor) could satisfy their obligations under the loan by applying or assigning monies or rights represented by the share purchase agreement and the insurance policy. However, in his view, the short answer was that it was a right exercisable by the borrower and if not exercised it had "no practical effect". Pending such exercise there was no reason why the lender/mortgagee should not take further security under cl 9.1(d) to secure the loan moneys due to it under the loan contract "to cover the situation of the borrower/mortgagor not exercising that right".[5]

The Court of Appeal judgment

[16] The Court of Appeal[6] gave a brief description of the commercial and litigation context in which the documents fell to be interpreted. It observed that Venning J had started with cl 9 and had then "discretely assessed" the effect of cl 11. The Court thought it appropriate, however, to seek an integrated interpretation of the two documents and, importantly, to start with the loan agreement. It did not accept arguments from Totara that the lender's acknowledgment in cl 11.1 was merely a preamble to the rest of the subclause and had no substantive effect; nor that since the borrower had not exercised the right under the clause to extinguish liability by

---

5 At [35].

6 *Crismac Ltd and Ulster Ltd v Totara Investments Ltd* [2009] NZCA 369 per William Young P, Randerson and Asher JJ.

assigning the share purchase agreements and the policy to the lender, that liability was unimpaired. The Court also did not accept an alternative, and less preferred, interpretation from Totara that the words of the acknowledgment, although having some effect, merely capped the monetary liability of the borrower and did not delimit what property could be rendered (under cl 9.1(d)) subject to a charge to secure that liability.

[17] The Court noted the absence from the loan agreement of any mention of a right to obtain further security. Clause 11.1 itself stated that the loan agreement was "limited to the value of the Security provided". On the interpretation preferred by Totara, cl 11.1 had exactly the same meaning as it would without all the words which came before "to the intent that". In all this, the Court said, the *contra proferentem* principle was distinctly applicable.

[18] The Court then proceeded to cl 9 of the mortgage, reading it together with the loan agreement. It said that it was arguable that the breadth of the language of cl 9.1(d) meant that the loan agreement should be interpreted in the way Mr Walker, for Totara, had contended. But it did not see that as the most natural meaning of the words used in the loan agreement in their commercial context. If cl 9.1(d) of the mortgage had the meaning contended for by Mr Walker the acknowledgment in cl 11.1 was inaccurate. The Court considered that the natural meaning of cl 11.1 was inconsistent with Totara's interpretation of cl 9.1(d). It regarded the loan agreement as the controlling document. Further:[7]

> ... the operative part and cl 11.1 of that document record and provide for what was a central and fundamental feature of the contractual relationship: that the loan was on limited recourse terms and able to be enforced only against the share purchase agreement and policy. To put this a slightly different way, we see the specific language of the loan agreement as being of more significance than the general language of cl 9.1(d) of the mortgage.

Accordingly, the Court construed cl 9.1(d) of the mortgage "so as to conform to the operative part and cl 11.1 of the loan agreement even though this means that cl 9.1(d) is rendered largely (and perhaps wholly) redundant".[8] The Court referred again to the need for a *contra proferentem* interpretation of both documents.

---

7 At [45].
8 At [46].

[19] The Court of Appeal allowed the appeal by the present respondents and declared that the powers of attorney contained in the mortgages did not authorise the taking by Totara of additional securities.

Submissions and discussion

[20] Mr Walker began his able argument with cl 9.1 and submitted that the first part of it (down to the word "AND") obliges the mortgagor to:

> ... execute all such ... securities as the Mortgagee may in its absolute discretion require to further secure to the Mortgagee ... the payment of the Moneys Hereby Secured.

Correlatively, counsel said, para (d) gives the mortgagee power, acting in the name of and on behalf of the mortgagor, that is, as attorney, to:

> ... do, execute and perform all such further acts, deeds, matters and things which may become necessary or be regarded by the Mortgagee ... as necessary for more satisfactorily securing the payment of the Moneys Hereby Secured.

Para (d) was said to be designed to achieve the second objective in the first part of the subclause, namely "further [securing] to the Mortgagee ... the payment of the Moneys Hereby Secured". It was an additional, separate power and not a "belt and braces" provision supporting cl 9.1(a)-(c). The Court of Appeal was said to have erred in failing to construe the loan agreement and the mortgage together in a way which did not avoid redundancy or repugnancy if reasonably possible. There was a straightforward interpretation which reconciled the two documents: the loan agreement imposed an obligation on the borrower to pay a certain sum at the expiry date and gave the borrower the option of satisfying its liability by assigning the benefit of the share purchase agreement and insurance policy to the lender; until the borrower satisfied its liability one way or the other, it still had obligations under the loan agreement which were secured by the mortgage deed and for which further security could be taken under cl 9.1.

[21] It was also submitted by Mr Walker that there was in fact no conflict between the documents. The operative clause in the loan agreement[9] did not purport to restrict what security might be given. The "Security" was defined as "the mortgage over the Policy and the Share Acquisition Agreement". The form of mortgage included cl 9.1. Clause 11.1 said nothing at all about what security might be taken for the borrower's liability pending satisfaction of that liability. It could not be construed as a provision which immediately limited the borrower's liability to the value of the share purchase agreement and insurance policy so that whatever that value might be at any point in time was all that the borrower was obliged to pay. That would render redundant the operative clause and provisions in the loan agreement which obliged the borrower to pay a sum certain on the expiry date. It was submitted that the interest provisions would become unworkable if the sum due was whatever the current value of the defined property was at the time. The correct interpretation was that the borrower had the "option" of applying or assigning to the lender all monies or other value received from that property. If it did so, even after the lender had taken and realised further security, this would constitute full satisfaction of the borrower's obligations. If not, Mr Walker submitted, the borrower would have the obligation to pay the stipulated sum on the expiry date. For this the borrower gave the consideration provided for in cl 11.2.

[22] And even if, it was submitted, contrary to that argument, cl 11.1 did immediately convert the borrower's liability to the value of the share purchase agreement and policy, there was nothing in cl 11.1 which provided that the lender could not take security in respect of that liability over other property.

[23] We find the respondents' argument to be more persuasive. In what follows, we adopt much of what was put forward by Mr Campbell, who carried the burden of analysis of the two central provisions, cl 11 of the loan agreement and cl 9.1 of the mortgage.

[24] The Court of Appeal was right to begin with the loan agreement which is, as it found, the controlling document. We say this because the terms and conditions of the advance are contained in the loan agreement, as the recital to the mortgage says.

---

[9] See [4] above.

Certainly the loan agreement defines "Security" as the mortgage over the policy and the share acquisition agreement, and that mortgage does include cl 9.1. But the provisions of the mortgage need to be read in a way which is consistent with the whole of the loan agreement, including cl 11.

[25] Even though it contained that limited recourse clause, the drafter of the agreement naturally had to proceed on the basis that the defined property might be more than sufficient as a source of repayment. The drafter therefore had to include, on that assumption, provisions for payment of the principal and interest at the expiry date, or if the mortgage became repayable at an earlier time on certain events, such as were contemplated, for example, in the provision for events of default, like the insolvency of the borrower, or the provision for the lender to terminate the arrangement because a change in the law made continuance of the funding impracticable.

[26] But within the loan agreement cl 11.1 was an overriding provision, which is hardly surprising given that it was described, in cl 11.2, as a limitation of recourse. It opens with the emphatic words "Notwithstanding any other term or provision of this Agreement". It then proceeds with an acknowledgement that:

> ... this Agreement and the liability of the Borrower hereunder is limited to the value of the Security provided, namely the Policy and the Share Acquisition Agreement ...

To this point, which Mr Walker termed the first part of the subclause, nothing could be plainer. The borrower is to have no liability exceeding the value of the two specified items of property; the lender's only recourse in the event of default is to that property. Mr Walker made much of the supposed difficulty of valuing these items at a particular point in time when they might not be readily realisable and values might change. That is presumably why the remainder, or second part, of the subclause authorises an application by the borrower of moneys received from those items of property. That could only occur if the borrower itself turned the assets into cash, presumably with the approval of the lender, and thereby established their value. It is clear also that the drafter perceived that the most convenient solution might well be for the borrower simply to pass over to the lender absolute title to the assets concerned, freed from any right of redemption, since then there would be no need to

fix upon a value. It would of course be highly unlikely that this would occur when the value actually exceeded the amount secured.

[27] It was Mr Walker's argument that the second part of the subclause did more than merely indicating one means available to the borrower in order to obtain a release from liability for any deficiency in the security as compared with the amount of the loan (the Moneys Owed). He said that it was the *only* such means, and that unless and until the borrower resorted to it (which apparently is no longer possible for the respondents) an obligation to repay the loan in full existed. That would be surprising in view of what is found in the first part of the subclause but Mr Walker supported the argument by referring to the limiting words ("to the intent that") and to the final words of the subclause ("if the Borrower so applies or assigns all such monies, value or benefit, this shall relieve the Borrower from any further or personal liability"). But this would have the Court read the limiting words as if they said "to the intent *only* that". And the closing words seem to us merely to confirm that all liability ceases in the event of an application or assignment of the defined property or its proceeds, that is, that the obligations of the borrower are at an end. We do not understand them to be saying by implication that if there has been, or can be, no such application or assignment, the lender has a right of recourse to any other assets of the borrower which may be amenable to execution of a judgment in debt for the deficiency, in addition to realising the proceeds of the defined property or, as the appellant puts it, that the borrower is exposed to personal liability. That would entirely contradict the clear language of the first part of the sub-clause.

[28] Moreover, it would lead to perversely different results depending upon how matters came to a head after default by the borrower. As Mr Walker accepts, if the borrower were somehow able to sell the assets and pay the proceeds to the lender, the limitation on recourse would apply. But on his argument it would not do so if the lender had exercised the power of sale and taken the proceeds for itself. The lender could presumably, if this distinction is accepted, take advantage of its custody of title documents to forestall any sale by the borrower. Indeed, it might well have an ability to insist on being the seller of the defined property.

[29] If, as we have concluded was objectively the intention of cl 11.1, the limitation on recourse was not limited to the circumstances described in the second part of the subclause, it can hardly then be the case that the lender would be able to require from the borrower further security over assets not specified in the definition of "Property", that is, beyond those specifically mentioned in the first part of the clause. As Mr Campbell pointed out, the taking of further security would in any event be a pointless exercise, for the limitation on value is to the value of the defined property. The lender could never recover more than the value of that property by recourse to other assets over which it might, on the appellant's argument, obtain further security. It could therefore never be said, in terms of cl 9.1(d), that any further security over other assets was "necessary" for more satisfactorily securing payment of the Moneys Hereby Secured. If it is said that, by taking additional security, the mortgagee might thereby gain an ability to realise other assets more swiftly, that is no real answer, for the value of the defined property will surely reflect any relative illiquidity. It cannot be taken that the parties would have intended to confer on the lender, notwithstanding the limited recourse provision, a power to take further security which could never be of benefit to it.

[30] Clause 9.1 must be read in light of the bargain struck in cl 11, which is expressed to be the paramount provision. It is not, in that light, to be understood that the doing of the further acts and the execution of further documents and securities required of the mortgagor can be for purposes going beyond securing the mortgagee's title to the defined property and the obtaining *therefrom* of payment of the Moneys Hereby Secured. The tail must not be allowed to wag the dog. Admittedly, as Mr Walker submitted, this may leave cl 9.1(d) with little or no work to do, although the same may also be said of cl 9.1(c), for (a) and (b) would appear to cover all its ground too.

[31] In the documentation of commercial transactions the drafter will frequently, out of caution (belt and braces) or perhaps without thinking about function in the particular case, incorporate boilerplate provisions which have little or no work to do. While a court will strive to find a role for such general provisions to play, their presence should not be permitted to lead to distortion of the objective intention of the parties which can be discerned from a reading of the whole contract (or in this case,

combination of documents), and in particular of a clause which has been marked out by the parties as an important element of the bargain. The maxim *ut res magis valeat quam pereat*, which comprehends giving effect to some matter rather than having it fail, expresses an aspiration, not a rule. In this case, two possible interpretations of cl 11 and cl 9, read together, are possible, as the Court of Appeal recognised. But, because the parties emphasised the paramountcy of cl 11 and because one of the suggested interpretations would lead to the arbitrary result described above, that interpretation should not prevail merely because it would provide some work for cl 9.1(d). This is a case like *Walker v Giles* where "effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected".[10]

[32] Finally, we should mention Mr Walker's subsidiary argument that his contended interpretation received support from references in some miscellaneous provisions of the documents, like subcls 10.3 and 10.8 of the loan agreement, to other securities. These are, again, boilerplate provisions, as can be seen from the fact that, despite the respondents being newly formed special purpose vehicles, there is reference to securities granted "before" the date of the loan agreement[11] and other security "now" held by the lender,[12] when of course there was none. These subclauses are in our view directed to the possibility that, as apparently did happen in the case of some other borrowers, further securities might be executed in relation to further advances to the same borrower.

Result

[33] The appeal is dismissed with costs of $15,000 to the respondents together with their reasonable disbursements to be fixed by the Registrar.

Solicitors:
Gilbert/Walker, Auckland for Appellant

---

10 (1848) 6 CB 662 (CP) at 702, 136 ER 1407 at 1424. See also *Gwyn v The Neath Canal Navigation Co* (1868) LR 3 Ex 209 at 215 and *Re O'Brien (deceased)* [1975] 1 NZLR 688 (CA) at 693.

11 Clause 10.3.

12 Clause 10.8.

Grove Darlow & Partners, Auckland for Respondents