IN THE SUPREME COURT OF NEW ZEALAND

SC 56/2017
[2017] NZSC 112

BETWEEN	TORCHLIGHT FUND NO 1 LP (IN RECEIVERSHIP) First Applicant
	NZ CREDIT FUND (GP) 1 LIMITED Second Applicant
AND	WILACI PTY LIMITED Respondent

Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	R B Stewart QC and B W Walker SC for Applicants N S Gedye QC and D F Jackson QC for Respondent
Judgment:	14 July 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent costs of $2,500.

REASONS

Introduction

[1] Torchlight Fund No 1 LP (in receivership), the first applicant, is a private equity fund which invests in distressed assets. The second applicant, NZ Credit Fund (GP) 1 Ltd, is Torchlight's general partner.

[2] In August 2012 Torchlight was in what was described as a "very tight liquidity situation". It was buying debt owed by a distressed Australian property company to the Bank of Scotland International. Torchlight had still to pay the bank

AUD 37 million[1] and needed short-term bridging finance to pay that amount. The sum was due on 17 August 2012, the bank having granted an extension until then.

[3] Finance was arranged, after negotiations via a financial intermediary, from the respondent, Wilaci Pty Ltd. The ultimate arrangement was for a loan of $37 million for 60 days plus interest of $320,000. In addition, Torchlight was to pay a facility fee of $5 million and, on default, there was provision for a late payment fee of $500,000 per week.

[4] The principal and interest were not paid when the sums fell due on 26 October 2012. Torchlight was then in default. Repayment of the principal was eventually achieved in seven tranches, the last on 2 May 2014. On 29 May 2014 Wilaci issued a demand for payment of $33,628,934, which comprised: the $5 million facility fee; the $320,000 interest; and the late payment fees, which by this point totalled $28,308,934. Payment was not made. Receivers were appointed pursuant to an associated general security agreement.

[5] Torchlight then issued proceedings in the High Court. For present purposes it is relevant that, by the time of the trial and on appeal, the only live issue in the proceedings related to the late payment fees and, in particular, whether those fees were an unenforceable penalty. It is also relevant that the contract was governed by the law of New South Wales.

[6] In the High Court, Muir J found that the late payment fee was an unenforceable penalty.[2] Judgment was entered in favour of the applicants.

[7] Wilaci's appeal to the Court of Appeal was successful.[3] The Court of Appeal concluded that the late payment fee provision was a secondary obligation conditional on, and responsive to, default[4] but was not an unenforceable penalty.[5]

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1 All monetary amounts in this judgment are in Australian dollars.
2 *Torchlight Fund No 1 LP (in rec) v Johnstone* [2015] NZHC 2559.
3 *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] NZCA 152 (Kós P, French and Miller JJ) [*Wilaci* (CA)].
4 At [56].
5 At [102].

The proposed appeal

[8] Torchlight now seeks leave to appeal to this Court primarily on the basis the proposed appeal is of general commercial significance. In particular, Torchlight submits that the proposed appeal would provide greater certainty about the application of the penalty doctrine to commercial agreements and as to the proper identification of the "legitimate interests" of the lender to be protected in such cases.

Assessment

[9] As the contract was governed by the law of New South Wales, the focus of the Court of Appeal decision was on the application of the decision of the High Court of Australia in *Paciocco v Australia and New Zealand Banking Group Ltd* (decided after the High Court decision in this case).[6] The Court of Appeal was accordingly applying a very recent recitation by the High Court of Australia of the principles relevant to the doctrine of penalties in Australia.

[10] Given the sums involved, the case is obviously of commercial significance for the parties themselves. But we are satisfied no more general issues arise where Torchlight's complaint is about the application of the principles in *Paciocco* to the particular facts of this case, not about the principles themselves. In that respect, it is also relevant that, as the respondent submits, the case had some particular features which take it outside the usual. The Court of Appeal noted two contextual points. First, Wilaci was looking to "gain a return commensurate with some form of short term investment".[7] Second, the Court said, "it was unlikely that a bank or other commercial lender would have provided Torchlight with finance of the kind sought".[8]

[11] Torchlight submits that New Zealand law aligns with Australian law on this topic with the result that this Court's views would be helpful more generally in New Zealand and more broadly. However, on appeal this Court would be deciding the case on the basis of *Paciocco* with no ability, given it is under New South Wales law,

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6 *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 333 ALR 569.

7 *Wilaci* (CA), above n 3, at [12].

8 At [13].

to depart from that decision or to address how the same issue might be approached in New Zealand.

[12] Nor is this a case which could be said to be one of those "rare" situations of "a sufficiently apparent error, made or left uncorrected by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected".[9] As the Court of Appeal noted, both of the parties to this arrangement were "substantial commercial entities".[10] They were independently advised and there was no disparity of bargaining power. In addition, as Torchlight knew, making commercial loans was not normally part of Wilaci's business. Further, each party "stood to make substantial returns" as a result of the arrangement.[11] On the other hand, the arrangement involved "exceptionally high risk" to Wilaci as lender.[12] Finally, the Court of Appeal noted that, in contrast to the normal situation, the late payment fee reflected a lower cost than the equivalent credit cost of the primary transaction.[13]

[13] We add that Torchlight challenges the approach to the latter calculation. But, even if they are correct,[14] this was only one aspect of the Court of Appeal's decision and could not by itself mean that there was a risk of miscarriage in the sense required in civil cases.

[14] For these reasons, the application for leave to appeal is dismissed.

[15] The applicants must pay the respondent costs of $2,500.

Solicitors:
Gilbert Walker, Auckland for Applicants
Lowndes, Auckland for Respondent

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9 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].
10 *Wilaci* (CA), above n 3, at [91].
11 At [92].
12 At [93].
13 At [94].
14 And it is by no means clear to us that they are.