

**NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF ANY  
REFERENCE TO THE TERMS OF AN INSURANCE SETTLEMENT  
AGREEMENT REMAINS IN FORCE.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 27/2019  
[2019] NZSC 93**

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|---------|---|
| BETWEEN | FTG SECURITIES LIMITED<br>Applicant   |
| AND     | BANK OF NEW ZEALAND<br>First Respondent   |
|         | STEPHEN JOHN TUBBS AND COLIN<br>ANTHONY GOWER AS RECEIVERS OF<br>TUAM VENTURES LIMITED (IN<br>RECEIVERSHIP AND IN LIQUIDATION)<br>Second Respondent |
|         | ROBERT BRUCE WALKER AS<br>LIQUIDATOR OF TUAM VENTURES<br>LIMITED (IN RECEIVERSHIP AND IN<br>LIQUIDATION)<br>Third Respondent                        |

Hearing: 25 July 2019

Court: Winkelmann CJ, O'Regan and Williams JJ

Counsel: A J Forbes QC, H M Weston and G W Smith for Applicant  
T C Weston QC and K M Paterson for First Respondent  
K C Francis for Third Respondent

Judgment: 26 August 2019

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicant must pay costs of \$4,500 to the respondents (to be shared equally between the first and third respondents unless they agree otherwise) plus usual disbursements.**

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## REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal,<sup>1</sup> dismissing its appeal from a decision of the High Court.<sup>2</sup> The Court decided to convene a hearing to consider the arguments relating to the application.

[2] Both the applicant (FTG) and the Bank of New Zealand (the Bank) are creditors of Tuam Ventures Ltd (in receivership and in liquidation) (Tuam). The factual background is that Tuam borrowed money from Canterbury Finance Ltd (CFL) and granted securities to CFL over both its personal property and a property it owned in Christchurch (the Christchurch property). Later, the Bank agreed to lend money to Tuam, also secured on the Christchurch property and on personal property owned by Tuam, subject to obtaining first priority for its securities. This led to Tuam, CFL and the Bank entering into a deed of subordination and priority. A replacement deed of subordination and priority was subsequently entered into, but it did not differ materially from the earlier document. It is this latter deed (which we will call the Priority Deed) that is in issue in this proceeding.

[3] The Priority Deed provided that the Bank had priority over CFL for the amount of \$7.5 million plus two years' interest and costs, and CFL had priority for a subsequent \$10 million plus interest and costs.

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<sup>1</sup> *FTG Securities Ltd v Bank of New Zealand* [2019] NZCA 16 (Asher, Lang and Moore JJ) [FTG (CA)].

<sup>2</sup> *FTG Securities Ltd v Bank of New Zealand* [2018] NZHC 1516 (Gendall J) [FTG (HC)].

[4] Clause 15 of the Priority Deed provided as follows:

**TRANSFER OR ASSIGNMENT**

15. Neither Secured Party will transfer or assign any interest or right in or to that Secured Party's Securities to any person unless that person has entered into a deed or contract in a form approved by the other Secured Party (which approval will not be arbitrarily or unreasonably withheld or delayed) by which that person agrees to be bound by the Document.

[5] In 2008, CFL amalgamated with South Canterbury Finance Ltd (in receivership), which later changed its name to FCS Loans Ltd (FCS). FCS is in liquidation. In 2012, FCS entered into an agreement with Crown Asset Management Ltd (CAML) to assign to CAML the debt owed to it by Tuam and the securities relating to that debt. At the time of this assignment, no action was taken to comply with cl 15 of the Priority Deed.

[6] In 2015, CAML purported to assign its debt and security interests in Tuam to FTG. Although CAML raised with FTG the issue of the need to comply with cl 15, FTG advised it wanted to keep the transaction confidential and no approach was made to the Bank for the approval required under cl 15.

[7] The recoveries made in relation to the debts of Tuam were unexpectedly high. FTG alleges the Bank received more than it was entitled to under the Priority Deed. It commenced proceedings seeking declarations as to the interpretation of the Priority Deed. By the time this occurred its mortgage over the Christchurch property had been discharged as the property had been sold.

[8] After issuing its proceedings, FTG sought the Bank's consent under cl 15 but this was refused, and there has been no challenge to that refusal.<sup>3</sup> The ultimate objective of FTG's proceedings was to obtain an order that the Bank and the receivers of Tuam were required to give effect to the Priority Deed on the basis that FTG had succeeded to the rights of CFL under the Priority Deed.

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<sup>3</sup> See *FTG (HC)*, above n 2, at [70].

[9] The High Court judgment was an interim judgment dealing with a single issue: whether FTG, not having complied with cl 15, had obtained a valid assignment of the debt and securities previously held by CFL/FCS/CAML, including rights under the Priority Deed, and so was entitled to enforce the Priority Deed against the Bank. Gendall J decided that issue against FTG.<sup>4</sup>

[10] In the Court of Appeal, FTG challenged the High Court finding that neither CAML nor it had obtained a valid assignment of the debt and securities of Tuam and that this meant that FTG was not properly a party to the Priority Deed and could not enforce it.

[11] The Court of Appeal upheld the High Court finding that FTG lacked standing to bring proceedings against the Bank to enforce the Priority Deed.<sup>5</sup> But it did not adopt the High Court finding that FTG did not have title to the debt and security interests, expressing the view that there may be an enforceable contract between assignor and assignee (without ultimately deciding the issue).<sup>6</sup>

[12] The Court of Appeal observed that its finding that FTG could not enforce the Priority Deed was not a harsh outcome. FTG had knowingly taken a risk in participating in an assignment that was contrary to the express requirement set out in in cl 15, that requirement being for the benefit of the Bank. So, the Court said FTG had not failed on a technicality and there was no unfairness in it being prohibited from enforcing the Priority Deed.<sup>7</sup>

[13] FTG advanced the application for leave to appeal on the basis that it was necessary in the interests of justice for this Court to hear and determine its proposed appeal because the appeal involved matters of commercial significance.<sup>8</sup> It highlighted a number of issues in relation to the assignment of personal property securities and of interests in land that it said were matters of general or public importance. These included issues such as the legal effect of a prohibition on

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<sup>4</sup> *FTG (HC)*, above n 2, at [107].

<sup>5</sup> *FTG (CA)*, above n 1, at [58].

<sup>6</sup> At [60].

<sup>7</sup> At [62].

<sup>8</sup> Senior Courts Act 2016, s 74(2)(c).

assignment; whether an assignment of security documents includes any accompanying priority arrangement automatically; whether the provisions for registration under the Land Transfer Act 1952 and for perfection under the Personal Property Securities Act 1999 altered the position; and whether there were public policy issues relating to restrictions on assignment of securities.

[14] We accept that at least some of these issues may give rise to matters of commercial significance. But, at its heart, this case is about the interpretation of a particular provision in a particular Priority Deed. While this document was, apparently, a standard form document in wide use, we were told that this is no longer the case. We see the issues arising in the present case as specific to the unusual terms of cl 15, particularly the apparent requirement to obtain the consent of the Bank to the form of the assignment document when the Bank is not itself a party to the assignment that document effects. There is no difficulty in interpreting or complying with cl 15 and the only reason the present issue arose appears to be that FTG made a deliberate decision not to comply with it. We are not persuaded that there is any real likelihood that the more general issues highlighted by Mr Forbes QC would arise in other cases governed by a clause like cl 15. That being the case, we do not think that there is truly a point of commercial significance to be resolved in FTG's intended appeal.

[15] We therefore decline leave to appeal.

[16] FTG must pay costs of \$4,500 to the respondents (to be shared equally between the first and third respondents unless they agree otherwise) as well as the respondents' usual disbursements.

Solicitors:  
Canterbury Legal, Christchurch for Applicant  
Buddle Findlay, Christchurch for First Respondent  
Meredith Connell, Auckland for Third Respondent