

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2011-404-008346
[2013] NZHC 1800**

UNDER THE Personal Property Securities Act 1999 and
 the Property Law Act 2007

IN THE MATTER of an originating application

BETWEEN PERPETUAL TRUST LIMITED
 Applicant

AND BANK OF NEW ZEALAND
 First Respondent

 DORCHESTER FINANCE LIMITED
 Second Respondent

Hearing: 10 July 2013

Appearances: B White for Applicant
 G K Holm-Hansen for Second Respondent

Judgment: 17 July 2013

JUDGMENT OF VENNING J

This judgment was delivered by me on 17 July 2013 at 12.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Buddle Findlay, Wellington
 Russell McVeagh, Wellington
 Simpson Grierson, Auckland

Introduction

[1] In its amended application Perpetual Trust Limited (Perpetual) seeks orders directing or authorising the Bank of New Zealand (BNZ) to pay Perpetual the costs it incurred in seeking to enforce Dorchester Finance Limited's (Dorchester's) obligations to it under a trust deed.

Background

[2] At all material times, Perpetual was the trustee of Dorchester's debt securities pursuant to a secured debenture trust deed (trust deed).

[3] In 1998, Dorchester took advice about a deferred repayment plan. Perpetual engaged Deloitte to provide an independent assessment of the plan. Deloitte rendered a fee, which ultimately was revised to \$177,274.69. Perpetual wanted to pay the Deloitte fee and to recover the payment from Dorchester under the terms of the trust deed. Dorchester took the view Perpetual had no obligation to pay the Deloitte fee. In a judgment delivered on 17 December 2010, this Court held, *inter alia*, that Perpetual was entitled to pay the Deloitte fee and to recover payment from Dorchester under the terms of the trust deed as a reasonably incurred expense.

[4] On or about 6 May 2011, Perpetual demanded payment of the Deloitte fee from Dorchester. Dorchester refused or failed to pay. Perpetual paid the Deloitte fee on or about 30 June 2011. On 13 July 2011, Perpetual advised Dorchester that it had paid the Deloitte fee and again made demand of Dorchester for it (plus interest).

[5] Dorchester refused to pay. Instead it responded through its solicitors by letter of 22 July 2011 noting that Dorchester was appealing the judgment and that it had paid into its solicitors' interest bearing trust account the sum representing the Deloitte fee.

[6] Perpetual then sought payment direct from BNZ by letter of 9 August 2011. The BNZ declined to make payment.

[7] Perpetual then issued these proceedings on 22 December 2011 seeking orders or directions that the BNZ reimburse Perpetual for the Deloitte fee from Dorchester's accounts held with the bank.

[8] These proceedings came before MacKenzie J for a case management conference on 23 February 2012. MacKenzie J noted that there was an appeal from the judgment of this Court to be heard very soon (in March) and that as the proceedings were opposed they could not realistically be progressed on a timeframe that would produce payment to Perpetual before then. On that basis the matter was adjourned to be called in the duty judge list a month after the scheduled Court of Appeal hearing.

[9] After the hearing on 21 March the Court of Appeal reserved its decision before ultimately dismissing the appeal on 5 June 2012.¹ Dorchester then sought leave to appeal to the Supreme Court. From time to time when the matter was called in the Duty Judge list, thereafter the proceedings were adjourned by consent.

[10] On 11 September 2012, the Supreme Court declined leave to appeal, noting that the issue at the heart of the case, namely the application of clause 6.1.3 of the trust deed was not reasonably arguable.²

[11] Following release of the Supreme Court decision, Dorchester paid the Deloitte fee in terms of the undertaking. However, it initially delayed payment of the costs in the Court of Appeal and Supreme Court until 14 February 2013 and has refused to meet Perpetual's costs in relation to these proceedings.

[12] In light of Dorchester's refusal to pay the costs of these proceedings, Perpetual filed an amended application seeking orders similar to those originally pursued save that the relief was directed at payment of Perpetual's costs in these proceedings.

[13] The costs sought as at the date of the hearing of this matter totalled \$49,670.45 made up as follows:

¹ *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226, [2012] NZCCLR 15.

² *Dorchester Finance Ltd v Deloitte* [2012] NZSC 78.

- (a) \$32,037.78 – costs of solicitors and counsel;
- (b) \$17,632.67 – being costs incurred by Buddle Findlay.

The position of the BNZ

[14] The BNZ abides the Court's decision. However it seeks costs as it was required to maintain a watching brief over the matters at issue in the proceeding. The BNZ seeks scale costs of \$1,316.00 in relation to its attendances until the decision of the Supreme Court and up until the filing of the amended application. I apprehend that it has not incurred any costs thereafter as it has been excused further attendance and has not appeared since.

The issues in this case

[15] There are two principal issues in this case. First, whether the costs Perpetual has incurred in these proceedings in relation to both the original application and amended application can be recouped under cls 6.1.3 and 6.1.5 of the trust deed. This depends upon whether the costs were reasonably incurred.

[16] Second, if the costs were reasonably incurred, whether under the terms of the trust deed, s 108 of the Personal Property Securities Act 1999 (PPSA) or s 148 of the Property Law Act 2007 (PLA), Perpetual is entitled to the orders it seeks against BNZ for payment direct from Dorchester's bank accounts with the BNZ.

[17] Dorchester's submissions focused on the first issue.

Were the costs of this proceeding reasonably incurred?

[18] Clause 6.1.3 of the trust deed provides inter alia:

6.1.3 The Company [Dorchester] shall also pay all expenses ... **reasonably incurred** by or on behalf of the Trustee in connection with ... the exercise of any power ... hereunder including the taking of any expert advice deemed necessary by the Trustee ...

(emphasis added)

[19] Clause 6.1.5 provides:

6.1.5 All expenses incurred by, payments made in the lawful exercise of the powers hereby conferred on ... the Trustee ... shall be payable on demand and shall be a first charge on the Charged Assets and form part of the Moneys and until payment shall carry interest at the highest rate per annum for the time being payable on any Security.

[20] The short point that follows is that, if the costs of this proceeding were reasonably incurred by Perpetual in seeking payment of the Deloitte fee, then Dorchester is liable for them.

[21] Mr Holm-Hansen accepted that. He submitted that this application turned on this issue of the reasonableness or otherwise of Perpetual's action in pursuing these proceedings and there was no need to consider the orders sought under the PPSA or PLA. Without conceding the point, he did not forcefully suggest that if the Court was against him on the first issue, Perpetual would not be entitled either under the terms of the trust deed or the statutory authority to require payment direct from BNZ. However, he did submit such orders would be unnecessary as Dorchester would pay any judgment for costs.

[22] Mr Holm-Hansen submitted that it was not reasonable for Perpetual to have incurred the costs of these proceedings to seek payment of the Deloitte fee, in particular because the judgment of this Court of December 2010 was not a judgment for payment of a specific sum and, in any event, before these proceedings were issued Dorchester had paid the sum representing the Deloitte fee into its solicitors' trust account pending the outcome of the appeal(s). When ultimately the Supreme Court declined leave, payment was then forthcoming in terms of the irrevocable instruction Dorchester had provided its solicitors. Mr Holm-Hansen also relied on the minute of MacKenzie J when this matter was called, and the subsequent adjournments by consent of the proceeding.

[23] Mr Holm-Hansen also made the point that, on Perpetual's analysis, Dorchester's failure to pay was a breach of the trust deed which would have entitled it, amongst other things, to have put Dorchester into receivership. Perpetual recognised that would be an unreasonable response in the circumstances. He submitted that equally, Perpetual's issuing of these proceedings was also unreasonable.

[24] Despite Mr Holm-Hansen's submissions, I am satisfied that Perpetual's actions in commencing these proceedings in the first place and then, when Dorchester failed to pay the costs of these proceedings, amending the application were reasonable. Rather, it is Dorchester's approach which has been unreasonable.

[25] While the judgment of this Court of December 2010 was not a judgment for a sum of money, the judgment declared that Perpetual was entitled to pay the Deloitte fee and to recover payment from Dorchester under cls 6.1.3 and 6.1.5 of the trust deed.

[26] When Perpetual then subsequently paid the Deloitte fee on 30 June 2011, the effect of the judgment was that Perpetual was entitled to recover the \$177,274.69 from Dorchester. In terms of the judgment and cl 6.1.5 of the trust deed, that sum was payable on demand at that time. Despite Perpetual's demand for payment, Dorchester refused to pay, choosing instead to pay the money into its solicitors' bank account. In the circumstances, given the terms of the judgment, and its rights under the trust deed, Perpetual had two choices, either to seek the reimbursement by the issue of these proceedings or to accept Dorchester's refusal to pay (without obtaining a stay) until Dorchester had exhausted its appeal rights.

[27] Dorchester was of course entitled to exercise its rights of appeal but, by failing to pay in the interim without obtaining a stay of the judgment, it took the risk that if it ultimately failed it would be liable to pay the sum and any costs reasonably incurred by Perpetual seeking to enforce its rights under the terms of the trust deed and judgment. In the absence of a Court-ordered stay, an appeal does not itself operate as a stay of the enforcement of any judgment or order appealed against.³

[28] Mr Holm-Hansen sought to justify Dorchester's failure to apply for a stay on the basis the judgment was not for a monetary sum. However, stays are not restricted to judgments for monetary sums.⁴ A stay is directed at the effect of the judgment under appeal. The effect of the judgment in the present case was that once Perpetual had paid the Deloitte fee, Perpetual was entitled to recover that sum from

³ High Court Rule 20.10(1).

⁴ *Legal Services Agency v Walker* (2006) 18 PRNZ 280.

Dorchester. Put another way, Dorchester was obliged to pay the Deloitte fee to Perpetual.

[29] Dorchester could and should have paid Perpetual the Deloitte fee when Perpetual made demand for it after paying the fee itself. But instead, Dorchester simply took the view that it would determine when it would pay the Deloitte fee.

[30] For completeness, I note that it could not be said that any substantial miscarriage of justice would have arisen if Dorchester had paid the Deloitte fee to Perpetual or that Dorchester's appeal rights would have been rendered nugatory if it was required to pay it. There is no suggestion that if ultimately Dorchester had succeeded on the appeal, Perpetual would not have been in a position to refund the money to it. No stay would have been granted.

[31] Mr Holm-Hansen next referred to the decision of *Black v ASB Bank Ltd*.⁵ In that decision the Court of Appeal identified a number of matters the Court should consider when assessing whether indemnity costs claimed under a contract were reasonable. In particular, whether the steps undertaken were reasonably necessary in pursuance of the tasks under the contract. Mr Holm-Hansen submitted it was not reasonably necessary for Perpetual to have issued these proceedings. I do not consider the *Black v ASB Bank Ltd* decision advances the issue in this case. The issue remains whether it was reasonable for Perpetual to seek to enforce its rights under the first deed, when those rights had been affirmed by the Court.

[32] I also consider Dorchester's reliance on MacKenzie J's remarks to be misconceived. The Judge's comments were made in the context of a first call of a matter of a case management conference in February 2012 with the appeal in the Court of Appeal due to be heard in March 2012. It was reasonable for the Judge to take the pragmatic position he did in the circumstances and note that matters would be resolved by the Court of Appeal decision. There is no suggestion that the Judge was dealing with Perpetual's application on its merits.

⁵ *Black v ASB Bank Ltd* [2012] NZCA 384.

[33] Nor do I consider that Dorchester is entitled to rely on Perpetual's consent to the adjournments in the duty judge list thereafter. Perpetual's consent to the adjournments was a realistic approach by it and its advisers to the practical situation they faced. If Perpetual had opposed further adjournments of the matter, additional costs would have been incurred. By agreeing to the further adjournments, given that the decision of the Court of Appeal was anticipated, and then Dorchester sought leave to appeal, Perpetual and its advisers were acting reasonably in the circumstances. However, those circumstances had been created by Dorchester.

[34] The short point is that the effect of the judgment of this Court, taken with the terms of the trust deed, meant that once Perpetual paid the Deloitte fee on 30 June 2011 it was entitled to demand payment from Dorchester. Perpetual did so. At that time, Dorchester was obliged to pay Perpetual. Dorchester refused to do so. In the circumstances, Perpetual acted reasonably in issuing proceedings to seek to recover the Deloitte fee from Dorchester.

[35] As Perpetual had acted reasonably in commencing these proceedings, when Dorchester had exhausted its appeal rights and paid the Deloitte fee it should, at that time, also have paid the costs of these proceedings to date. However, again it refused to do so. Mr Holm-Hansen submitted that Dorchester had simply played the litigation hard. It was quite entitled to do so but it must take the consequences of ultimately failing in that approach. Perpetual was entitled to pursue the recovery of those costs and to do so in the context of these proceedings by filing the amended application. The costs of these proceedings were expenses incurred by Perpetual in the lawful exercise of its powers, namely seeking to recover from Dorchester all expenses it reasonably incurred (the payment of the Deloitte fee).

[36] The first issue is determined against Dorchester. Perpetual acted reasonably in issuing these proceedings and filing the amended application when Dorchester refused to pay. Perpetual is entitled to recover the costs it has incurred in doing so from Dorchester.

Is Perpetual entitled to payment direct from BNZ?

[37] I am also satisfied that, if necessary, Perpetual is entitled to recover the costs of these proceedings from accounts held by Dorchester with BNZ. The costs may be recovered under the terms of the trust deed itself or alternatively by application of the PPSA.

[38] Clause 6.1.5 of the trust deed confirms that all expenses incurred by Perpetual in the lawful exercise of the powers conferred on it (which include in this case the expenses of these proceedings) are a first charge on the charged assets. “Charge” is defined in the trust deed as including:

a mortgage, charge (including a floating charge), lien or pledge and “charges” and “charged” bear meaning accordingly.

[39] Clause 5.1.1 of the trust deed provides:

The security constituted by this Deed shall become enforceable on the happening of any one of the following events:

5.1 Events of Default

(a) ...

(ii) If default is made in payment of any other moneys payable under this Deed for 7 days after written demand therefor.

...

[40] Clause 5.2.1 provides:

5.2 Enforcement

5.2.1 Subject to clause 5.1.2, at any time after the happening of an Event of Default the Trustee may in its discretion ...

(b) Enter upon or take possession of the Charged Assets;

(c) With or without taking possession sell (together or in parts) call in, collect and convert the Charged Assets into money on such terms and for such consideration payable in such manner as the Trustee thinks [fit] ...

AND the Trustee may compromise and effect compositions and for any purposes aforesaid, may execute and do all such assurances and things as the Trustee thinks fit.

[41] The effect of the above clauses is that Perpetual would be entitled to attach the charged assets of Dorchester, (which include its bank accounts with BNZ) for payment in order to recover the Deloitte fee from Perpetual. Perpetual's right is secured by first charge over Dorchester's assets: cl 6.1.5. When Dorchester failed to pay, that constituted an act of default under cl 5.1.1. As a result, pursuant to cl 5.2.1, Perpetual is entitled to take such action as it sees fit, including collecting and converting sufficient money from the bank accounts to meet its fee.

[42] Mr Holm-Hansen suggested that the enforcement provisions of the deed were not applicable as Perpetual had not made written demand for the costs. However, Mr Lithgow's affidavit confirms that Dorchester refused to meet Perpetual's costs. Further, Perpetual wrote on 13 July 2011 demanding payment of the Deloitte fee, some five months before issuing proceedings. In any event, service of these proceedings and the subsequent amended application would make it very clear the demand was being made.

[43] Alternatively, although it is strictly unnecessary to consider it, I am also satisfied that s 108 of the PPSA applies. That section provides:

108 Secured party may apply certain collateral in satisfaction of secured obligation

A secured party with priority over all other secured parties may apply an account receivable, investment security, money, or a negotiable instrument in the form of a debt obligation taken as collateral to the satisfaction of the obligation secured by the security interest if the debtor is in default.

[44] Perpetual is a secured creditor with first ranking priority as registered on the Personal Property Security Register. That is confirmed by the affidavit of Ms Franklin sworn in support. An account receivable is defined under s 16 of the PPSA as:

a monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance.

[45] That means and includes sums held to the debtor's account in any bank account.⁶ The money held in Dorchester's accounts of the BNZ is an account receivable, which Perpetual may take to the satisfaction of the obligations secured by the security interest given that Dorchester is in default.

[46] Mr Holm-Hansen referred to the conflicting authority on the meaning of accounts receivable in *Commissioner of Inland Revenue v North Shore Taverns Ltd (in liq)*⁷ and *Burns v Commissioner of Inland Revenue*⁸ and submitted it was not clear whether s 108 applied.

[47] However, while in the *Commissioner of Inland Revenue v North Shore Taverns Ltd* case Associate Judge Hole held the term "accounts receivable" was limited to the book debts of the company in liquidation, that is not the position suggested in *Gault on Commercial Law* and moreover was rejected by Associate Judge Gendall in the subsequent decision *Burns v Commissioner of Inland Revenue*. In *Burns*, Associate Judge Gendall considered and rejected the reasoning of Associate Judge Hole in *Commissioner of Inland Revenue v North Shore Taverns Ltd*. I note that a judgment on appeal from the decision of Associate Judge Gendall is awaited from the Court of Appeal.

[48] For present purposes, because I have found the trust deed applies it is strictly unnecessary for me to resolve the particular issue. It would be better resolved in a case where the matter has been more fully argued and is directly in point. However, for my part, I prefer the reasoning of Associate Judge Gendall in the latter decision and, if necessary would apply it.

[49] Given the above reasoning and conclusions, I have not found it necessary to consider whether s 148 of the PLA applies in this case.

⁶ Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed., Brookers) at [8A.2].

⁷ *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)* (2009) 10 NZCLC 264, 429.

⁸ *Burns v Commissioner of Inland Revenue* (2011) 10 NZCLC 264,665.

Result/findings

[50] Perpetual acted reasonably in issuing the original proceedings to recover the payment of the Deloitte fee. If anyone acted unreasonably in this case, it was Dorchester in refusing to pay the fee and seeking to set its own terms whilst it pursued its appeal rights. Dorchester must pay the consequences of that approach which, in terms of the trust deed, are solicitor/client costs on an indemnity basis.

Orders/declarations

BNZ's costs

[51] BNZ is entitled to costs from Perpetual in the sum of \$1,316.00. Dorchester is, however, to pay those costs to Perpetual, as they are an obligation incurred by Perpetual in seeking to enforce its rights under the trust deed.

[52] Dorchester is also to pay Perpetual the costs of the original application and this amended application to the date of hearing in the sum of \$49,670.45. In addition Dorchester is to pay Perpetual solicitor/client costs for the hearing before the Court on this application. For the avoidance of doubt, Dorchester is also to indemnify Perpetual for its liability to the BNZ for its costs.

[53] BNZ is entitled, either pursuant to a request from Perpetual in terms of the trust deed or pursuant to s 108 of the PPSA to apply funds held in Dorchester's accounts to meet the judgment sums due to Perpetual on receipt of a request from Perpetual for payment.

Venning J