IN THE COURT OF APPEAL OF NEW ZEALAND CA 93/81

BETWEEN NOEL MACKENZIE FREDERICK GIBSON, TERENCE REGINALD NEWTON and THOMAS McLUCKIE GRAY all of Auckland, Company Directors

Appellants

A N D ANZ BANKING GROUP (NEW ZEALAND) LIMITED a duly incorporated company having its registered office at Wellington, Banker

Respondent

Coram: Richardson J
Somers J
Casey J

Hearing: 10, 11 February 1986

Counsel: R B Stewart and R B Lange for Appellants
W M Wilson and G S A Macdonald for Respondent

Judgment: 18 March 1986

JUDGMENT OF RICHARDSON J

In a reserved judgment delivered in the High Court at Auckland as long ago as 11 May 1981 and reported at [1981] 2 NZLR 513 Holland J upheld a claim by the ANZ Banking Group (New Zealand) Limited (the bank) against the present appellants who were guarantors of debentures given to the bank by 2 associated companies, Universal Diesel Services Limited (UDS) and Auckland Commercial Vehicles Limited (ACV). The guarantors were directors of each company, Mr Newton and Mr Gray being working shareholders and Mr Gibson, the Chairman of Directors, was for

many years partner in a firm of chartered accountants, Grierson Goodaire & Partners, whose office in Auckland was the registered office of each of the companies.

The background

The debentures were entered into on 1 November 1974 in the case of UDS and 19 June 1975 in the case of ACV. They were in a standard bank form and included in clause 1 the covenant that the company "will on demand duly pay to the Bank the moneys hereby secured". Clause 20 empowered the bank by notice in writing "at any time after the moneys hereby secured become payable" to appoint a receiver. The preceding clause 19 provided that the moneys would at the option of the bank become due and payable without the necessity for any demand or notice immediately on the happening of any one or more of the specified events, all concerned with matters actually or potentially affecting the bank's security, including where the company was carrying on business at a loss and in the opinion of any officer of the bank further prosecution by the company of its business "will endanger this security" (para (q)). And clause 39 relating to service of notices provided:

> " Any notice to be given to the Mortgagor hereunder shall be deemed to be duly given if the same be in writing and be left at or sent through the Post Office addressed to the Mortgagor at the registered office of the Mortgagor or be affixed to some part of any land hereby charged or some building thereon (in the latter case to be advertised in the New Zealand Gazette) and any such mode of service shall in

> all respects be valid and effectual notwithstanding that the Mortgagor may be in liquidation or wound up and notwithstanding any other matter or event whatsoever. "

Under the guarantees, the guarantors undertook to guarantee payment by UDS and ACV of all moneys lent by the bank to the companies "and for the time being unpaid". The central issue in the case is whether at the time the bank by notice required payment from the guarantors the moneys in question were "unpaid"; that is whether they had "become payable" in terms of the debentures.

The factual background is set out in considerable detail in the judgment of Holland J. That narrative and his findings of fact were not challenged in any significant respect. That being so it is sufficient to refer quite briefly to certain facts directly relevant to certain matters in issue on the appeal.

For a period of 2 years prior to March 1979 the companies had been insolvent. There were continuing difficulties over the operation of the overdraft accounts and the bank was aware that in the latter stages rent, wages and salaries and other creditors were not paid when due. Eventually at approximately 4.30 pm on 28 February 1979 the bank officer concerned, a Mr Upson, advised Mr Gibson by telephone that the bank had waited long enough and would be acting and that on the following day formal demand requiring the repayment of the debt would be served on the companies. At a discussion 3 months previously Mr Gibson had advised Mr Upson that he was unable to

infuse further capital into the companies and in the discussion on 28 February he made no comment as to that or otherwise as to the ability of the companies to obtain the sums outstanding (some $128,000) following notice of demand the next day.

Shortly after 10 o'clock on the following morning, 1 March, the solicitor for the bank called at the registered office of the companies and served the demands for payment. When doing so he brought the demands to the attention of and explained their nature to the senior person to whom he was introduced when he asked for the partner of the firm who was secretary of both companies, and who as it happened was not in the accountancy firm's office that day. There was no evidence as to what if any steps were taken on receipt of the demands to bring them to the attention of directors of the company. What is clear is that no intimation or indication was given to the bank or its solicitor on or subsequent to service of the demands that there was any intention or present ability to meet the payment. Receivers were appointed in writing by the bank's solicitor and formal notice of their appointment signed by the solicitor was served by the solicitor at the registered office of the companies about 12.15 pm and on the guarantors personally at the companies' business premises some miles away at 12.45 pm. Again there was no intimation or indication of any willingness or ability on the part of the companies to pay the bank and thus make it unnecessary for the receivers to embark on the receivership. After the receivership had been concluded the bank claimed the deficit amounting to $145,318.45 plus interest and the costs of

recovery. At the trial Mr Gibson said he could have raised personally and within 24 to 48 hours from the making of the demands enough money from 11 or 12 sources to meet the demands.

The validity of the appointment of the receivers

The primary argument for the guarantors in the High Court and on the appeal was that the appointment of the receivers was invalid. Two grounds were advanced. The first was that service at the registered office of the companies was not an effective demand: demand could not be said to have been made until actually brought to the attention of a director or other officer of the company who could respond to the demand or until there had been a reasonable time to have it brought to the attention of any such officer. The second was that if service of the document at the registered office constituted an effective demand for payment a reasonable time for compliance with that demand had not been allowed before the receivers were appointed 2 hours later.

Service at the registered office

The submission for the guarantors was that a company can only respond to demands through its officers and as in the case of service on an individual where the notice is not served personally but left at his premises it "should be left or given in such a way that, if reasonable diligence were used, it might without subsequent delay come to his knowledge" (Massey v Sladen

(1868) LR 4 Ex 13, 17 per Kelly CB; Moore v Shelley (1883) 8 Ap Cas 285). Time should not run until the demand has come or could reasonably have come to the attention of an officer of the company.

This submission must be rejected. A limited liability company is obliged to have a registered office and s 460 of the Companies Act 1955 provides that a document may be served on a company by leaving it at that registered office. And in terms of clause 39 of each debenture any notice to the company was "deemed to be duly given if ... left at ... the registered office [of the company] ... and any such mode of service shall in all respects be valid and effectual ... notwithstanding any other matter or event whatsoever".

Service at the registered office by leaving the demand there was expressly authorised both by s 460 and by the specific provisions of the debentures. It is implicit in the section and in the debenture provisions, as it is in principle, that such service took effect as from the time the demand was left at the registered office. There is no room for adding a gloss deferring the effective time of service and to do so would be inconsistent with the recognition of the company as a separate entity, which must be taken to be present at its registered office, and would also create undesirable uncertainty. Massey v Sladen and Moore v Shelley are clearly distinguishable. Each was concerned with a debtor who was a natural person to whose attention the notice had to be brought for him to be able to make payment.

Time to comply with the demand

The second question is whether sufficient time was allowed after the demand had been made before receivers were appointed. If not then just as in the case of a seizure of the goods of a person not yet in default, a premature receivership is invalid and may give rise to a claim for substantial damages. To put the issue in terms of clause 20 of the debenture, had the moneys "become payable" when following service of the demands about 10 am the receivers were appointed and notices of demand were served on the company about 12.15 pm? It is well settled and was common ground between counsel that in providing for notice requiring payment on demand as a condition precedent to the appointment of a receiver the debenture itself required that the company be given a reasonable time to comply wth the demand for payment. That construction is reinforced where, as here, the requirement is that the company will on demand duly pay. The addition of the adverb "duly" signifies that the payment must be made according to the provisions of the law governing legal tender and at the due time. And it is only "after the moneys hereby secured became payable" that a receiver may be appointed. But the authorities are not clear as to what circumstances are relevant in determining whether the time allowed for payment was reasonable in the contractual sense.

The English cases

The question arose in 2 cases in the Court of Queen's Bench in November 1862 - Toms v Wilson 4 B & S 442; 32 LJQB 33

(affd (1863) 4 B & S 529; 32 LJQB 382) and Brighty v Norton 3 B & S 305; 32 LJQB 40. In Toms v Wilson the grantor under a bill of sale covenanted to pay the sum secured "immediately upon demand thereof in writing" and if he did not immediately upon such demand pay the money the grantees were authorised to seize the goods comprised in the bill of sale. A sheriff's officer served the demand on the grantor and immediately proceeded to seize the goods. It was held that there was no default to justify the seizure, sufficient time for compliance with the demand not having been given. Cockburn CJ said at p 453:

> " The deed must receive a reasonable construction, and it could not have meant that the plaintiff was bound to pay the money in the very next instant of time after the demand, but he must have a reasonable time to get it from some convenient place. For instance, he might require time to get it from his desk, or to go across the street, or to his bankers for it. There are other circumstances in the case. When, as here, the person making the demand is not the person entitled to the money, but his attorney, the person on whom the demand is made must have a reasonable opportunity to inquire into the authority of the person making the demand. The attorney may send a bailiff to make the demand and authorize him to receive the money, but the mere demand by that bailiff does not intimate to the plaintiff that payment to him will suffice; that fact at least ought to have been communicated to the plaintiff. And even if that fact had been communicated to the plaintiff, still, if he bona fide doubted the truth of the statement, he would have been entitled to some opportunity to inquire into its truth before the defendants would be entitled to seize his goods. "

And Blackburn J said at p 454:

> " When, by the express terms of the instrument creating the debt, payment is to be made 'immediately upon demand in writing,' it must

> be construed to mean within a reasonable time. This agrees with what is said in Com. Dig. tit. Condition (G.5): 'Where a condition is to be performed immediately, he shall have a reasonable time to perform it, according to the nature of the thing to be done. So, if it be to be performed upon demand'. "

Wightman J and Mellor J delivered short concurring judgments and the appeal to the Exchequer Chamber was dismissed without any wider discussion of the construction of the bill of sale.

In Brighty v Norton a bill of sale provided for entry and sale of goods on default in payment at the time to be appointed by notice in writing to the plaintiff and that until default the plaintiff would hold possession of the goods without disburbance by the defendant. Notice was given at 12 o'clock and in the absence of payment the goods were seized at 12.30. The jury awarded damages for wrongful seizure and one question before the Court concerned the sufficiency of the time given. That was a question of construction of the bill and as to that Blackburn J said at p 312:

> " I agree that a debtor who is required to pay money on demand, or at a stated time, must have it ready, and is not entitled to further time in order to look for it. But here the question is on a proviso in a deed, and if the intention of the parties to the deed had been to give the creditor a right to enter and seize the goods of his debtor immediately after notice to pay, it would have been very easy, by apt words, to have expressed that intention. I think the fair meaning of the proviso, as it must have been understood by both parties, is that the debtor should have so long a notice of the day or time appointed for payment as would allow him a reasonable time to get the money. I admit the difficulty of saying what is a reasonable time,

> and the risk of a jury finding that a notice was not reasonable; but that is a matter which ought to have been considered by the creditor. This being a question for the jury, they have found that the notice was not reasonable, in which I think they were right, and therefore the rule on the point reserved must be discharged. "

In Wharlton v Kirkwood (1873) 29 LT 644 where the defendant was held justified in seizing goods as soon as demand had been made under a covenant to pay "immediately on demand" there was some difference between Kelly CB and Bramwell B as to what possible steps by the debtor to obtain the funds for payment should be allowed for. After observing that a properly solvent debtor may not have a large sum of cash about him or in his house, Kelly CB went on to say (p 646):

> " A reasonable time must be allowed to the debtor, after the demand is made upon him, to enable him to get the money. Thus, in the present case, had the plaintiff been at home on the occasion in question, and had he offered the defendant a cheque for the amount, and the latter had refused to take it, and the plaintiff had then proposed to send a person to his banker to cash the cheque and bring back the money, and the creditor (the defendant) had refused to wait that interval of time, and had proceeded at once to put his bill of sale in force, such conduct on his part would, I think, have been altogether unjust and inexcusable, and could not have been justified by the terms of the agreement between him and his debtor. "

But Bramwell B said at pp 646-7:

> " Of course, time must be given to the debtor to go upstairs, or to open a desk or a drawer, or to put his hand into his pocket in order to get the money; but whether he is to have time allowed him to go to his bankers, I think is very doubtful. The bank may be half a mile off, or

> five or even ten, or any greater number of miles away, and I confess I have great doubt as to its being incumbent on the creditor, in such a case, to give the time suggested. A man lends his money in these cases on the precise and strict condition that it shall be repaid 'immediately' on demand; to that stipulation, on the part of the creditor, the debtor has agreed, and by it he is bound to stand. "

Massey v Sladen and Moore v Shelley referred to in argument are not of direct significance for while it was accepted in both those cases that the debtor must be given reasonable time to comply with the demand each turned on the fact that the demand was served at the premises of the debtor and goods there were seized in the absence of the debtor and in the absence of any opportunity to bring the demand that he pay to his attention. However, in terms of the rationale of the rule as bearing on its contemporary application there is a helpful observation by Pigott B in Massey v Sladen in which he said (p 19):

> " It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act. "

Finally in the English authorities there is Cripps (Pharmaceuticals) Ltd v Wickenden [1973] 2 All ER 606 where under a debenture providing for repayment on demand, demand was made at about 11 am and the receiver was appointed about midday. Goff J, referring to Brighty v Norton, Toms v Wilson and Moore v Shelley,

concluded at p 616 that "the cases show that all the creditor has to do is to give the debtor time to get it from some convenient place, not to negotiate a deal which he hopes will produce the money".

The Canadian cases

Canadian Courts have in recent decisions adopted a more generous view of what is comprehended within the reasonable time requirement. In Ronald Elwyn Lister Ltd v Dunlop Canada Ltd (1982) 135 DLR (3d) 1 the Supreme Court of Canada per Estey J expressly accepted the rule as enunciated by Pigott B in Massey v Sladen that the debtor must be given "some notice on which he might reasonably expect to be able to act" and went on to say (p 16):

> " The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but none the less real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment. "

Then after referring to the 19th century English cases Estey J described as a modern summation of the rule and its particular application the approach taken at first instance in Mister Broadloom Corp (1968) Ltd v Bank of Montreal (1979) 101 DLR (3d) 713 and Royal Bank of Canada v Cal Glass Ltd (1979) 18 BCLR 55. In referring to those decisions in that way the Supreme Court

must be taken to have endorsed the approach taken at first instance in those cases. In the Cal Glass Ltd case, Fawcus J accepted that the factors identified by Linden J in Mister Broadloom (at p 723) should be considered in dealing with the question of reasonable time. In the passage cited by Fawcus J Linden J said:

> " Thus, a reasonable time must always be allowed, but, in assessing what length of time is reasonable in a particular fact situation various factors must be analyzed: (1) the amount of the loan; (2) the risk to the creditor of losing his money or the security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability to raise the money required in a short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factors. "

Earlier in his judgment Linden J had observed, referring to Cripps, that the debtor does not have the right in every case to get as much time as he needs to see if he can raise the money, for if he did a demand note would be useless (p 721). But, he added (without it seems having Bramwell B's dicta in Wharlton v Kirkwood in mind) that even the strictest of the old cases permit the debtor enough time to get the money from his bank or his desk. More to the point, he observed that the earlier cases allowed for less actual time than some of the more recent Canadian cases, noting (p 722):

> " The reason for this may be the increasing complexity of arranging for the payment of large sums of money today and the additional time now required to do so. This does not mean, of

course, that a debtor is entitled as a matter of right in every demand situation to a few days to meet the demand. As is so often the case, the amount of time that will be allowed will depend on the individual circumstances of each situation. "

The Australian position

The only recent reported discussion in Australia of the question of construction involved is in Bunbury Foods Pty Ltd v National Bank of Australasia Ltd (1984) 51 ALR 609. The High Court of Australia in a joint judgment expressed the matter in this way (pp 618-619):

" It is now a well established principle of law that a debtor required to pay a debt payable on demand must be allowed a reasonable time to meet the demand. Even in a case where a deed provided that the debt was payable 'immediately upon demand thereof in writing' it was held that the provision must be given a reasonable construction so that the debtor had a reasonable time to get the money from some convenient place (Toms v Wilson (1862) B & S 442 at 453-5; 122 ER 524 at 529). This does not mean that the notice calling up the debt is invalid unless it requires payment 'within a reasonable time'. It means no more than that the debtor must be allowed a reasonable opportunity to pay before it can be said that he has failed to comply with the demand. A notice requiring payment forthwith will be regarded as allowing the debtor a reasonable time within which to comply. Until a reasonable time in the sense discussed has elapsed the creditor cannot enforce his security. As Pigott B stated in Massey v Sladen, supra, at p 19: 'It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend

> to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act' (see also at pp 17-18, per Kelly CB; Wharlton v Kirkwood, at 646, per Kelly CB; and Ronald Elwyn Lister Ltd v Dunlop Canada Ltd (1982) 135 DLR (3d) 1 at 16-17)... Upon the making of a demand the debtor has a reasonable time to obtain the money. "

I do not read the bare reference to the Lister case as implicit support for the approach taken by Linden J in Mister Broadloom and it would I think be unwise to read too much into the various expressions used by the High Court of Australia in what was clearly intended as a general statement, except to recognise that formulations such as "a reasonable time to meet the demand", "a reasonable opportunity to pay", "a reasonable time within which to comply" and "a reasonable time to obtain the money" do not necessarily posit the same inquiry.

The approach to construction

In my view the question must be approached essentially as one of interpretation of the particular debenture applying well settled principles of construction. The Court must place itself in the same factual matrix as that in which the parties were when they entered into the contract and must interpret the provision both in its context in the debenture and in the factual setting in which it was entered into. In a commercial contract of this kind the provision must be interpreted in the way businessmen would construe it when used in relation to a commercial matter of this description.

There is no evidence in this case as to the circumstances surrounding the entry into these debentures on 1 November 1974 (UDS) and 19 June 1975 (ACV). There is no specific assistance of that kind. But as Upjohn J observed in Lloyds Bank, Ltd v Margolis [1954] 1 All ER 734, 738:

> " Where there is the relationship of banker and customer and the banker permits his customer to overdraw on the terms of entering into a legal charge which provides that the money which is then due or is thereafter to become due is to be paid 'on demand', that means what it says. "

The parties could have stipulated for time to pay following service of the notice. They chose not to do so and as in many areas of commercial activity the parties were content to agree on an obligation to pay on demand without any qualification as to time and so without any delay. The language of "demand" envisages a peremptory notice unaffected by any questions as to matters personal to the debtor or creditor such as are reflected in some of Linden J's factors. And while the potential risk in some circumstances of the disappearance of assets or their seizure by other creditors during any period of delay might well be a reason for the incorporation of an obligation to pay unqualified as to time, it does not follow that the parties ever contemplated that the presence or absence of any such risk at the time of demand or the subjective expectation of risk could then be used as a factor in determining when the otherwise unqualified demand was to be met. But the parties must be taken to have accepted, particularly where the sums involved in the overdraft accommodation were likely to be substantial, that the

company would not be expected to have the money immediately to hand. Any other conclusion would also frustrate the obvious object of overdrafts in providing credit for the operation of the business.

Next, and considering the debenture as a whole, I am not persuaded that the parties would ever have contemplated that a borrower who becomes insolvent would be in any better position than a borrower who was solvent when the demand was made. The bank has an unfettered right to make demand whether the borrower is solvent or insolvent. The debenture provides for the moneys to become payable without demand in any of the situations referred to in clause 19 and thus where the debtor's solvency is in question in any of those ways. If the bank elects to make demand under clause 20 a borrower whose relative impecuniosity would take him longer to scrape up the funds than it would ordinarily take a properly solvent borrower could not be expected to have additional leeway allowed as of contractual right.

In my view the only proper justification for allowing any time for payment after the actual demand is made is the practical commercial consideration that the borrower is not expected to have large cash sums immediately at hand. However, he is expected to pay from resources which are presently accessible to him but have to be converted into immediate cash or utilised within the same time to obtain financial cover. It is the time reasonably required to achieve that, always bearing in mind that it is a demand liability which must be met. And

further time to negotiate a loan with a third party is not comprehended within that reasonable time. The test is objective and produces the certainty which commercial parties require in order to be clear from the outset as to their rights and obligations. To allow the elasticity and subjectivity inherent in the Canadian approach appears with respect to be contrary to commercial reality in this country and to lead to undesirable uncertainty to borrower and lender alike.

In this case the companies had 2 hours to obtain $128,000. Some regard may be had to the oral advice to their chairman, Mr Gibson, the previous day that formal demand would be made the next day. Even so 2 hours might on its face be an unreasonably short time in some circumstances for funds of that order to be obtained and paid over. But in this case it is abundantly clear that the companies did not have resources of that order. They could not pay from their own funds. They did not reasonably require even 2 hours for they lacked any present ability to meet the demand when it was made. The only possible source of aid to the companies which is now suggested is Mr Gibson, and to take into consideration the willingness he expressed at the trial to raise $128,000 personally and put it into the company within 24 to 48 hours would be to allow an extraneous factor to bear on the simple question whether the companies were given reasonable time following demand for the companies themselves to comply with the demand.

Breach of duty

The appellants sought to raise as a ground of appeal the contention that the bank owed a duty of care to the companies and the guarantors beyond its obligations under the terms of the debenture and that it breached that duty in 2 respects: (1) by appointing receivers when the bank considered the property and undertaking of the companies to be worthless, thereby inflicting a forced sale and exacerbating the loss to the companies and thereby to the guarantors; and (2) by failing to give notice to the guarantors of the fact of the demand on the companies before appointing a receiver and in the result diminishing the security against which the guarantors would have had recourse.

A quite different breach of duty argument was raised and rejected in the High Court. These are new points and following a preliminary argument on the hearing of the appeal we stated that we accepted Mr Wilson's submissions and were satisfied that the matters sought to be raised on this branch of the appeal could, if raised in the High Court, have been met by evidence at the trial. We accordingly refused leave to raise these new points and nothing further needs be said as to that.

Costs

The remaining ground of appeal requiring consideration is the contention that Holland J erred in awarding the bank costs on a solicitor-client basis. In the result costs payable

pursuant to the judgment were $12,459 whereas on a party party basis under the Code scale costs would have been $8,041.

Under their guarantees the guarantors undertook liability for payment of "all costs and expenses in or for which the Bank is or may become liable or may charge against the Customer including all costs and expenses (computed as between solicitor and own client) of or incidental to obtaining or enforcing or attempting to obtain or enforce payment of all or any of such moneys as aforesaid under or by virtue of this Guarantee or otherwise". Relying on that contractual obligation the bank sought judgment for "such costs and expenses as may be proven at the trial of this action to have been incurred by the plaintiff of or incidental to enforcing or attempting to enforce payment by the defendants of the moneys payable under the said guarantees". In the alternative it sought judgment in the ordinary way for the costs of the action.

It seems that there was limited argument before the Judge, as indeed before this Court. Holland J concluded that the Court's discretion as to costs under the Code of Civil Procedure could not be removed by contract and accordingly that the bank could not recover costs of the litigation by way of damages. However in the exercise of the discretion under Rule 568 and for the reasons which he gave of which the consideration that the parties had agreed that the costs would be paid on a solicitor-client basis was it seems the dominant factor, he ordered that costs be paid on that basis.

The undertaking in the guarantee for payment of costs of enforcement on a solicitor-client basis is in my view an extending provision intended to entitle the bank to indemnity with respect to legal expenses properly incurred by it in relation to recovery action under the guarantee. Clearly that contractual obligation is enforceable unless contrary to public policy and I am unable to see how this contractual arrangement could be said to impede the administration of justice or otherwise be contrary to any discernible public policy considerations. To put the point affirmatively, why should a lender be out of pocket as a result of a failure to pay when the parties have expressly provided that he should be indemnified in the event of default by the other. In a parallel situation the Property Law Act 1952 provides that in redeeming at the redemption price the mortgagor must pay the expenses already incurred by the mortgagee in connection with the intended sale (s 100) and the covenants implied in mortgages under the Fourth Schedule to that statute provide for payment of moneys arising from any sale by the mortgagee in payment of the costs and expenses incidental to the sale or otherwise incurred in respect of the mortgage (clause 8).

In Re Adelphi Hotel (Brighton) Ltd [1953] 2 All ER 498, 502 Vaisey J observed that prima facie costs are fixed on a party party basis unless the party asking for an alternative basis can show that he is entitled to it "either on some well recognised principle, or under some contract plainly and unambiguously expressed". In Canada too the authorities recognise that a

provision for payment of a mortgagee's legal costs of recovery action on a solicitor-client basis is valid and binding on the mortgagor in the absence of an overriding statutory provision, (for example Central Mortgage and Housing Corporation v Conaty (1967) 59 WWR 11 (Alberta); Central Mortgage and Housing Corporation v Johnson [1971] 5 WWR 163 (Sask); and Pope v Roberts (1979) 10 BCLR 50).

While it is not entirely clear, I read the first prayer for relief in this action as having been sought under the covenant to pay solicitor-client costs and there not in my view being any considerations of public policy precluding its enforcement, I consider that the bank was entitled to judgment for the amount of its solicitor-client costs. If I am wrong in this conclusion I am satisfied that Holland J was entitled to give the contractual stipulation the weight he did in ordering that costs be paid on a solicitor-client basis and that we would not be justified in interfering with his discretionary decision as to costs of the action under the code.

Judgment

The Court being unanimous as to the primary issue concerning the validity of the appointment of the receivers and associated issues and in accordance with the views of the majority on the question of costs the appeal is dismissed. As discussed at the hearing costs on the appeal are fixed at a lump sum and the amount fixed is $1,500 together with all reasonable disbursements to be fixed by the Registrar.

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Appellants

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Coram: Richardson J
Somers J
Casey J

Hearing: 10, 11 February 1986

Counsel: R.B. Stewart and R.B. Lange for Appellants
W.M. Wilson and G.S.A. Macdonald for Respondent

Judgment: 18 March 1986

JUDGMENT OF CASEY J

Richardson J has dealt with the facts and the relevant authorities in a way which makes it unnecessary for me to add anything to his conclusions on the question of service at the Registered Office, with which I agree. I also accept that the words "on demand" used in the debenture require that the Company be given a reasonable time to comply. I see the distinction between the English and Canadian cases as essentially that in some of the latter,

the Court has embarked on an analysis of relevant factors to determine reasonableness in the particular circumstances, without perhaps recognising the limits imposed by the peremptory nature of an "on demand" obligation. Indeed, the factors mentioned by Linden J in the Mister Broadloom case and cited at p.12 of Richardson J's judgment virtually reduce the obligation to one of making payment on reasonable notice from the creditor.

On the other hand, those English cases limiting the time for compliance to that necessary for the physical transfer of funds to the creditor can be regarded as too restrictive in modern commercial conditions. However, they do recognise the peremptory nature of the obligation and I believe that this must always be borne in mind when determining the question of a reasonable time for compliance. The remarks by Bramwell B at pp.646/7 of Wharlton v Kirkwood (1873) 29 LT 644 cited by Richardson J express what I believe to be the long-held understanding of the business community about the intent of "on demand" when used in mortgage documents - especially those in common form such as the present debenture - and in other standard financial and commercial situations:-

> "A man lends his money in these cases on the precise and strict condition that it shall be repaid "immediately" on demand; to that stipulation, on the part of the creditor, the debtor has agreed, and by it he is bound to stand."

Although the obligation there was to repay "immediately on demand", I do not think this detracts from the importance

of the fact that when the parties have agreed the money will be paid on demand, they meant it could be there when it was required. Accordingly, what is a reasonable time to effect payment must be assessed in the light of this intention. I think this kind of consideration influenced those Judges who would regard as reasonable only the time needed for the "mechanical" steps of getting the money in and paying it. This approach seems to accord better with the meaning of the words "on démand" than the more liberal view adopted by the Canadians, and also has the virtue of ensuring a degree of certainty and consistency in the interpretation of this widely used commercial expression.

I am therefore in agreement with the conclusions reached by Richardson J. It is obvious that the Company could not meet the demand from its own assets and Mr Gibson's explanation in Court of his hopes of accumulating the funds from various sources lacks conviction against the background of his earlier refusal to put more money into the Company when it was clearly needed, and the lack of any response along these lines when he was told the previous day that demand was going to be made. In these circumstances I regard the time for compliance between the giving of the notice and the appointment of the Receiver as reasonable.

I also concur in rejecting the breach of duty grounds raised by the Appellants for the first time in the appeal hearing, for the reasons stated by Richardson J.

This leaves the final ground of appeal relating to the decision by Holland J to award costs to the Bank on a solicitor/client basis, the bill to be taxed by the Registrar, in the exercise of his decision under R.568 of the former High Court Rules. The guarantee provided that the Appellants would pay on demand the amounts owing to the Bank by its customer and all costs and expenses which the Bank may charge against the latter, including "all costs and expenses (computed as between solicitor and own client) of or incidental to obtaining or enforcing or attempting to obtain or enforce payment of all or any of the moneys as aforesaid under or by virtue of" the guarantees. The Bank sought under a separate heading judgment for such costs as might be proven at the trial. In redemption or foreclosure actions between Mortgagor and Mortgagee the latter is entitled, in the absence of misconduct, to costs based upon the express or implied contract between them making the mortgage a security therefor, and not upon the exercise of the Court's discretion. (Cotterell v Stratton (1972) LR 8 Ch 205). Generally, it will be party-and-party costs only, but Vaisey J accepted in re Adelphi Hotel (Brighton) Ltd (1953) 2 ALLER 498 that this right could be enlarged if the parties have expressed themselves in plain and unequivocal language (p.502). They have done so under the guarantee. The words directly quoted above add rights to recover costs incurred under that instrument beyond the rights of recovery which the Bank had under the debenture, and which were already chargeable to the Customer. The latter are made recoverable from the guarantors by the words preceding those I have quoted. In this Court counsel

did not dispute the Judge's view that there was an agreement to pay the added costs.

Holland J thought the costs of an action can normally be recovered by a party only as a result of an award by the Court under R.555, and that "contracting out" was not permissible; he appears to have thought this contrary to public policy. He went on to say that while his discretion could not be removed by contract, a Judge could take it into account as a factor in its exercise and felt he should do so here.

Mr Lange submitted that he should not have paid regard to a contractual term which he had already found to be of no effect and, with this factor removed, there was no justification for departing from the normal rule of party-and-party costs. Even though all the defences failed, it could not be suggested they were frivolous or totally without foundation. His further submission that the Judge did not properly exercise the discretion under R.568 by fixing "a sum in full of all costs" can be dismissed with the comment that he indicated the manner in which it was to be fixed - "certum est quod certum reddi potest".

In determining whether this contractual arrangement is contrary to public policy - presumably as one tending to affect the administration of justice - one must be careful to recognise the "broad distinction between an agreement

which tends to divert the course of justice and prevent it reaching its proper goal, and an agreement which merely regulates the rights of the parties after the course of justice has reached this proper goal." - per Lawrance J in Prince v Haworth (1905) 2KB 768,770. I fail to see how such an arrangement about costs can have any adverse effect on the course of justice between these parties. There are countless occasions in which the Court has been told that no order for costs is necessary because the litigants have made their own arrangements. Whether or not it was appropriate in this case to make a separate award of costs as part of the judgment, the agreement could properly be taken into account in the exercise of the Judge's discretion to award solicitor/client costs. From information subsequently supplied by counsel, costs paid pursuant to the judgment were $12,459, while scale costs would have been $8,041. In a judgment of over $147,000, this difference is insignificant and cannot be regarded as a factor which ought to have affected the Judge's discretion. I see no grounds for interference with it by this Court, and concur in the dismissal of the Appeal.

M.G. Casey J.

Solicitors: Simpson Grierson for Appellants
Bell, Gully, Buddle, Weir for Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 83/81

BETWEEN NOEL MACKENZIE FREDERICK GIBSON TERENCE REGINALD NEWTON and THOMAS McLUCKIE GRAY all of Auckland, Company Directors

Appellants

A N D ANZ BANKING GROUP (NEW ZEALAND) LIMITED a duly incorporated company having its registered office at Wellington, Banker

Respondent

Coram: Richardson J.
Somers J.
Casey J.

Hearing: 10, 11 February 1986

Counsel: R.B. Stewart and R.B. Lange for Appellants
W.M. Wilson and G.S.A. Macdonald for Respondent

Judgment: 18 March 1986

JUDGMENT OF SOMERS J.

The obligation of a surety or guarantor is to see that the debtor keeps his promise to the creditor. It is not an obligation to pay money to the creditor and he is not entitled to notice of the debtor's default. If the guarantor fails to have the debtor carry out his obligation to the creditor he is liable in damages to the creditor. All this is discussed in Moschi v. Lep Air Services Ltd. [1973] A.C. 331. The contracts between the three appellants and the respondent Bank in the instant case

modify some of those concepts but not so far as to render the transactions something other than guarantees.

The appellants contracted to 'guarantee the payment' by the two debtor companies Universal Diesel Services Ltd. and Auckland Commercial Vehicles Ltd. of all moneys lent by the Bank to the companies 'and for the time being unpaid'. The guarantees are expressed to be 'upon service upon the Guarantors of the Bank's written request for payment'. It is not disputed that such notices were given. But it is said that at the time of their service no moneys were 'unpaid' by the debtor companies - that they were at that time under no obligation to repay. The issue in the case therefore is whether the moneys owing by the companies to the Bank had become payable to the Bank by the time the requests were served on the guarantors. As the Bank's right to appoint receivers depended on the same considerations the case was argued as if the issues were whether the receiver was lawfully appointed.

Each debenture contained a covenant by the Company with the Bank that the company 'will on demand duly pay to the Bank the moneys hereby secured'. Each also contained an agreement that 'at any time after the moneys hereby secured become payable' the Bank might appoint a receiver.

It is well settled that the obligation to pay on demand does not arise eo instanti on the making of the demand. On any rational construction of such a promise the debtor must be

allowed a reasonable opportunity to pay before he can be held to have failed to comply with the demand. And until that reasonable time has elapsed the creditor may not enforce his security. What is a reasonable time must depend upon the circumstances. This has been so stated in many cases. Thus Pigott B. in Massey v. Sladen (1868) L.R. 4 Ex 13, at p.19, said -

> It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and the relationship of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one.

And earlier still in Comyn's Digest title Condition (G.5) -

> Where a condition is to be performed immediately, he shall have a reasonable time to perform it according to the nature of the thing to be done. So, if it be to be performed on demand.

The point has been referred to in many cases including Brighty v. Norton (1862) 3 B. & S. 305; Toms v. Wilson (1862) 4 B. & S. 442, (1863) 4 B. & S. 455; Wharlton v. Kirkwood (1873) 29 L.T. 644; Cripps (Pharmaceuticals) Ltd. v. Wickenden [1973] 2 All E.R. 606; Bunbury Foods Pty. Ltd. v. National Bank of Australasia (1984) 153 C.L.R. 491; the Canadian cases mentioned in the judgment of Richardson J; and Feltex New Zealand Ltd. v. Nielsen Property Management Ltd. [1974] 2 N.Z.L.R. 292. In Toms v. Wilson (1863) 4 B. & S. 442 at 453 Cockburn C.J. in relation to money demanded referred to 'a reasonable time to get it from

some convenient place. For instance he might require time to get it from his desk or to go across the street to his bankers for it'. In Wharlton v. Kirkwood (1873) 29 L.T. 644, 646 Bramwell B. doubted whether it was incumbent on a creditor to give time to the debtor to go to his bank to get the money. And in the Cripps case [1973] 2 All E.R. 606 at 616 Goff J. said that 'the cases show that all the creditor has to do is to give the debtor time to get it from some convenient place not to negotiate a deal which he hopes will produce the money'.

I would regard the instances given by Cockburn C.J. in Toms v. Wilson (supra) as but examples of the general principle that a debtor is to have a reasonable opportunity to pay. Modern documents fall to be interpreted, and what is a reasonable time to be decided, against the background of modern business practice and conditions. Thus a solvent company bound by its contract to pay $1m. to its bankers on their demand must surely be expected to have time to resort to other bankers or persons lending such sums at short notice. I do not consider that any more finite statement can or should be made than that the debtor must have a reasonable opportunity to pay and that what is reasonable will depend on the circumstances.

In the instant case notice was served at the registered offices of the companies. This accords with the agreement between the Bank and each of the companies. Each company must be understood by that arrangement to have accepted that a demand so served would promptly reach those called upon to make decisions. I do not think it can be heard to say that its

controlling officers did not receive the document until some much later time. The case is distinguishable from that of an individual required to meet a demand. Here it is the company which is liable and has received the notice - its mode of control and management are a matter for its directors.

Nor do I think the time allowed by the Bank was unreasonable. The companies were clearly insolvent. There were moneys owing for rent, salaries and wages, and on creditors accounts. Notice of the Bank's intention to demand had been given the previous afternoon. The company was never able to meet the demand. The suggestion was made in evidence at the trial that one of the guarantors may have advanced the money to the companies had there been more time. But it was not made when notices of appointment of receivers and notices to the guarantors were given and should be disregarded.

In all the circumstances I am of opinion that the companies were given a reasonable time to pay and not having done so were in default when the various subsequent notices were served.

The remaining question is whether the judge was right to allow the costs of the action on a solicitor and client basis. He was moved to do so because he considered the guarantors had agreed with the Bank, albeit in his opinion unenforceably, that they would be so liable.

The guarantors' undertaking about costs, extracted from

the lengthy provisions of clause 1 of the guarantees, is in these terms -

> 1. The Guarantors hereby guarantee the payment by the Customer to the Bank upon service of the Bank's written request for payment...of all...money loans and advances heretofore lent or made by the Bank...or which may now or hereafter be lent or made by the Bank to or for the use or accommodation of the customer...And also all Bank charges or commissions and all costs and expenses in or for which the Bank is or may become liable or may charge against the Customer including all costs and expenses (computed as between solicitor and own client) of or incidental to obtaining or enforcing or attempting to obtain or enforce payment of all or any such moneys as aforesaid under or by virtue of this Guarantee or otherwise.
>
> (The emphasis is mine)

I am of opinion that the appellant guarantors did not ever undertake to pay the solicitor and client costs of an action against them by the Bank. The contract which they entered into was a contract of guarantee. It included a guarantee of costs and expenses the Bank might charge against the companies 'including' solicitor and own client costs in the enforcement or attempted enforcement of payment of 'all or any such moneys as aforesaid.' If the clause had stopped at that point there could be no doubt that the guarantee was intended to extend to costs reasonably incurred by the Bank in endeavouring to recover moneys against the companies but no further.

The question then is whether the further words 'under and by virtue of this guarantee or otherwise' constitute an original or independent promise by the guarantors to pay costs

as between solicitor and client in any proceedings against them to enforce the guarantee. As the operative words of obligation which govern the whole phrase are 'guarantee the payment by the Customer to the Bank' I am of opinion that there was no such independent agreement by the guarantors as was contended for by the Bank. That the Bank at least understood the difference between guarantee and indemnity is shown by Clause 17 of the printed form of guarantee.

In its statement of claim the Bank pleaded an agreement by the guarantors to pay to it 'all costs and expenses (computed as between solicitor and own client) of or incidental to obtaining or enforcing or attempting to obtain or enforce payment of all or any [the] moneys...under or by virtue of' the said guarantee. The relief prayed by the Bank against the guarantors included judgment 'for such costs and expenses as may be proven at the trial of this action to have been incurred by the plaintiff of or incidental to enforcing or attempting to enforce payment by the defendants of the moneys payable under the said guarantees.' The Bank also claimed the costs of the action. The use under the first head of the words 'proven' and 'to have been incurred' and the simple claim for the costs of the action lead me to doubt whether the Bank was claiming more than party and party costs of the action.

Ordinarily, even in a mortgagee's suit, costs are to be taxed as between party and party and not between solicitor and client: see The Kestrel (1866) L.R. 1 A. & E. 78; Re Adelphi Hotel (Brighton) Ltd. [1953] 2 All E.R. 498. If more than that

is sought it must be shown by the party claiming that he is entitled to it "either on some well recognised principle or under some contract plainly and unambiguously expressed." (per Vaisey J. in Re Adelphi Hotel (Brighton) Ltd. at p.500). No such contract has been shown by the Bank in the instant case and no recognised principle was suggested.

I would dismiss the appeal in so far as it relates to the validity of the Bank's request for payment from the guarantors; I would allow it in so far as it relates to the award of costs as between solicitor and client.

Solicitors -

Simpson Grierson, Auckland, for Appellants
McElroy Duncan & Preddle, Auckland, for Respondent