IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-003112

BETWEEN	FOUNDATION CUSTODIANS LTD Plaintiff
AND	LEA THORNTON First Defendant
AND	LEA THORNTON AND ITL TRUSTEES 2006 LTD AS TRUSTEES OF A TRUST CALLED THE MABAGO FAMILY TRUST Second Defendants

Hearing: 27 October 2009

Appearances: F B Collins for Plaintiff
W D McKean for ITL Trustees 2006 Ltd

Judgment: 2 November 2009 at 4:30 pm

JUDGMENT OF WHITE J

This judgment was delivered by me on 2 November2009 at 4:30 pm pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Date: ……..

Solicitors:
Gibson Sheat (EMS Cox/F B Collins), Private Bag 31 905, Lower Hutt 5040
Webb Ross (W D McKean), Private Bag 9012, Whangarei 0140

[1] In April 2006 Mallet Angelo Quinn Ltd, a firm of chartered accountants practising in Whangarei, incorporated ITL Trustees 2006 Ltd (ITL) as a professional corporate trustee to act as a trustee for clients who settled trusts. ITL is a bare trustee and has no assets or liabilities. Its capital is limited to 100 $1.00 shares. ITL is a professional corporate trustee for three separate trusts, including the Mabago Family Trust.

[2] Ms Lea Thornton and ITL, as trustees of the Mabago Family Trust, were registered as proprietors of Lot 9, Muritai Road, Parua Bay, Whangarei (the property).

[3] In February 2007, on the basis of a valuation of the property for lending purposes with a land value of $350,000, Foundation Custodians Ltd (FCL) made a loan facility of $653,054.40 available to Ms Thornton personally and the trustees for the purchase of the land ($292,774.40) with the balance ($360,280.00) available for construction of a dwelling house.

[4] The terms of the loan facility were contained in FCL's standard printed Loan Agreement dated 27 February 2007 and executed by Ms Thornton personally and the trustees, with ITL described as "ITL Trustees 2006 Limited (LLT)". The loan was secured by a first mortgage to FCL registered against the title to the property on 18 April 2007.

[5] From December 2007 Ms Thornton and the trustees defaulted on the monthly interest payments due under the Loan Agreement. In March 2009 FCL issued demands under s 119 of the Property Law Act 2007. The demands expired on 29 April 2009.

[6] FCL exercised its power of sale under the mortgage and the property was sold at auction on 15 May 2009 for $124,000.

[7] FCL then issued proceedings for summary judgment against Ms Thornton and the trustees for $559,110.46, being the balance owing under the Loan

Agreement. Summary judgment was entered against Ms Thornton personally on 24 July 2009 by Associate Judge Doogue for $451,959.89 plus interest and costs.

[8] The issue now is whether summary judgment should also be entered against ITL. The issue arises because clauses 10.10 and 10.11 of the Loan Agreement provide:

> **10.10 Loans to trustees**
>
> If you have entered into this contract as a trustee of any trust, you are liable under this contract in your own right and as trustee of the trust. Accordingly, we can recover against your personal assets as well as the trust assets. You must not change a trustee, terminate the trust, or change any terms of the trust without our consent.
>
> **10.11 Limited liability trustees**
>
> If any one of you is a trustee and is named in this contract as a limited liability trustee then, despite what we say in clause 10.8 [sic], we agree that the liability of the limited liability trustee under this contract and under any Security or under any Guarantee is not personal and unlimited but will be limited to an amount (the "limited amount") equal to the value of the assets of the trust under which the limited liability trustee has entered into this Agreement. However, if the right of the limited liability trustee to be indemnified from the assets of the trust has been lost and, as a result, we are unable to recover the limited amount from the limited liability trustee then the limitation of liability under this clause does not apply.

[9] FCL originally relied on the second sentence in clause 10.11 to submit that, with the mortgagee sale, ITL, as a limited liability trustee, had "lost" the right to be indemnified from the assets of the trust and was therefore no longer entitled to the limitation of liability contained in the first sentence of clause 10.11. At the hearing of the application, however, FCL accepted the submission for ITL that the loss of the right to be indemnified from the assets of the trust under the second sentence would occur only in the event of a breach of trust by ITL. FCL therefore argued instead that, in terms of the first sentence of clause 10.11, ITL was liable either for $350,000, being the value of the property at the time of the Loan Agreement, or $124,000, being the price obtained for the property on the mortgagee sale. It was acknowledged by counsel for FCL that either way FCL's statement of claim would need to be amended in several respects.

[10] Faced with this new argument, ITL submitted that its liability under the first sentence of clause 10.11 was limited to $124,000, but, as that amount had been recovered by FCL, no loss had in fact been incurred by FCL so it was not entitled to judgment.

[11] In the context of an application for summary judgment under r 12.2(1) of the High Court Rules, the issue is whether, applying the appropriate principles, FCL is able to satisfy the Court that ITL has not raised any arguable defence to its claim. If it is able to do so, summary judgment should now be entered in FCL's favour. If, however, ITL has raised an arguable defence, FCL's entitlement to judgment must be determined in the usual way at trial.

Relevant principles

[12] The principles which apply to an application for summary judgment have been clearly established through decisions of the Court of Appeal in cases such as *Pembroke v Chappell* [1987] 1 NZLR 1, *Grant v New Zealand Motor Corporation Ltd* [1989] 1 NZLR 8, *Westpac Banking Corporation v M M Kemble New Zealand Ltd* [2001] 2 NZLR 298 and *Jowada Holdings Ltd v Cullen Investments Ltd* CA 248/02 5 June 2003.

[13] For present purposes the relevant principles may be summarised as follows:

a) The onus is on FCL to convince the Court that ITL has no arguable defence.

b) To avoid summary judgment being ordered, ITL needs to raise an issue of fact or law requiring determination at trial.

c) If a genuine issue of fact is raised, the Court is unlikely to enter summary judgment.

d) If a clear-cut issue of law is raised which does not require findings on issues of fact, the Court may determine the issue of law on the summary judgment application.

e) If an issue of law is not clear-cut and involves a novel or developing point, the context provided by a trial may be necessary to give the Court sufficient perspective to determine the issue.

[14] Counsel for the parties in the present case accepted that these were the relevant principles which the Court should apply here.

The approach to the interpretation of clause 10.11

[15] This case turns on the interpretation of clause 10.11 of the Loan Agreement.

[16] The parties were in agreement that the correct approach to the interpretation of clause 10.11 is that mandated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 HC at 912-913 and adopted by the Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.

[17] Lord Hoffman summarised the principles of contractual interpretation as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal

> interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. ...

[18] Lord Hoffmann has subsequently explained that his reference to the "matrix of fact" as including "absolutely anything" meant anything a reasonable person would regard as relevant: *Bank of Credit & Commerce International SA v Ali* [2001] 1 All ER 961 at 975.

[19] It is important to note that the factual matrix includes anything that would have affected the way in which the language of the document would have been understood by a reasonable person, but excludes from the admissible background the previous negotiations of the parties and their declarations of subjective interest. The subsequent conduct of the parties, if it is shared or mutual, may, however, be taken into account in interpreting a contract so as to give effect to the common intention of the parties: *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277 (SC).

[20] As is pointed out in Burrows, Finn & Todd *Law of Contract in New Zealand* (3 ed, 2007) at 162, the factual matrix may include: the nature of the industry or market concerned and the practices adopted by it; the history of dealings between the parties; the relative states of knowledge and experience of the parties; the legal background; the origins of the contract; particular concerns and needs of the parties;

other interconnected contracts or sub-contracts; and "the commercial purpose" of the contract.

[21] In the context of a summary judgment application of this nature the matters constituting the relevant factual matrix are unlikely to be disputed by the plaintiff because if there are relevant aspects of the factual matrix genuinely in dispute, which would affect the interpretation of the contract, the case would need to proceed to trial for those questions to be determined. This means that in a case such as this, if the summary judgment application is to be pursued, the plaintiff will normally need to accept the factual matrix put forward by the defendant.

The relevant factual matrix

[22] In the present case, for the purposes of the summary judgment application and reserving the position if the case proceeds to trial, counsel for FCL was prepared to accept that the following matters constituted the relevant factual matrix for the interpretation of clause 10.11:

a) While FCL had no notice of the terms of the Mabago Family Trust, the liability of ITL as trustee was limited to the assets of the trust.

b) ITL, with a capital of only $100, was a bare trustee without any ability to repay the loan itself. It was a corporate professional trustee.

c) Consistent with ITL's position as a bare trustee, it was named in the Loan Agreement as a limited liability trustee. FCL accepted, at least for present purposes, that the description of ITL in the Loan Agreement as "ITL Trustees 2006 Limited (LLT)", was sufficient to meet this requirement of clause 10.11, i.e. "LLT" stood for "limited liability trustee".

d) While FCL disputes the relevance of this point, if there had been any intention for ITL to repay the loan itself, it was likely that FCL would have investigated ITL's position, but it did not do so.

e) The director's certificate from ITL to FCL included a handwritten note that –

> It is agreed the advance is made between the lender and the trustee of Mabago Trust, not to the trustees in their individual capacity.

f) The authority from ITL to FCL to register the mortgage over the property stated:

> confirm that if I have been named as a limited liability trustee in the Loan Agreement that I am entering into the mortgage on the understanding that your recourse against me is limited and that the provisions of clause of the General Terms and Conditions that limit your rights against me also apply to my liability to you under the mortgage.

g) The parties entered into the Loan Agreement in light of well-established legal principles relating to the personal liability of trustees.

The personal liability of trustees

[23] Counsel for the parties agreed that clause 10.11 of the Loan Agreement needed to be interpreted in light of the well-established principles relating to the personal liability of trustees. These principles have been summarised recently in *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506 at [34]-[41], *Sovereign Homes Ltd v Meurant* HC AK CIV-2006-404-7394 15 May 2007 at [17]-[24] and *Jacques v UDC Finance Ltd* HC WN CIV-2008-404-2521 4 May 2009 at [10]-[12].

[24] The well-established principles are:

a) A trustee is personally liable for all debts incurred in the conduct of a trust, and the personal assets of the trustee are available to meet the liabilities of the trust.

b) A trustee will normally have indemnity in the first instance from the assets of the trust in respect of liability in a trust transaction: Trustee Act 1956, s 38.

c) Trustees may avoid personal liability for the debts of the trust under a contract with a third party if their liability is expressly limited to the assets of the trust and their personal liability is expressly excluded by the terms of the contract. The need for an express provision in the contract arises because there is a presumption in favour of personal liability**:** *NZHB Holdings Ltd v Bartells* at [41] per Baragwanath J.

d) Whether the personal liability of a trustee has been excluded will depend on the language of the particular contract. In *NZHB Holdings* the following language, quoted at [10] and [42], was sufficient to exclude liability for an independent trustee but not for anyone else:

> Persons, except independent trustees, who sign this document shall at all times remain personally liable for all obligations of the persons on whose behalf they have signed. An independent trustee is a person who is not a settler of the trust or has no rights to an interest in or assets of the trust except as a trustee of the trust.

As Baragwanath J also pointed out in *NZHB Holdings* at [43]:

> It is common for contractual language, like that of a statute, to offer more than one possible literal meaning. In that event a major consideration is what construction best conforms with settled legal principle and settled commercial practice and thus suggests the meaning most reasonably to be ascribed to contracting parties.

e) A trustee's right to be indemnified from the assets of the trust may be lost if the trustee breaches duties owed to the trust: Butler (ed) *Equity and Trusts in New Zealand* (2 ed, 2009) at 449-451; *Laws NZ*, Trusts Reissue 1, at paras 439, 455 and 459.

[25] The wording of contractual provisions designed to limit the personal liability of a trustee will vary considerably from contract to contract. Mr K R Ayers in an

article "Limiting trustees' liability to lenders" (1996) NZLJ 181 at 183 identified three fundamentally different types of trustee limitation clauses:

> (a) The personal liability of the trustees shall be restricted to a fixed sum eg "Despite any other provision of this document the amount of liability of the mortgagor under this document shall be limited to $100,000". This type of clause is normally only found in guarantees.
>
> (b) The secured creditor shall look only to the charged property for payment.
>
> This type of clause is quite straightforward in both its drafting and effect. By way of example refer *New Zealand Forms and Precedents* form 32.21 (although note the difficulty there involved in the concept of liability being "limited to the land mortgaged" rather than to its value or the net proceeds of its sale). See also form 32.23. In practice, however, such clauses are unlikely to be attractive to lenders who will normally expect all the assets of the trust to be available to meet any liability arising in relation to a loan made to, or at the request of, the trustees.
>
> (c) The secured creditor shall only have access to the assets of the trust to meet the trustees' liability.
>
> This last type of clause is the one most likely to be acceptable to secured lenders dealing with trustees.

The interpretation of clause 10.11

[26] Turning now to the interpretation of clause 10.11 in the Loan Agreement in the present case in light of the relevant factual matrix and the well-established legal principles, there are a number of points to note.

[27] First, clause 10.11 was obviously designed to limit the liability of "a limited liability trustee" named in the contract. Without the limitation of liability conferred by clause 10.11, the liability of "a limited liability trustee" would be unlimited and would extend to the personal assets of the trustee as stipulated in clause 10.10. The cross-reference in clause 10.11 to "clause 10.8", rather than to clause 10.10, was clearly an error.

[28] Secondly, clause 10.11 constituted an express limitation on the liability of "a limited liability trustee" named in the contract. It stipulated that the liability of the limited liability trustee under the contract was:

> "not personal and unlimited ..."

The ordinary and natural meaning of these words excluded both "personal" and "unlimited" liability for the limited liability trustee. Unlimited personal liability was expressly excluded in accordance with the requirements of the applicable legal principles.

[29] Thirdly, the express exclusion of unlimited personal liability was then qualified by the succeeding words in the first sentence of clause 10.11:

> but will be limited to an amount (the "limited amount") equal to the value of the assets of the trust under which the limited liability trustee has entered into this Agreement.

This qualification to the express exclusion of unlimited personal liability clearly reintroduced an element of liability. Two questions were raised in the course of argument, however, as to the nature and scope of this qualification to the express exclusion of unlimited personal liability:

a) Did it reintroduce a level of personal liability (an amount equal to the value of the assets of the trust) in the event that the assets of the trust were insufficient to meet the debt under the contract (the argument for FCL) or did it simply record the position at law following the exclusion of unlimited personal liability that the creditor would have access only to the assets of the trust to meet the trustee's liability (the argument for ITL)?

b) In either case was the level of liability (i.e. the value of the assets) to be fixed at the time of the execution of the contract or was it to be determined at the time payment was required under the contract? Here FCL argued that the value of the assets should be fixed at the time of the execution of the contract (i.e. $350,000), but as a fallback position acknowledged that the Court might decide that the value

should be fixed at the time payment was required (i.e. $124,000). ITL argued that the correct interpretation required the value to be fixed at the latter time so that the correct figure was $124,000 and as that amount had been recovered by FCL on the mortgagee sale there was no entitlement to recovery from ITL under clause 10.11. FCL responded that, having sold the property at mortgagee sale for only $124,000, it had incurred a loss under the contract which it was entitled to recover from ITL under clause 10.11.

[30] The best argument for FCL is that if the parties had intended not to reintroduce an element of personal liability for the limited liability trustees they could and should have made that clear. Instead clause 10.11 refers to "an amount ... equal to the value of the assets of the trust". Whenever that amount is fixed, it is a fixed sum and therefore within Mr Ayers' first category. If this outcome had not been intended, the clause should have referred simply to "the assets of the trust".

[31] It seems to me, however, that, adopting the approach mandated by Lord Hoffmann in *Investors Compensation Scheme Ltd* and Baragwanath J in *NZHB Holdings*, there are a number of difficulties with FCL's approach. A reasonable person looking at clause 10.11 in light of the relevant factual and legal matrix would recognise that:

a) The purpose of clause 10.11 was clearly to remove any element of personal liability otherwise imposed on a limited liability trustee by clause 10.10. By definition a limited liability trustee will be a professional trustee and would not be expected to have recourse to its assets, if any, to meet the liabilities of the trust. Imposing personal liability on a limited liability trustee such as ITL, which had no assets, would therefore normally be pointless.

b) The purpose of clause 10.11 emerges clearly from the express exclusion of "personal and unlimited liability". Having expressly excluded personal liability, it would be strange to reintroduce it at all, especially in an uncertain manner and to an uncertain extent.

c) The second sentence of clause 10.11 reinforces the view that the intention was to exclude all personal liability by limiting the limited liability trustee's liability to the assets of the trust because it states:

> However, if the right of the limited liability trustee to be indemnified from the assets of the trust has been lost ...

This suggests that the qualification to the exclusion of unlimited personal liability was intended to extend only to the right to be indemnified from the assets of the trust in accordance with established legal principles.

d) The second sentence imposes personal liability on the limited liability trustee when the limited liability trustee is personally in breach of its trust obligations and that breach causes loss under the contract. In that situation personal liability would be appropriate.

e) In the context of clause 10.11 it therefore does not make sense to interpret the reference to "an amount ... equal to the value of the assets of the trust" as suggesting that the limited liability trustee is liable for anything beyond the assets of the trust from which, in accordance with well established principles (and the Mabago Family Trust deed), it would be entitled to indemnity. The reference to "an amount ... equal to the value" was not intended to reintroduce an element of personal liability.

[32] FCL's decision, conveyed at the hearing, not to pursue its original submission that, with the mortgagee sale, ITL had "lost" the right to be indemnified from the trust assets was understandable. If FCL were right and the sentence applied to re-impose unlimited personal liability on ITL in the event of any inadequacy in the assets of the trust to meet the debt owed to FCL, it would mean in practical terms that the express exclusion of unlimited personal liability by the first sentence of the clause had no effect and was in fact meaningless. This would not have been the intention of the parties.

[33] ITL's interpretation of the second sentence makes sense for other reasons as well. It is consistent with the express reference to losing "the right" to be indemnified from the assets of the trust. The "right", which belongs to ITL as a limited liability trustee, would only be lost in the event of its breach of trust and the imposition by the law of personal liability. In the absence of a breach of trust, the trustee would not lose its "right" of indemnity. The fact that the assets of the trust are not sufficient to meet the indemnity does not mean that the trustee has lost the "right" to be indemnified. There are simply insufficient assets to satisfy the indemnity.

[34] The reference in the latter part of the second sentence of clause 10.11 to the "result" for FCL is also consistent with this interpretation. If the trustee's breach of trust adversely affects the value of the trust assets and precludes the trustee from indemnity from the assets, then FCL would be unable to recover the limited amount from the trustee (ITL) and the removal of the personal liability exclusion would make sense.

[35] For these reasons I do not accept the argument for FCL as to the interpretation of clause 10.11. The purpose of the clause was to exclude any element of personal liability for a limited liability company such as ITL, not to impose such liability. The language of clause 10.11 should be interpreted in a manner which implements and achieves that purpose.

[36] Furthermore, as counsel for FCL acknowledged, if there were any doubt involved in the interpretation of clause 10.11 that doubt would need to be resolved against FCL, which had prepared the Loan Agreement, in favour of ITL: *Chitty on Contracts* (30 ed, 2008) Vol 1 at 858-860.

[37] The resolution of a doubt in this way is particularly apposite when the second question relating to the time for fixing the value of the assets under clause 10.11 is considered. The question whether the value of assets in a trust should be ascertained in that context at the date of the document containing the clause limiting liability or at the date of its enforcement was also considered by Mr Ayers in "Limiting trustees' liability to lenders" (1996) NZLJ 181 at 183-184:

> In some limitation clauses reference is made to the trustees' liability being in relation to the assets of the trust "from time to time" which expression is normally taken to mean at the time payment under the relevant document is required of the trust.
>
> From the lender's viewpoint often the only time it will be practicable for the lender to ascertain the extent to which the trust assets could meet liability under the relevant document will be at the time it is executed. On the other hand the trustee will not want, in effect, to guarantee the minimum value of the trust assets in the future and down to the date of actual repayment of the liability form trust assets. Most lenders seem to implicitly take the view that because they do not normally insist on a borrower keeping assets of a certain value (outside the specialised area of commercial securities) they should not impose a more stringent requirement on a trustee. If a date other than that of inception of a loan is to be chosen as the date on which the extent of the liability of the trustee is to be fixed by identifying the assets of the trust at that time then the other options are to either use the date on which some form of notice is given by the lender to the trustee (which could be constituted by service of proceedings claiming repayment of the amount borrowed from the lender) or the date on which judgment is obtained against the trustee in relation to the debt. It is therefore highly desirable to be totally specific as to which of these dates are to be used as the date on which the assets of the trust are to be ascertained.

[38] Clause 10.11 in the present case does not contain a specific date for the valuation of the assets of the trust in the form which Mr Ayers suggests would be appropriate. Instead it states:

> liability ... will be limited to an amount (the "limited amount") equal to the value of the trust under which the limited liability trustee has entered into this Agreement.

It was argued for FCL that the words "has entered into" meant that the date for the valuation was the date of the Loan Agreement. I do not agree with this argument because the subject of those words is "the trust under which ...", i.e. the Mabago Family Trust. The words do not refer to or incorporate the date of the Loan Agreement.

[39] I agree with the argument for ITL that the important words are that "liability ... will be limited", i.e. in the event that at some future date the issue of liability arises it "will be limited" to the value of the assets of the trust at that time. This interpretation makes sense because, in the absence of a specific date in clause 10.11, it would normally be expected that changes in the value of the assets, either way, after the date of the Agreement should be reflected in the amount of the trustee's limited liability. As Mr Ayers pointed out, the trustee would not want to guarantee

the minimum value of the trust assets as at the date of execution of the document. The lender would also wish to ensure that any increase in the value of the trust assets over time was available to meet any liability under the loan contract.

[40] Again, as counsel for FCL acknowledged, if there were any doubt remaining on the date of valuation issue it too would be resolved against FCL and in favour of ITL.

[41] This means that in terms of clause 10.11 the liability of ITL was limited to the value of the assets of the Mabago Family Trust at the time of the enforcement by FCL of its mortgage security over the property. With the mortgagee sale of the property for $124,000, ITL's potential liability under clause 10.11 would have been limited to that amount, but because FCL in fact received that amount on the mortgagee sale ITL's potential liability was extinguished. FCL had no entitlement under clause 10.11 to recover that amount from both the sale of the property and from ITL because to do so would impose personal liability on ITL, contrary to the interpretation of clause 10.11 which I have favoured.

Conclusion

[42] For these reasons, which are based on the factual matrix that FCL was required to accept for the purposes of its summary judgment application, I have concluded that FCL has failed to convince me that ITL has no arguable defence to its claim. On the contrary, ITL has satisfied me that it has a good defence to the claim based on the interpretation of clause 10.11 which I have favoured in this judgment. It will now be necessary for FCL to decide whether it wishes to amend its statement of claim, which it acknowledged would be necessary in any event, and to proceed to trial on the basis that it proposes to adduce evidence establishing a different factual matrix for the interpretation of clause 10.11.

[43] In the meantime FCL's application for summary judgment is dismissed.

Costs

[44] Costs are reserved: *Air Nelson Ltd v Airways Corporation of New Zealand Ltd* (1992-93) 6 PRNZ 1 (CA).

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D J White J