IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-004784

BETWEEN	SPANBILD HOLDINGS LIMITED Plaintiff
AND	CRAIG ALEXANDER URQUHART AND DAVID JOHN MILLER First Defendants
AND	CRAIG ALEXANDER URQUHART Second Defendant

Hearing: 19 May 2009

Counsel: B A Scott for plaintiff
R P Lewis for defendants

Judgment: 4 December 2009 at 5:15pm

JUDGMENT FOR ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 4 December 2009 at 5:15pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Chapman Tripp, PO Box 2510, Christchurch 8140 for plaintiff
Rodney Lewis Law, PO Box 591, Hamilton 3240 for defendants

[1] The plaintiff, Spanbild Holdings Limited (Spanbild), has applied for summary judgment against the defendants for what it says is their share of a debt for which they are all liable as co-guarantors.

[2] The parties are shareholders in a finance company, FINCO Holdings Limited (FINCO). Spanbild purchased 50% of the shares in FINCO from the defendants (the defendants between them hold the other 50%). FINCO obtained banking facilities up to a total amount of $12,435,000 from ANZ National Bank Limited. Spanbild and the defendants gave separate guarantees of FINCO's obligations under the facilities. Each guarantee was limited to $6,000,000 plus interest and costs, reflecting their respective shareholdings.

[3] In late 2007 FINCO decided to wind down its loan book and approached ANZ about reducing its facility. ANZ offered a new facility conditional on the level of shareholders' equity in FINCO being improved (ANZ was concerned about deterioration of FINCO's loan book). After the defendants said that they were not in a position to contribute any money, Spanbild told FINCO's directors that it would provide the necessary funds. Before any money was advanced ANZ made demand on the parties under their guarantees. The following day Spanbild paid $1,218,000 into FINCO's bank account. The money was applied by ANZ in reduction of FINCO's indebtedness.

[4] At the time Spanbild acquired its shares in FINCO, it entered into a shareholders agreement with the defendants. Spanbild contends that it is entitled under a term in that agreement to reimbursement of 50% of the payment it made. The defendants say that the term does not apply. The defendants also contend that the matter is unsuitable for summary judgment because the circumstances of the issue of ANZ's demand require investigation. (They contend that Spanbild procured issue of the demand to assist in recovering funds from the defendants).

[5] For the reasons I shall give I have come to the view that the defendants do not have an arguable defence to the claim.

Factual background

[6] Spanbild (then named The Portacon Group Limited) purchased 50% of the shares in FINCO from the defendants on or about 3 April 2006. This left the first defendants with 45% and the second defendant with 5%. of the shares.

[7] The parties entered into a shareholders agreement on 3 April 2006 to govern the future conduct of FINCO's business and their relationship as shareholders. The agreement had a section headed "Financial and regulatory matters" which included the following clauses:

> 10.2 **No guarantee:** Subject to clause 10.3 below, no party shall be required to give any guarantee on behalf of the Company. If any of the parties make payment to any creditor of the Company under any guarantee or other obligation which that party may see fit to grant or undertake to assist the Company then the other parties will reimburse the party who has made the payment to the extent necessary to ensure that the parties' contributions will be in the same proportions as the parties' respective percentage Shareholding in the Company.
>
> 10.3 **Existing guarantees:** the parties acknowledge that CU [the second defendant] has provided personal guarantees in respect of leases to the Company's premises, advertising with the Auckland Herald and motor vehicle leases. Portacon will indemnify CU against 50% of all loss, damage, costs or expenses (including legal and other costs) incurred by CU pursuant to such guarantees.

[8] In April 2006 Spanbild provided FINCO with mezzanine finance (working capital) of $500,000 by way of shareholder advance.

[9] On 5 May 2006 FINCO accepted an offer from ANZ of banking facilities totalling $12,000,000 (together referred to as "the facility"). Both Spanbild and the defendants gave guarantees of FINCO's obligations under the facility agreement, limited to $6,000,000 plus interest and costs. The facility agreement was varied on October 2006 by addition of a further facility for the sum of $435,000.

[10] On 8 October 2007 the parties entered into a further agreement under which they agreed that FINCO's loan book would be wound down in an orderly fashion, with a view to minimising or removing their exposure under the guarantees. Two of the directors approached ANZ about reducing the facility, as a consequence of which

ANZ put a proposal for a new facility to FINCO in January 2008. FINCO questioned aspects of the proposal. Before ANZ answered the queries, it became apparent that FINCO was in breach of the financial covenants under the 2006 facility agreement. ANZ advised Mr Urquhart on 1 April 2008 that it was concerned about the deterioration of FINCO's loan book and that (amongst other things) it would require shareholders to inject further equity.

[11] On 9 May 2008 ANZ gave FINCO notice that it was in breach of financial covenants under the facility agreement and required FINCO to remedy the breaches by restoring the effective equity ratio to above 20%. On 16 May 2008 ANZ gave FINCO notice that it required the facility to be repaid and that it would advance a new facility, but on terms including a financial covenant that bank debt would be less than 80% of the total loan book (less non-performing assets) with a condition precedent that shareholders contribute funds to reduce indebtedness so that FINCO would comply with the covenant at the outset of the new facility.

[12] FINCO's directors discussed ANZ's facility offer at a meeting on 22 May 2008. The defendants advised that they were not able to contribute any further funds. The meeting was informed that Spanbild would contribute funds but would seek to recover 50% of any contribution pursuant to clause 10.2 of the shareholders agreement of 3 April 2006.

[13] FINCO tried unsuccessfully to get ANZ to accept an alternative proposal. On 13 June 2008 ANZ sent FINCO a letter asking for all facilities to be repaid and advising that a failure to comply by 20 June 2008 would result in formal demand being made on FINCO and all guarantors.

[14] ANZ's requirements were discussed at a meeting of FINCO's directors on 18 June 2008. The minutes record a resolution that the shareholders be asked to provide loans pro rata to shareholding to raise a sum of $1.3 million. The minutes also record that the meeting was advised:

a) by a Spanbild director (Mr Matheson) that Spanbild would pay its share but as soon as it had to pay more than its 50% share it would take legal action to recover under the shareholders agreement, and

b) by the defendants that they were not in a position to inject further equity (but would re-confirm that by the end of the week).

[15] On 20 June 2008 the second defendant wrote to the other FINCO directors stating (amongst other things) that "complying with the request [to repay the facility] is clearly out of the question" and noting that they could expect formal demand from ANZ, made both on FINCO and on the shareholders pursuant to their respective guarantees. The Board held a teleconference to discuss its response to the demand. The defendants confirmed that they were not willing or able to provide their share of the equity required. The Spanbild directors advised that Spanbild would lend FINCO the full $1.3 million if required by ANZ. Resolutions were passed that FINCO would:

a) offer to provide that sum to ANZ on acceptable terms, and

b) accept a loan from Spanbild to allow it to fulfil the offer.

This position was put to ANZ by letter written that day.

[16] On 25 June 2008 ANZ sent FINCO a revised facility offer, which included financial covenants and a condition precedent in similar terms to those set out in its offer of 16 May 2008. Acceptance was required by 2 July 2008.

[17] FINCO's directors arranged to meet on 2 July to make a decision on ANZ's offer. Just after 5pm on 1 July 2008 ANZ made demand on FINCO for repayment of the facility in the sum of $6,553,582.64, and on Spanbild for payment of $6,000,000 under its guarantee. It made similar demands on the defendants. On 2 July 2008, after discussing the procedure with ANZ, Spanbild paid $1,218,000 into FINCO's cheque account and FINCO's directors resolved to accept ANZ's offer of a revised facility. The same day Spanbild wrote to ANZ as follows:

PAYMENT UNDER GUARANTEE

I refer to your letter of 1 July 2008 constituting a demand by the Bank under our all obligations guarantee dated 26 May 2006. We understand a similar demand has also been made on the other shareholders of FINCO Holdings Limited (*FINCO*).

We further understand you have received or are about to receive the facility offer document dated 25 June 2008 issued by ANZ duly executed by FINCO, Spanbild Holdings Limited, the Trustees of the Halstaff Trust and Craig Urquhart.

We have today transferred the sum of $1,218,000 into FINCO Holdings Limited cheque account to be utilised by the ANZ in reduction of the existing indebtedness of FINCO to the ANZ, and which is a payment made pursuant to our guarantee dated 26 May 2006.

This reduction in indebtedness will result in FINCO being in a position to accept the facility offer dated 25 June 2008, by providing that FINCO will be in a position to meet the financial covenants required in that facility offer.

Could you therefore please now confirm your withdrawal of the demands served on FINCO and the other guarantors date 1 July 2008.

[18] On 4 July 2008 ANZ replied to Spanbild confirming receipt of the funds and advising that it would not be taking action under its demand:

Removal of Bank demand

Thank you for the funds provided by Spanbild Holdings Limited as guarantor to reduce the outstanding debt of FINCO Holdings Limited (FINCO).

Following the Bank's receipt of the signed Facility Offer to FINCO dated 25 June 2008 and FINCO's compliance with conditions in that letter, we confirm that the Bank will not take any action under the Demand Letter dated 1 July 2008 sent to Spanbild Holdings Limited.

This letter is without prejudice to the Bank's rights, power and remedies under any facility or security agreement between the Bank, FINCO or any guarantor.

[19] On 8 July 2008, following a request by the second defendant, ANZ wrote to the defendants in identical terms except that the opening paragraph (the acknowledgment of funds provided by Spanbild) and the reference to Spanbild in the second paragraph were omitted.

[20] On 18 July 2008 Spanbild made demand on the first defendants for reimbursement of $548,100 (being 45% of Spanbild's payment), and on the second

defendant for reimbursement of $60,900 (being 5% of Spanbild's payment). The demand letter began:

> **FINCO HOLDINGS LIMITED**
>
> 1 You will be aware that on 2 July 2008 Spanbild transferred the sum of $1,218,000 into FINCO's cheque account, to be utilised by ANZ in reduction of the existing indebtedness of FINCO to ANZ.
>
> 2 This payment was made pursuant to Spanbild's guarantee dated 26 May 2006 and in response to ANZ's demand dated 1 July 2008. The reduction in indebtedness as result of Spanbild's payment resulted in FINCO being in a position to accept ANZ's facility offer dated 25 June 2008 by meeting the required financial covenants.
>
> 3 Pursuant to clause 10.2 of the Shareholders Agreement dated 3 April 2006, Spanbild hereby requires reimbursement in relation to the payment of $1,218,000 to the extent necessary to ensure that the parties' contributions will be in the same proportions as the parties' respective percentage shareholding in the company.
>
> ....

[21] Also on 18 July 2008, the second defendant wrote to the ANZ asking it to advise what had led it to issue the demand on 1 July 2008, before the time for acceptance had been reached (and without withdrawing the offer). ANZ replied the following (working) day:

> Due to ongoing delays and uncertainty about FINCO's ability to present an acceptable full repayment proposal to the Bank, the Bank felt it necessary to continue to take the appropriate steps towards obtaining repayment of the existing facility, including making demand on the guarantors of the existing facility.
>
> The Bank's position on repayment of the existing facility was clearly set out in our letter to FINCO dated 13 June 2008 and, as at 1 July 2008 because the existing facility remained outstanding the Bank proceeded to make formal demand.

[22] This application was filed when the defendants failed to reimburse Spanbild as requested.

Summary judgment - applicable principles

[23] Spanbild applies for summary judgment under r 12.2 of the High Court Rules, contending that the defendants do not have an arguable defence to the claim.

The principles that the Court applies in determining such applications are well known, and can be found in the leading cases of *Pemberton v Chappell* [1987] 1 NZLR 1, and *Bilbie Dymock Corporation v Patel* (1987) 1 PRNZ 84 (CA) and more recently in *Jowada Holdings Limited v Cullen Investments Limited* CA 248/02 5 June 2003. The following general principles are of particular application in the present case:

a) A plaintiff seeking summary judgment has the onus of showing that there is no arguable defence (the Court must be left without any real doubt or uncertainty in the matter).

b) The Court will not hesitate to determine legal issues, even difficult legal issues, where appropriate.

c) Although the plaintiff has the overall onus, a defendant must put forward a factual basis for any defence being raised: summary judgment will not be avoided by raising a hypothetical defence.

d) The Court will not attempt to resolve disputes over facts that are essential elements of the defence. However, the Court is not required to accept uncritically, as raising a dispute, unsupported assertions of fact, particularly where such assertions are contrary to incontrovertible fact or inconsistent with clear contemporaneous documents.

e) When called for by the facts of a case, the Court must balance a robust and realistic attitude against the need to ensure that there is no prejudice to a defendant.

The competing arguments and issues arising

[24] Spanbild says that it is entitled to the contribution being sought from the defendants under clause 10.2 of the shareholders agreement of 3 April 2006. It says that by this agreement the shareholders modified general principles of contribution

contained in ss 84-86 Judicature Act 1908 and under common law and in equity. Parties are free to exclude or modify rights to contribution by express agreement: O'Donovan and Phillips "*Modern Contract of Guarantee*" (English 2003 Ed) at para 12-128; *Trotter v Franklin* [1991] 2 NZLR 92, 97-98.

[25] Counsel for Spanbild argued that on the ordinary and natural meaning of its language, clause 10.2 was clearly intended to apply to the guarantees given to ANZ. He argued that, as a matter of construction, by this clause the parties intended:

a) to modify the equitable rule that allowed contribution from a co-guarantor only where, and to the extent that, the party seeking contribution had paid more than its proportionate share, and

b) to extend the contribution rules so that a shareholder who gives a guarantee and makes a payment under it for the benefit of the company can seek contribution towards that payment in keeping with respective shareholding, even if the payment did not exceed its proportionate share of the obligation.

[26] As to the payment itself counsel submitted that:

a) although Spanbild had been contemplating making a shareholder's advance, it expressly made the payment under the guarantee, as evidenced by the letter sent to the ANZ at the time of payment;

b) although the payment was made to FINCO, it was still a payment to ANZ as the payment to FINCO was either "a mere matter of procedure", or FINCO was the agent, conduit or vehicle for the payment to ANZ: *Mahoney v McManus* (1981) 36 ALR 545 (HCA); and

c) although Spanbild had been contemplating payment of the whole amount as a shareholder's advance (and that would not have given it any rights under clause 10.2), this changed when ANZ made its

demand and Spanbild was entitled to elect to make its payment pursuant to the guarantee, thereby giving it the right to seek contribution under clause 10.2.

[27] The defendants raised several matters in their notice of opposition, but they come down to the central proposition that clause 10.2 does not apply to Spanbild's payment. Counsel for the defendants submitted that:

a) Spanbild's unilateral stipulation in its letter of 2 July 2008 that it was a payment pursuant to the guarantee is not conclusive, and that the true nature of the payment is to be determined having regard to all the circumstances surrounding it: *Mills v Dowdall* [1983] NZLR 154;

b) in substance this was a shareholder's advance, as evidenced by the history leading up to the payment, the fact that payment was made to FINCO rather than direct to ANZ, a later request by ANZ for the payment to be included in a deed of postponement and on the subsequent treatment of the payment in budgets and accounts presented to ANZ;

c) "the coincidence" of the demand under the guarantees late on the day before FINCO resolved to accept an advance from Spanbild (to enable it to take up the ANZ's revised facility offer) requires further investigation, particularly in light of a long-standing association between Spanbild and ANZ and ANZ's withdrawal of its demand under the guarantees upon payment of only 20% of the sum demanded.

[28] Although not raised in the notice of opposition, counsel for the defendants raised a further ground of defence in his submissions. He submitted that clause 10.2 cannot apply because it is limited to a prior guarantee given by one shareholder only (arguing that the clause was intended to address the fact that contribution would not otherwise be available under general principles of contribution). Counsel for Spanbild did not challenge the defendants' entitlement to advance this further ground

but submitted that it was a point that one would have expected to have been raised at the outset if there was any substance to it.

[29] Finally counsel for the defendants argued that it was not possible to determine the true nature of Spanbild's payment on this summary application. He submitted that further inquiry was needed into the pre- and post-payment conduct of the parties to assist a determination as to the purpose of the payment, and evidence was needed from ANZ as to the circumstances leading to the issue of the demand.

[30] The issues arising out of these opposing contentions, and which the Court must determine on this application, are:

a) The true construction of clause 10.2 (whether it applies to Spanbild's guarantee or is limited to prior guarantees by one party only).

b) If clause 10.2 does apply to subsequent guarantees, whether Spanbild's payment was a payment under the guarantee (entitling it to contribution) or a shareholder's advance (for which it was not entitled to contribution).

c) Whether there are any matters which make these questions unsuitable for determination by summary judgment.

Construction of clause 10.2

[31] Counsel for the defendants submitted that, when read in the context of the shareholders' agreement as a whole and with the background knowledge reasonably available to the parties (*Boat Park Limited v Hutchinson* [1999] 2 NZLR 74), clause 10.2 applies only where one shareholder only had previously given a guarantee. He submitted that the clause was intended to give that shareholder recourse against co-shareholders in circumstances where a right to contribution was not otherwise available (because the other shareholders were not co-guarantors). In my view such a construction limits the clause in a way that is not warranted by its language or its context.

[32] The starting point must be the words of the clause itself. In the first sentence the parties address the future position in respect of guarantees: .. "no party shall be required to give any guarantee on behalf of the Company". The second sentence is the relevant part of the clause for the present application. There is nothing in it to limit it to guarantees given prior to the agreement, or to the circumstance of one party only giving a guarantee. Indeed, its language is wide and again forward-looking

> "If any of the parties make payment ... under any guarantee ... which that party may see fit to grant ... to assist the Company then the other parties will reimburse ...."

[33] The phrase "may see fit to grant" suggests a step still to be taken rather than an existing guarantee, particularly when following a first sentence which is clearly forward-looking. This interpretation is strengthened by the following sub-clause (10.3) which expressly addresses existing guarantees. Counsel for the defendants sought to argue that clause 10.3 was simply illustrative of the application of clause 10.2 to prior single guarantees. I cannot accept that submission. The two clauses are clearly intended to address different circumstances. I accept the submission of counsel for Spanbild that limiting clause 10.2 to guarantees already in existence would render clause 10.3 superfluous.

[34] Similarly, I see nothing in the language of the clause to restrict it to circumstances where only one party has given a guarantee. The clause refers to "any guarantee". It would have been a simple matter to have drafted the clause to limit it in that way. Counsel for the defendants argued that there was no need for the clause to cover the circumstance of co-guarantees because that was covered by general principles of contribution. However, that overlooks the equitable rule that contribution can only be claimed where the payment exceeds a proportionate share of the obligation under the guarantees. The language of the clause indicates that the parties were seeking to maintain contributions to the company in proportion to shareholding. It cannot simply be taken that they had in mind arranging the loan facility with ANZ and the likelihood that ANZ would require guarantees of that facility. Construed in that context it is clear that whilst the parties agreed that there was no obligation to provide a guarantee, where either one shareholder provided a

guarantee or both shareholder groups provided guarantees (as in fact happened), they intended that there would be reimbursement to ensure contributions remained in proportion to shareholding.

[35] Counsel for the defendants submitted that the parties could be taken to have included clause 10.2 in the knowledge that a single prior guarantor did not have a right to seek contribution from the other shareholders. However, that reasoning equally, and more compellingly, applies to knowledge of the equitable rule of an entitlement to contribution only after a party had paid more than its proportionate share of the obligation. In this case, where both parties had separately guaranteed payment up to $6,000,000, the parties can be taken to have known that there would be no entitlement to contribution until one party had paid more than $3,000,000, and to have inserted clause 10.2 to allow reimbursement whenever any payment was made so as to bring contributions back into line with shareholding.

[36] Another factor counting against the defendants' construction of the clause is that it could only apply to the second defendant. I cannot see any logical reason for the parties to have intended that consequence, particularly in light of the terms of clause 10.3 in which the parties expressly address the second defendant's position. There is force to the submission of counsel for Spanbild that if this was the intention of the parties, it would have been raised at the outset as a ground for opposing the claim rather than emerging in argument.

[37] I find as a matter of construction that clause 10.2 applies to the guarantees given by the parties in May 2006.

Application of clause 10.2

[38] The next question to determine is whether Spanbild's payment falls within the scope of clause 10.2. The central issue here is whether it was a payment under the guarantee or a shareholder's advance. It is also necessary to consider the consequences of the manner in which the payment was made.

[39] As mentioned already, at the time of making its payment into FINCO's bank account, Spanbild wrote to ANZ advising that the purpose of the payment was to reduce FINCO's existing indebtedness and that it was a payment pursuant to Spanbild's guarantee. The latter statement is unambiguous. Spanbild intended it to be a payment under the guarantee. In turn, in its acknowledgement letter of 4 July 2008, ANZ accepted it as a payment under the guarantee.

[40] Counsel for the defendants argued, however, that Spanbild's stipulation that it was a payment under the guarantee did not determine the point. He submitted that the nature of the payment could not be considered in isolation from the wider transaction involving the revised ANZ facility. He submitted that in the context of the preceding negotiations over the revised facility, and particularly Spanbild's stated intention to advance up to $1.3 million to allow the revised facility to be accepted, the payment was properly characterised as a shareholder's advance. He relied on *Mills v Dowdall* (at 159) for the proposition that the Court will look at the substance of a transaction rather than the form of its expression in determining its true legal character. He argued that, as Spanbild had already agreed to make an advance to enable the revised facility to be accepted, the last minute delivery of the demand under the guarantee and unilateral stipulation of the payment as one pursuant to the demand did not alter the true character of the payments as an advance. He said that this was also supported by reference to the payment as a shareholder's advance in a budget and in financial accounts for FINCO that were given to ANZ in February 2009 with the concurrence of the Spanbild directors.

[41] I do not accept that the "substance over form" argument applies in this case. It is not in dispute that prior to receipt of ANZ's demand under the guarantee, Spanbild was contemplating making a payment by way of shareholder advance. It is common ground that a payment had to be made to allow FINCO to accept the revised facility offer. It seems clear, however, that Spanbild considered that it did not have an option in the matter until ANZ made its demand. Although FINCO's board had resolved on 18 June 2008 that shareholders would be asked to contribute in proportion to their shareholding, the defendants had stated that they were not in a position to make their contribution.

[42] The position changed, however, with receipt of ANZ's demand. Spanbild had previously made known that if it had to contribute more than a share proportionate to its shareholding it would seek reimbursement from the defendants. Its ability to do so before formal demand was made may be arguable but its entitlement is clear once the demand was made. The making of the demand allowed Spanbild to make its payment in response to the demand, which both satisfied the pre-condition to ANZ's offer and gave Spanbild the ability to exercise its rights under clause 10.2. Although he was dealing with quite different circumstances, comments by Richardson J in *Mills v Dowdall* (at 159) are apposite:

> It frequently happens that the same result in a business sense can be attained by two different legal transactions. The parties are free to choose whatever lawful arrangements will suit their purposes. The true nature of their transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out.

[43] He added later (at 160):

> The reason why the Courts have adopted the approach I have been discussing is obvious enough. Commercial men are entitled to order their affairs to achieve the legal and lawful results which they intend. If they deliberately enter into a genuine transaction intended to operate according to its tenor, those intentions should be recognised. It is what they choose to do that counts and their rights and obligations should be determined on that basis except where the legislation [the Matrimonial Property Act 1976] has itself directed otherwise.

[44] It was Spanbild's election, made prior to ANZ's demand, to make the advance so that FINCO could accept the revised facility. It was not bound to take that course (it had made it clear that it would do so only if there was no other option). It was entitled to take the option of paying under the guarantee instead, when that opportunity presented itself.

[45] The reference to the payment as a shareholder loan in the draft budget and financial accounts presented to ANZ in February 2009, and provision for interest on such a loan in the budget, do not call for a different conclusion. These documents were prepared by the second defendant. The provision for interest was challenged by Spanbild as soon as the budget was produced as was the reference to "shareholder loan". Spanbild's Mr Matheson acknowledges that he was aware of these matters when the documents were given to ANZ, but says that they had not been resolved

internally at that point (and still have not). He stated that he allowed the documents to go to ANZ because it was not in FINCO's interest to delay provision of financial information, and the disputed points did not materially affect FINCO's balance sheet or profit and loss account. As a consequence of the payment Spanbild became a creditor of FINCO for the amount of the payment, and a surety's right of indemnity entails a right to be paid interest: *Mahoney v McManus* (at 550)

[46] In my view the best, and conclusive, evidence on the matter is Spanbild's statement as to the nature of the payment, made at the time that the payment was made. The defendants' case, in effect, is that a different inference should be drawn from the arrangements made to meet the terms of the revised facility and from Spanbild's willingness to allow the (contested) accounts to go to the ANZ. Even if the inference is open on the facts (which I do not accept for the reasons I have given) it is not sufficiently cogent to contradict the clear words Spanbild used when making the payment.

[47] For the sake of completeness I also note that counsel for the defendants initially relied also on correspondence in late 2008 suggesting that the payment was part of Spanbild's "mezzanine finance". However, he did not pursue that point (correctly in my view) in light of evidence that ANZ accepted that the payment was not debt to be postponed to its advances. That is consistent with ANZ treating it as a payment under the guarantee.

[48] The defendants also contend that clause 10.2 does not apply because the money was paid to FINCO rather than to ANZ directly. The same point was addressed in the decision of the High Court of Australia in *Mahoney v McManus*.

[49] *Mahoney v McManus* also concerned a claim to contribution between co-guarantors. The parties were shareholders and directors of a company. Each of them had given guarantees in respect of the company's obligations. Demands were made pursuant to the guarantees. An injection of capital was required to pay the creditors, but the respondent was unable to provide any funds. The plaintiff (appellant in the High Court) agreed to provide the funds, and the company agreed to pay interest. Three payments were made totalling $43,600. Payment was made by cheques

written out to the company. The company banked the cheques and then paid three different creditors (a small balance being retained in the company's account). The cheque butts recorded the payments as loans, and money was receipted into the company's ledger as loans. The Trial Judge found that the payments were in substance payments made to the creditors under their guarantees rather than loans to the debtor company to enable it to pay the creditors. This finding was overturned by the Court of Appeal, but restored by the High Court of Australia (by a majority). In the principal judgment of the majority, Gibbs CJ held that the correct characterisation of the payments was as payments under the guarantee as they were made only for the purpose of enabling the paying of the creditors.

[50] In a passage that is also relevant to the defendants' argument as to substance rather than form, the Chief Justice rejected the significance of the labelling of the payments as loans (at 550):

> The facts that the amounts are shown in the company's ledger as loans, and that the proof of debt refers to an advance, support the argument of the respondent, but are hardly conclusive, since, if the appellant, as surety, had paid the company's creditors, he would to that extent have become a creditor of the company. Similarly, the fact that the company agreed to pay interest at a particular rate is not conclusive, since a surety's right to be fully indemnified entails the right to be repaid with interest the amount he has paid to the principal creditor.

[51] He then addressed the point as to the manner of payment (also at 550):

> On the other hand it is clear that the moneys were not paid to the company to be used for its general purposes, but only for the purpose of enabling it to pay the creditors which held guarantees and which, as all those present at the meetings knew, would resort to the guarantees if the company's debts were not paid.

[52] He expressed his conclusion as follows (at 551):

> In my opinion the proper conclusion to be drawn from all the facts is that on each occasion the appellant provided the money, not as a loan which the company might use as it liked, but to be applied in payment of the debts the subject of the guarantees. The learned trial judge was in my opinion right in saying that the interposition of the company between the appellant and the creditors was a mere matter of procedure. In so far as the moneys were used for the purpose of paying the creditors, they were, in my opinion, payments by the appellant under the guarantees and they should be taken into account in determining the amount of contribution payable as between the appellant and the respondent.

[53] He then stated as his rationale for adopting this approach (at 551):

> It should be remembered that the doctrine of contribution is based on the principle of natural justice that if several persons have a common obligation they should as between themselves contribute proportionately in satisfaction of that obligation. The operation of such a principle should not be defeated too technical an approach to the question whether a surety has paid the creditor, when he had supplied moneys to the principal debtor for the purpose of making such payment.

[54] *Mahoney v McManus* has been cited with approval in this Court in *Topaz Holding Limited v Clark* HC ROT CP31/95 23 August 1999 (Williams J), where the Court also had to consider whether payments by guarantors that were made into a company's bank account were payments to the creditor bank. The Court held that the routing of payments via the debtor company's current account was "no more than a convenient means by which the payments could be amalgamated and the whole of the Westpac debt repaid" and a "mere matter of procedure" (pages 23-24).

[55] I am satisfied on the facts of the present case that Spanbild paid the money to FINCO's cheque account in its capacity as guarantor. FINCO was not entitled to spend the money as it willed. It was paid specifically for the purpose of repaying its debt to ANZ. Spanbild has given evidence that it contacted ANZ prior to making the payment and was advised to make the payment in that manner. I find that FINCO was merely a conduit for the payment, which was essentially one by Spanbild to ANZ. This is consistent with the contemporaneous letter written by Spanbild to ANZ confirming the payment.

[56] Taking all of these matters into account I find that clause 10.2 applies to Spanbild's payment (as a payment made to a creditor under a guarantee), and accordingly Spanbild is entitled to reimbursement in accordance with that clause.

Suitability for summary judgment

[57] Counsel for the defendants argued that the matter was not suited for summary judgment both because there was need to have a better understanding of the steps being taken to allow FINCO to take up the revised loan facility, and also because there was a need to investigate the coincidence of ANZ's demand the day before the

payment was due to be made to ANZ. In effect, the defendants invite the Court to infer that there was a collusion between Spanbild and ANZ which calls into question whether this was a genuine demand under the guarantee.

[58] For the reasons I have already given I do not consider it necessary investigate further the circumstances surrounding the proposed shareholder's advance. The facts are not in dispute, but in any event that course was overtaken by ANZ's demand.

[59] Similarly, I do not accept that there is any substance to the argument in respect of possible collusion. There is nothing to support such an allegation in the evidence before the Court. The defendants invite an inference from a banking history between Spanbild and ANZ, the timing of the demand, and the withdrawal of the demand following Spanbild's payment of a lesser amount. Such an inference is not warranted. ANZ had clearly foreshadowed the likelihood of a demand in its letter of 13 June 2008. It was aware that its revised facility offer was to be considered on 2 July 2008, but was clearly concerned that its precondition might not be met. It was fully entitled to make its demand and to withdraw it once it had achieved its purpose, just as Spanbild was entitled to pay in response to it. ANZ had neither a legal duty to wait until time for acceptance of the new facility offer had expired nor an obligation to insist on the full amount of its demand. ANZ explained its position in response to a query by the second defendant. There is no evidence of the defendants raising any issue of collusion with ANZ. The second defendant's initial query referred to the timing as "strange" and "most unusual" but no issue has been taken with ANZ over its explanation.

[60] In the circumstances, I do not accept that the defendants have any evidential basis for their assertion. It is no more than a hypothetical defence.

Decision

[61] For the reasons I have given I find that Spanbild has discharged its onus of proving that there is no arguable defence to its claim. I make an order for summary judgment in favour of the plaintiff against the first defendants for $548,100 and

against the second defendant for $60,900, together with interest on those amounts at the prescribed rate under the Judicature Act 1908 from 2 July 2008 to date of payment.

[62] As the successful party, the plaintiff is also entitled to costs incidental to this application on a 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge Abbott