

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

**CIV 2009-404-002617**

BETWEEN FM CUSTODIANS LIMITED  
Plaintiff

AND BRUCE PHILLIP WEST  
First Defendant

AND GRANT BARRY ADAMS  
Second Defendant

Hearing: 6 November 2009

Appearances: J G Krebs for the Plaintiff  
B P West in Person  
No appearance by G B Adams

Judgment: 6 November 2009

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**[ORAL] JUDGMENT OF WYLIE J**

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*Solicitors/Counsel:*  
Davidson, Armstrong & Campbell, P O Box 54, Waipukurau 4242

J G Krebs, P O Box 754, Napier 4140

Copy to:  
B P West, P O Box 24 391, Royal Oak, Auckland

[1] FM Custodians Limited (“FM”) has filed proceedings seeking judgment against the first defendant, Mr West, and the second defendant Mr Adams.

[2] FM is a fund trustee for the Midlands Mortgage Trust (“the Trust”). As such, it is responsible for supervising all lending activities conducted by the Trust. It seeks summary judgment against the defendants, alleging that they are liable as guarantors of a mortgage advance made by the Trust to an entity known as Wiles Project Limited. The loan offer and the deeds of guarantee and indemnity signed by the defendants are all in the name of FM.

### **Background**

[3] In July 2001, the Trust made a loan advance of \$990,000 to Wiles Project Limited. Messrs West and Adams were in effective control of the company. It was a condition of the loan offer that the Messrs West and Adams would provide joint and several guarantees to FM.

[4] Both Messrs West and Adams executed the loan agreement. It is dated 28 July 2007. They signed both as directors of Wiles Project Limited and as guarantors. On the same day, they also signed separate deeds of guarantee and indemnity, both in favour of FM.

[5] Wiles Project Limited has defaulted under the mortgage. The principal sum fell due on 31 January 2008. It was not repaid on that date. Further, Wiles Project Limited has not paid interest since that time.

[6] The defaults were brought to the attention of Mr West when a notice under s 122 of the Property Law Act 2007 was served on him on 21 May 2008. The defaults were brought to the attention of Mr Adams when a similar notice was served on him on 28 May 2008. The notices required that the defaults be remedied by 28 June 2008. Neither Wiles Project Limited nor Messrs West and Adams has done so.

[7] As at the date of this hearing, the amounts secured under security document total \$1,298,916.09. That sum is made up as follows:

a)	Principal	\$990,000.00
b)	Interest to 6 November 2009	\$301,028.73
c)	Costs and expenses	\$ 7,887.36

[8] FM was initially seeking summary judgment against both defendants. It was also seeking an order that they vacate and deliver up possession of the property.

[9] An affidavit of service has been filed confirming service on Mr West, and Mr West has filed a notice of opposition. No steps have been taken by Mr Adams. I am advised by Mr Krebs appearing for FM that Mr Adams is overseas, and that he has not been served. Mr Krebs seeks an adjournment of the proceeding in respect of Mr Adams. There is no difficulty with this. Judgment against one or more of several persons jointly liable does not operate as a bar or defence to proceedings against the other or others except to the extent that the judgment has been satisfied – s 94 of the Judicature Act 1908.

[10] FM no longer seeks possession of the property. That issue has been amicably resolved.

### **Notice of opposition**

[11] As indicated, Mr West has filed a notice of opposition. He asserted in that notice of opposition that FM has failed to exercise the powers granted to it under the security documents. It was asserted that until the property is sold, FM will not know what amount, if any, is owed to it by Wiles Project Limited, and consequently by the guarantors.

[12] There are a number of other matters raised in the notice of opposition, but they are relevant only to the possession issue, and as noted that is no longer pursued.

## **Submissions**

[13] I have heard submission from Mr Krebs for FM, and from Mr West.

[14] Mr Krebs asserts that Mr West is liable as principal debtor. He refers to the term of the loan agreement, and the deed of guarantee and indemnity. He submits that in the circumstances, there can be no suggestion that FM must exhaust its remedies against Wiles Project Limited before it can recover from the defendants as guarantors.

[15] Mr West, for his part, has advised that there have been helpful discussions with FM. FM has agreed to advance further monies to enable the property to be subdivided and Wiles Project Limited has entered into an agreement for sale and purchase in respect of one of the lots to be created. It is selling that lot for \$740,000 and is marketing the remaining lot for \$795,000. Mr West anticipates that there will be sufficient funds available to clear the debt in full. He tells me that he has had discussions with a Mr Harrison from FM and progress has been made. He accepted that he could not realistically resist the entry of summary judgment today, but he sought that FM should delay the enforcement of any judgment granted in its favour.

[16] I explained to Mr West that that issue was not before me today, and suggested to him that he should raise the issues he has put before me today with Mr Krebs and Mr Harrison of FM. Mr Krebs confirmed that he will discuss the matters raised direct with Mr West at the conclusion of this hearing.

## **Analysis**

[17] In my view the loan agreement signed by Mr West and the deed of guarantee and indemnity are clear.

[18] FM advanced the sum of \$990,000 to Wiles Project Limited. It took security for that advance by way of a first mortgage over a property situated at 19 Wiles Avenue, Remuera, Auckland. It also took the joint and several guarantees from Messrs West and Adams.

[19] The loan agreement required that the mortgage advance be repaid on 31 January 2008. Clause 14(a) in the agreement provided that Wiles Project Limited would be in default if it failed to make payment when the same was due. It also provided that if Wiles Project Limited was in default, FM could enforce its securities.

[20] The securities included the guarantee and indemnity given by Mr West in favour of FM. The deed recording that guarantee and indemnity recorded that the guarantee was a joint and several guarantee with the guarantee given by Mr Adams – see paragraphs 1.3 and 3.5 of the deed. Mr West unconditionally and irrevocably guaranteed to FM the due payment by Wiles Project Limited of the guaranteed indebtedness of that company to FM. Mr West also guaranteed the due performance and compliance by Wiles Project Limited of its various obligations – see paragraph 2.1. He undertook that if for any reason Wiles Project Limited did not pay the guaranteed indebtedness when due, that he would pay the relevant amount immediately on demand by FM – see paragraph 2.2. It was acknowledged that as between Mr West and FM, Mr West was liable under the deed of guarantee and indemnity as a sole and principal debtor, and not as surety – see paragraph 3.1.

### **Conclusion**

[21] I am satisfied that Mr West has no defence to FM's claim for summary judgment. Accordingly judgment is entered against Mr West in the sum of \$1,298,916.09.

[22] The proceeding against Mr Adams is adjourned for call before the Duty Judge on 3 February 2010 at 10.00am. In the event that Mr Adams is served prior to that date, FM may file a memorandum to that effect, and request that the matter be brought on for earlier hearing.

### **Costs**

[23] I have heard from both Mr Krebs and Mr West in relation to costs.

[24] In terms of the security documentation, FM is entitled to recover its actual costs. Mr Krebs, however, does not seek an order in that regard on behalf of his client company. Rather he seeks costs in relation to this matter on a 2B basis, together with FM's reasonable disbursements. In this regard, he seeks reasonable travel and accommodation expenses because FM is based in Hawkes Bay as is Mr Krebs.

[25] The concession by FM is in my view appropriate given the goodwill which appears to exist between the parties at least at the present time. Mr West did not oppose an award of costs made on this basis.

[26] Accordingly, I make an order for costs in favour of FM on a 2B basis. It is also entitled to its reasonable disbursements, including Mr Krebs' reasonable travel and accommodation costs. In the event of dispute regarding disbursements, the same is to be referred to me.

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Wylie J