**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA398/2011**
**[2012] NZCA 384**

| | | |
|---|---|---|
| | BETWEEN | RICHARD JOHN CARSON BLACK<br>Appellant |
| | AND | ASB BANK LIMITED<br>Respondent |

Hearing: 23 July 2012

Court: Randerson, Wild and Venning JJ

Counsel: M C Black for Appellant
M V Robinson and E C Gellert for Respondent

Judgment: 24 August 2012 at 2.30 pm

---

**JUDGMENT OF THE COURT**

---

**A The appeal is dismissed.**

**B The appellant is to indemnify the respondent for its actual costs reasonably incurred in respect of this appeal plus usual disbursements.**

---

**REASONS OF THE COURT**

(Given by Wild J)

**Table of Contents**

## Introduction

[1] This appeal results from the business failure of a company called Deli Ca Sea Wholesale Limited (Deli). The respondent (the ASB) held securities from Deli and from two family trusts which owned Deli. The trusts were associated with the two directors of Deli, the appellant Mr Richard Black and Mr Peter Osborne. The trusts are the Black Family Trust (the BFT) and the Osborne Family Trust (the OFT) respectively. The trustees of the two family trusts (including Mr Black and Mr Osborne) also provided personal guarantees to the ASB.

[2] The ASB was owed substantial sums by Deli as well as by Mr and Mrs Black, and Mr and Mrs Osborne, for their personal borrowings. The OFT trustees voluntarily sold the property they owned which was secured to the ASB and paid the sale proceeds to the ASB. The ASB applied most of those monies to repay the Osbornes personal borrowings. The BFT trustees then sold their property, also secured to the ASB, and accounted to the ASB for the proceeds. The ASB applied these monies first to discharge the whole of Deli's indebtedness. Mr Black raised two principal objections to this. First, he maintained that the BFT trustees' personal guarantee was limited to $300,000. Secondly, he argued that the proceeds of sale of the property owned by the OFT should first have been applied in payment of Deli's indebtedness rather than to the Osbornes' personal borrowings.

[3] Mr Black issued a proceeding seeking by way of summary judgment a declaration that the BFT trustees' personal guarantee and an associated mortgage were limited to $300,000, and a declaration as to the correct application of the proceeds of sale of the two mortgaged properties. The ASB responded by seeking summary judgment against Mr Black on all the causes of action in his statement of claim or, alternatively, an order striking out those claims.[1]

[4] The appellant, Mr Black, appeals against two judgments of Associate Judge Bell. In the first judgment, delivered on 8 July 2011, the Judge dismissed Mr Black's application for summary judgment against the ASB, but granted the ASB's application for summary judgment against Mr Black.[2]

[5] Mr Black had applied for summary judgment in his capacity as one of the trustees of the BFT. Essentially, he sought summary judgment that the liability of the BFT trustees to the ASB under the securities they had given the ASB was:

(a) "expressly limited to $300,000";[3] and

(b) reduced by the $300,000 it received from the sale of the OFT trustees' property.[4]

[6] The Judge dismissed Mr Black's application for summary judgment but granted the ASB's cross-application, entering judgment for it against Mr Black.

[7] In his second judgment given on 30 September 2011, the Judge ordered Mr Black to pay the ASB indemnity costs plus disbursements totalling $93,268.90.[5]

[8] The grounds on which Mr Black appeals the substantive judgment relate to the correct interpretation of provisions in the security documents, the manner in

---

1 Amended interlocutory application by the ASB for summary judgment or strike out, 1 November 2010.

2 *Black v ASB Bank Ltd* HC Auckland CIV-2010-404-3252, 8 July 2011 [Summary judgment decision].

3 Amended notice of application by plaintiff against first defendant for summary judgment, 29 October 2010, at [1](b) and [1](c).

4 At [1](d).

5 *Black v ASB Bank Ltd* HC Auckland CIV-2010-404-3252, 30 September 2011 [Costs decision].

which the ASB went about realising its securities, the ASB's disclosure obligations to the BFT trustees as guarantors of Deli's indebtedness to the ASB and whether the Judge was wrong to enter summary judgment without first ordering the ASB to make discovery to Mr Black.

[9] The costs judgment is challenged on two bases. First, that indemnity costs ought not to have been awarded. Secondly, that even if indemnity costs were appropriate, $93,268.90 was excessive.

[10] Some factual background is necessary before these issues can be addressed in a comprehensible way.

**Factual background**

[11] As its name suggests, Deli operated a seafood business. The business was Whakatane based. It had its own retail store in Mount Maunganui, and supplied licence holders in other cities and towns.

[12] Deli was a joint venture between the Black and Osborne families. In addition to being one of Deli's two directors, Mr Black was a trustee of the BFT which owned approximately 43 per cent of the shares in Deli.[6] Mr Osborne held matching roles: he was the other director, and a trustee of the OFT which also owned 43 per cent of Deli's shares.

[13] Deli first borrowed from the ASB in April 2007. The bank gave Deli a revolving credit facility with a $50,000 limit and a term loan of $150,000. Both facilities were documented in an ASB Facility Agreement dated 20 April 2007. That Agreement listed the following securities for the two facilities:

(a) a new all obligations general security deed over all Deli's assets and undertaking;

---

[6] In the affidavit he swore on 30 September 2010 in opposition to the ASB's application for summary judgment and in support of his own cross-application, Mr Black deposed that the shareholding of Deli was Mr and Mrs Black 510 shares, Mr and Mrs Osborne 510 shares, Mr O'Sullivan 180 shares.

(b) an existing all obligations mortgage over the property at Papamoa (owned by the BFT);

(c) a new limited guarantee and indemnity from the trustees of the BFT, limited to $300,000;

(d) a new all obligations mortgage over the property at Ohope (owned by the OFT); and

(e) a new limited guarantee and indemnity from the trustees of the OFT, limited to $300,000.

[14] The term loan continued throughout to be governed by the 20 April 2007 Facility Agreement.

[15] In July 2007 the ASB agreed to increase Deli's revolving credit facility to $250,000. To support this increase, the trustees of the BFT and of the OFT each gave a new guarantee and indemnity, each limited to $600,000. Both these guarantees were dated 21 August 2007.

[16] In November 2007 the ASB agreed to a further increase in the revolving credit facility limit, to $475,000. This was documented in a new Facility Agreement dated 12 November 2007. The list of securities listed in the 12 November 2007 Facility Agreement included:

> An existing limited guarantee and indemnity on our standard form, from [the trustees of the BFT]. Limited to $600,000.00.

[17] On 13 May 2008 the trustees of the BFT gave the ASB a new guarantee, this time unlimited. The ASB's Commercial Manager, Mr Bresnahan, deposed that this guarantee was given in contemplation of the ASB further increasing its finance facilities to Deli.[7] It is not clear whether Mr Black disputes this. In one place in his

---

[7] Affidavit of Rhys Jeffrey Bresnahan in support of interlocutory application seeking summary judgment sworn on 2 September 2010 at [17]. Mr Bresnahan explained at [18] that an unlimited guarantee was not sought from the OFT trustees because a valuation obtained by the ASB of the OFT's Ohope property had indicated the property "had insufficient equity to secure any further lending".

affidavit he asserts only that the unlimited guarantee was "provided for a number of reasons".[8] But then he deposes that:[9]

> … the prior "unlimited" guarantee he refers to was dated five months earlier on the 13th of May 2008 and applied to the previous November 2007 facility nearly a year ago.

As [16] above demonstrates, that latter statement by Mr Black is simply incorrect.

[18] On 15 October 2008 Deli executed a new Facility Agreement with the ASB (the 2008 Facility Agreement). This increased the limit of the revolving credit facility to $575,000, to carry Deli through the summer trading period. It also provided for monthly reductions of that limit, commencing on 31 December 2008, until the facility had reverted back to its former limit of $475,000.

[19] The 2008 Facility Agreement listed the following securities for the increased revolving credit facility:

(a) the existing all obligations general security deed over Deli's assets and undertaking;

(b) the existing mortgage over the BFT's Papamoa property;

(c) the existing mortgage over the OFT's Ohope property;

(d) the existing guarantee from the trustees of the OFT, limited to $600,000; and

(e) "an existing limited guarantee and indemnity on our standard form, from Anna Jordan Lilburn Black, Richard John Carson Black, Selwyn Paul Eden (as trustees for Richard and Anna Black Family Trust). Limited to $300,000."

[20] We have given the verbatim description of that last security because that description is at the heart of this appeal against the substantive judgment.

---

8 Mr Black's affidavit at [22].
9 Mr Black's affidavit at [30].

Mr Bresnahan deposed that the description of the guarantee set out in [19](e) was an error by an ASB staff member. He went on to explain how that error had occurred. He recalled that Mr Black had pointed the error out to him in a telephone call after Deli went into liquidation, after assuring Mr Bresnahan that he would make sure Deli's debt was fully repaid. Mr Black disputed that he had said anything to Mr Bresnahan about "an error" in the 2008 Facility Agreement.[10]

[21] The shareholders of Deli placed the Company in voluntary liquidation on 20 February 2009. That liquidation put Deli in default of its obligations to the ASB, enabling the Bank to enforce its rights under the Facility Agreements and the securities for those facilities.[11]

[22] On 12 February 2010 the ASB made demand on the trustees of both the BFT and the OFT for the $446,464.74 owing under the revolving credit facility.

[23] When those demands were not met, on 10 March 2010, the ASB served notices under s 122 of the Property Law Act 2007 on the trustees of both the BFT and the OFT.

[24] In June 2010 the ASB entered into a deed of settlement with the trustees of the OFT. Pursuant to that deed the ASB:

(a) accepted $300,000 in full repayment of Mr and Mrs Osbornes' personal indebtedness, and in part repayment of Deli's indebtedness; and

(b) did not discharge the Osborne trustees from their guarantee of Deli's indebtedness, but covenanted not to sue them for the balance of that indebtedness.

[25] The ASB applied the $300,000 settlement monies first in reduction of the Osbornes' personal indebtedness to the ASB. That left only $41,060.10 available to

---

10 Mr Black's affidavit at [32].

11 We deliberately refer to Facility Agreements (plural), because it was the 20 April 2007 Facility Agreement that continued to apply to the term loan.

reduce Deli's indebtedness, leaving a balance of $528,082.68 outstanding (on both the term loan and revolving credit facility) as at 10 June 2010.

[26] Mr Black issued his proceeding against the ASB in the Auckland High Court on 21 May 2010.

[27] On 6 August 2010 the trustees of the BFT sold their Papamoa property, paying the net proceeds of $1,392,484.44 to the ASB, under protest. The ASB applied this money:

(a) first, to pay its own costs and expenses of $25,894.65;

(b) second, to pay Deli's revolving credit facility of $433,357.43;

(c) third, to repay Deli's term loan of $101,206.86;

(d) fourth, the remaining $831,825.50 in partial reduction of Mr and Mrs Blacks' personal borrowing from the ASB (leaving $504,967.67 still owing by them as at 2 September 2010); and

(e) fifth, to pay an "administration" fee of $200.

**The issues**

[28] We have distilled what we consider to be the issues on this appeal from the parties' separate lists. In dealing with each issue, after stating what it is, we will refer to the relevant part of the judgment under appeal, and the parties' opposing submissions, so far as is necessary. Where, in dealing with the issues, we refer to Mr Black, it is to counsel for the appellant rather than to the appellant himself, unless we indicate otherwise.

*Issue One: Did the Judge err in holding that Deli's revolving credit facility was secured by the unlimited guarantee of Deli's indebtedness to the ASB which the trustees of the BFT had given the ASB on 13 May 2008?*

[29] Mr Black's broad proposition to the Judge, and to us, was that the liability of the trustees of the BFT to the ASB for Deli's indebtedness under its revolving credit facility was limited to $300,000. Thus, the ASB was only able to appropriate $300,000 of the proceeds of the sale of the BFT's Papamoa property to repayment of Deli's indebtedness to the ASB. The balance needed to be applied toward repayment of the Blacks' personal indebtedness to the Bank. The Judge rejected that submission. So do we. As we largely agree with the Judge's reasoning, it is convenient to follow it through. Where we differ, or have something to add, we will make that clear.

[30] Two initial points relevant to Issue One must be made. The first is that success on this first issue would be a Pyrrhic victory for Mr Black. There are two reasons for that. The first is that the ASB had recourse to the BFT trustees under the all obligations mortgage secured over the Papamoa property, quite independently of any guarantee, whether limited or unlimited. Mr Black pleaded that the mortgage was "collateral".[12] Although it was not entirely clear, he appeared to argue that this meant the mortgage also was limited to $300,000. There is nothing in the mortgage or in the 2008 Facility Agreement to support that argument. The only way of reading the 2008 Facility Agreement and the securities listed in it, is that each security stands alone. Mr Black's argument that the mortgage is also limited to $300,000 because it is a "collateral" security is untenable.

[31] The second reason is that Mr Black was constrained to accept that the BFT trustees' 13 May 2008 unlimited guarantee of Deli's indebtedness to the ASB remained in full force and effect.[13] The ASB had recourse to the BFT trustees under that unlimited guarantee for all Deli's indebtedness to the ASB.

[32] The second initial point about Issue One is that the $300,000 limit Mr Black contends for relies on a term of the 2008 Facility Agreement. As we pointed out in

---

12 Statement of Claim dated 21 May 2010 at [2].

13 We elaborate on the reasons for this concession in [37] below.

[14] above, the terms of that Agreement do not apply to the term loan or to the BFT trustees' unlimited guarantee of that term loan. We agree with the Judge that the BFT trustees cannot invoke the provisions of the 2008 Facility Agreement to limit their liability to the ASB under their unlimited guarantee of the term loan.[14]

[33] In interpreting the 2008 Facility Agreement, the Judge began by holding that the second and third of the successive guarantees given by the trustees of Deli's indebtedness to the ASB had replaced and extinguished the previous guarantee.[15] We agree. A later guarantee will discharge an earlier guarantee by implied agreement if that was the parties' intention.[16] There was such an implied agreement here because the parties cannot have intended that there be in force at the same time between the same parties a guarantee limited to $300,000, a second guarantee limited to $600,000, and then a third unlimited guarantee.

[34] Thus, the Judge held that the only guarantee in existence when the 2008 Facility Agreement was entered into was the BFT trustees' unlimited guarantee. The Judge described the resulting ambiguity in the 2008 Facility Agreement in this way:[17]

> It refers either to an existing guarantee that is not limited or to a guarantee that no longer exists but is limited.

[35] The Judge resolved that ambiguity by holding that the reference in the Facility Agreement was to the BFT trustees' existing guarantee – their unlimited guarantee. He reasoned that it would not make business sense for the ASB to reduce the guarantee (from an unlimited one to $300,000), while at the same time increasing the limit on Deli's revolving credit facility (from $475,000 to $575,000). The Judge said:[18]

> It makes better business sense to read the words as applying to the existing unlimited guarantee instead of a limited guarantee that has been replaced.

---

14 Summary judgment decision, above n 2, at [50].

15 At [47].

16 *Mahoney v McManus* (1981) 180 CLR 370 at 379; *National Australia Bank Ltd v Drummond* (unreported, Supreme Court of New South Wales, Giles J, 7 July 1995) at 54–55; James O'Donovan and John Phillips *The Modern Contract of Guarantee* (2nd English ed, Sweet & Maxwell, London, 2010) at [9-16]–[9-22].

17 At [52].

18 At [54].

[36] We agree with this reasoning. In our view, to accept Mr Black's interpretation of the 2008 Facility Agreement would result in a commercial absurdity. It would mean the ASB was taking reduced security for increased lending, by somehow reviving a guarantee that had been extinguished on 21 August 2007, and substituting that revived guarantee for the existing unlimited guarantee that nevertheless remained in force.

[37] It follows that we reject Mr Black's argument that the 2008 Facility Agreement is to be given its "plain and natural" or "plain and unambiguous meaning", namely that the BFT trustees' liability to the ASB for Deli's indebtedness on the revolving credit facility was limited to $300,000. That argument necessarily required Mr Black to submit that the 2008 Facility Agreement operated to "revive" the guarantee limited to $300,000 which the BFT trustees had given the ASB in April 2007. Mr Black was constrained to accept that this "revival" occurred notwithstanding that the BFT trustees' unlimited guarantee remained in existence.

[38] Mr Black recognised the difficulties of his argument that the April 2007 guarantee, limited to $300,000, was revived. In an effort to overcome these difficulties, Mr Black made the alternative submission that the $300,000 limit applied to the BFT trustees' existing unlimited guarantee, because the terms of the 2008 Facility Agreement expressly prevailed over it.[19] That alternative submission, effectively that a limit was placed on the unlimited guarantee is, if anything, even more problematic. We reject it also.

[39] We also agree with the Judge that accepting Mr Black's interpretation of the 2008 Facility Agreement would create a further conflict, or ambiguity. That is because limiting the BFT trustees' liability to $300,000 cannot be reconciled with the following acknowledgment the trustees gave when they executed the Facility Agreement as guarantors:

> The Guarantor(s) [each]
>
> …

[19] Clause 3 of the 2008 Facility Agreement.

> 3. acknowledge and agree that all existing and future securities granted to us by the Guarantor(s) will also secure the Guarantor(s) indebtedness to us for all amounts owing under this Facility, unless otherwise specified in the Guarantee … .[20]
>
> …

[40] Interpreting the 2008 Facility Agreement in the "business sense" way the Judge did is consistent with that acknowledgment. The Judge recorded the ASB arguing that the BFT trustees' acknowledgment was "performative", while the list of existing securities in the 2008 Facility Agreement was merely "descriptive".[21] We are not persuaded that distinction is sound. But nor do we see that it need be drawn.

[41] Mr Black argued that cl 3 did not create an ambiguity because the guarantee limited to $300,000 listed in the 2008 Facility Agreement did "otherwise specify". This argument relied both on the reference in cl 3 to "existing … securities", and on various terms in the 20 April 2007 guarantee limited to $300,000. Mr Black contended that the effect of those terms[22] was that the 20 April 2007 guarantee continued in force and had not terminated. For the reasons we have given in [33], we do not accept these arguments. Where, as in this case, one guarantee is replaced by another increasing the limit of the guarantee, the parties can only have intended the earlier, lower guarantee to end.

[42] The Judge considered that interpreting the 2008 Facility Agreement in the way he did resolved the ambiguities he saw in it. However, we point out that an ambiguity is not a prerequisite to an interpretation that gives an agreement the commercial sense the parties to it intended, including by accepting that words that would deprive it of that commercial sense have been mistakenly included. That has been made clear both by the Supreme Court[23] and by the House of Lords.[24] In his judgment in *Vector Gas Ltd v Bay of Plenty Energy Ltd* Tipping J said:[25]

---

20 Although clumsily worded, the "us" in this acknowledgment obviously refers to the ASB.

21 At [56].

22 Mr Black relied particularly on cls 3.2 (No Discharge), 3.3 (Continuing Guarantee), and 4 (Termination of Guarantor's Liability).

23 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

24 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [15]–[22] and [25].

25 At [22] (footnotes omitted), in a passage with which three of the other members of the Court agreed: Blanchard J at [10]–[11]; McGrath J at [61]; Wilson J at [123].

> Nor does the objective approach require there to be an embargo on going outside the terms of the written instrument when the words in issue appear to have a plain and unambiguous meaning. This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean. An example of that situation is when plain words, read contextually, lead to a result which does not make sense, whether commercially or otherwise: a meaning that flouts business commonsense must yield to one that accords with business commonsense. The appropriate contextual meaning, if disputed, will, almost invariably, involve consideration of facts and circumstances not apparent solely from the written contract. While displacement of an apparently plain and unambiguous meaning may well be difficult as a matter of proof, an absolute rule precluding any attempt would not be consistent either with principle or with modern authority.

In *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffman concluded an admirable summary of the law with this passage:[26]

> What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. …

[43] A last point on this issue. Mr Black pointed out that the ASB had not sought rectification of the 2008 Facility Agreement. He nevertheless made some submissions emphasising the difficulty he contended the ASB would have faced had it sought rectification. In support of those submissions he referred to affidavits sworn in the proceeding by each of the BFT trustees as to their reliance on the wording of the 2008 Facility Agreement, in particular that their guarantee was limited to $300,000. Rectification was indeed not sought by the ASB. It is thus not an issue we need address. We merely comment that the subjective views of the parties as to what they thought the 2008 Facility Agreement meant are irrelevant to the objective exercise of interpretation.

[44] We answer Issue One ‘No’.

---

[26] At [25].

*Issue Two: Did the Judge err in dismissing, as not reasonably arguable, Mr Black's causes of action under the Fair Trading Act 1986, the Contractual Remedies Act 1979, or upon an estoppel by deed?*

[45] Following from our answer to Issue One, we also answer this second issue 'No'. That is because all these causes of action were dependent on the 2008 Facility Agreement limiting, to $300,000, the BFT trustees' liability to the ASB for Deli's indebtedness on the revolving credit facility.

*Issue Three: Did the Judge err in holding that the ASB was entitled to apply the proceeds of the realisation of the securities it held in respect of its lending to Deli as it chose?*

[46] Mr Black submitted to the Judge that the relevant security documents required the ASB to apply the proceeds of the OFT's Ohope property first in discharge of Deli's indebtedness. The Judge rejected that argument. He held:[27]

> The provisions Mr Black relies on impose obligations on Deli Ca Sea and the guarantors, not on the bank. The provisions are not in conflict with clause 9.1 of the mortgage. They do not impose on the bank any duty of the kind claimed.

[47] Reiterating this argument to us, Mr Black relied on four provisions. First, cl 9.1(b) of the mortgage the ASB held over the OFT's Ohope property:

> **9 PROCEEDS OF ENFORCEMENT**
>
> **9.1 Proceeds of Enforcement**: All money received by a Receiver or the Bank after the exercise of any enforcement right is to be applied, and any money received by the Bank after an Event of Default has occurred is to be applied by it, subject to any claim ranking in priority to the Secured Indebtedness (and subject to any law to the contrary), in the following order of priority towards:
>
> (a) all costs and expenses (including legal fees (on a solicitor and own client basis) and taxes) incurred by a Receiver or the Bank in connection with, or as a result of the exercise of, their respective rights (including the remuneration of a Receiver) under or otherwise in relation to this Mortgage in the order determined from time to time by the Receiver or the Bank;
>
> (b) all other Secured Indebtedness, in the order determined from time to time by the Bank; and

[27] At [28].

(c) the claims of those entitled to any surplus.

…

[48] Next, the following introduction to the list of securities in the 2008 Facility Agreement:

> **Security**
>
> Security for the Facility is as set out below. Prior to the Facility being made available you will provide us with those securities marked "new" (and/or our completed form of Solicitor's Certificate), registered *first in ranking* unless otherwise specified (any security governed by the Personal Property Securities Act 1999 will be registered on the Personal Property Securities Register).
>
> (Mr Black's emphasis.)

[49] Lastly, the following two parts of the ASB's General Terms and Conditions, which formed part of the 2008 Facility Agreement.

> **1. INTERPRETATION**
>
> **1.1 Definitions:**
>
> …
>
> "**indebtedness**" includes any obligation (whether present or future, actual or contingent, secured or unsecured, and whether incurred alone, jointly and severally, as principal, surety or otherwise) relating to the payment or repayment of money.
>
> …
>
> **6. SECURITY**
>
> **6.1 Securities:** You will provide or procure the provision of the securities specified in the Facility Agreement prior to initial Drawdown of the Facility, and any future securities required to secure your indebtedness to us. Any security governed by the Personal Properties Security Act 1999 will be registered on the Personal Property Security Register. *All securities are to be first in priority unless otherwise agreed with us. All existing and future securities granted by you or any other person as security for your indebtedness or performance of your obligations to us also secure your indebtedness to us for all amounts owing under a Facility Agreement.*
>
> (Again, Mr Black's emphasis.)

[50] The first of those provisions is the one relied upon by the ASB as entitling it to apportion the proceeds of the sale of the OFT's Ohope property in the way it did. We agree with the Judge that cl 9.1 entitled the ASB to appropriate the sale proceeds to discharge costs and expenses, and then to discharge indebtedness secured by the mortgage in the order the ASB saw fit. The clause defeats rather than supports Mr Black's argument.

[51] None of the other clauses supports Mr Black's argument on apportionment. His reliance on the two clauses referring to the security being "first in ranking" or "first in priority" misunderstands the effect of those clauses. As the Judge pointed out, they bind the borrower not the lender.[28] They required Deli as borrower to provide the ASB with a security or securities which rank above any other securities Deli may have given other lenders. They are not clauses that require the ASB to appropriate the proceeds it received upon realisation of the securities first to discharge the indebtedness of Deli. The last sentence of cl 6.1 specifically refers to "a Facility Agreement" as opposed to the reference in the first sentence to "the Facility Agreement". It thus covers the facility agreement or agreements pursuant to which the ASB lent money to Mr and Mrs Osborne personally.

[52] Mr Black also contended that the ASB was unable to appropriate any of the proceeds from the sale of the OFT's Ohope property to discharge the Osborne's personal indebtedness to the ASB, because it had not made demand upon the Osbornes "crystallising" the amount due under their mortgage or the 2008 Facility Agreement. There is nothing in this argument. Rather than have the ASB sell the Ohope property forcibly, the trustees of the OFT sold it themselves and paid the sale proceeds over to the ASB. Clause 9.1 in the mortgage then entitled the ASB to apportion those proceeds as it saw fit. Those sensible arrangements obviated the need for any demand. The amount due was the amount of the Osbornes' indebtedness to the ASB.

[53] Quite apart from any of this, Mr Black's appropriation arguments overlooked the fact that the ASB could quite properly have sought repayment of Deli's

---

[28] Summary judgment decision, above n 2, at [28].

indebtedness by recourse solely to the securities it held from the BFT trustees.[29] Had it done so, the manner in which the ASB appropriated the proceeds of the realisation of the OFT trustees' Ohope property would not have arisen.

[54] We answer this issue 'No'.

*Issue Four: Did the Judge err in holding that the ASB neither had nor breached any relevant disclosure obligations it had to the BFT trustees?*

[55] Mr Black submitted that the Judge was wrong to hold that the Credit Contracts and Consumer Finance Act 2003 did not apply to the ASB's lending to Deli, because it was not a consumer credit contract. Mr Black repeated to us the submission that he had unsuccessfully made to the Judge, namely that the following clause in the guarantors' acknowledgment of the 2008 Facility Agreement invoked the Act:

> The Guarantor(s) [each]:
>
> 1. acknowledge receipt of this Facility Agreement, (which includes the Terms and any initial disclosure required under the Credit Contracts and Consumer Finance Act 2003), the Guarantee and a copy of each of the new Security Documents referred to in the paragraph headed "Security" herein:
>
> …

[56] We agree with the Judge[30] that this acknowledgment applies where the Credit Contracts and Consumer Finance Act applies. As the Act did not apply, nor does the acknowledgment.

[57] The ASB acknowledged that it had an obligation to disclose unusual features to the BFT trustees as prospective guarantors: *Scales Trading Ltd v Far Eastern Shipping Co Public Ltd.*[31] As Mr Robinson correctly submitted, and as the Judge held, that is a duty to prospective guarantors which ends once the contract of

---

29 The well established position is succinctly summarised in *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 (PC) at 545.

30 At [81]–[82].

31 *Scales Trading Ltd v Far Eastern Shipping Co Public Ltd* [2001] 1 NZLR 513 (PC) at [27]–[28].

guarantee is entered into.[32] In terms of the ASB's obligations once the BFT trustees had given their guarantees, Mr Black cited the following passages in Phillips *The Modern Contract of Guarantee*[33] as a correct statement of a bank's duty to a guarantor:

> **(v) A duty to answer questions**
>
> If the guarantor asks the creditor a direct question about a material point, the creditor must give the information honestly and to the best of its ability. Sureties are entitled to true, honest and accurate answers to their questions about any matters germane to the guarantee. However, if the creditor's replies are misleading they will only release the sureties if they amount to a misrepresentation. In a sense, the creditor's obligation is a positive duty to abstain from misrepresenting the material facts. The creditor is not obliged to make inquiries elsewhere as to the financial position of the principal debtor. It is merely required to answer truthfully from information within its own resources.
>
> On this basis a surety has a right to inquire periodically from the bank the amount for which the surety is liable under the guarantee. The bank should then disclose the amount of the surety's existing and contingent liabilities. If the amount of the debt secured is more than the limit of the guarantee, the surety should simply be advised that he is liable for the full amount stated in the guarantee, but generally the surety is not entitled to know of the particulars of the customer's account or be given a copy of it. The surety can also demand information as to the interest rate charged on the principal debt and the amount, if any, realised by the bank under its collateral securities. On all these matters, the surety is entitled to a truthful answer.

[58] In his affidavit Mr Black deposed that he had met with Mr Bresnahan in May and June 2009 (that is, after Deli had gone into liquidation on 20 February 2009). Mr Black stated that he had asked Mr Bresnahan at these meetings about the Osbornes' financial position, and in particular how they were able to continue meeting their equal interest commitments for Deli's debt to the ASB. Although Mr Bresnahan would not disclose details, Mr Black stated that Mr Bresnahan told him "that the Bank had already lent and was continuing to lend to the Osbornes money …". But Mr Black also deposed that Mr Bresnahan explained that the Bank had the benefit of two securities for the Deli debt, being the Ohope property and also the BFT's property. He said Mr Bresnahan confirmed that both properties would be "looked to" for repayment of the Deli debt.[34]

---

32 At [92].
33 O'Donovan and Phillips, above n 16, at [4-29]–[4-31].
34 Mr Black's affidavit at [53], [54] and [58].

[59] We do not see anything deficient or misleading in the way Mr Bresnahan answered Mr Black's questions. It is true that the level of the Osbornes' personal indebtedness to the ASB could have potentially affected the BFT trustees. As events transpired, that potentiality became an actuality. Yet, while both the BFT trustees and the OFT trustees had guaranteed Deli's indebtedness to the ASB, neither had guaranteed the other's personal borrowing from the ASB. Mr Black anyway knew what securities the ASB held for Deli's indebtedness; they were as listed in the successive facility agreements.

[60] The submission put to us was that if Mr Black had known the Osbornes' financial situation the BFT trustees "might have been able to protect their position in direct dealing with the Osbornes". That submission is as unconvincing as it is unspecific.

[61] We have pointed out that Deli was a joint enterprise of the Black and Osborne families. The Blacks were heavily personally indebted to the ASB, in addition to being guarantors of the whole of Deli's debt. What Mr Bresnahan outlined in appropriately general terms to Mr Black conveyed to Mr Black that the Osbornes were in much the same position. We doubt that that was news to Mr Black. As the Judge observed:[35]

> The Blacks were likely to know as much about the financial position of the Osbornes as the bank and they were in at least as good a position to find out.
> …

[62] It is appropriate to reiterate, in relation to this issue about the ASB's disclosure obligations to the BFT trustees, a point we have already made. That point is that the ASB could have sought repayment of Deli's indebtedness solely by recourse to the securities it held from the BFT trustees.

[63] For all these reasons there is nothing in Mr Black's unspecific complaint of a lack of disclosure, and anyway no force in his assertion that further disclosure might in some unspecified way have enabled the BFT trustees to protect their position.

[64] We also answer this issue 'No'.

---

[35] At [87].

*Issue Five: Did the Judge err in entering summary judgment in favour of the ASB without first giving the BFT trustees discovery?*

[65] Now that discovery under the High Court Rules is a co-operative and confined exercise, we asked Mr Black to indicate what documents the trustees were seeking. He answered by referring us to that part of Mr Bresnahan's affidavit in which he describes investigating the ASB's error in recording, in the 2008 Facility Agreement, a guarantee from the BFT trustees "limited to $300,000". He told us the BFT trustees sought discovery of the documents relevant to, or generated by the Bank's investigation. He referred us to one of those documents, an email from a Ms Maxwell to Mr Bresnahan sent on 25 August 2010. Ms Maxwell is the business manager at the ASB's support centre in Mt Eden, Auckland. In her email Ms Maxwell describes how the error occurred.

[66] We do not see how discovery of the "investigation" documents could have advanced the BFT trustees' claim in the High Court. The Court had:[36]

> the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended.

[67] Documents relating to an internal investigation by one of the parties to the agreement as to how one of the terms in the agreement came to be worded in the way it was have no relevance to that interpretation task.

[68] Our answer to this issue is also 'No'.

*Issue Six: Did the Judge err in awarding the ASB costs of $93,268.90?*

[69] Mr Black's primary submission to us was the one he had unsuccessfully advanced to the Judge. At the first case management conference of the proceeding in the High Court on 29 July 2010, Associate Judge Faire, pursuant to r 14.3 of the High Court Rules, fixed costs at category 2 for the proceeding. In Mr Black's submission, that category then applied for the remainder of the proceeding, unless

---

[36] *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus LR 1336 per Carnwath LJ at [50] as cited by Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd*, above n 24, at [23].

for "special reasons" the Court changed the category pursuant to r 14.3(2). He contended there were no special reasons for departing from category 2 in terms of the complexity, skill and experience factors mentioned in r 14.3.

[70] The ASB sought indemnity costs pursuant to r 14.6(4)(e) which provides:

> (4) The Court may order a party to pay indemnity costs if –
>
> …
>
> (e) the party claiming costs is entitled to indemnity costs under a contract or deed.

[71] The ASB's contractual entitlement to indemnity costs in respect of the litigation in the High Court was in two of the security documents. First, it was in the mortgage dated 2 August 1999 which the BFT trustees gave the ASB as security for their obligations to the ASB. Secondly, it was in the unlimited guarantee the BFT trustees gave the ASB on 13 May 2008. The clauses in those two documents are in very similar terms. That in the unlimited guarantee provided:

> **14.1** **Expenses**: You will pay each cost and expense (including all legal expenses on a solicitor and own client basis) sustained or incurred by us in connection with:
>
> …
>
> (c) the exercise of, or in protecting or enforcing or otherwise in connection with, our rights under this Deed or another transaction required or contemplated by this Deed.
>
> In each case on demand and on a full indemnity basis.

[72] As the Judge pointed out, the answer to Mr Black's argument on costs is that r 14.6 expressly provides that the Court may order indemnity costs notwithstanding any categorisation of the proceeding earlier made under r 14.3.[37] Rule 14.6 provides:

> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> …

[37] Costs decision, above n 5, at [11].

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (**indemnity costs**).

(2) The court may make the order at any stage of a proceeding and in relation to any step in it.

[73] The Judge recorded that the fees of the ASB's lawyers "on a pure time and attendance basis" would have amounted to $131,765.25, but were written down by the lawyers to $91,413.50.[38] Mr Black submitted that even that figure was "still grossly excessive and unreasonable".

[74] The Judge dealt with that submission in this way:

> [14] The concern that the bank's lawyers spent more time on the case than it required is addressed by the lawyers' write off of time. Substantial adjustments have been made on that account. I am entitled to take into account that the bank is not assured of full recovery from the Blacks. The bank carries the legal charges in the first instance, without the certainty of recovery from the Blacks. The bank will be alive to the reasonableness of its lawyers' charges. In these circumstances I am entitled to assume that if the charges are reasonable as between the bank and its lawyers, I do not have to scrutinise the charges further. The matter may be otherwise if the bank could be assured that it would recover in full for any legal costs, but that is not this case. In these circumstances I see no reason to hold that the costs claimed are not reasonable.

[75] In that passage the Judge embarks on assessing the reasonableness of the fees charged by the ASB's lawyers. The fact that the lawyers had written off $40,334.75 – approximately 31 per cent – of their fees calculated on a "pure time and attendance basis" was obviously relevant to the assessment and the Judge rightly noted it. The Judge was also entitled to take into account that the ASB may ultimately have to pay its lawyers fees itself, and would therefore be concerned with the amount of those fees. But we do not agree with the Judge that that latter factor entitled him, without more, to conclude that the charges were reasonable.

[76] Rather than allowing Mr Black's appeal against the costs judgment and remitting the costs to the Judge for proper fixing by him, we intend to assess ourselves whether the indemnity costs claimed by the ASB are reasonable. The rules

---

[38] At [8]. There is a minor error in the Costs decision: the correct figure is $91,413.50, not $91,430.50 as it is recorded at [8] of that decision.

permit that course,[39] and it is appropriate here for two reasons. First, we have everything necessary to enable us to make that assessment, because the detailed submissions of the ASB's lawyers to the Judge are part of Mr Robinson's submissions for the ASB to us. We lack only the advantage the Judge would have had because he had heard the opposing summary judgment applications. Secondly, we are anxious to minimise further legal costs and delays for the parties.

[77] As this Court held in *Frater Williams & Co Ltd v Australian Guarantee Corporation (NZ) Ltd*,[40] where there is a contractual right to indemnity costs the question for the Court asked to make an order is: for the necessary steps, are the costs claimed reasonable in amount? That is because r 14.6(1)(b) permits the Court to order payment of costs "reasonably incurred". It follows from the wording of r 14.6(1)(b) that indemnity costs are determined with reference to actual costs, but may be less than the actual costs if the Court considers the actual costs were not reasonably incurred.

[78] In *Frater Williams* this Court emphasised that the word "reasonable" does not import a discretion in the usual sense.[41] The principle that one party may contractually bind itself to pay the other party's full solicitor/client costs is established: *ANZ Banking Group (NZ) Ltd v Gibson.*[42] These two points were well made in the course of the following observations by this Court in *Beecher v Mills*:[43]

> … In the case of a contract [giving an indemnity for costs] it must in the end be a matter of determining what recovery is expressly or impliedly intended. In principle, anything less than a full indemnity for costs properly incurred must leave the indemnitee with part of the liability for which the indemnifier is prima facie responsible (*Simpson and Miller v British Industries Trust Ltd* (1923) 39 TLR 286, 289). In the absence of a contrary indication it is not to be assumed that the parties intended such a result. Nor can there ordinarily be any room for the exercise of a judicial discretion to order less costs and thereby erode the contractual protection the indemnity was intended to provide. A contractual obligation of that kind is enforceable unless contrary to public policy and, as in *ANZ Banking Group (NZ) Ltd* …, we are unable to see how requiring the Beechers in this case to meet all costs (calculated on a solicitor/client basis) properly incurred by Mr Mills in relation to the

---

39 Court of Appeal (Civil) Rules 2005, r 48(4).

40 *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd* (1994) 2 NZ ConvC 191,873 (CA) at 191,886–191,887.

41 At 191,887.

42 *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA).

43 *Beecher v Mills* [1993] MCLR 19 (CA).

> performance of the indemnity under cl 20 could be said to impede the administration of justice or otherwise be contrary to any discernible public policy considerations.

[79] Thus, where the entitlement to indemnity costs is contractual and the Court is exercising its power under r 14.6(4)(e), the position is distinctly different from orders under either of r 14.6(4)(a) or (b). *Bradbury v Westpac Banking Corp*[44] demonstrates the different approach required where an order is made under r 14.6(4)(a).

[80] Assessing whether the indemnity costs claimed under a contract are reasonable involves the Court making an objective assessment of these matters:[45]

(a) what tasks attract a costs indemnity on a proper construction of the contract;

(b) whether the tasks undertaken were those contemplated in the contract;

(c) whether the steps undertaken were reasonably necessary in pursuance of those tasks;

(d) whether the rate at which the steps were charged was reasonable having regard to the principles normally applicable to solicitor/client costs; and

(e) whether any other principles drawn from the general law of contract would in whole or in part deny the claimant its prima facie right to judgment.

[81] Normally, for example in the course of a typically busy summary judgment list, it will not be feasible for the Court to make a detailed assessment of the reasonableness of the indemnity costs claimed under a contract. That is the reason for this Court's observation in *Frater Williams* that the Court's assessment of the fee

---

[44] *Bradbury v Westpac Banking Corp* (2008) 18 PRNZ 859 (HC) particularly at [198]–[214], upheld on appeal in *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 particularly at [88].

[45] *Frater Williams* at 191,887, endorsed by this Court in *Watson & Son Ltd v Active Manuka Honey Association* [2009] NZCA 595 at [20].

note(s) leaves "room for robust judgment as to the costs considered reasonable in all the circumstances".[46] If the party liable to pay the indemnity costs is not content with that "robust judgment", but indicates to the Court that it seeks a detailed vetting of the reasonableness of the costs, then we consider three avenues are open to the Court. We do not set these out in any general order of preference, save that we have deliberately put the third last, for the reasons we explain in [86]–[100].

[82] The first avenue is that the liable party can ask the Judge to make the order for indemnity costs subject to taxation, which then engages rr 14.18–14.21 and 14.23 of the High Court Rules. While these rules have been little used of recent years, our inquiries confirm that the capacity to tax costs still exists.

[83] The second avenue is that the parties could agree to be bound by the decision of a suitably qualified practitioner who vets the reasonableness of the costs. That agreement could provide for the practitioner's decision to be referred to the Court for formalising in an order.

[84] The third avenue involves referring the fee note(s) to the New Zealand Law Society. This avenue was outlined by this Court in *Frater Williams* in the following way:[47]

> … A legal practitioner's bill of costs is subject to revision under Pt VIII of the *Law Practitioners Act* 1982, whether at the instigation of the immediate client or at the instigation of any other person who is liable to indemnify the client (see definition of "party chargeable" in s 139 and its use in ss 143(b) and 145). The costs charged must be reasonable having regard to criteria which are now well known and understood in the context of cost revisions under the Act. The party chargeable can normally exercise its right to a costs revision at any time before judgment is given (*Law Practitioners Act* ss 145, 146(2) and 151(2)(b)). In a case like the present one, the defendant could therefore seek a costs revision under that Act. If it has not done so, it will be for the Court to decide in each case whether it should consider the bill itself or refer it to a District Council for revision pursuant to s 146. In either case the principles to apply in assessing the bill will be the same.

[85] Subject to ss 150 and 151, s 146 provided:

> … a Court may order that a bill of costs be referred to the appropriate District Law Society for revision by the District Council.

---

[46] At 191,887.
[47] At 191,887.

That order could be made either on the application of the practitioner or that of "the party chargeable": s 146(2). "Party chargeable" was defined in s 139 as including "any person who has paid or is liable to pay the bill either to the practitioner or to any other party chargeable with the bill".

[86] What this Court said in *Frater Williams* is predicated on s 139 extending to parties against whom an indemnity costs order had been made. Associate Judge Sargisson subsequently took a similar view in *Hanover Finance Ltd v Krukziener*,[48] when granting Mr Krukziener's application under s 146 that the bill of costs rendered to Hanover Finance by its solicitors be referred to the Auckland District Law Society for revision.

[87] The 1982 Act has, of course, now been repealed and replaced by the Lawyers and Conveyancers Act 2006. That abolished the costs revision process under the 1982 Act. Complaints about bills of costs are treated under the 2006 Act as a complaint about a lawyer's conduct. If the lawyer's conduct is considered to be unsatisfactory, then s 156(1) permits various orders including reducing or cancelling the lawyer's fees. The provision in the current Act most comparable to s 146 in the 1982 Act is s 132(2):

> **132 Complaints about practitioners, incorporated firms, and their employees**
>
> …
>
> (2) Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).

[88] Related, is reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008:

> **29 Complaints relating to bills of costs**
>
> If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the

[48] *Hanover Finance Ltd v Krukziener* HC Auckland CIV-2006-404-1667, 17 August 2007.

complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs—

(a) was rendered more than 2 years prior to the date of the complaint; or

(b) relates to a fee that does not exceed $2,000, exclusive of goods and services tax.

[89] As it was introduced to Parliament on 24 July 2003, what became s 132(2) of the Lawyers and Conveyancers Act read:

> **119 Complaints about practitioners, incorporated firms, and their employees**
>
> Any person may complain to the appropriate complaints service about –
>
> ...
>
> (c) the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint) ... .

[90] The Select Committee Report tabled on 27 July 2004 records that the Justice and Electoral Committee recommended that cl 119 be amended to remove (c) above and to insert a new subclause (2) as follows:

> **119 Complaints about practitioners, incorporated firms, and their employees**
>
> **...**
>
> (2) *Any person who is chargeable with a bill of costs*, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).

[91] That recommendation was explained as follows:[49]

> We recommend the inclusion of new clause 119(2) so that only a person who is chargeable with a bill of costs may lay a complaint about the amount of a bill of costs. Russell McVeagh submitted that it was inappropriate for people unconnected with a fee to be able to lay a complaint.

[49] At 7 of the Report.

[92] Parliament voted to accept that recommendation on 29 March 2005. The wording of cl 119(2) was not altered further before the Bill received the royal assent on 20 March 2006.

[93] Unfortunately, although the word "chargeable" was reintroduced by the amendment, no definition of "any person … chargeable" was included in the 2006 Act. Subsequent case law diverges sharply as to whether a person in Mr Black's position is a "person …chargeable" in terms of s 132(2).

[94] In *Simpson Grierson v Gilmour*, Stevens J was in no doubt that a person in Mr Black's position would not be included:[50]

> … The opening words of [s 132(2)] are important. Such person must be one "who is chargeable with a bill of costs". This depends upon there being a contract of retainer between the practitioner and the person concerned.

[95] In *GM v TT*[51] the Legal Complaints Review Officer reached the same view. She said:

> [20] The Practitioner did not invoice the Applicant. Rather, his complaint is based on a costs order of the Court. Notwithstanding that the costs sought by the [District Council] may have reflected the fees it had paid to the Practitioner, it is difficult to see any basis on which the Applicant had standing to file a complaint under section 132(2) against a lawyer concerning charges to its client.

[96] On the other hand, in *JG v RS*,[52] another Legal Complaints Review Officer notes the view expressed by Judge Cunningham in a related District Court proceeding that "there are in my view good policy grounds that the current section 132(2) should not be interpreted narrowly", even though the Judge acknowledged that "it could be argued that the ambit of persons who can avail themselves of the costs revision process has been narrowed".

[97] *JG v RS* involved a dispute between the registered proprietors of a unit in, and the body corporate of, a unit title development. That was also the context of Associate Judge Christiansen's decision in *Doody v Body Corporate 343562*.

---

50 *Simpson Grierson v Gilmour* HC Auckland CIV-2008-404-8674, 27 August 2009 at [64].
51 *GM v TT* LCRO 31/2011.
52 *JG v RS* LCRO 245/2010.

Without deciding the point, the Associate Judge observed that s 132 "may not preclude a complaint by a unit title owner about the legal fees incurred by a body corporate in the recovery of outstanding levies".[53]

[98] Finally, there are two judgments of the High Court which note the issue as to the ambit of s 132(2), without needing to decide the point: *Hannam v Herd*;[54] *Eagle v Petterson*.[55] In the first of those cases White J said:

> [20] … The Standards Committee may, however, wish to consider whether Mr Herd is a person "who is chargeable with a bill of costs" in terms of s 132(2) of the Lawyers and Conveyancers Act 2006. The issue appears to be whether the reference to "any person chargeable with a bill of costs" is limited to a person, who as a result of a contractual relationship with a lawyer or a third party, such as a lessor, mortgagee or guarantor, or as a result of a statutory or regulatory obligation is liable to meet a lawyer's costs (cf *Simpson Grierson v Gilmour* at [63]–[65], *Crown Money Corp Ltd v Grasmere Estate Trustco Ltd*,[56] and *Watson & Son Ltd v Active Manuka Honey Assoc*[57]) or whether, in addition to beneficiaries who are expressly entitled to complain about certain costs under s 160 of the Lawyers and Conveyancers Act 2006, it extends to anyone else, including a party in a proceeding who is ordered by the Court to pay indemnity costs to another party in the amount which the Court determines was "reasonably incurred".

[99] We have set all this out because we have suggested that a complaint under s 132(2) is a potential avenue for dealing, in a detailed way, with a challenge to the reasonableness of indemnity costs. Yet it remains to be authoritatively decided whether, in a case such as this, that is so. Hopefully the background we have set out will assist when that decision needs to be made.

[100] Returning to the position here, we accept Mr Robinson's submission that the ASB had no option but to defend Mr Black's claims on behalf of the BFT trustees. Mr Black's statement of claim launched a wide attack on the Bank's right to enforce the securities it held from the BFT trustees for Deli's indebtedness to the Bank. Although three causes of action were pleaded against the ASB,[58] we accept Mr Robinson's submission that Mr Black pursued at least 10 discrete issues. The

---

53 *Doody v Body Corporate 343562* [2012] NZHC 25 at [82].
54 *Hannam v Herd* HC Auckland CIV-2008-404-5195, 3 December 2010.
55 *Eagle v Petterson* HC Auckland CIV-2011-404-7387, 16 December 2011.
56 *Crown Money Corp Ltd v Grasmere Estate Trustco Ltd* HC Auckland CIV-2008-404-3801, 21 November 2008.
57 At [18]–[23].
58 It was perhaps four, since the third was pleaded in the alternative.

ASB was obliged to respond to each of these issues, researching the point, preparing evidence if required and preparing and presenting submissions. This is Mr Robinson's summary for the Judge of those 10 issues:

(1) The ASB was not entitled to apply $300,000 received from the OFT first, to repay Mr and Mrs Osborne's personal obligations and, secondly, towards Deli's indebtedness to the ASB.

(2) The ASB was not entitled to apply the proceeds of the sale of the BFT's Papamoa property first to Deli's indebtedness to the ASB, and secondly, to Mr and Mrs Black's personal indebtedness.

(3) The ASB had breached its duty of care as mortgagee by agreeing to accept $300,000 for the sale of the OFT's Ohope Property.

(4) The settlement deed entered into between the ASB and the OFT discharged the BFT from any liability as co-guarantors in respect of Deli's obligations to the ASB.

(5) The 2008 Credit Facility limited the BFT's obligations as guarantor to $300,000. This limitation of liability was argued to arise variously from:

(i) an express breach of contract;

(ii) an implied breach of contract;

(iii) a misrepresentation, relied on by the guarantors; and

(iv) estoppel by deed.

(6) The ASB's employee (Mr Bresnahan) made representations as to how the ASB would exercise its powers in relation to the securities.

(7) Misleading and deceptive conduct under s 9 of the Fair Trading Act 1986.

(8) The ASB failed to make disclosure under the Consumer Credit Contracts and Finance Act 2003 of the co-guarantor's financial arrangements.

(9) The ASB failed to disclose "unusual" features in relation to the lending.

(10) The ASB failed to comply with information requests.

[101] Mr Robinson placed before the Judge copies of the fee notes rendered to the ASB by Simpson Grierson, a schedule of the hourly rates for partners and staff used in compiling those fee notes, and also a schedule (Schedule C) setting out the various steps Simpson Grierson had undertaken. Schedule C described each step and the work it involved, gave the date of the relevant invoice and the amount of fees involved in the step.

[102] Inevitably, the ASB's costs reflected the breadth and complexity of the points raised by Mr Black. It is significant that the argument extended into a second day, so that the hearing before the Judge took one and a half days.

[103] A submission made to the Judge by Mr Black was that the ASB's costs were unreasonably incurred because they substantially resulted from the Bank's error in drafting the unlimited guarantee. There was no force in that submission for the reasons set out by the Judge in his substantive judgment. Mr Black issued his proceeding and applied for summary judgment alive to the risks of attempting "to take advantage of a drafting slip in the [October 2008] Facility Agreement".[59] And it was Mr Black who defined the scope of the issues. We accept Mr Robinson's submission that the ASB cross-applied for defendant's summary judgment in an effort to avoid the expense (and no doubt the delay) of a full trial, including interlocutory matters such as discovery.

---

[59] Summary judgment decision, above n 2 at [108].

[104] The award of $91,413.50 is a substantial one. In his costs judgment the Judge recorded the ASB's acknowledgment that it had deducted $30,104.50 from the proceeds of the sale of the BFT's Papamoa property.[60] Mr Robinson acknowledged to us that that sum was also for legal fees covered by two further invoices from Simpson Grierson.[61] The sum was deducted on 11 August 2010, well after the proceeding was commenced by Mr Black on 21 May 2010, but a few days before the ASB filed its statement of defence on 19 August 2010. So, effectively, the total costs impost on the BFT was $121,518 (or $117,308.15 if the lower figure $25,894.65 mentioned in [27](a) above is adopted).

[105] While every case is different, a broad comparison can be made with recent awards of indemnity costs in proceedings where summary judgment was sought. The following list was put to the Judge by Mr Robinson:

(a) *Agape-Holistic Retreat Corp Ltd (in liq) v Agape-High Q-Holistic Horsemanship Corp Ltd.*[62] Summary judgment application against the second defendant withdrawn before a hearing had taken place. Associate Judge Hole awarded the second defendant indemnity costs of $78,534.35.

(b) *Agape-Holistic Retreat Corp Ltd (in liq) v Agape-High Q-Holistic Horsemanship Corp Ltd*.[63] Defended summary judgment application. Two day hearing considering five legal issues. Lang J awarded the first defendant indemnity costs of $95,000 including disbursements.

(c) *Fotheringhame v Singh Farms New Zealand Ltd*.[64] Application for summary judgment and a Mareva injunction. Some interlocutories. One day hearing. John Hansen J ordered indemnity costs of $66,298.71 plus disbursements.

---

60 Costs decision, above n 5, at [15].

61 Invoices 455596 and 457566.

62 *Agape-Holistic Retreat Corp Ltd (in liq) v Agape-High Q-Holistic Horsemanship Corp Ltd* HC Auckland CIV-2007-404-6917, 7 August 2008.

63 *Agape-Holistic Retreat Corp Ltd (in liq) v Agape-High Q-Holistic Horsemanship Corp Ltd* HC Auckland CIV-2007-404-6917, 16 September 2010.

64 *Fotheringhame v Singh Farms New Zealand Ltd* HC Auckland CIV-2008-404-2215, 5 November 2008.

(d) *Stockco Ltd v Denize*.[65] Defended applications for summary judgment and a stay. Associate Judge Doogue critical of the defendants for pursuing obstructive and meritless defences. Awarded the plaintiffs indemnity costs of approximately $45,000.

[106] To that list might be added the costs judgment of White J in *Ibanez Ltd & Ors v Westpac New Zealand Ltd*.[66] That case involved a one day hearing of an application for an interlocutory injunction to restrain the sale of a property pending the hearing of the substantive claim alleging that Westpac was in breach of its duty of care at common law and under s 176 of the Property Law Act 2007 in and about the exercise of its power of sale. White J was satisfied that the security documents entitled Westpac to indemnity costs, and awarded it $153,467.76 against the unsuccessful plaintiffs.

[107] To summarise, we are satisfied that the ASB was entitled to indemnity costs against Mr Black in respect of the High Court proceeding. We are further satisfied that the costs of $91,413.50 claimed by the ASB were reasonably and properly incurred by the Bank in defending Mr Black's challenge to the ASB's rights to enforce the securities it held from the BFT trustees in respect of Deli's indebtedness to the ASB. There is no dispute about the disbursements of $1,855.40, giving the total of $93,268.90 awarded by the Judge.

[108] We accordingly answer this sixth and last issue 'No'.

**Result**

[109] We have answered each of the six issues adversely to the appellant.

[110] The appeal is accordingly dismissed.

[111] The costs of this appeal are within the indemnity provided by the BFT trustees to the ASB in terms of cl 14.1 of their unlimited guarantee of 13 May 2008.

---

65 *Stockco Ltd v Denize* HC Auckland CIV-2010-404-5668, 15 July 2011.
66 *Ibanez Ltd v Westpac New Zealand Ltd* [2012] NZHC 1864.

We have set that clause out in [71] above. In particular, the costs of this appeal are within sub-clause (c). Accordingly, the appellant is to indemnify the respondent for its actual costs reasonably incurred in successfully resisting this appeal plus usual disbursements.

Solicitors:
Craig Griffin & Lord, Auckland for Appellant
Simpson Grierson, Auckland for Respondent