IN THE DISTRICT COURT
AT AUCKLAND

CIV 2016-004-001066
[2017] NZDC 25428

BETWEEN	DEBT BUYERS LIMITED Plaintiff
AND	PAUL GOOLD SPACKMAN Defendant

Hearing:	25 October 2017
Appearances:	Mr Chapman and Mr Botterill for the Plantiff Ms Palu for the Defendant
Judgment:	14 November 2017

DECISION OF JUDGE G M HARRISON

Introduction

[1] On 2 July 2007 Pier Developments Limited (PDL) agreed to borrow $357,459.20 from Propertyfinance Securities Limited (PFSL). A loan agreement was executed that day.

[2] As security for the loan PDL executed a mortgage in favour of PFSL over Apartment 11, The Pier, 12-18 Marine Parade, Paraparaumu Beach, Wellington. A mortgage was executed and registered against the title.

[3] Also on 2 July 2007 the defendant Mr Spackman and his then partner Mrs Rosalind Jane Meyer executed a deed of guarantee and agreed "to guarantee payment of, and indemnify the creditor in respect of all the debtors' (existing and future) indebtedness to the creditor on the terms and conditions contained in this document …"

[4] Mr Spackman and Ms Meyer also executed the loan agreement and mortgage as covenantors.

[5] On 5 July 2007 PFSL assigned the loan to New Zealand Guardian Trust Company Limited as trustee of PFSL, which in turn transferred the mortgage over the property to its nominee Propertyfinance Funding Nominees Limited (PFNL).

[6] By notice of 10 August 2007 a letter was forwarded to PDL by Shane Clark, Chief Financial Officer, the letter exhibited in evidence not having any letterhead or description on behalf of whom the letter was written.

[7] It provided:

> As part of our funding arrangements, from 05-07-2007 your loan and its associated mortgage have been transferred from Propertyfinance Securities Limited to the New Zealand Guardian Trust Company Limited (as trustee of the Propertyfinance Securities RML 2005-3 Trust) ("trustee") and Propertyfinance Funding Nominees Limited (as nominee and bare trustee for the trustee) ("nominee").

[8] No separate notice was forwarded to Mr Spackman nor Mrs Meyer as guarantors.

[9] I note at this point that notice of assignment of the benefit of the guarantee only needs to be given to the guarantor to protect the assignee's priority, but it is otherwise unnecessary. "The Modern Contract of Guarantee" 2nd English Edn, JC Phillips at 10-172.

[10] On or about 5 March 2009 PDL defaulted by failing to make a payment due under the loan and a Property Law Act notice was issued. On 29 November 2010 PDL sold the property for $320,000.

[11] After costs and disbursements there remained a shortfall of $203,255.21 which consisted of the loan principal of $122,258.37 and $80,996.84 for interest. Up to June 2015 Mrs Meyer made payments totalling $25,676.52 pursuant to a creditors proposal approved by the High Court.

[12] Up until 21 May 2015 Mr Spackman made payments totalling $2,732.52. That resulted in a nett shortfall of loan principal of $93,849.33.

[13] On 30 August 2013 NZ Guardian Trust assigned "the assets and obligations on the terms and conditions set out in this agreement," to PFSL.

[14] The assets were defined as:

> Means all of the vendor's right, title and interest, present or future, vested or contingent under and in connection with the documents and related documents, including (without limitation):
>
> (a) All amounts due or to become due to the vendor under or in connection with the document;
>
> (b) All rights to any cause of action or remedy under or in connection with the documents and the related documents;
>
> (c) All other rights, powers and benefits (express or implied) of the vendor arising under or in connection with the documents and the related documents.

[15] "Documents" is defined as:

> (a) Each loan agreement; and
>
> (b) In relation to each loan agreement each:
>
> (i) Mortgage;
>
> (ii) Deed of priority;
>
> (iii) Guarantee or collateral security.
>
> (c) Each liquidated loss; and
>
> (d) In relation to each liquidated loss, each:
>
> (i) Loan agreement;
>
> (ii) Deed of priority;
>
> (iii) Guarantee or collateral security; and
>
> (iv) Loan statement.

[16] On 29 August 2014 PFSL assigned "all of the assignor's right, title and interest in the loan book with effect from the date of this deed," to Debt Buyers Limited ("DBL").

[17] "Loan book" was defined as "the shortfall loans described in Schedule 1 of this deed".

[18] Schedule 1 was largely redacted. It did however record:

Pier Developments	As at 30 August 2013	As at 20 August 2014
	Balance	Balance
	$201, 455.30	$194,820.43

[19] Notice of that assignment was sent to PDL on 11 September 2014. It provided inter alia:

> As you are aware, your debt with PFSL has been assigned to Debt Buyers Limited ("DBL").
>
> We have calculated the outstanding amount including all interest and your current balance is $254,557.72. Please note that this amount may also include default interest under your loan agreement. …

[20] How the amount claimed at that date was arrived at was not explained, particularly as Schedule 1 to the assignment of 29 August 2014 stated the debt owing as $194,820.43.

[21] Mr Spackman had been ruined financially as a consequence of the failure of the residential development being undertaken by PDL. He was unable to pay any further amounts in reduction of the debt other than those I have already recorded.

[22] These proceedings were commenced on 14 July 2016 whereby DBL claims to recover from Mr Spackman $168,874.84. The claim acknowledges the principal amount owing of $122,258.37, with the remainder claimed apparently being interest.

[23] A significant decision of the High Court has dictated the outcome of this claim. It is *Debt Buyers Limited v Adamson* [2016] NZHC 932, a decision of Mallon J.

[24] The decision is on all fours with this proceeding in that Mr and Mrs Adamson were borrowers from PFSL in respect of a property at Napier in respect of which they fell into arrears and which was subsequently sold at mortgagee sale, and for which DBL acquired the right to pursue the shortfall debt. I am of course bound by a decision of the High Court.

[25] In that case Mallon J held that the principal amount owing was payable and entered judgment for the sum in question.

[26] However, she declined claims for interest on the basis that the amounts claimed were either statute-barred or were not effectively assigned in the course of the three assignments I have described, and which were also the assignments relevant to the claim against Mr Adamson.

[27] My conclusions as far as the claim against Mr Spackman is concerned can be stated relatively shortly.

[28] There is no doubt that the letter of 10 August 2007 to Pier Developments Limited advising of the assignment from PFSL to the New Zealand Guardian Trust would have come to the notice of Mr Spackman as a guarantor of the obligations of PDL.

[29] What is far from clear, however, is what was actually assigned. The deed of assignment was not produced in evidence. I accept that the business interests involved in the assignment would most likely have assigned all rights and obligations pursuant to the loan agreement and the mortgage. I simply do not know whether the assignment also referred to the deed of guarantee. For the purposes of this decision I will assume it was on the basis that Mr Spackman as guarantor executed not only the separate deed of guarantee but also the loan agreement and the deed of mortgage.

[30] That being so he became liable certainly for the shortfall of the principal sum of the loan after sale of the property.

[31] That occurred in 2010. The mortgage was discharged. That left only the shortfall debt.

[32] It seems that little happened between the sale of the property in November 2010 and 30 August 2013 and the assignment from New Zealand Guardian Trust to PFSL.

[33] That deed of assignment was the same as that executed in the *Adamson* case.

[34] Mallon J analysed the effect of the assignment as follows:

> [71] There is a further difficulty. Debt Buyers' claim to interest accrued and continuing to accrue under the loan agreement depends on whether it received an assignment of the Lender's right to claim that interest. For the period from the mortgagee sale (21 April 2009) until the second assignment (30 August 2013) NZGT had not made a claim for that interest (or, at least, there is no evidence that it did). That is apparent from schedule 7 which referred to a residual claim amount of a specific sum. In accordance with the terms of that schedule, payment of that specific sum would discharge the borrower's obligations in relation to that sum. Although a notice in that form is not in evidence, it is apparent from the terms of the second assignment to PFSL (which referred to an assignment of a "Liquidated Loss") and the notice with PFSL later gave to Mr and Mrs Adamson that the residual claim amount was $362,137.70.
>
> [72] I consider that NZGT assigned to PFSL its rights to recover that specified sum. I consider that if the assignment was intended to include the right to recover interest and default interest accruing on that specified sum under the loan agreement on or after 21 April 2009 until the Residual Claim Amount was paid in full it needed to do so in clear terms. In my view it did not do so. It might be argued that the right to recover future interest accruing on the Residual Claim Amount was a right "in connection with the Residual Claim Amount". However, NZGT had not asserted that right. Rather it had specified the amount of its claim and assigned the right to pursue that specified claim to PFSL. NZGT did assign its rights and interests under the Loan Agreements specified in Schedule 1. Mr and Mrs Adamson's Loan Agreement was not included in that schedule.
>
> [73] The notice which PFSL gave to Mr and Mrs Adamson of the assignment to Debt Buyers is consistent with my view that PFSL did not receive such an assignment. That notice referred to an assignment of its "rights, title and interest in the residual debt owing by you to PFSL under your loan account of $362,137.70 to [Debt Buyers]." It did not refer to an assignment of Mr and Mrs Adamson's outstanding and continuing interest obligations under the loan agreement. Rather, the notice was consistent with a debt of a fixed sum having been assigned.

[35] Further, the Judge said:

> [75] Further, clause 2.2 of the agreement between PFSL and Debt Buyers required PFSL to "immediately deliver to [Debt Buyers] the original documents comprising the Loan Book." NZGT was asked to and did provide confirmation that it had received all PFSL's right, title and

> interest in the Loan Book and associated securities. It is, however, unclear whether PFSL delivered to Debt Buyers the loan agreement pursuant to this clause.
>
> [76] Additionally, clause 2.2 provided that PFSL was to give notice to the debtor of each Loan described in the Loan Book in the form set out in Schedule 2. That form referred to an assignment of "the residual debt owing by you to PFSL under [*describe relevant document*] of [*insert amount owing*] to" Debt Buyers. However, the notice which PFSL in fact gave Mr and Mrs Adamson did not refer to the loan agreement. Rather it referred only to their "loan account".

[36] The deed of assignment between PFSL and DBL exhibited in evidence in this case contains cl 2.2 as referred to by Mallon J in [75] and [76] above. However, it does not include Schedule 2. I can only assume that it is in the same terms as referred to by the Judge.

[37] That being the case, I am bound by the Judge's conclusion where she held:

> [78] PFSL's actions in respect of the assignment to Debt Buyers are therefore consistent with it having received from NZGT only an assignment of NZGT's rights, title and interest in the residual debt of $362,137.70 and not a right to claim interest under the loan agreement from 20 August 2009 until the loan was repaid in full.

[38] I have no option but to conclude that the same outcome must apply in this case. That is to say, Mr Spackman is liable to pay the outstanding principal sum of $93,849.33. Judgment is entered against him for that amount. Costs would normally follow the event. In my view this claim should not have been brought, unless Mr Spackman denied liability for the principal sum. Clearly this Court was bound by the decision of Mallon J. In re-examination, Mr Damien Grant, who gave evidence for the plaintiff, acknowledged that the sum claimed including interest was only advanced on the possibility that another Judge may decide differently from Mallon J. I am accordingly of the preliminary view that no costs should be awarded in favour of DBL, but reserve leave for memoranda to be filed in that regard in the absence of agreement to that outcome.

G M Harrison
District Court Judge