IN THE SUPREME COURT OF NEW ZEALAND

SC 129/2013
[2014] NZSC 28

BETWEEN	YANDINA INVESTMENTS LIMITED Applicant
AND	ANZ NATIONAL BANK LIMITED First Respondent
	WESTPAC BANKING CORPORATION Second Respondent
	BNZ INVESTMENTS LIMITED Third Respondent

Court:	Elias CJ, William Young and Arnold JJ
Counsel:	C R Carruthers QC and R J Cullen for Applicant J A Farmer QC and A R B Barker for Respondents
Judgment:	26 March 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents costs of $2,500 and reasonable disbursements.

REASONS

[1] This proposed appeal involves transactions entered into in 1995 involving assignments by the respondent banks of interests that they held in the Maroro Partnership. That partnership consisted of the respondent banks as to 93 per cent and Development Finance Corporation of New Zealand as to seven per cent. In 1982, that partnership had acquired from, and then leased back to Air New Zealand, a Boeing 747. It funded the purchase price of the airframe from Japan Leasing

Corporation.[1] In 1994, Air New Zealand took an assignment of the debt owed by the partnership to Japan Leasing Corporation.

[2] When the 1995 transactions were entered into, the partnership was entitled to receive over the balance of the remaining term lease payments of $45.5 million, from which it had to pay back to Air New Zealand $22 million. The difference (or cash surplus) – being the $45.5 million less the $22 million – thus amounted to $23.5 million. This cash surplus included the residual value of the aircraft, which was guaranteed by Air New Zealand to be not less than $10.1 million.

[3] Each of the banks assigned to the applicant[2] its "equitable right, title and interest in the Equity Participation". "Equity Participation" was defined as comprising the right to receive:

(a) "a share of the net profits (which are expected to comprise the Partnership Payments)"; and

(b) "on dissolution of the Partnership, a share in the net Partnership assets".

Each component was described as being the entitlement of the assignor:

> pursuant to the Equity Participants' Agreement which relate solely to the period commencing from and including the Effective Date.

[4] "Partnership Payments" was defined as including:

> (a) the net periodic payments detailed in column 2 of schedule 1 [being the surplus already referred to];
>
> (b) the termination values calculated by reference to the dates specified in schedule 1; and
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> (c) all other payments or distributions made in connection with the Equity Participation, or made to the Assignor in its capacity as partner of the Partnership.

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1 The acquisition by the partnership of the engines was separately funded. The transactions associated with this are not in issue in the litigation.

2 More correctly, companies associated with the applicant.

Column 1 of schedule 1 represented the $22 million which had to be paid back to Air New Zealand. So the language of (a) most easily reads as an exclusion of that money.

[5] The applicant paid the banks $10.9 million and accepted liability to account for tax on the post-assignment income of the partnership. This was an onerous obligation as the net profit of the partnership for tax purposes over the three tax years involved included not only the outstanding rental payments but also accrual income and depreciation recovered, and amounted to approximately $90 million and thus a tax liability of around $30 million.

[6] The transactions were implemented with the applicant receiving $23.5 million, being the cash surplus and residual value of the aircraft. The applicant intended to shelter itself from liability for the $30 million tax by setting off tax losses from unrelated transactions. If this had succeeded, the transactions would have been profitable for the applicant. As it turned out, however, the Commissioner of Inland Revenue disallowed the tax losses. In the result, the applicant has accepted liability for the core tax (as noted, of around $30 million) together with substantial penalties and interest.

[7] After the difficulties over the tax loss deduction arose, the applicant issued proceedings in the High Court against the banks claiming to be entitled under the assignments to substantially more than had been paid to it. These proceedings were commenced in December 2010. They were struck out in the High Court[3] and the applicant's appeal to the Court of Appeal was dismissed.[4]

[8] The nature of the claim has evolved. It initially included a claim in respect of a foreign exchange loss of $47.3 million, but as this argument is no longer pursued, we can put it to one side. In both the High Court and Court of Appeal the applicant also relied on an argument that the assignments encompassed the further $22 million, which the partnership received from and paid back to Air New Zealand. A somewhat

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3 *Yandina Investments Ltd v ANZ National Bank Ltd* [2012] NZHC 1389 (Miller J). We note in passing that the case might have been better dealt with by way of an application for summary judgment, but nothing turns on that now.

4 *Yandina Investments Ltd v ANZ National Bank Ltd* [2013] NZCA 469 (Harrison, Stevens and Wild JJ).

more general argument advanced in the Court of Appeal and perhaps in the High Court[5] was that references to "net profits" in the assignments should be construed as encompassing the net taxable profit of the partnership (that is, the $90 million already referred to, of which the respondents' share was $83.5 million). It is this last argument, albeit now somewhat differently developed, which is primarily relied on by the applicant in support of the application for leave to appeal.

[9] Both Miller J in the High Court and the Court of Appeal carefully analysed the critical documents and the undisputed components of the surrounding facts. In their view, the construction arguments advanced by the applicant were implausible on the face of the documents and inconsistent with the commercial context in which they were entered into. When the transactions were on foot, the applicant did not complain about short-payment. It was not until the difficulties over its tax loss claim crystallised that the applicant began to assert the construction arguments which we have reviewed. As well, Miller J concluded that the banks had limitation defences, albeit that this was because he rejected the construction advanced by the applicant which, if successful, may have enabled the applicant to rely on s 21(1)(b) of the Limitation Act 1950.

[10] The application for leave to appeal proceeds very much on the basis that the assignments should be construed in light of their commercial context and that the evidence as to context, which substantially came only from the banks, could not be properly assessed on a strike out application. A similar argument was advanced in the Court of Appeal and rejected. That Court noted that the applicant had not put forward a credible factual narrative which might have affected the interpretation issues. Very much the same could be said of the way in which the argument was developed in the leave submissions. There was considerable discussion of the tax issues associated with the "tail" of an aircraft lease (which incentivises the lessor to sell that "tail" to a party which is either exempt from tax or with tax losses). This, however, was well understood by both the High Court Judge and Court of Appeal and does not appear to assist the applicant (which did attempt to deduct tax losses from the tax liability which it accepted). So nothing concrete has been advanced in terms of a contextual argument which might assist the applicant.

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5 See the discussion at [85] of the High Court judgment, above n 3.

[11] This case involves a very particular set of contractual documents which were entered into in a very specific commercial context. The case raises no issue of public or general importance and there is no appearance of a miscarriage of justice.

Solicitors:
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