IN THE SUPREME COURT OF NEW ZEALAND SC 75/2009

BETWEEN **TOTARA INVESTMENTS LIMITED**
Appellant

AND **CRISMAC LIMITED**
First Respondent

AND **ULSTER LIMITED**
Second Respondent

Hearing:	16 March 2010
Court:	Elias CJ Blanchard J McGrath J Wilson J Anderson J
Appearances:	C T Walker and N C Z Khouri for the Appellant P J Dale and N R Campbell for the Respondents

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CIVIL APPEAL

MR WALKER:

May it please the Court, Walker and Khouri for the appellant.

ELIAS CJ:

Thank you Mr Walker, Ms Khouri.

MR DALE:

May it please the Court, Dale and Campbell for the respondents.

ELIAS CJ:

Thank you Mr Dale, Mr Campbell. Yes Mr Walker.

MR WALKER:

I've given you 30 pages of submissions and two volumes of authorities but in my submissions this appeal should ultimately turn on the construction of one clause, namely clause 9.1. So I'm hoping that you'll regard it as a reasonably confined issue. I'm going to have to direct you to clause 11.1 of the loan agreement because that's the clause that my learned friends principally rely on but I think I should be able to convince you, I hope to convince you, that that clause really has nothing to do with the issue in question.

BLANCHARD J:

Mr Walker, I wonder if you could move the microphone closer to you?

ELIAS CJ:

I'm wondering if the microphone is working because (inaudible 10.02.45)

MR WALKER:

Is that any better?

ELIAS CJ:

Only fractionally. I think we have a sound system issue. Yes, they're not working. Well yours is working Mr Dale. Well, perhaps speak up for the moment.

MR WALKER:

Yes, that's fine, that sounds better. So I think apart from looking at those two clauses, there are three general matters that may interest you in the appeal. One is the question of context, the interpretation of these clauses. You'll be aware that the Court of Appeal appears to have been influenced by its view of the context, namely that this is a tax scheme where there was a common intention to protect the taxpayers against commercial risks. I don't think

ultimately your judgment will turn on it but we have to deal with it, whether that's an appropriate way to interpret these contracts. The second of those three issues is repugnancy. Is this, as the Court of Appeal seems to think, a case in which when you put clause 11.1 of the loan agreement and clause 9.1 of the mortgage together, you have to treat the words of 9.1(d) which is the clause we're relying on, as effectively redundant. Then the third issue is contra proferentem. In my submission, this is not a contra proferentem case and I hope to persuade you that's so but the Court of Appeal did rely on it in finding in favour of my learned friends and the respondents. So that, in broad outline, are the issues that we're going to be addressing.

ELIAS CJ:

You are going to start, are you, with the test –

MR WALKER:

Of course.

ELIAS CJ:

– not the, well (inaudible 10.04.43).

MR WALKER:

Yes. If I just turn to the overview, I'll move through this reasonably quickly because it is truly an overview. We obviously would seek to uphold Venning J's judgment and the issue here is whether the further security clause, clause 9.1(d), empowers the mortgagee to execute a security other than the present mortgage and by that I mean the mortgage that's already been granted over the share purchase agreement and insurance policy and the clause in question is at, in the case at tab 13, page 103 to 104.

Now I won't go through the whole of the argument immediately but just by way of introduction. It's called a further security and attorney clause, however there is a provision in the interpretation clause that says that headings are not to assist in the interpretation but I don't think it matters because the clause itself clearly provides for further security and it essentially has two elements.

It starts with what the mortgagor has to do if so requested by the mortgagee and that is, "To do all such acts and execute all such documents and securities as the mortgagee may, in its absolute discretion, require to further secure to the mortgagee its title as mortgagee of the property and of the payment of the moneys hereby secured." In my submission which I will elaborate on, those two purposes secure title as mortgagee and secure payment of the moneys hereby secured, are to be read disjunctively. So that is what you can require the mortgagor –

ELIAS CJ:

You are going to (inaudible 10:06:35) –

MR WALKER:

Yes, I am. This is what you can require the mortgagor to do. There's then an attorney provision which starts at the capitalised and, "And the mortgagor in consideration..." et cetera "...doth hereby irrevocably appoint the mortgagee to be the true and lawful attorney of the mortgagor with full power..." et cetera and then it lists four things that the attorney can do on the mortgagor's behalf, (a) through (d); "(a) To do, execute and perform all and every act..." et cetera "...which in the opinion of the mortgagee is necessary or expedient for more fully and perfectly transferring, assigning and securing the property or necessary for the protection of the mortgagee's security or the preservation of its interest in the property." Now if you regard these, the initial part of the clause and the attorney clause as being essentially correlative, that gives you effectively all the power that you need to secure the mortgagee's title as mortgagee of the property. Then you move to, "(b) The next power is to demand, sue for, recover and receive the property..." and you can read the rest of the clause but essentially it's to get the property, is what's involved.

ELIAS CJ:

(inaudible 10.07.57)

MR WALKER:

And the property is defined –

ELIAS CJ:

(inaudible 10.07.59)

MR WALKER:

That's right, the share purchase agreement and the insurance policy. You'll notice that (a) and (b) both expressly refer to "the property".

ELIAS CJ:

Yes.

MR WALKER:

Turn over to (c), (c) may in fact may subsume (a) and (b) because it says that, "The mortgagee as attorney can cause the mortgagor to exercise all or any powers of the mortgagor with respect to the property –

ELIAS CJ:

Do you mean it is redundant?

MR WALKER:

It's not that it's redundant, it's that (a) and (b) are, well, they may be redundant in the sense that it's difficult to see what in (a) and (b) are not comprised in (c).

ELIAS CJ:

This is just a rather difficult argument for you to maintain, seeing as it is a (inaudible 10:08:41).

MR WALKER:

No. I think the way – you get some attorney clauses where you have say three specific powers and then you have a general provision at the end and generally to do any act for the said purposes but I think what is happening here, is that this is simply a very broad set of powers and if anything, it's expanding in the other direction so you have something quite specific in terms

of (a) but it is focused on title and transferring, assigning and securing the property, so it is specific in that sense. Then you have (b) which is all about getting at the property if you need to but (c) is giving you the fullest powers you possibly could in terms of the property which is to do anything that the mortgagor could and then (d) is actually addressing a different purpose, in our submission which is – and it says the purpose in the clause itself (d) "You are entitled to do, execute and perform all such further acts, deeds, matters and things which may become necessary, or be regarded as necessary..." and there's the purpose, "...for more satisfactorily securing the payment of the moneys hereby secured." So that (d) contains its own purpose. This isn't one of those provisions where there's a general clause referring to acts, that you have to refer back to the previous clauses for the purpose for which those acts can be exercised, or the powers can be exercised. It's actually got its own purpose.

In our submission, all that's happening here is that you have an initial clause dealing with what the mortgagor is entitled to do which has two objects. Securing the title as mortgagee is one thing that you can do but the second is, generally, securing payment of the moneys hereby secured. It's clear that one of the things you can do that is execute securities and then you have, I'm not suggesting they're exactly correlative because there isn't a complete – you can't completely line up (a), (b), (c) and (d) with each of those two purposes but if you look at (d), it's clearly addressing the same two objects, excuse me, (a) to (d) are clearly addressing the same two objects generally, i.e. securing title as mortgagee but also doing anything to secure the payment of the moneys hereby secured and we say (d) at least is directed to that second object.

BLANCHARD J:

While we're looking at clause 9 –

MR WALKER:

Yes Sir.

BLANCHARD J:

– I notice that 9.2 and 9.3 are (inaudible 10:11:34) to the matters related to the property as defined.

MR WALKER:

Yes.

BLANCHARD J:

If 9.1(d) had a broad, more excessive function as you're suggesting, wouldn't you have expected that would be reflected in 9.2 and 9.3?

MR WALKER:

I wouldn't. Just as a preliminary point, one of the things that has been picked up by the question is that not only 9.2 to 9.4 say property but so do 9.1(a), (b) and (c), whereas (d) doesn't. I think that 9.2 and 9.3, that's actually dealing with the present mortgage. What you've got to appreciate is that there is a present mortgage of the specific property.

BLANCHARD J:

But wouldn't you want the same to apply in relation to the additional security obtained under 9.1(d)?

MR WALKER:

Well, the further security is going to be its own document. It will contain its own provisions, not only in this respect but in all manner of other respects which will be appropriate to the particular security that's being taken. So I think, you wouldn't expect to see here where there's a further security clause, that you are going to define exactly what the terms of the further security will be.

BLANCHARD J:

Well, 9.2 and 9.3 are pretty general, except that they're related to the property. They could fit perfectly well in relation to any additional security.

MR WALKER:

Well, I think I would say two things to that. It's true that they are general but they can be read perfectly happily as clauses that you would expect to appear in the present security which is a specific mortgage over two specific items of property. So my first submission is that it's not fatal to us that they don't go on to contemplate what the position might be under a further security but I make the further submission that it is difficult to take, merely from the existence of those clauses, that 9.1(d) doesn't mean what it says.

BLANCHARD J:

Well, it's an additional obstacle for you. They appear sequentially, you would naturally expect them to encompass everything that is in 9.1 but they don't. Not fatal but it's another curiosity.

MR WALKER:

But if you look at 9.2, all it's saying is that you're acknowledging the possession of this deed shall be complete and sufficient proof of the mortgagee's authority to withdraw or otherwise deal with the moneys represented by the property. So it's talking about the moneys represented by the property, rather than the property itself, as a first point. It is a clause that you might expect to see, it may or may not be repeated in the next security that's entered into. I'm probably repeating myself. I certainly don't regard it as a strong indication that (d) can only be talking about the property. The better indication is that they don't say the property in (d), where they conspicuously do in (a) to (c).

ANDERSON J:

Does it follow from your argument that immediately upon execution of this mortgage, the mortgagee could itself, create and execute on behalf of the mortgagor, a mortgage in any other security over any other property whatsoever that the mortgagor owned?

MR WALKER:

If they regard that as necessary, yes. I appreciate that if you put it that way, it might sound like an extreme proposition.

ANDERSON J:

It doesn't sound like a limited recourse loan, that's the problem.

MR WALKER:

But if you look at the facts of what happened here. At the time this mortgage was entered into, the only asset to the company were going to be the rights in the share purchase agreement and the insurance policy. As it happens, those rights and the entire value of that has been compromised, we say by the actions of the borrower and it is a situation where the borrower can compromise those values, the value of that property, for example, by not performing which we say is what happened which led to the termination of the share purchase agreement and therefore the insurance policy having no – there's no possibility of an insurable event at which it could kick in.

ANDERSON J:

Well, just to carry on from there. You may have to develop this later in the argument, or maybe not, it's just an idea I had. If the security had gone, how could you better secure it?

MR WALKER:

Well, you couldn't do anything to the security obviously but you could further secure payment of the moneys hereby secured. So commercially, it's not that nonsensical. It could easily be within the parties' contemplation that security might be compromised and you might need to get different security and that's in fact what happened.

WILSON J:

Isn't that contrary to the whole concept of limited recourse?

MR WALKER:

I don't think it is. I'm going to hope to persuade you of that. The limited recourse provision is in the nature of an option. What it does, it's not that this loan and this mortgage are turned into a closed loop, where all you're really concerned with is the share purchase agreement and the insurance policy. The borrower is left with the option of completing the transaction in year 10, paying the remainder of the share purchase price, if necessary calling on the insurance policy and that's quite clear from 11.2 which I'll take you to because that clause contemplates that if they did do that and then they subsequently sell at a profit, they are going to pay a portion of the surplus to the lender. So these agreements clearly do contemplate that they may actually be closed out, by the borrower paying the share purchase price, repaying the loan plus any interest, calling on the insurance if you need to.

What the limited recourse provision is doing is giving the borrower the protection, the option of saying, if things go wrong, I always can hand over to you the share purchase agreement and the insurance policy and in that case my liability is at an end but for so long as your liability exists, the question of how you secure that liability is a completely different question. Yes, it may be secured initially by the share purchase agreement and the insurance policy but there's no reason in principle why it can't be secured by a different means.

BLANCHARD J:

But then it wouldn't be a limited recourse.

MR WALKER:

It is, still. For a start, limited recourse, it's not a term of art. We have to ask ourselves what clause 11.1 means. Shall we turn to 11.1.

McGRATH J:

Just before you leave, I'm just trying to understand the argument, your response to Justice Anderson, Mr Walker. Are you actually reading in a qualification, perhaps, to the words "as effectually as the mortgagor could", so

that they're not completely open ended but are you reading in some qualification by references to particular circumstances that occur, or that reduce the value of the property? You certainly were not prepared, did not think you had to accept Justice Anderson's point in its entirety.

MR WALKER:

I'm not suggesting that there is an implicit trigger, if that's where your question is going, that there first needs to be some implied set of circumstances before you can actually call on the further security. The only stipulation is it has to be necessary, or regarded by the mortgagee as necessary, for more satisfactorily securing payment.

McGRATH J:

You are nevertheless introducing an implied qualification. I just really want to try and get clear what words might represent that implied qualification?

MR WALKER:

I didn't mean to suggest that I was trying to imply a qualification. I mean, I appreciate that this is, on it's face, a very broad power but that in itself can't be the end of the matter, people can agree to broad powers. All I'm saying is that the only limitation is that it has to be necessary, or regarded as necessary. Now I accept that's not much of a limitation but if for example, it wasn't necessary and in fact –

McGRATH J:

Necessary for what purpose then?

MR WALKER:

For more satisfactorily securing the payment of the moneys hereby secured.

McGRATH J:

Well in fact, you're not qualifying it at all. Now that seems to me to indicate that you probably then, don't you, have to accept Justice Anderson's proposition that regardless of whether circumstances had transpired which

reduced the value of the property, as far as you're concerned, the day after everything was executed, you could have sought security over other property that was available in the hands of the mortgagor.

MR WALKER:

You could have, provided you could say it was either necessary or you actually regarded it as necessary and I accept –

McGRATH J:

But if you regarded it as necessary because –

MR WALKER:

– the second one is –

McGRATH J:

– it was a limited recourse loan, to have a bit more security, to have a bit more security?

MR WALKER:

Well, I think that indicates – I don't see limited recourse in the same way that you do and perhaps it is right to turn to 11.1 –

ELIAS CJ:

Well, sorry, before you do. I just wanted to summarise my understanding of what you're saying. The first, (a) to (c) deal with the defined property because they are powers in respect of that property; (d) you say, looks to further security and the property secured will be defined in the new mortgage?

MR WALKER:

That's right.

ELIAS CJ:

Even on the basis of clause 11 which you will now have to go to but on that basis, is it your position that the terms of clause 11 would preclude access to,

or the need for further security, except in the position that eventuated here with cancellation of the share purchase?

MR WALKER:

No, that's not my position. My position is that the loan agreement, I regard as a very straightforward document, perhaps wrongly but I regard it as a very straightforward document. You commit to pay a particular sum in year 10. In one of the agreements that's a defined amount and in another it's the loan plus interest calculated at a fixed rate. That's your primary commitment and there are plenty of clauses which I can take you through in the agreement which make clear that that is what's contemplated. So for example, the provision for interest makes little sense if in fact you're dealing with this closed loop where the amount that's owed is whatever the current value of the insurance policy and share purchase agreement maybe. I can take you through those.

BLANCHARD J:

No, that's a misstatement. It's not the amount that is owed, it's limited to the value of the security provided.

MR WALKER:

Yes.

BLANCHARD J:

If the policy and the share acquisition agreement turn out to be tremendously valuable, they could be worth a lot more than the amount of the loan.

MR WALKER:

Well, the reason I'd framed it the way I did is because that's the way the Court of Appeal say it, that they thought that what this meant was it was a, it effectively equated the amount that had to be repaid with the value of the share purchase agreement and the loan at any one time and I don't think that can be possibly what it means. For a start, it's completely impractical, you'd have to work out in any one point in time what those two things are worth

even if for example, it can't be settled until year 10. So, I completely agree with you. I should also point out, as I understand my learned friend's argument, they're not suggesting that it's entirely linked to the value because, they may correct me in their submissions but I take it what they're saying –

BLANCHARD J:

It's limited to the value.

MR WALKER:

Yes, they're saying that if the value was more than the amount that would have been repaid otherwise, then you just repay the amount that would be fixed by the loan, so it effectively acts as a sort of a ratchet down.

BLANCHARD J:

A perfectly ordinary limited recourse arrangement.

MR WALKER:

Well it may be perfectly ordinary in that sense but could we turn to 11.1. I still think it doesn't get the respondents anywhere on security.

ANDERSON J:

Just before you do, could I take you back to what you say is the only constraint on limitation on the 9(d).

MR WALKER:

Yes.

ANDERSON J:

"It's necessary for more satisfactorily securing." Now, any extra security is going to be a more satisfactory security and will be necessarily so if it achieves that purpose. So it's no limitation at all, it's open slather because anything you do will more satisfactorily secure it.

MR WALKER:

Look, I don't shy from that. As I say, I accept it's a very broad power but you do have to think about the particular context here. These are single purpose LAQCs, the only asset that they have is the agreement in the policy. If something goes wrong with that and you can't actually anticipate what could go wrong or to what extent, it may be you may not have advised the borrower to sign up to this, they were advised but it's not out of the question that a lender would insist that they have a general power to take further security as they think necessary. This isn't a, I mean, I'm going to take you to a decision of Chilwell J where he had no problem with the idea of a further security clause which had the effect. I'm not saying that you shouldn't have that problem but –

McGRATH J:

Are you saying though and I'm going back, are you saying that "necessary" does require something, perhaps along the lines of slippage in value of the property or something of that kind?

MR WALKER:

I'm not because I accept Justice Anderson's point that if you're just looking at it from the provision of security, if one amount of security is good, two amounts is better.

McGRATH J:

Yes, okay.

ELIAS CJ:

But that's why I wondered why you don't argue that if the borrower doesn't have a policy and share acquisition agreement, that in those circumstances securing the loan by other means is necessary?

MR WALKER:

It clearly would be necessary in that situation but – and I would like to be able to say that there is an implicit trigger here but it's only where there's some

negative impact on the security provided by the share purchase and loan that you can –

ELIAS CJ:

But she can't say that because of the terms of clause 11.

MR WALKER:

No, you can and I think, if you regard 11.1 as an option where the liability is to pay the principal and interest in year 10 unless you've taken the limited recourse option, then unless and until you do take that option and it's a true option because it may suit you to complete this transaction and keep the shares, until you take that option you have a liability and that's the liability to pay, the principal and interest and the question here is what security –

BLANCHARD J:

Well, is it? Isn't it a liability to pay the principal and interest up to the value of the security?

MR WALKER:

If we take 11.1 which is at tab 12, page 94.

ELIAS CJ:

I've been at 132, is that the wrong one?

MR WALKER:

No, there are two, we're looking at two. I was just looking at the first of them.

ELIAS CJ:

Oh yes, of course. It's in the same terms, is it?

MR WALKER:

It's in the same terms, yes. Now this agreement doesn't have the heading "Exclusion provision" so you can have regard to the heading but the heading,

in my submission, doesn't tell you a great deal because you have to ask yourself, "What is the limited recourse here?"

WILSON J:

Well, it certainly confirms it as a limited recourse arrangement though, doesn't it?

MR WALKER:

It certainly does.

ELIAS CJ:

So this one because I'd been looking at the other one, this one doesn't direct you not to look at the head, is that right?

MR WALKER:

As far as I can tell, no it doesn't.

ELIAS CJ:

All right, okay.

MR WALKER:

Now, I should say that you have to spend a bit of time with this clause. I've never seen a clause exactly like this and I think it probably does grow out of the unusual genesis of the transaction but it does actually make perfect sense, even if you think of this as a tax scheme. It starts off by saying, "Notwithstanding any other term or provision of this agreement." Now, my learned friends would like you to understand that to mean, "Ignore the rest of the agreement, this is actually what our agreement is about." So they refer to this as being the clause that expresses the main object and intent of the parties. In my submission, they're saying something slightly less than that. There are various provisions for example, if you go back to 4.1 which is the key one, that's on page 87, it says, "The borrower shall repay in full to the lender on the expiry date, the loan..." loan is a defined term, it means, "The New Zealand dollar equivalent to the drawdown amount", that's page 85. The

drawdown amount is actually stated in the operative clause which is on the previous page, page 84. So if you look at the operative part, "The lender agrees to advance to the borrower the loan of 480,000 by advancing the drawdown amount of US307,200..." which was actually just the US dollar equivalent to that New Zealand amount, "...subject to the security specified in this agreement." I think this is reasonably critical, "The parties covenant and agree with each other, as set out in the agreement and the schedules hereto, including the obligation under clause 4.1, to repay on the expiry date the amount of New Zealand one million four hundred thousand." So that's the actual operative commitment and that's obviously consistent with 4.1 which effectively repeats that obligation.

There are a number of other clauses which I've referred to in my written submissions but that should be enough just for the purpose of this argument. What do we mean when we get to 11.1 and we say "notwithstanding"? Well, does "notwithstanding" mean ignore that? In my submission, it can't, that's the operative part. What they're saying is that notwithstanding that clause for example, you acknowledge and this is in consideration for the profit participation arrangement in the clause below which will become important, you acknowledge that this agreement and the liability of the borrower hereunder is limited to the value of the security provided.

WILSON J:

Can we just go back Mr Walker, to the opening words at 11.1. Don't they mean that even if there's another term indicating that the loan is not limited recourse, it does remain a limited recourse loan?

MR WALKER:

I don't suggest there is another clause saying it's not limited recourse. What I'm saying is there's a primary, well, I shouldn't say primary, there is an obligation which is in the operative part in clause 4.1 to repay a particular amount in year 10 but there's a way to get out of that, to escape that liability or to reduce your liability, however you want to put it and that's the option that you're given in 11.1. So it's saying notwithstanding that clause, if you do this

we can ignore that clause. That's effectively what it's saying. So the lender is acknowledging and I won't read it to you but the point is, both the agreement and the liability of the borrower is limited to the value of the security provided and we have to actually understand what that means because they aren't words which immediately obviously convey a clear meaning. It defines what the security is, the policy and the share acquisition agreement and then the parties have actually expressly explained what they mean, "to the intent that". Now those words, in my submission, are quite critical. This isn't one of those situations where you say, "So that, for example." This is the parties actually explaining what they mean, "To the intent that the borrower can apply or assign all moneys received thereunder, or other value received thereunder, including but not limited to the benefit of the rights of the borrower under the policy and the share acquisition agreement, in full satisfaction of the obligations." So the intention is, notwithstanding 4.1 in the operative part, this is a limited recourse loan and our intent is that if you apply or assign all of the value under those two assets, you have no further liability.

It then goes on to say, "If the borrower so applies or assigns all such moneys, value or benefit, this shall relieve the borrower from any further or personal liability." In my submission, implicitly, if you don't do that, you're not relieved from further or personal liability. Now, that's not a strange provision, it might be unusual but it's not strange. If you have a situation where you have rights under a share purchase agreement which are uncertain in their value, this is a technology company, it could be worth $10 in year 10, it could be worth nothing in year 10. The borrower wants some protection. They want to be able to complete the agreement, because if you think of this as a tax scheme just as a first point, there's not much point in not having the option of completing the agreement, because you can't, for example, claim tax deductions against your interest through the ten years of the agreement.

Leaving aside the tax issues, if you look at it as a commercial deal, if you think there's a chance that the share might be worth $10 in year 10, you'd want the option of settling out the transaction and keeping the benefit of the share purchase agreement. On the other hand, if things go horribly wrong and the

shares are worth nothing or 50 cents, you'd like to be able to hand the whole lot over to the lender. That's exactly what they've provided for here, and they've made it perfectly clear by the words, "to the intent that", and then the explanation at the end, that if you so apply, then you have no further liability. Now, it's clear that they aren't contemplating that you will necessarily so apply, because in 11.2, it provides the consideration for this arrangement. The borrower, in consideration of that limitation of recourse, hereby covenants with the lender that if it sells the shares, either directly or by way of selling the entity holding the shares, now, this is either during the term of the agreement or within ten years of the date of final repayment of the moneys owing. Now, moneys owing is actually a defined term. It's back on page 85. It means, it says moneys owing, but it means all principal interest, costs, fees, et cetera owing being initially the loan, together with interest thereon.

So if within ten years of paying that back, you sell it and you realise a sale price in excess of $3, then that's actually the insured amount under the agreement, that being called the excess, the borrower shall pay 10% of the excess to the lender. So there's a couple of things that become clear about that. This can't be, in effect, converting this obligation into the value of the share purchase agreement and the insurance policy, because if it did that from the outset, why would the lender be taking only 10% of the excess above $3?

ANDERSON J:

Would it summarise your argument on this point to say that the words following "to the intent" indicate the way in which the liability is limited?

MR WALKER:

Yes.

ELIAS CJ:

If the option is taken?

MR WALKER:

Yes but 11.2 makes it perfectly clear you don't have to take the option. You're entitled to complete the transaction in year 10, which involves paying the balance of the share purchase price, paying the loan, because you need to redeem the mortgage over the shares, and then whether, if you meet the circumstances, calling on the insurance policy, and then if you sell the shares within the next ten years at a profit, you've got to give 10% of the difference above $3 to the lender.

ANDERSON J:

Well, there's two ways of looking at it, perhaps. One is that "to the intent" indicates an aspect of the limitation in value, but the limitation is always there anyway. And the other is "to the intent" that indicates what's meant by the expression "limited in value". It explains the nature of the limitation.

MR WALKER:

I agree.

ANDERSON J:

On the first count, if for some reason the share value became nil, the liability of the borrower would be nil, in which case it would have been better for the borrowers to redeem than to suffer rescission, I suppose.

MR WALKER:

Yes. We'll talk about the rescission in a second because I suspect that's something that wasn't necessarily contemplated, the precise way it played out in this case but just looking at it from the beginning. I agree with you, I don't think the first one is an available interpretation but it has to be the argument put for the respondents. The second one is the interpretation obviously I'm arguing for and to me it makes perfect sense. The problem with the first one is there's some very practical problems. Can it really mean that the amount that you owe at any one time under the loan can go up or down by reference to a reasonable opaque value? These are shares to be traded in year 10, I should say acquired in year 10. There's an insurance policy where you're

going to be suing a purpose trust three months after settlement. Can it really mean that that's what they have in mind and I think the answer is, it isn't and that's what leads my learned friends to say no, it really is a ratchet. So we don't actually mean it's limited to the value in the sense of it equals the value. What we mean is that the least you will have to pay is either the principal plus the interest, or whatever the value is. So as soon as it pops above the amount of the principal and interest, then you're limited to the amount of the principal and interest.

In my submission that's simply an unworkable interpretation of what they mean. If you just think about what happens when they get to year 10 and you're supposed to redeem this mortgage on 31 March 2005. There is no mechanism in this agreement to establish the value of the share purchase agreement in the insurance policy. You are not going to redeem, you are not going to call in your insurance for several months. You are not going to know what you actually collect out of that insurance. It's not as if this is a company trading in a market where there's a clear available market for the shares, so how exactly would someone go about paying back the value of the share purchase agreement and insurance policy on 31 March. There is no provision for that. There's provision for payment of the principal plus interest and I think what that's telling you is that that's just not what they meant. This is a perfectly sensible limited recourse provision.

You can complete the agreement in its normal sense but you have this way out. So that's liability but we still have this further problem that even if you did think that this, the amount of the loan is limited in that sort of day by day sense to the value of the share purchase agreement and insurance policy, this doesn't purport to address what security you can get for that liability. All it says is that this agreement, and my learned friends' notes suggests in their submissions that that means this agreement and the mortgage, that's the first point. It just says "this agreement". The loan agreement is limited to the value of the security and it's this agreement and the liability is limited to the value. Well let's say for example that in year 5 the shares are worth $2 for example. Well, is there any reason in principle why the lender couldn't have

more security than $2? There are quite logical reasons why you might want more security, for example, you don't know exactly what your costs are realising that value are going to be for example but in any event, the concept of liability and security is a different one. Here they're limiting your liability under the agreement but for as long as you're liable and you haven't applied or assigned, you have to provide security and it's a different question, what security you have to provide.

ANDERSON J:

Well you're saying, as has happened here, the security can't be redeemed, that doesn't extinguish the liability, it's only limited by the fact of redemption.

MR WALKER:

Yes and if you think about it from the lender's point of view, this deal can only make sense if the lender is saying I'm prepared to take the risk on the share purchase agreement and insurance policy. So if you hand those over to me it's my risk whether they're worthwhile or not but in a situation that actually eventuated, where the borrower is actually completely compromised on our view, the value of those assets, it's not a bizarre result that the lender says well, you've actually, whatever those rights might have had, through your refusal to pay an instalment on the share purchase agreement, you've allowed the vendor to cancel, that's completely compromised the value of those assets so you've lost the option of handing those assets over in satisfaction of your liability. You still have your, let's call it a primary liability but I'll just use that in a loose sense, and I'm allowed to have whatever security clause 9.1 allows me to have.

ELIAS CJ:

So it's on assignment that you obtain limited recourse not before?

MR WALKER:

Well in a sense except that you always have the limited recourse because, provided you've got the share purchase agreement and insurance policy, you

always have the option of handing those over. So it's always limited recourse in that sense. Your downside is protected. What's unusual here –

ELIAS CJ:

No I'm thinking about the necessity for additional security on your argument.

MR WALKER:

Yes.

ELIAS CJ:

That there would be no, on your argument it could be said that there's necessity for additional security if the value of the shares decline unless the share agreement is assigned.

MR WALKER:

Yes.

BLANCHARD J:

On your argument, assuming that there was some additional security taken, and you get to year 10 and there's a default, you're saying that the additional security can then be realised upon by the mortgagee. What happens to the extent that the amount realised on is worth more than the value of the policy and the share acquisition agreement at that time? Forgetting about compromise because I don't think we're concerned with that, your remedy for that is a different thing. Assuming that the policy and the share acquisition agreement haven't been compromised in any way, that they don't have the same value as the additional security which has been taken?

MR WALKER:

Yes. I think the answer is that provided the purchaser is in a position to do so, so we're not in that compromised situation, if you're coming to year 10 you simply still have the option of saying, well rather than paying the purchase price, the loan and redeeming the security, I'm simply going to assign these to

you. So in that sense the most that you have to pay is the value of the share purchase agreement and the insurance policy.

BLANCHARD J:

But what if you've got in first and realised on the other security before the mortgagor has woken up and has exercised the right in relation to the policy and the share acquisition agreement to put them to the mortgagee?

MR WALKER:

I don't think the timing matters because it's two different issues, liability and security, so if you happen to realise through your security more than is owed, well obviously you have to pay it back, and the question of what is owed, they still have the option of saying, well I'm simply going to give you the value or rights under the share purchase agreement and insurance policy –

BLANCHARD J:

What do you mean by "what is owed"?

MR WALKER:

By –

BLANCHARD J:

Are you talking about the face value of the loan or the value of the policy and the share acquisition agreement?

MR WALKER:

I'm talking about both because the borrower has the option effectively of paying two different values. They can either pay, as you say, at face value or if they choose to they can pay by applying or assigning the benefit of the share purchase agreement.

BLANCHARD J:

But what if you've grabbed the additional security, sold it and you've got a sum which is more than the current value of the policy and the share acquisition agreement, what happens then?

MR WALKER:

Well if the purchaser elects to assign or apply you have to pay back the difference. But imagine, for example, that the shares are worth $10 and the purchaser has made a deliberate decision not to apply or assign the benefit of these assets, and so they owe, in the case of the Armour Fidelity loan, $2,400,000 on 31 March 2007, if they haven't paid that amount, the vendor is entitled to exercise whatever security they validly have, pay that amount and cost and return the rest. Sorry, I should say take that amount in the costs and return the rest.

ANDERSON J:

At that stage the security, the original security that we're talking about, couldn't be redeemed, could it, because there's nothing owing?

MR WALKER:

Sorry I didn't quite –

ANDERSON J:

The mortgagee, mortgagor doesn't wake up a day late. The mortgagee gets in on the first available date or redeems the office block that's been acquired in the meantime?

MR WALKER:

Yes.

ANDERSON J:

Discharges the debt by applying the process. There's no debt that can then be redeemed by handing over the security.

MR WALKER:

That's true.

ANDERSON J:

It's just the mortgagor should have woken up sooner?

MR WALKER:

That's right and so in a sense if you don't get your nuts in a row and apply or assign in time, you might face that problem, you might be forced to your option but –

ANDERSON J:

And you don't have to wait until the day that it's due –

MR WALKER:

You don't.

ANDERSON J:

– you can redeem them the day before or any time.

MR WALKER:

As a practical matter you'd be doing it much sooner. I mean, talking about this, ignoring the tax context for a minute, if you're heading towards, if you're at year 7 for example and the company is, you know, heading for insolvency you think well, you probably apply or assign then. Yes, it maybe that it's only in the last few days that you wake up for whatever reason or you form the judgment that that's probably your best option but that's one possible scenario, it's hardly the likeliest scenario. This is just an option you have throughout the agreement to really say well, right up until year 10 I can simply hand all of this over and walk away but it is an option I have to exercise, 11.2 makes that clear, I am entitled to complete if I want to. So, perhaps then I will –

ELIAS CJ:

Well, the argument doesn't really depend, does it, entirely on 11.2 because on your argument, in terms, 11.1 is an option, 11.2 is simply the state of consideration for having that option.

MR WALKER:

Well certainly, I'm happy to stand on 11.1 but 11.2 is helpful to me because it simply illustrates that it must be an option because you can complete, that necessarily completes, so you can complete.

ELIAS CJ:

Well, complete and pay the additional.

MR WALKER:

Yes.

WILSON J:

But even in 11.1, doesn't the phrase, "If the borrower so applies or assigns," make clear it is a means of discharging liability but not a mandatory procedure?

MR WALKER:

That's right because they can't mean, "If the borrower applies or assigns, this shall relieve the borrower from any further or personal liability but even if the borrower doesn't so apply or assign, they are still relieved."

ELIAS CJ:

Yes, so 11.1 gets you there on your argument.

MR WALKER:

Yes and in my submission, Justice Venning was quite right to distinguish between liability and security. I think he interpreted 11.1 correctly as an

option but I think he was also correct to say that in any event telling me what the liability is under the loan doesn't necessarily help me at all in deciding what security means, what security is available. For this clause to work for my learned friends, this would have to be a provision not just that the agreement and liability are limited in the sense of the amount that has to be paid but actually the whole of this arrangement, the only thing that we are interested in is the share purchase agreement and insurance policy. Just operating on the normal principle that you're supposed to reconcile clauses, how do you reconcile that with 9.1(d), quite least on our interpretation, I don't think you can.

WILSON J:

Doesn't the first part of 11.1 itself link liability and security?

MR WALKER:

How so?

WILSON J:

By providing that the liability of the borrower is limited to the value of the security.

MR WALKER:

The only – security though is used as a defined term and it's defined as the mortgage over the policy and the share acquisition agreement but it actually goes on to say, "Namely the policy and the share acquisition agreement." So, I mean, I appreciate it refers to security but I don't think it's doing so to indicate that it's a limitation on security –

ELIAS CJ:

It's not as security –

MR WALKER:

That's right.

ELIAS CJ:

– it specifies a mode of discharge of the loan obligation –

MR WALKER:

That's right.

ELIAS CJ:

– assignment.

MR WALKER:

Yes. Put another way, it's simply using security as a defined term and it is a defined term and then it refers exactly to what it means, namely, the policy and the share acquisition agreement. If we could just turn back to 9.1(d) for a minute which is page 104 of the bundle. It's obviously a matter for you to interpret the agreement but I think –

ELIAS CJ:

Sorry, what are you taking us to?

MR WALKER:

Back to 9.1(d) of the mortgage at page 104. It's obviously a matter for this Court to interpret that clause but I think it is significant that Justice Venning had no difficulty in construing it in that way. The Court of Appeal accepted that it could be construed in the way that we propose. In my learned friend's argument, just on the face of 9.1(d) as I understand it. The argument is really limited to the idea that (d) doesn't refer to the execution of securities. So if you go back to 9.1, the very start, the first clause and it's talking about what the mortgagee can request the mortgagor to do, it expressly says, "Do all such acts and execute all such documents and securities" and I think my learned friend is accepting that that would include further – well, that includes, I'll leave to him.

I take it from his argument, he must be accepting that would include further security but he then draws a contrast with the attorney clause and says, by

contrast (d) says further acts, deeds, etc but it doesn't expressly say that that can include (inaudible 10:55:12) securities and he's relying there on the principle that powers of attorney should be construed strictly in the sense of, you must be able to find the power expressly or implicitly. Now, I say two points to that. My first response is that, as a matter of construction, acts, deeds, matters and things which are more satisfactorily to secure the payment of money, must naturally include securities.

That's the whole point of a security, in fact it's hard to think what other acts would be covered other than either the execution or actions in respect of a security. The reason I'm bringing it up at this point is to make the point that that is where my learned friend's argument comes out as I understand it. It's really a dispute about whether the clause includes specifically the power to execute a security, there isn't a dispute that this does give a general power to do such acts as are more satisfactorily securing the payment of moneys hereby secured.

So what I'm really saying there is that while, the way this morning started off, Your Honours clearly had a difficulty with the breadth of this provision. It is something which, well, can be interpreted in the way that we are proposing –

ANDERSON J:

It's not a general power of attorney and that's as wide as you can get, it's a power of attorney which is broad but limited to specific objectives.

MR WALKER:

Exactly.

ELIAS CJ:

Don't you need to take us through the other provisions of the loan agreement though and in particular the obligations there to provide security?

MR WALKER:

Ah, yes –

ELIAS CJ:

And the fact that security is defined in that agreement as the mortgage over the policy and share acquisition agreement. I mean, what's the, I haven't looked to see what the provision –

MR WALKER:

It's page 84.

ELIAS CJ:

Yes, what's the security obligation under the loan agreement, where do I find that?

MR WALKER:

It's 84, I think is the – well, put it this way, page 84 is what the Court of Appeal relied on.

ELIAS CJ:

Oh, I see.

MR WALKER:

What the Court of Appeal – there's basically a difference of view between the High Court and the Court of Appeal. Venning J, if you read it, it says, "The vendor agrees to advance the loan on the terms and conditions and subject to the securities specified in this agreement."

ELIAS CJ:

Right.

MR WALKER:

Now, Justice Venning turned to the definition of security and saw that it meant, on page 86, "The mortgage over the policy and the share acquisition agreement" and he said well, the mortgage includes 9.1 and so that doesn't really take you any further because it's simply saying it's subject to the mortgage including whatever clause 9.1 means. I think the Court of Appeal

may have misread that and understood security to mean "the policy and share acquisition agreement" per se. I think that's paragraph 40 from memory.

McGRATH J:

Sorry, what's that reference to the Court of Appeal judgment?

MR WALKER:

So it's 16 and 39, paragraph 16 and 39, tab 5 of the case. So there they quote –

ELIAS CJ:

Para 16, did you say?

MR WALKER:

Yes. Now, they're actually quoting one from the Crismac agreement but it's effectively the same for this purpose because it says over the page, top of page 40 of the case, "Subject to the security specified in this agreement." They then correctly identify the definition of security, "Mortgage over the policy and the share acquisition agreement," at paragraph 17 but then at 39 of the judgment, on page 46 of the case they say, they're referring to my arguments, "His arguments do not sit easily with the contractual language that records the loan subject to the security specified in this agreement. The definition of security refers to the share purchase agreement and the insurance policy, there's no mention of a right to obtain additional security." In my submission that's just, it's simply circular and I think it's purely because when they looked back they didn't see the words "the mortgage over" or didn't pay attention to them.

ELIAS CJ:

It's a funny way to do it though. To specify that it's the mortgage over the policy and share acquisition agreement. Not "and any other security".

MR WALKER:

I'm not sure it is funny. It's not unusual for securities to give some provision for the lender to get further security perhaps limited to –

ELIAS CJ:

But aren't they in the loan – wouldn't that be in the loan agreement, one would expect to find that?

MR WALKER:

In my experience not necessarily, no, it's quite common for it to be in the mortgage and I accept that normally it might be in quite defined circumstances, where they refer to express acts that might compromise the value of security, you can go further. That's naturally something you'd find in the mortgage itself and you wouldn't necessarily see that pans out in the operative provision of the loan which is really just recording the core obligation.

ANDERSON J:

I think you might find it in a mortgage for all obligations present and future.

MR WALKER:

Yes.

ANDERSON J:

Where the obligations exceeded the value of the original security.

MR WALKER:

Yes.

ANDERSON J:

Or might.

MR WALKER:

Now, so perhaps if I just then take you through the agreements since we're sort of off piece in terms of my submissions. If I take you through the loan and the mortgage. Just turning to page 85, these are the definitions, and I just note the following ones. There's a provision for a default interest rate and I just draw that to your attention because that's the sort of provision you're going to have if at least one of the things the borrower might have to do is to repay the principal and interest. Similarly there's the provision for the actual interest rate further down. The loan is defined as we've seen.

BLANCHARD J:

I don't know that this proves much because one works on the assumption that the loan amount at the end of the day may be less than the value of the security and then you have to work out what the amount is that's properly payable.

MR WALKER:

I accept it if that's the way you construct the agreements, that one of the things that you may have to do is to repay the actual loan amount.

BLANCHARD J:

All goes well the shares turn out to be enormously valuable.

MR WALKER:

Yes.

BLANCHARD J:

You may not even need the insurance policy, then you're just going to pay the amount of the loan plus interest. But if you pay it late you have to pay some default interest.

MR WALKER:

No I accept that and respectfully I don't think that's the correct interpretation that it operates in the way that you say but I, the reason I think it's there is

because there is an option, it's not the same option, but my option works differently in the sense of you have the obligation to pay the loan amount but you always have the option of handing over the share purchase agreement and the insurance policy. My submission earlier was that the parties shouldn't be taken to have intended that the, first of all that it operates purely as a ratchet because all he said was that it's limited to the value to the intent that you can hand it over and escape your liability.

They didn't express themselves to say, to the intent that you only have to pay at most the amount in the loan agreement, the stipulated amount, so that's a question of expression. And the second is, in my submission, conceding that that way is impractical because it involves you actually working out at any one point in time what the value of the share purchase agreement and the loan is and therefore the amount that's due for repayment and there are no mechanisms for that. Whereas if you regard it purely as an option, to simply assign or apply the benefit of the assets, there is no practical difficulty at all.

So the reason I'm taking you to these is because I see it as, you're supposed to repay the loan amount, unless and until you exercise the 11.1 option. Because I said money is owed, I accept that that could mean any amount that's owing including whether that's the value of the share purchase agreement or not but it is significant that they say that it is at least initially the loan together with interest thereon. That's what they think the moneys owed are and they don't say, for example, or if it is less the value of the insurance policy and the share purchase agreement. So that's the sort of classic thing you would expect on a stand alone agreement whereas over the page we've seen the definition of "security". So then 3.5, over on page 87, we have the obligation to pay interest at 3.1 and default interest.

It's really the same point again. We have that primary obligation to repay the loan with interest. So that's the actual repayment obligation. And then if you look, for example, at clause 6.2, it's a change of law provision, that's on page 90, and it allows the lender to terminate its obligations under the agreement. I simply draw that to your attention first of all because it refers to the fact that if

you go to 6.2 it gives the conditions for exercising this right and then it says then (e) if any of those things happen the lender may at its discretion by notice terminate the lender's obligations under this agreement upon which the loan shall be cancelled and the borrower shall immediately repay the moneys owed. As it would seem moneys owed could potentially mean the value of the share purchase agreement and insurance policy but it's been defined to say, at least initially, that's the drawdown amount plus the interest. And again you're in that situation where, the one that Justice Anderson mentioned earlier, where that might be a situation where your right is sort of taken away from you effectively because you, the loan is cancelled but presumably even in that situation you still have the option of handing over the share purchase agreement and the insurance policy.

Over at 8.1 on page 91 there's a provision for payment. It says when and how money is to be paid. I draw that to your attention simply to make the point again, there is no mechanism for ascertaining the value of a share purchase agreement and insurance policy in paying that on the due date. Which if that was really what they'd meant you'd expect the parties to have inserted some sort of mechanism for doing so.

Then over at page 93, clause 10.3, remedies accumulative. The rights, powers and remedies in this agreement are cumulative and not exclusive of any rights, powers or remedies provided by law or pursuant to any other agreements or securities granted either before or after the date of this agreement. I don't suggest that takes me very far but it's at least not inconsistent with the idea that there might be other securities securing the same moneys owed.

ELIAS CJ:

Sorry which, was that 9.3?

MR WALKER:

10.3.

ELIAS CJ:

10.3, sorry.

MR WALKER:

So that is at least consistent with our case. Next is – well I just note that this agreement is governed by Swiss law over at 10.11 but no one has taken a point about that. So if you look at –

ANDERSON J:

Do we have to assume that's the same as New Zealand law?

MR WALKER:

Yes. Everyone seems happy to make that assumption.

ANDERSON J:

You don't want to be arguing this in Geneva.

MR WALKER:

Well I wouldn't mind. So, taking you through all that, the only thing in this agreement which my learned friends can point to as supporting their view that the security is limited by the loan agreement, is 11.1 and as I say, I don't believe it does. So then we turn to the mortgage itself. In the operative clause on page 96, the recital and operative clause, you have a similar issue as you do for the operative clause in the loan agreement because the mortgagor is required to grant to the mortgagee security over certain personal property. Again, that's question begging because it's the question of what the security actually provides for and it says, "in the form of this deed" and of course, the deed includes clause 9.1. So that really doesn't take matters far for either side. Similarly the operative part, it does say, "The mortgagor agrees to and hereby does grant security over the property." So if you stop there that might support the respondents but it goes on to say, "...and covenants with the mortgagor as set out in this deed." So again, you have the circular problem, since it includes 9.1.

Now over at page 99, 2.2, "If the mortgagor defaults, the mortgagee is entitled to charge and recover interest at the penal rate." I accept, for the reasons we discussed earlier, that doesn't take matters very far but it does necessarily suppose that in some situations you're going to be repaying the principal and interest and that's confirmed by 3.1, "Mortgagor acknowledges these provisions should provide security for the principal sum, interest and other moneys payable." So that clause is premised on the idea that it's the principal and interest and other moneys which are being secured rather than, for example, the value of the share purchase agreement and the insurance policy and that's the defined term, "the moneys hereby secured" which we see used repeatedly in clause 9.1.

BLANCHARD J:

It is of course payable under the contract and the contract includes 11.1.

MR WALKER:

It does but it would be odd to say the principal sum, interest and other moneys payable under the contract, if what you really had in mind is that the most you're ever going to have to pay is the value of the share purchase agreement and insurance policy.

BLANCHARD J:

Well I'm afraid I'm still stuck on the fact that it looks to me as though this is a mortgage obligation to pay the principal sum but if the value of the security, the policy and the share acquisition agreement, are less than that, then there's a limitation.

MR WALKER:

But how practically would that play out, other than by applying or assigning the share purchase agreement and insurance policy?

BLANCHARD J:

Well you'll only be looking at it at the end of the 10 years. You'll establish their value then and that will be the value that's fixed.

MR WALKER:

But it won't necessarily be at the end of the 10 years because you might have a clause 6.2 situation, that's the change of law clause I just directed your attention to.

BLANCHARD J:

Well you value them at that date then if the arrangement is brought to an end by the mortgagee under a clause of that kind. But you're not having to do a value every day.

MR WALKER:

I accept you may not do but all I can do is really repeat the point that this is a, this is not, these aren't publically traded shares in a listed company.

BLANCHARD J:

So what?

MR WALKER:

Well so what, it makes it very difficult –

BLANCHARD J:

You establish value by selling the rights or in the case of the insurance policy claiming on it and receiving the payment under the policy.

MR WALKER:

Well the problem is the insurance you can't actually collect for several months afterwards.

BLANCHARD J:

I don't see how that makes any difference.

MR WALKER:

All I'm saying is –

BLANCHARD J:

It's still of value as at the date where you were entitled to claim.

MR WALKER:

Yes, but you have an obligation to repay the moneys owed on 31 March 2005. Now yes I accept you could have onsold the shares at that time but equally you may not have and I'm just wondering how someone at 31 March 2005 is supposed to ascertain what's really got to be an agreed value. It can't be something that just suits the purchaser. It would also have to be an amount that satisfies the lender and there is no mechanism to do that. There's simply an obligation to pay the money at 2 pm on that day.

BLANCHARD J:

Isn't that true under most non-recourse loans? The practical solution is to hand the assets over to the mortgagee but they could be realised upon. The mortgagee might not want that of course because they might want to control the realisation of the value. It's interesting in 11.1 it talks about to the intent that the borrower can apply or assign all moneys received or other value received. Now how do you get moneys received other than by realisation?

MR WALKER:

I completely agree with that but I don't think it defeats my argument because you still have that option. You can realise, you can either do it as an assignment before you realise or you can realise and apply or assign and if you do that –

BLANCHARD J:

So you accept there could be a realisation?

MR WALKER:

I accept that there could be yes, but what I'm not accepting is that the way that the loan works is that the amount that you owe at any particular time is the, provided it's below the floor, is the –

BLANCHARD J:

It's not the amount you owe at any particular time, it's the amount you owe at the point when the matter is being resolved.

MR WALKER:

But how –

BLANCHARD J:

It may well be that the borrower can't simply tender an amount which the borrower says is the value of the policy and the share acquisition agreement at a particular time but the only way of redeeming the loan is to redeem the entire amount of the principal sum.

MR WALKER:

My, I think the main answer to your point is I've been making the point that in my submission if the parties had really intended that it would – even if it's at a terminal date for example, that it would be the actual value of the share purchase agreement and insurance policy. You'd expect them to have some mechanism for ascertaining that, there is no such mechanism. But going beyond that the parties have explained exactly –

BLANCHARD J:

Well why did they put in the reference to applying or assigning all moneys received?

MR WALKER:

They put that in because they're explaining what they mean when they say that the agreement and the liability of the borrower is limited to the value of the security. So they've used a sort of slightly opaque phrase, they've then explained what they mean by that is our intention is that the borrower can apply or assign and if it does it has no further liability because as I say –

ANDERSON J:

How can it receive moneys when the goods, when the shares or the security is mortgaged? How can it sell the mortgage, the security and apply the moneys without breaching the mortgage?

MR WALKER:

Well as a practical matter presumably you're going to either have to make your sale conditional or you're going to have to redeem the mortgage, I accept that. I accept it's not –

ANDERSON J:

So as soon as you establish some mechanism of value, you're right. Earlier we discussed the question of redeeming the shares but 11.1 doesn't allow you to redeem the shares. It allows you to apply the proceeds in satisfaction which is rather different.

MR WALKER:

Well that's one of the options but you can also assign the value received under it.

ANDERSON J:

Yes but you can't just assign the security under clause 11.1. You can't just do an absolute assignment of the security itself to the mortgagee, in satisfaction. All that 11.1 says "to the intent that", is that if you apply moneys received which means moneys for true value, that will discharge the debt.

ELIAS CJ:

No, it must be, surely, also assignment of the share acquisition agreement and policy because –

MR WALKER:

Yes.

ELIAS CJ:

– or of the benefits.

ANDERSON J:

All moneys received thereunder, or other value received thereunder.

MR WALKER:

Yes, sorry.

ANDERSON J:

A bit amorphous really, isn't it?

ELIAS CJ:

Including but not limited to the benefit of the rights.

MR WALKER:

I'm not sure it is problematic because all that they're really saying is, I can enter into a deed where I assign either the immediate benefit of the agreement or I can assign my interest in performance of the contract, there's no problem in law with that and I can do that on day two if I want to. So I can do that on 2 April 1995 and then I have, effectively, applied or assigned all moneys received thereunder, or other value received thereunder.

ANDERSON J:

Yes, that's the key point, the value received under the security. Thereunder relates to the security.

MR WALKER:

Yes, in the sense of share purchase agreement and insurance policy and since it's an assignment or application to the mortgagee, then it must be implicit that that redeems the mortgage.

ANDERSON J:

Yes, I understand. You do a transfer to the mortgagee of all your rights, title and interest under the security.

MR WALKER:

Yes. So all I'm saying is, I think they've made perfectly clear what they mean, and it makes commercial sense, given the uncertainty about the share value. Now, we were in the mortgage. I'd simply note – I won't spend any time on it, but there are other provisions that contemplate that the moneys may become payable during the term of the 10 years. So you have a default provision at 7.1 and at 8.1, another default provision but I take it that if you take the view that Justice Blanchard expressed, that may not take you very far but in my submission, that's consistent with the idea that you have an amount that's owing on which interest is accumulating over time, which must be an amount that can be calculated. Then we come to 9.1. Now, the next clauses which are significant are over at 11.3 though to 11.7 on page 105.

Even if it does work as a sort of ratchet down provision, so that the most you have to pay is the principal and interest, you still have to address the question of what security you can get to cover that liability, and in my submission, that is a different question. The way that it was presented, and the way that the Court of Appeal seems to have taken it, is that we can't read 9.1 as a further security provision because of 11.1, and 11.1 is simply inconsistent with the idea you can get security over other property, or have a further security other than the present mortgage. But 11.3 through to 11.7 all say, all contemplate, that there may be another security, including one executed after this deed, held by the mortgagee for the purpose of securing payment of the moneys hereby secured. So you can see that in each of 11.3 through 11.7, except in 11.7 it doesn't have the parenthesis.

Now, my learned friend dismisses those as boilerplate provisions, first of all. And then he says, well, those would cover the situation where, for some reason, the borrower volunteered some security. But in my submission, that doesn't work as an explanation. This isn't one of those cases where there's a

standard form for use in many different contexts, and the parties have printed words or written words on it for their particular context. So you have that potential for conflict, where you just ignore – you might say that part of the agreement is inconsistent with the main object and intent of the agreement. These clauses are just in a standard form. Well, I shouldn't say in a standard form. They're in the mortgage. There's nothing to indicate that they have any greater or lesser value than 9.1, and the traditional approach to interpreting is to try and find a – or 11.1, for that matter – an interpretation that reconciles all of them.

WILSON J:

Mr Walker, how does 10.1 of the mortgage relate to 11.1 of the term loan agreement?

MR WALKER:

Well, that simply is the assigned provision. That's just the assignment by way of mortgage.

WILSON J:

How does that relate to the, on your argument, borrower's possible assignment of moneys under 11.1?

MR WALKER:

Oh, I see. Well, clearly because it's a mortgage, there's an initial assignment but it's only by way of mortgage. That's made perfectly clear because there's provision in 10.2 that when all the moneys are paid, the mortgagee is going to reassign the property to the mortgagor and there's earlier provisions for the notice of assignment to be held on trust. So that's at 4.1. The mortgagor is going to lodge certificates or other contractual documents in respect of the property with the mortgagee. Then over the page, mortgagee acknowledges it won't utilise them unless there's an event of default. So all I'm saying is that that's just the assignment by way of mortgage, but 11.1 is contemplating a further assignment, an absolute assignment of the borrower's interest in the

share purchase agreement and insurance policy. Now, if I just, in light of that, I'm not sure I need to take you through –

ELIAS CJ:

Sorry, is that answer the same as your earlier answer, that it is in the subsequent mortgage of additional property that one would expect something equivalent to 10.1 of the mortgage?

MR WALKER:

Quite right.

BLANCHARD J:

Why does 11.3, in the words in brackets, talk about whether before the execution of this deed, when we know this was a special purpose company and there was no prior security, isn't this just an indication that this is boilerplate?

MR WALKER:

Well, it may be boilerplate in that sense, in that it's –

ELIAS CJ:

Copied?

MR WALKER:

– if you like, standard wording in a document but it's – the whole thing could be boilerplated, in that sense.

BLANCHARD J:

But if was tailored for the kind of situation you would have us accept was in contemplation, it surely would have been more specific and would have referred to something after the execution of the deed but not before.

MR WALKER:

I don't think so. The boilerplate debate – what the respondents seek to do, is effectively to say that pretty much everything in the loan agreement and mortgage is boilerplate and the only cause you actually need to –

EMERGENCY ALARM

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.47 AM

MR WALKER:

I'm going to return to the boilerplate point but just coming back briefly to 11.1 and really addressing Justice Blanchard's concerns. My submission is that that is a true option and there are two things that the borrower can do. They can either pay the principal and interest as all the clauses of the loan agreement contemplate, or they can do the things that follow the words "to the intent that". So you either pay principal and interest, or you apply or assign all of the benefit value and moneys received over to the lender.

As a first point, it's important to appreciate that whereas the obligation under the loan agreement is to repay the principal and interest in year 10, this option is something you can exercise at any time. That's important because I think what Justice Blanchard's interpretation requires is that those words, "The agreement and the liability of the borrower hereunder is limited to the value of the security." They must be doing something more than what is explained by "to the intent that". So they're doing two things at least. One is, there is an application or assignment option but in addition, they're also creating this ratchet down provision. So what I say to that is, given we're dealing with a lender and a borrower –

BLANCHARD J:

What do you mean by "ratchet down provision"?

MR WALKER:

All I mean by that is that the most you have to pay is the principal and interest but if the value of the share purchase agreement and insurance policy is less at any point in time, that's all that you have to pay.

If you put yourself in the shoes of the borrower reading this, they've seen this phrase with the acknowledgement and then it's explained what the intention is. So they get from this a fairly simple proposition which is that I can get out of this deal at anytime by handing over my rights under the share purchase agreement and insurance policy. Would the borrower understand, what to me is a much more sophisticated proposition which is that, in addition to that, this first phrase starting, "The lender acknowledges", is also providing for, what I submit, is a reasonably sophisticated fixing of the amount due under the loan at any point in time. I think the borrower, the reasonable borrower in the shoes of the borrower, would not ever think that that might be what is meant because they understood that it's been explained what is meant, that's why they use the words "to the intent that".

To me, it doesn't make a great deal of commercial sense. It makes a great deal of sense that you would simply hand over the share purchase agreement and insurance policy, that's a very simple thing that you could imagine a borrower wanting to do. It doesn't make so much sense that, at any particular point in time, what the borrower would do is work out by whatever mechanism the value of the share purchase agreement and insurance policy, pay that and keep the shares. By definition you've paid what they're worth so you're no better off. Why not just hand over the share purchase agreement and insurance.

Now, just turning to my written submissions. I think we've covered a lot of it, so I'm just going to take you through –

BLANCHARD J:

Could you just go to 11.2. I'm just puzzled by some language in them. "The borrower covenants with the leader that if it sells the shares either directly or

by way of sale of the entity which holds the shares." What's contemplated by that because isn't the borrower the entity which holds the shares?

MR WALKER:

Yes and I think in every single case that that was so. There was no holding company arrangement –

BLANCHARD J:

But how can the borrower give a covenant in that form, doesn't make any sense. I don't know that this plays out either way, I'm just curious.

MR WALKER:

I can't really offer an explanation because it doesn't actually fit with the facts. It maybe that whoever was drafting it, had in mind the idea that you might hold things indirectly and wanted to cover that off without really paying attention to whether that was, what was the case here.

ANDERSON J:

Because we don't know what is possible under Swiss law, do we?

MR WALKER:

That's correct. It could be a Swiss law issue.

BLANCHARD J:

That provision though, does seem to indicate a contemplation that the shares might get sold during the term of the agreement?

MR WALKER:

Yes. Presumably you could only do that if you were in a situation where you were going to realise a greater amount and you could redeem the mortgage.

ELIAS CJ:

The loan doesn't become repayable however, on sale of the shares, does it, there's no provision for that?

MR WALKER:

It doesn't, no.

ELIAS CJ:

No.

MR WALKER:

Well, only in the sense of if there's a default, if you've sold the shares improperly that could be a default provision –

ELIAS CJ:

So then the lender would be unsecured?

MR WALKER:

Yes but I think what this is contemplating is that you're going to have to redeem the mortgage to sell the shares and so there would have to be an arrangement with the lender where the lender accepts whatever the payment is in redemption, so the problem goes away and liability and security are at an end.

Just before I come back to the boilerplate point, one correction. On page 12 of my submissions and still going through the facts, paragraphs 50 and 51, I've referred to dead polls dated 20 February, that should be 26 February. I raise it simply because otherwise the sequence seems odds because the Bank Hapoalim assignment would have happened afterwards if it was the 20th of February.

ANDERSON J:

Sorry, what paragraph is that?

MR WALKER:

Paragraphs 50 and 51, 20 should read 26 February in each case.

WILSON J:

Mr Walker, just looking at the next paragraph, 52, where did the receivers come from?

MR WALKER:

Sort of originally, or –

WILSON J:

No, no, where are they based?

MR WALKER:

It's an insolvency practice whose name is – the name will come to me in a second. It's a sort of regular insolvency practice in Auckland.

WILSON J:

I just hadn't heard of them, so I was interested to –

MR WALKER:

Yes. No, I mean, put it this way, if the question is are they plants or – as far as I know, not, they do take their responsibility seriously, they separately advised, et cetera.

Now, I don't think I need to take you through the application itself if you're aware of the point that the grounds of challenge were much broader and it had been reduced to this interpretation point and I don't think I need to take you through the High Court judgment. It maybe worth just focusing on a couple of points in the Court of Appeal's judgment, this is page 15 of my submissions. Court of Appeal's judgment is at tab 5.

The Court of Appeal placed a great emphasis on context and at page 37 they talked about the commercial context. There wasn't actually any evidence in front of them about the commercial background, or at least not evidence going to the points that they next set out but they say that they're aware of the general context from other proceedings and you'll recall that we were here a

few years ago on the costs coming out of the criminal judgment for example. So, they're aware from the Court of Appeal and Supreme Court and High Court judgments in respect of the criminal trial about some of the background facts. They then go on to say they ignore that because it wasn't in front of Venning but they said a number of propositions – I should make clear as we made clear in that criminal appeal, criminal cost appeal, that we don't deny for a second that these are tax driven transactions, it's perfectly obvious. So, I'm not meaning to suggest at all that's incorrect but the bit that I have a difficulty with is 10(b), "The Court assumed that there was an intention that the individual taxpayers and their LAQC should be protected as far as possible from commercial risks." There's no background material to suggest that there was some sort of intention which preceded the agreement itself. The only evidence that we have of what they intended is the agreement which is the question that we're addressing today.

ELIAS CJ:

But isn't that what 11.1 achieves?

MR WALKER:

Precisely, that was my next point. Even if you regard it as a tax scheme, it makes sense for you to cover off your downside risk in this way and be able to walk away from it and that would be sufficient to meet the Court of Appeal's objective. It's not necessary to go further and find that there was no contemplation at all that there might, for example, be additional security required and if you were going to actually engineer a successful tax scheme, you would want some risk because the more risk free it is the less likely it's going to (inaudible 11:57:51) with the Inland Revenue Department.

ANDERSON J:

If there was no risk other than the redemption of the shares, it would be less likely to be approved, wouldn't it?

MR WALKER:

Yes.

ANDERSON J:

If there was a contingent liability for 1.4 million or whatever it was, it might get the nod.

MR WALKER:

Yes, particularly when your objective is to claim as a deduction the interest on that principal amount each year. You wouldn't want a situation where it was thought there was a closed loop, where actually there was only ever the share purchase agreement and insurance policy that were in play.

ANDERSON J:

Pieces of paper.

MR WALKER:

Yes.

McGRATH J:

On the other hand, presumably the promoters would need to be seen to be offering in clause 11.1 and the first half of it in particular, some extensive protection to attract people to the scheme?

MR WALKER:

Yes and that is extensive protection. I think possibly no one thought about the situation where the rights under the share purchase agreement were compromised. They assume that at any point during the course of the agreement they could simply hand over those rights. So what you've got here really is a situation where it may not have played out in the way that they anticipated but it's certainly not inconsistent with what they've actually agreed.

McGRATH J:

Some of those sort of issues would be if you weren't successful, played out later, wouldn't they, in the litigation, this is just one issue in the litigation, isn't it?

MR WALKER:

It is, yes. So I simply make that point, that the Court of Appeal seemed to be quite influenced by this idea that this was supposed to be a completely protected borrower/taxpayer but that's really the question before us and 11.3 does provide substantial protection in all perhaps except the current situation, where you've compromised your rights. Then the next point is that the Court twice refers to the contra proferentem principle, that's at paragraphs 40 and 46 and they say, "it's distinctly applicable". Now, you already have the point that we didn't actually argue about contra proferentem in the Court of Appeal or the High Court, for that matter but I'll still address you shortly about whether contra proferentem applies here.

Now, if you turn to page 16 please of the submissions, we come back to this boilerplate point. So the idea is for the respondents that, really, you can ignore many or most of the provisions in these agreements, and just have regard to 11.1. It's true that there are situations in which a court can legitimately treat words as redundant or even repugnant, and not have regard to them, but the law is reasonably clear that you should only do that if it's absolutely clear that there is no way to reconcile the two clauses. I've set out for you the propositions from Chitty, and if we perhaps turn to Chitty there are two other paragraphs that might be useful. Tab 3 of the authorities bundle, the first volume. I'm not going to take you through principles such as you should have regard to the whole of the contract, et cetera, but the only thing I think I do need to address you on is when it's acceptable to have regard to redundancy or repugnancy.

So those start over at 12076, and in particular, 12077, and the point that's being made is that there's not a presumption against redundancy as such. So that if there's a contractual word to which no sensible meaning can be given, it may be rejected. So it's not that there's a presumption against it but that doesn't mean that you can simply start treating words as redundant or surplus, as you'll see. Dealing with inconsistency which is the case we're dealing with here, if it's truly inconsistent, you can actually ignore one or more

clauses in the agreement. That's reasonably clear but halfway down through the paragraph, "To be inconsistent, a term must contradict another term or be in conflict with it such that effect cannot be given to both clauses. A term may also be rejected if it's repugnant to the intention of the parties. However, an effort should be made to give effect to every clause in the agreement unless a clause is manifestly inconsistent with, or repugnant to, the rest of the agreement." Now, I will focus on this for a few minutes because I think that it's my learned friend's main argument, that we are dealing with this sort of case and there are four authorities to refer you to. They're in the bundle, all but one are in the bundle. *Glynn v Margetson & Co* [1893] 1 AC 715 is at tab 9 of the first volume. Just to give you a little roadmap, there's a Privy Council decision I'm going to take you to from 1989 which I think makes clear what the principle is but just proceeding in time.

This was a case where there was a Bill of Lading which stated that the ship was lying in the Port of Malaga bound for Liverpool but critically, it had liberty to proceed to and stay at any port or ports at any station in the Mediterranean and then, very broadly, also the Black Sea, the Adriatic, the Coast of Africa, Spain, Portugal, France, Great Britain and Ireland and this was a Bill of Lading to ship oranges. What happened, essentially, was that rather than head for Liverpool, the ship actually headed in completely the opposite direction and went to another port, with the result that by the time they got to Liverpool, the oranges were spoiled. The question for the House of Lords was whether or not that was permissible and the decision was that it wasn't and what the House of Lords held was that you had to have regard to the main object of the contract which was the contract to freight oranges and that, depending on which other Lord you refer to, either overrode or had to be read consistently with the liberty provision, the liberty to proceed to all those ports. So if you turn to page 354 of the report, this is Lord Herschell, the Lord Chancellor.

If you come down to the second full paragraph starting "These words". The point that he makes there is that the words of the Bill of Lading are designed for a great variety of different voyages that might be contemplated but here the parties have expressly agreed on a particular voyage to transport oranges

to Liverpool. He goes on, down towards the bottom of the page, three lines up, “It’s well recognised that in construing an instrument of this sort and considering what is its main intent and object and what the interpretation of which connected with that main intent and object ought to be, it’s legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, it is not specially agreed upon in relation to a particular voyage.” Now, he treats it as a question of construction, reading the clauses together but it’s treated subsequently by Lord Halsbury for example, at page 357, just those opening words of his judgment, he treats it not as a matter of construction but as simply rejecting the words you regard as being inconsistent. Now, that is that decision.

The next one to refer you to is the Privy Council decision. This isn’t in the bundle, so with your permission I’ll hand it up. I think this case states accurately the true proposition of law which Your Honours should apply. This was the Privy Council on appeal from Hong Kong. What happened was that there was a warehouse which was storing a company’s goods. There was a bank that was financing these goods and essentially there were defalcations by employees of the company running the warehouse which resulted in substantial loss, ultimately to the bank. Now, if you look at page 1 of the report, you’ll see the clause in question, there are really two clauses, 6.3 is the exclusion and it said, “The company shall not, under any circumstances, be responsible for loss or damage resulting from any of its officers, servants, employees, et cetera, dishonestly mis-delivering the goods to any person” and there was dishonest mis-delivering here.

There was another provision which is immediately below it, clause 4 which said that, “The company will deliver the goods only on surrender of...” what was called “...a godown warrant endorsed by the party as for the time being registered in the company’s books as entitled to the goods and that was designed to be a protection for the bank because the godown warrant couldn't be released without the bank’s agreement. So the question arose, what do you do with those two clauses and the dissenting Judges, Lord Brandon and Mr Justice Bissen, as in Mr Bissen of our Court of Appeal, they regarded

those two clauses as inconsistent because you can't on the one hand require the company only to deliver the goods on surrender of the warrant but then exclude them from any dishonest delivery, including without a warrant being presented. The majority of the Privy Council disagreed with that and the passage I'd like to refer you to starts at page 6 of the report I've handed up. So you can see the argument that's put, it's in the first full paragraph in the left-hand column. The third submission was that the clause should be rejected as repugnant to clause 4.

It was submitted clause 4 imposed a positive obligation not to deliver goods, otherwise a non-surrender of a godown warrant, or against a delivery order and on that basis, to give effect to clause 6.3 where there was no godown warrant or delivery order, would be to deprive clause 4 of all effect. The key passage is in the next column, "But the matter does not stop there. Their Lordships wish to stress that to reject one clause as inconsistent with another involves rewriting the contract and it can only be justified where the two clauses are, in truth, irreconcilable." They say that's likely to occur only where there's been some defect in the draftsmanship and so they refer to the classic example which is the one we've seen, where there is a printed form which is designed for many eventualities but a specific agreement designed for one purpose and one has to override the other.

So from time to time it's discovered the typed positions cannot live with part of the printed form, in which event the typed position will be held to prevail but this is the critical bit, "Where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has after all to be read as a whole and the overwhelming probability is that on examination an apparent inconsistency will be resolved by the ordinary processes of construction" which I submit is an eminently sensible approach.

ELIAS CJ:

It's really just that they disagreed on the point of construction with a minority, wasn't it?

MR WALKER:

That's true but it does –

ELIAS CJ:

Because they said although, as they say at the column before, "Although the exception is sweeping in its terms, it's not all embracing."

MR WALKER:

Yes. I completely agree but it is still important that the basic point that –

ELIAS CJ:

I don't think anyone would take any issue with this.

MR WALKER:

No, I don't think they would but all I'm trying to do is confine to its proper context the idea that parties draft redundant or repugnant clauses, the law –

McGRATH J:

Rule one, first be satisfied there's an inconsistency.

MR WALKER:

That's right and you would normally not expect to find an inconsistency. As here, parties have sat down and drafted agreements as a whole. It would be unusual if there was something that was truly repugnant. So, I'm just trying to stress –

McGRATH J:

"As here, the parties have sat down and drafted the agreements as a whole," what do you mean by that?

MR WALKER:

What I mean is, this isn't a case of a printed form where they've written across the front of it, or printed across the front of it –

ELIAS CJ:

Filled in the gaps or something.

MR WALKER:

– some different words. It's been drafted as a whole agreement, presumably by lawyers, it would seem to be by lawyers and so all that Lord Goff is saying, is normally you wouldn't expect there to be redundancy in that case.

ANDERSON J:

If you take account of the fact that cutting and pasting with computers is so common place now that the old idea of writing something across a standard form has limited commercial application.

MR WALKER:

That may well be the case but I'm the one who has got the agreement with lots of provisions that seem to contemplate that there will be security other than the share –

ANDERSON J:

I take that point.

MR WALKER:

– purchase agreement and policy. What I'm trying to defeat or meet, is an argument that you're actually entitled essentially to ignore a very large number of provisions in this agreement and treat 11.1 as being really all that the agreement is about and I'm just trying to get you to the premise that you should be slow to accept that unless you've got very good reason and I don't think there is good reason here because you can –

ANDERSON J:

There's a preference for construction that reconciles rather than which contradicts.

MR WALKER:

That's right.

ELIAS CJ:

But isn't your best way forward to demonstrate, as is the case here, that there isn't any necessary repugnancy or inconsistency?

MR WALKER:

Well, shall I just turn back to 9.1 and 11.1 and show you how that works. So, before we come to 9.1 we recall those operative provisions in the loan agreement saying you're going to repay the principal and the interest. What we have, sorry, perhaps, excuse me, I'll start with 11.1, might be easier. So we've read already the provision saying you'll pay the principal and interest in year 10 on 31 March 2005. Then the clause says, "Not standing that, the lender acknowledges the agreement is limited to the value of the security." I explain what I mean by that. It means that at any time you can apply or assign the benefit under those assets to the lender in satisfaction of your liability, so that's in full satisfaction of the obligations and if you do so, that will relieve you from any further liability. Very sensible, commercial arrangement in a situation where the shares may be worth a great deal or not very much at all and, for whatever reason, the lender seems prepared to take that risk.

You then say, "But clearly it's anticipated that you may well just complete and hold onto these benefits and rights and if you do that and sell at a premium above $3 you pay us 10% of the difference." All very sensible, no real problem at all, a simple straightforward option. You then turn to 9.1. This is a mortgage –

ELIAS CJ:

Well, isn't your point really that the further security need may arise before the option is exercised?

MR WALKER:

Quite right, yes.

ELIAS CJ:

Well, it's as simple as that really, isn't it?

MR WALKER:

Yes.

ELIAS CJ:

So that there's no repugnancy because of the way you would have us construe clause 11.1?

MR WALKER:

Yes, that's it because for as long as you have that liability there's something that can be secured. As soon as you exercise the option you're fine because you've met your liability, there's nothing to secure but you've got to exercise the option.

If I could just direct you to *Equiticorp Finance Group*, that's at tab 12 of the authorities. Now, I draw this to your attention because we searched for any decisions considering a clause of this kind and the only one we found that was remotely close was this authority and obviously I'm aware that authorities aren't binding on points of contractual interpretation but what's interested about this case is it does appear to concern an earlier precedent for clause 9.1(d). So, if you look over at page 476 written at the top, it's page 3 of the report, you'll see the further security clause in question. So you'll notice, if you held the two together that it seems very likely, this preceded this transaction we're concerned with here.

It seems likely that whoever drafted it had some reference to a precedent in the same line. Starts off with exactly the same words but the difference is that the clause in question in *Equiticorp* is narrower because it says, "Execute such further documents and securities as the mortgagee shall in the circumstances referred to in clause 10.1 require." So it actually places a limit on the circumstances which is actually triggered by the value of the shares dropping, that's over the previous page. I take it that's what the 10.1 is about,

that if the value of the shares drops below a stated proportion of the amount of the secured loan that's when this right kicks in and it says, "The purpose is to further secure to the mortgagee payment of the moneys hereby secured." Then there's an attorney provision and instead of having (a) to (d) it simply says, "That the attorney can sign in the mortgagor's name and on his behalf any security which the mortgagee shall request the mortgagor to execute pursuant to this clause."

Now, I just direct this to your attention really for the fact that Chilwell J had no issue with the fact that it was at least reasonably arguable that this clause permitted the lender to take further security. The argument was well, it could only be security over shares because that was the sort of security that was originally contemplated and Chilwell J said well, it's at least arguable, it could be security over a real property, it wouldn't have to be a mortgage over some other shares necessarily. I think, in the light of the discussion earlier, it's interesting that this clause does actually contain a trigger, a specific trigger, by reference to the value of the security, whereas ours doesn't but all I would take that to indicate is that it's perfectly possible that someone drafting this clause might have decided that you didn't need a trigger other than where it was necessary or you regarded it as necessary. So, I just draw that to your attention to show that –

McGRATH J:

Sorry, where's the trigger?

MR WALKER:

Well, if you look in the fourth line of clause 11.1, it says, "Shall in the circumstances referred to in clause 10.1 hereof require." Now, there's a question about what that means. There isn't, 10.1 isn't set out but I –

McGRATH J:

No, that's enough, I understand, thank you.

MR WALKER:

So, that's that one. Now, I don't know if you need me to address you on the point about powers of attorney being –

ELIAS CJ:

Were those shares that the mortgagor had acquired in the case?

MR WALKER:

Yes.

ELIAS CJ:

Presumably?

MR WALKER:

Yes.

ELIAS CJ:

I mean, you have the added wrinkle here, don't you? That's all right.

McGRATH J:

So what's your point about what you call "a precedent", are you saying it's a standard provision?

MR WALKER:

I'm not saying it's a standard provision at all. All I'm saying is that when we searched for cases considering further security clauses, this is the only one that we found and –

McGRATH J:

This one popped up?

MR WALKER:

– it just so happens, at least on my reading, that it seems that whoever drafted our 9.1 must have had some version of this precedent in front of them

because otherwise it would be quite a coincidence that it starts with exactly the same words. You can see the heading is the same, "Further security and attorney" and then both start, "The mortgagor..." well, it's "will" rather than "shall", "...if so requested by the mortgagee" and then they've inserted, "...do all such acts and execute..." So, I'm not suggesting they're the same but it looks like someone has taken that precedent and expanded it. You can't take anything from that in the sense that the question is still, what would these parties understand it to mean and I don't suggest they had the decision of Chilwell J in front of them or the precedent in front of them but this does illustrate that there's at least one other case where people are perfectly prepared to give a right to take further security –

ANDERSON J:

That simply means that the clause, that the interpretation you contend for, is not unprecedented.

MR WALKER:

Yes and I don't take it any further than that –

ANDERSON J:

Might be rare but it's not a novelty.

MR WALKER:

No and what we were searching for were cases which might uphold my learned friend's contention that this is somehow an abhorrent or unusual idea, or there's some sort of presumption against it and we couldn't find anything to suggest that.

Now that, I'm not sure I can – well, at page 20 I deal with the question of how you construe it as a power of attorney but I'm not sure it's worth dwelling on that. It's accepted that powers of attorney are construed so you only have the power that's expressed or implied but here we're dealing with is it expressed or implied and so that will solve that question. We're not in a *Bryant* situation but if you'd like me to address you on that I can.

ELIAS CJ:

Does anyone want that?

MR WALKER:

Shall I set it out briefly what I mean by that?

ELIAS CJ:

I would be grateful, thank you.

MR WALKER:

Yes, yes. My learned friend relies on the proposition that powers of attorney are to read strictly.

ELIAS CJ:

Yes.

MR WALKER:

We accept that's the law but just to explain what that means. I've given you *Bryant* in the authorities, it's at 8 but actually it's all about this quote, "It's not disputed the powers of attorney are to be construed strictly." What that means is it's necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in expressed terms or by necessary implication and all I'm saying is, we're saying it is express in 9.1(d). We're not trying to suggest that there's something outside the document that needs to be read into this for us to succeed. So I think that's effectively a non-point.

I've then addressed at paragraphs 89 following. I'd anticipated the contention that (d) was really just a belt and braces provision. My learned friend doesn't seem to be advancing that in his written submissions at least but there are cases where, as I've said at the outset, that the attorney is drafted by saying specific things you can do and then saying something like, "...and generally to do all such acts for such purposes" and the question is, does that last enlarge the specific powers or not and the answer quite sensibly is no, it doesn't. In

my submission, we're not dealing with that situation here because (d) is actually its own power. It refers back to that object of further securing payment of the moneys hereby secured and it expressly states its own purpose. You're allowed to do anything for more satisfactorily securing the payment of the moneys hereby secured as effectually as the mortgagor could. So it doesn't actually link back to (a) to (c).

I've given an example which is taken from *Bowstead* of what our case isn't. That was a case where power was given, "...to demand and receive all moneys due to the principal on any account whatsoever and to use all means for recovery thereof and to appoint attorneys to bring actions and to revoke such appointments and to do all other business." The question was, is "do all other business" meant to be broader than those preceding objects and it was held that "all other business" must be construed to mean "all other business necessary for the recovery of the moneys or in connection with it" and I think that's a reasonably straightforward proposition, so I don't intend to take that further since my learned friend doesn't seem to be advancing that argument now.

Now, we've covered the points right down to page 27, so this is the last point. The Court of Appeal relied on the contra proferentem principle and Your Honours might take different views of how you want to deal with this. It seems to be very clearly established that contra proferentem only comes into play when there's an ambiguity and that there must be an ambiguity after you've exhausted all the other cannons of construction. The Court of Appeal didn't identify an ambiguity as such, instead what it said was that, "Lining 11.1 and 9.1(d) up together, we think 9.1(d) is largely or wholly redundant." So it's actually application of the principle of redundancy or repugnancy.

We have the further problem, there's a debate as I set out in the submissions, as to whether who is the proferens is a question of fact of law? Then you have debates within the factual paradigm, as to whether it's the person that puts forward the whole agreement or the clause in question. There was no evidence in the Court of Appeal or High Court about who actually drafted the

agreement. My learned friend had made an application to adduce some evidence going to that point in the Supreme Court but he has decided, that I can report, not to press that application. So, we're in a situation where we have actually no evidence about who drafted it and I should emphasise, I'm not taking that point in an opportunistic sense, where I think that if evidence could be adduced it would turn out that the mortgagor, mortgagee I should say, had drafted the clause, I wouldn't take the point if that was what I understood the situation to be. So, we're in a situation where we genuinely have no evidence as to who drafted either the whole of the agreement or the particular clause. So to the extent it's a question of fact, there's nothing to assist Your Honours, so it would only be if we have an ambiguity and it's a question of law who is the proferens, that it would become relevant to this.

My primary submission is there is no ambiguity, so we don't even need to invoke contra proferentem but I'm prepared and very happy to take you through contra proferentem, I just warn you that it's a minefield and you may have difficulty saying anything useful about it –

ELIAS CJ:

Well, for myself, I'm not sure whether anyone wants you to take us through the minefield. I can't see that it really arises, do you?

McGRATH J:

I agree with you.

ELIAS CJ:

Are you happy with that? Move on I think, or conclude.

MR WALKER:

Yes, just one last point. It would really only help my client if the answer was, it's a question of law and the proferens is the grantor but I don't that's something that I could responsibly advocate because I don't think that's a justifiable interpretation.

ELIAS CJ:

No.

BLANCHARD J:

It certainly would be contrary to practice.

MR WALKER:

Yes.

BLANCHARD J:

Because normally it's the mortgagee who drafts the mortgage and puts it forward.

MR WALKER:

That's right. So that's my submissions, unless you have anything you would like to ask.

ELIAS CJ:

No, thank you Mr Walker.

MR WALKER:

To answer Justice Wilson's question, the firm is McDonald Vague.

WILSON J:

Thank you.

ELIAS CJ:

Thank you Mr Dale.

MR DALE:

As Your Honours please. My learned friend Mr Campbell and I agreed that we would divide up our argument with Your Honours leave. I'm going to deal with the background to the litigation and the contract in issue, to take you to the contractual context and to attempt to demonstrate that, read as a whole,

clause 9.1(d) cannot operate to defeat the intentions of the parties. I'm going to take you through what we say are the relevant provisions of both documents.

Having listened to the argument, I think my learned friend Mr Campbell has drawn the short straw in this sense that his part of the argument is going to focus on the definitions and the explanations of clause 11.1 and 9.1(d) which is obviously –

ELIAS CJ:

Sorry, explain again how you're dividing this up because I would have thought that that comes into –

MR DALE:

Mr Campbell –

ELIAS CJ:

– your interpretation of the provisions?

MR DALE:

Mr Campbell is going to deal with those two specific provisions. I'll develop the broad argument as to how you should approach the interpretation of the two documents and take you to the provisions as a whole.

ELIAS CJ:

I see.

MR DALE:

It's just that when it comes to the minutiae of those two clauses and they have been dissected already and we say require further dissection so that they can be properly understood. The argument is that in the context of the agreements, by which I mean the loan agreement and mortgage as a whole, clause 9.1(d) operates to, on my learned friend's interpretation of it, to defeat the purpose of the contract.

I thought I should give you some introductory remarks on how we came to be here in terms of this litigation because there has been some reference to the issues that have arisen. For example, my learned friend has made the point that the reason the further security is required is because the investors, some of whom I think are present today, have compromised the loan agreement, the share purchase agreement rather and the policy. What has happened in this particular instance is that the investors signed up to buy the shares with this rather unlikely proposition that if they didn't increase in value by a significant extent over the 10 year period they could have resource to the policy of insurance –

ELIAS CJ:

Why is it unlikely?

MR DALE:

Because the company's technology companies were both able to trade during the whole of that period and the share purchase agreements provide them with the ability to do that. They included for example, the ability to continue to pay dividends. There were a number of provisions which meant that the companies were actively trading. It was the commerciality of the transaction that ultimately eventually came to the attention of the revenue who took the investors to task, with the consequence that they will have to pay out.

The proposition that an insurance company with insured against that contingency over a long period is unusual. My learned friend just touched upon the issue of tax because he rightly acknowledges this was tax driven. What has also been acknowledged now however, is the circulatory of the transaction and that became important particularly from the revenue's point of view. The dispute developed when the revenue began calling on the investors to explain and the investors sought information from the vendors and when that information wasn't forthcoming, there was the withholding of payments and then were letters sent treating those requests and refusals as repudiation.

The long and short of it is that the vendor companies n-Tech and St Lucia are suing the investors for breach of the share purchase agreement. It means that this is just a very small part of ongoing litigation. One of the features of it is that most of the entities, whether they be the lender, the vendor and the intermediaries, are all companies associated with Milloy Reid Tong and Mr Reid and indeed, if you'd be kind enough just to turn to the bundle, the case rather, at tab 24.

McGRATH J:

Just so I know where we're going, you're not disputing that these agreements are binding on their terms, are you?

MR DALE:

No, we're not.

McGRATH J:

Thank you.

MR DALE:

Tab 24 is an agreement between what's described as the successor of what was rather grandly entitled, "The Bank of New York Inter Maritime Geneva" which is –

ELIAS CJ:

Sorry, why are we going to this document?

MR DALE:

I'm just demonstrating. Part of the background is that the lender – the transaction is described in this document, whereby Hapoalim has assumed the obligations and rights of the Bank of New York and they record the transaction that was entered into in 1995, Asian Growth Fund which is the company, is a Reid company and Mr Reid assigns this. So, Asian Growth Fund ask the Bank of New York to participate and they enter into the

mortgage agreements that are described as the limited liability companies domiciled in New Zealand and they're entered into, you'll see in the last note, "For the dominant purpose of –

ELIAS CJ:

Why is this relevant to what we're looking at, the documents we're looking at?

MR DALE:

Well, I'll move quickly forward from this but this is the context in which this application has been brought. My learned friend has made the point repeatedly that they need to have further security because the securities had been compromised and all I'm demonstrating is that if there are problems with the transactions, they arise principally out of the circulatory. This is an illustration of how that arises. Then I'm going to go to the agreements themselves. I'll move quickly past this because it's of some importance –

ELIAS CJ:

Well, I don't think these matters of colour are going to help us particularly Mr Dale.

MR DALE:

All right, I'll move forward. The primary issue as it's developed and the argument and the discussion, is the interpretation of the two documents. Where we say that the case has misfired at first instance is because the argument developed from the wrong end. What my learned friend's argument is, begins with, is clause 9.1(d) and he takes that clause and argues that you can read that in such a way as to justify the granting of further securities, start from there. Having convinced the court or the listener that that's possible, then goes to the rest of the agreement to explain away the inconsistencies.

Where we say that's wrong, is that you've got to start with the documents themselves in terms of their general purpose, the purpose of the transaction as understood by the reader of the documents and if you do that and start at the beginning and look at the transaction as a whole, you reach the point that

clause 9.1 does not work to defeat that intention, both in terms of interpretation and in the alternative basis that it's repugnant. So, it is important to start at the beginning with the two documents.

My learned friend of course has already taken you through these documents to a significant degree but I do think it's necessary to go through them again. The starting point has to be, of course, the loan agreement. At page 84 of the bundle, start with the recital. The lender at the request of the borrower has agreed to advance the moneys in the terms and conditions contained in this agreement and the purpose of it is of course, as we know, to buy the shares and those shares are in this case Digitech and the other case St Lucia. The operative part is that the loan was to drawdown those moneys for the purpose set out under clause 4.1. The operative part describes the terms and conditions and subject to the security specified in this agreement.

Now, it's essential from the outset to understand objectively what is meant by security and we say the obvious step to take is to go immediately to page 86 and a definition. The definition means the mortgage over the policy and the share acquisition agreement could be given to the lender by the borrower. If there was going to be a suggestion of there being any further security, such other securities as provided by the mortgage, this was the place to say so. So, just pausing here, taking our ordinary reader, our typical investor, proceeding objectively, he looks at the document, what's this loan for, it's a loan for the amount specified on the terms and conditions and subject to that security, goes to security and there's a simple, straightforward clause which sets out what it means.

ANDERSON J:

Do we have in the documents the security documents themselves, or the agreement to purchase the shares?

MR DALE:

I do have the agreements to purchase the shares here –

ANDERSON J:

Because that's part of the context, isn't it, in which the rest of it was executed?

MR DALE:

Yes, I've got copies available of the share purchase agreements, if Your Honours would like them.

ANDERSON J:

And the insurance policy?

MR DALE:

The insurance policy is not in the, not in evidence.

ANDERSON J:

Well, I imagine it just says if they don't reach a certain value they'll pay.

MR DALE:

Yes.

ANDERSON J:

For my part, I'd quite like to see the agreement that actually forms part of the security.

MR DALE:

Yes. I've got one for –

ANDERSON J:

Run it over the lunch break, that will do.

MR DALE:

Yes. I've got three copes of the Ulster n-Tech agreement.

ANDERSON J:

After lunch will do.

MR DALE:

They're fairly standard by the way, fairly standard agreements for sale and purchase, nothing particularly surprising about them. So going back to the loan agreement, the second provision, working through the document in order, is the purpose of the loan. This is a transaction specifically structured for a specific acquisition. "The loan shall be used by the borrower for the purpose of paying a loss of profits premium, borrowing for the premium" which is part of the tax effectiveness, "in a form approved by the lender, with a named insurer and covering loss of profits on share dealings in relation to the shares. The borrower shall not use the loan for any other purpose without obtaining the prior consent of the lender," so there's an immediate safeguard built into that provision.

The next part of the document that's of relevance is clause 4 which provides for the repayment, no issue about that. We can then move forward to clause 11 which is the clause that we say is of central importance. Just to make it clear from the outset, we say that there are two parts to the clause and my learned friend Mr Campbell will expand on this. The first is to limit the value of the liability and the second is to be able to exercise the right by the assignment and one of the short points is that if my learned friend Mr Walker's argument was right, the words, "Is limited to the value of the security provided," are completely redundant.

That's central to the transaction and the outcome of this appeal. The next document is the mortgage itself which is at tab 13 and we go firstly to the recital which records that the mortgagee has agreed at the request of the mortgagor to advance the moneys in the terms and conditions contained in the loan agreement and, third line, "Including the requirement that the mortgagor grant to the mortgagee security over certain personal property." So not over personal property but specific property, being a contract for the purchase of the 500,000 fully paid ordinary shares in the capital of Digitech Communications and the loss of property, loss of profits insurance policy, being, "In the form of this deed to secure to the mortgagee

the performance by the mortgagor of the terms and provisions of the contract." So, straight away there you can see that a reading of the intention of the mortgage itself was not that there be a mortgage over any other asset, or even over assets, but certain and particularised assets, and that of course ties in with what the loan agreement said. And if that's not compelling, then the next part says, "The mortgagor agrees to and hereby does grant for the mortgagee the security," thus security, "over 'the' property hereinafter defined," and covenants with the mortgagee set out by it.

If we then go to the next page which is 1.1, is the definition provision, property is specifically defined, and "the property" means the rights of the mortgagor as purchaser under a contract, a share purchase contract, between the mortgagor and n-Tech, "Pursuant to which the mortgagor is bound to acquire the number of fully paid shares in the capital of the company and, two, their loss of profits insurance policy. So, the reader of the agreement, up to this point, would be in no doubt that he was granting security over two assets only, and they are identified both in the definition of the security and in the definition of property. There is no suggestion in any of these clauses that there would be any extended meaning at all to the meaning of security or the definition of property. And you may know, as well, from other cases and in the broad nature of debentures or now general security agreements, that properties are frequently widely defined at first instance.

One of the cases we mentioned was the *New Zealand Bloodstock* case where, under the first Property Securities Act, the wide definition of "property" had caught in a lease a stallion which had been leased by the owner, the stud farm had defaulted, the owner had taken the horse back. In spite of that the wide definition of "property" was sufficient to catch the interest under the Act and the financier was able to take the stallion and sell it, and that's because the definition of "property" was so wide. In this particular transaction the authors have specifically defined "property" in a narrower sense to two specific assets, and that's fundamental to our part of the case. And if we move forward in the document, after the rest of the recitals, and we go to the documents evidencing title, in clause 4, the mortgagor's obligation is to lodge

the documents in respect of, you see in 4(a), “the” property. So the only obligation is to provide the certificates and documents relating to the ownership of the shares, and to specifically assign the property. Nothing up to this point in time, having worked through the documents, would signal, in my respectful submission, to the reader that anything else is contemplated.

ELIAS CJ:

But that is all of a parcel with the argument that this mortgage is concerned with this specific property. But if further security was obtained these provisions would be paralleled in respect of that property. This wouldn't work for the additional security.

MR DALE:

No, it wouldn't. The point that these documents, in my respectful submission, illustrate is that the parties did not contemplate there being further security or further property or any further mortgages, because they have confined the transaction, the object of the transaction, to a stand-alone transaction – remember these are LAQCs, which are not expected to own any other assets, and that was part of that early introduction I was coming to – that these are stand-alone companies, established for the purpose of this investment, which is hoped to be tax effective, and so they’re not going to own any other assets and, indeed, Mr Reid concedes as much in his affidavit. And so the parties were not contemplating, in my respectful submission, that there would be any other security, and this is on a plain reading, reading the transaction as a whole is what it’s driving at, just a mortgage of the shares and a mortgage of the interest in the policy.

ELIAS CJ:

I must say, it really does seem to me to all turn on the loan agreement rather than the mortgage agreement, mortgage.

MR DALE:

Well, to an extent that is fair comment but we’ve had, of course, recently in the (inaudible 12:50:00) judgment, any amount of guidance on contractual

interpretation and I don't think there is a great deal of difference between my learned friends' position on interpretation and ours. The matter is very much a matter of emphasis. The cases say that you've got to look at the transaction as a whole –

ELIAS CJ:
Yes.

MR DALE:
– to satisfy yourself that the clauses in issue achieve that object and those that conflict with or are repugnant to it can, in certain circumstances, be overridden, and we say that very much applies here. But the starting point has got to be to look at the object of the transaction and what it achieves and then read as a whole to see if there's a problem in what's developed with this particular case. And what I'm saying here is that the draughtsman clearly has in mind one thing and one thing only and, I say, read objectively, rather than with the very technical and what we say is artificial construction, for which Totara contends, the plain reading is there was to be no other security. No other security because of the wording of the document, no other security because of the nature of the transaction and no other security because there would have been no other assets, a variety of reasons, and absent those kind of clauses that a lender who has this in mind would normally adopt, and definition of "property" would be one of them.

So, if we keep working through the process, the point becomes perhaps a little repetitive because, you see again at 4.3, there's another clause there which refers to specifically the property. "Should the property or any part thereof mature before the moneys hereby secured have been paid or otherwise satisfied in full and the mortgagee shall hold the same in trust for the parties for their respective rights and interests herein and may invest the same in interest bearing deposit with such person upon such terms and conditions as the mortgagee in its absolute discretion thinks fit." It doesn't refer to the property or any other security, it's specific to those two assets. And likewise clause 5.1 deals specifically with the obligations of the mortgagor in respect of

the property and, likewise, the next section, which deals with the warranties, of course it's not uncommon to have warranties in relation to ownership of the assets and to not further charge them. But these are all assets specific to the property. And likewise if we go on, for example, to clause 8 at page 102, in the event of default, "If the mortgagor defaults and the payments of the moneys hereby secured," which means secured over the two assets, "or in the performance or observance of any representation," et cetera, "then the mortgagor is entitled to exercise all rights in respect of the property or any part thereof." So, once again, we see a specific reference to limiting the rights of the mortgagee to the specific asset.

So that's the part of the argument which we say is pivotal to the outcome of this hearing, and I've set out in the written argument those provisions at clause 33 of our synopsis. And what that comes to is that we say that these are key provisions, clearly able to be understood, which express the fundamental aspect of the transaction. Namely, what the loan is for, the purpose for which it could be used, how it is to be repaid, what the security is and the extent of the borrower's liability, nothing particularly difficult or complex to understand in any of those issues. And the summary, which is at paragraph 35 of our synopsis, is that the object of the transaction was this. That they would grant security of this certain personal property, namely those two assets, the assets, the borrower's liability would be limited to the value of that property, irrespective of the value.

The notion that there needed to be a valuation formula to make this work we reject entirely, and it's plainly unworkable. The borrower was entitled at any time to satisfy its obligations under the loan agreement by simply assigning its rights to that property but it was under no obligation to, and the lender could have resource to and realise only that property. So it's hardly surprising, with the greatest of respect, that the Court of Appeal, when they looked at this, made the statement that the essential and fundamental feature of the relationship was that it be on limited recourse and able to be enforced only against the share purchase agreement, which is what they said at paragraph 45 of their judgment. And, as my learned friend said when he

discussed the *Glynn* case, there's nothing novel about the proposition of looking at the whole of the instrument, and we've set out a passage from that judgment at paragraph 37 of the synopsis, looking at the whole of the instrument and seeing what one must regard as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. And the principle, when it comes to reconciling those clear provisions and the intent of the transaction, as against what we say are boilerplate provisions, supported I might say by the suggestion that they come from the *Equiticorp* case, the principle was discussed in the *Margetson* case, "This principle is applicable when specific words are used to express the main object and intent of the instrument, and in some other part general words are used which, in their utmost generality, would be inconsistent with and destructive of the main object of the contract. When the court is dealing with a contract or document of any kind and finds that difficulty it always, so far as I know, follows this principle. That the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties." It's not a matter of rewriting the contract, because the passages to which I have referred and the provisions to which I have referred are particularly plain.

So we say that this is a straightforward case of contractual interpretation and that the purpose of the transaction is readily and easily understood. Now, I'm going to go on to a new point, I wonder if this is a convenient time, I see it's almost –

ELIAS CJ:

Yes, what's the next point that you are going to address Mr Dale?

MR DALE:

I was going to discuss with Your Honours the circumstances in which the appellant says that it's entitled to exercise this right, with reference to what's happened with the transaction. My learned friend's argument is that because there has been a compromising of the security, it's contemplated that there

should be a right to exercise the further security. It's a narrow point, I'm going to deal with that and then we'll move on quite quickly to 11.1 and 9.1.

ELIAS CJ:

Which Mr Campbell will –

MR DALE:

Which he will deal with.

ELIAS CJ:

All right, thank you. We'll take the adjournment.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.13 PM

MR DALE:

Yes, if Your Honours please. We conferred over lunch. I don't really think there's going to be a great deal more for me to say. The debate in the court below was more wide ranging and we went into areas which I apprehend Your Honours don't feel the need to visit and so, I mean, we've touched upon the background in our synopsis and it's there and it seems to me that really the heart of the case now is to go to those two clauses which my learned friend is going to do.

I just want to make one last point and it's only a reservation. In clause 20 of our synopsis, we've recorded that we did not accept the responsibility for the sale and purchase agreements and policy becoming valueless. There is an issue about that. My learned friend's argument was that, a number of times he referred to having compromised the securities. That's an issue of fact which we accept has to be resolved with trial. You'll remember our application was quite broadly drafted and we had narrowed it down to what is now plainly and purely an interpretation in point and we'll leave it at that but I didn't want to leave it unchallenged and that there might be some assumption

that we accept that in some way we have compromised the security because we haven't.

WILSON J:

Documents can't be interpreted by what people did a long time afterwards.

MR DALE:

No, no, that's exactly right.

WILSON J:

It's the hypothetical possibility, that sort of thing happening that might be relevant.

MR DALE:

Yes, well as I say, we discussed that in the Court below and it has reference to what was said in the judgment itself but I don't think we need to go into that today unless Your Honours want me to deal with any particular part, so we'll leave the rest of the argument to those two particular clauses which my learned friend is going to deal with now.

ELIAS CJ:

Thank you Mr Dale. Yes Mr Campbell.

MR CAMPBELL:

I want first to put the argument about clause 11.1 in context of the respondents' submissions and that is that it's an independent argument from that which my learned friend Mr Dale has already addressed you on. Mr Dale's argument in part rested on the meaning of clause 11.1 for which I'm about to argue but you'll see at paragraph 33 of our synopsis where Mr Dale went through the various terms of the loan agreement and the mortgage to which in our submission, express the main object of these transactions. The first part of clause 11.1 which is what I'm going to be addressing you on to begin with, is only one of 10 provisions on which Mr Dale my learned friend relied. Now, it is true that if our submissions on the meaning and effect of

clause 11.1 are accepted then that bolsters that first part of the argument that has already been delivered but even if the Court takes the narrow interpretation of clause 11.1 that the appellant has put forward today, that in itself is not fatal to the part of the argument that my learned friend Mr Dale has already presented.

Turning to clause 11.1. This is in two parts, separated by the words “to the intent”. The first part, or the entire clause begins, “Notwithstanding any other term or provision of this agreement,” a phrase to which I shall return and then it refers to, “...in consideration of the profit participation arrangement contained in clause 11.2” which is of no, ah, there’s no dispute about the meaning of that reference. Then it goes on, “...the lender acknowledges that this agreement and the liability of the borrower hereunder is limited to the value of the security provided, namely the policy and the share acquisition agreement.” My learned friend Mr Walker, has described that phrase as opaque. There’s nothing opaque about it. The liability of the borrower is limited to the value of the security provided, namely the policy and the share acquisition agreement. That’s a limitation of liability, it couldn’t be clearer.

The second part of the clause which starts from the words “to the intent”, deals with a quite distinct and independent matter and a matter that does not flow necessarily from a limitation of liability in the first part of the clause. The second part provides a means of satisfying the borrower’s liability. So the first part is a limitation on liability, the second part provides the borrower with an additional means by which it can satisfy that liability. Now those two ideas, limitation and liability and the means of satisfying the liability are, as I say, functionally distinct. To put that another way, if clause 11.1 only included the first part, simply the limitation of liability, that in itself would take effect according to its terms, it would be a limitation of liability. Moreover, it would not follow from that limitation of liability that the borrower would have any entitlement to satisfy that limited liability by assigning the share purchase agreement and the insurance policy.

I might just say, as an aside, I'll use the phrase "assigning the share purchase agreement and the insurance policy" to encompass the much broader terms that appear in that second part of clause 11.1. It talks about, "Apply or assign all moneys received thereunder or other value received thereunder." I'm simply going to use the idea of an assignment as a shorthand for what is encompassed by clause 11.2. If that second part was not there, the borrower would have no right, no entitlement to say to the lender, the mortgagee, oh look, not only is my liability, my liability is limited to the value of the share purchase agreement and the insurance policy so here they are, you can have them and that will deal with and discharge my liability to you.

The borrower would have no such right. The borrower's obligation is expressed in clause 4.1. Leaving aside the second part of 11.2, the borrower's obligation expressed in clause 4.1 is to, "Repay in full to the lender, one amount in New Zealand dollars" and that's of course the usual promise and obligation of a borrower under a loan agreement, it's to pay money, that is how the liability under the loan agreement is discharged. The, absent the second part of clause 11.1, the borrower would have no entitlement to require the lender to accept an assignment of the share purchase agreement and the policy in satisfaction of the liability. So, the second part deals with something functionally distinct from –

BLANCHARD J:

You said a moment ago, if I understood you correctly, that if the second part were not there, under the first part, the borrower's obligation would be to pay in full in terms of clause 4. Was that what you meant?

MR CAMPBELL:

No, I meant merely that the borrower's – the only way in which the borrower could discharge its liability under the agreement, limited by the first part of clause 11.1, is by paying money.

BLANCHARD J:

But you're saying the amount of the payment couldn't be more than the value of the security?

MR CAMPBELL:

Indeed. So the only reason I referred you to clause 4.1 was to make the perhaps obvious point that the borrower's obligation under a loan agreement is to repay money to the lender. The borrower doesn't have the freedom to repay the loan by some other means, by delivering property of whatever value to the lender. Now, the appellant submits that the second part simply explains the meaning of the first part. That can't be so given that they have these different functions. There are a number of reasons why the appellant's interpretation of clause 11.1 should be rejected.

The first is that, on the appellant's view, the limitation of liability in the first part of clause 11.1 begins to operate only at the very point in time where there is no need for a limitation of liability because on the appellant's argument all that clause 11.1 does is entitle the borrower to discharge the liability by assigning the secured property. The appellant says, at that point the borrower enjoys the limitation of liability but of course that's the very point at which there's no need for a limitation of liability because, under the second part of clause 11.1, from the moment of that assignment the liability is discharged and satisfied. In other words, on the appellant's interpretation of clause 11.1, there's absolutely no need for the first part of that clause. It's completely redundant on the appellant's, or no effect is given to the first part of clause 11.1 on the appellant's construction –

ELIAS CJ:

Well, you could read it as a whole which is the purpose of linking it like that instead of having three sub-clauses because if you read 1 and 2 together, there's a third issue which I suppose you would say is that 11.2 is simply the consideration for the limitation of liability. Is that right?

MR CAMPBELL:

Essentially, yes.

ELIAS CJ:

Well, why on earth not separate out 2 and why link it with "to the intent"?

MR CAMPBELL:

That's because they're linked in the sense that they are consistent even though they're functionally distinct. One limits liability, the other one provides a means of satisfying liability.

ELIAS CJ:

But why is it not a limitation of liability through the discharge of the debt in this way? I don't think it's fatal to your argument, that interpretation, necessarily.

MR CAMPBELL:

I agree Your Honour. Nonetheless, the reason why the second part is not merely explaining the first part, is the point that I made a couple of minutes ago which is that the second part is not a necessary consequence of the first part. One could have a limitation of liability, it doesn't follow from that –

ELIAS CJ:

No, I accept that but this is a composite and it is a limitation of liability in the circumstances, so the appellant says, of an assignment of the interest, of the property.

MR CAMPBELL:

Yes.

ELIAS CJ:

Why doesn't that make total sense?

MR CAMPBELL:

Because it doesn't give any effect to the first part of the clause because on that interpretation, the only point at which the limitation supposedly takes effect is at the very point in time at which the liability is discharged.

ELIAS CJ:

So you disagree with the Court of Appeal acceptance that both interpretations are possible?

MR CAMPBELL:

Of clause 11.1?

ELIAS CJ:

Oh, were they talking about clause – I can't remember now, clause 9, were they?

MR CAMPBELL:

I think that was more in reference to –

ELIAS CJ:

Oh, I'm sorry, yes.

MR CAMPBELL:

– clause 9.1.

ANDERSON J:

Your argument requires one to ignore the words "to the intent that"?

MR CAMPBELL:

No, with respect Your Honour, I don't believe that it does. Those words are perhaps a little obscure –

ANDERSON J:

They're surplus, surplusage because you could have 11.1 as a clause down to "hereunder", oh, down to "share acquisition agreement" and then you could have 11.2 which starts off "the borrower can apply or assign all moneys" and then you could have 11.3 which is the present 11.2. So the "to the intent" is just surplusage on your approach. It could be a semi colon for example.

MR CAMPBELL:

It could be an "and".

ANDERSON J:

Yes. I mean, I'm not saying it detracts from the argument, I just want to see what the consequences of the argument are?

MR CAMPBELL:

Yes, well –

ANDERSON J:

What about the fact that you can – is there any significance in the fact that, under 11.2, you can be liable to pay 10% of excess for up to 10 years after the due date?

MR CAMPBELL:

Not that I can see Your Honour. I don't think that's significant.

ANDERSON J:

Well, on the due date, you've still got the shares, you pay 1.4 million and you hang onto them for another nine years and they suddenly go into profit. That's just part of the consideration for the limitation of liability.

MR CAMPBELL:

Yes.

ANDERSON J:

What about the liability that you've met on the due date by paying 1.4 million?

MR CAMPBELL:

Well, that liability is now discharged but there was always the possibility of it being lower than that.

ANDERSON J:

So you'd say, you'd take a punt on the value of the shares in 10 years time. If you think they're higher you pay the money, if you think they're less you redeem the security?

MR CAMPBELL:

Ah, you mean the LAQC takes a punt when you turn into the transaction as a whole?

ANDERSON J:

Yes, the LAQC, yes.

MR CAMPBELL:

Undoubtedly they did Your Honour.

ANDERSON J:

Yes but that's the scheme of it?

MR CAMPBELL:

Yes, yes.

BLANCHARD J:

Mr Campbell, the phrase "to the intent that", are you reading that as if it were worded "and for this reason"?

MR CAMPBELL:

I think I'm reading it Your Honour, this may just be expressing your phrase at greater length and consistently with this limitation, we intend that the borrower be able to satisfy its liability in the following way.

McGRATH J:

So is the first part a statement of general principle and the second part an instance of how the general principle can be applied but only an instance?

MR CAMPBELL:

Yes Your Honour. It is because, even with the second part of clause 11.1, there is no dispute between the parties that that's simply an option, the borrower doesn't have to satisfy liability by assigning the secured property so the borrower could instead simply decide to satisfy its liability by paying to the lender whatever the borrower, subject to a point I'll come to in a moment, the value of the secured property at the relevant time, at the time of payment.

ELIAS CJ:

I suppose that's consistent also with subclause 2's indication that the borrower may hang onto the shares and sell within a 10 year period after repayment of the loan?

MR CAMPBELL:

I'm not sure that the terms of the profit participation agreement in themselves have much bearing on the operation of clause 11.1. They are, if you like, the quid pro quo of the limitation of liability or the limitation of recourse.

ELIAS CJ:

Well they do envisage though that one option is that the borrower will continue to hold the shares and therefore will be repaying, in money, the amount of the loan but that if that happens and there's a sale within 10 years from repayment there's an additional liability. Is that –

MR CAMPBELL:

Yes, yes, I see your point. No, Your Honour you're quite right, it does contemplate exactly the possibility that I've put forward which is that the borrower retains the option, if it wishes, to satisfy its liability by making a payment to the lender.

ELIAS CJ:

Which is consistent with the argument that you make that the, to the intent clause is not the, doesn't limit the, isn't co-extensive with the limitation or doesn't fulfil the limitation entirely?

MR CAMPBELL:

I think perhaps the formulation in the middle there, that it doesn't limit the limitation of liability. It doesn't express the only way in which –

ELIAS CJ:

Yes.

MR CAMPBELL:

– the borrower can make use of the limitation of liability.

McGRATH J:

It's not a comprehensive statement of how the first part technically works?

MR CAMPBELL:

That's correct Your Honour.

WILSON J:

Isn't that made clear by the phrases first, the borrower can apply and secondly, if the borrower so applies?

MR CAMPBELL:

Yes Your Honour. It's undoubtedly an option available to the borrower and the borrower retains the other option of paying money.

ANDERSON J:

Suppose you're right on this limitation, so let's assume you are. It tends to limit the amount that's owing, not the security that might be realisable to meet it, so that the mortgagee might say, well I can't get any more than the value of the shares at "X" time, but I want greater security than the present security so I will take out another security even though under it I may only be able to recover whatever the value of the shares is at the time of due payment. They could still do that, couldn't they?

MR CAMPBELL:

No because, with respect, that would be entirely inconsistent with the meaning that we're assuming for the moment would be given to clause 11.1.

ANDERSON J:

But 11.1 only limits the amount of liability to the value of the security. It doesn't limit recourse to the security, only to the value of it, and it maybe that another security is taken and the course can be had to that but for no greater amount than the value of the particular security that's mortgaged, because, for example, it might be more readily realisable. It might be.

MR CAMPBELL:

It might be worth pointing out that clause 8 of the mortgage which deals with the realisation options available to the mortgagor –

ANDERSON J:

Would it suit you better to come onto that later or do I have to deal with that now? It's just an idea that –

MR CAMPBELL:

It's a brief, it's a brief point.

ANDERSON J:

Is that clause 8 is it?

MR CAMPBELL:

Clause 8.1 which, as one would expect provides the realisation of security that only, that's the only provision in the mortgage providing for realisation. It is limited to realisation of the property, that is to say the share purchase agreement and the insurance policy.

ANDERSON J:

Right so you say it's limited recourse through the combination of 11.1 and this?

MR CAMPBELL:

Clause 8.1 is consistent with the limitation of recourse which, I would say, is implicit if not explicit in clause 11.1.

ANDERSON J:

What about (b) though? "To exercise the power in a sale and all other powers conferred on a mortgagee by the Property Law Act," it might be under another security?

MR CAMPBELL:

Yes although that continues in the second to last line, "And should be entitled to deal with the property as it sees fit," and it's clear, in my submission, from that reference that (b) as a whole is still confined simply to the property.

ANDERSON J:

I understand your point, thank you.

MR CAMPBELL:

If I can perhaps remain with that question that Justice Anderson posed. Although in a way it's a subsequent issue, the first question is what's the meaning of clause 11.1, a subsequent issue as well, if that's the meaning as the respondents are arguing for, is that inconsistent with what the appellant wants to do under clause 9.1(b) and my submissions do expand upon that

second issue later on, and I'm happy to deal with some, to some extent with the point now. Simply to say this, that I'll be submitting that it's implicit in clause 11.1 that it is, in effect, a limitation of recourse, that the lender has recourse to no other property of the LAQC than the two items of secured property. That, of course, is the term that's used in the heading "limited recourse". It's also the phrase that's used in clause 11.2 to describe what is contained in clause 11.1 because 11.2 says the borrower in consideration of the limitation of recourse contained in clause 11.1. So that's how clause 11.2 itself views the effect of clause 11.1. That in substance it's a limitation of recourse and it would be rather odd for the borrower's liability to be limited to the value of the specific property and for the borrower to have the option of satisfying that liability by assigning that specific property yet to allow the lender to exercise the power of attorney so as to grant to itself security over other property.

There are, there's another point if I may remain with the meaning of clause 11.1 that supports the respondent's view of that clause. The appellant is driven to say that if it realises the security under clause 8.1 of the mortgage, let's say there's a default at the end of the 10 years, if it realises the security, then the limitation of liability in clause 11. 1 has no effect. Now my learned friend Mr Walker didn't put it in those terms but that has to be the logical consequence of the appellant's interpretation of clause 11.1 because the appellant's interpretation is to say that clause 11.1 has effect only if the borrower exercises the option in the second part by assigning the secured property.

BLANCHARD J:

Is your point that that's inconsistent with the idea of a limitation of recourse?

MR CAMPBELL:

Well the particular point that I'm making presently is that if that's the position that the appellant is driven to –

BLANCHARD J:

Yes but if they can take whatever – if they realise the security, no, I won't pursue that any further.

MR CAMPBELL:

Your Honour, as you were mulling it over, I was thinking of saying that really that is my point in large terms, that if the appellant can exercise the security over this specific property and then go back for more which is the appellant's argument, they're driven to that because they, is their argument, if they've exercised the realisation rights the borrower cannot exercise its option under the second part of clause 11.1 –

BLANCHARD J:

I just wasn't sure that they were actually arguing that.

MR CAMPBELL:

They didn't make that point but it's difficult to see how they can't be driven to that. That's a logical consequence of their interpretation of clause 11.1 because, in sum, their interpretation of clause 11.1 is that all that matters is the second part. If the borrower hasn't exercised the option to assign, then the limitation of liability has no effect.

BLANCHARD J:

Yes, I was just recoiling from the argument that you were putting into their mouths.

MR CAMPBELL:

It would also be, with that particular argument Your Honour, be rather odd that if the borrower assigns the property, the limitation of liability has effect but if the lender exercises the realisation rights the limitation doesn't apply.

If I can say a few more words about the little phrase "to the intent that". Now there are several ways of which one might give content to that phrase. The appellant argues that what it's really saying is to explain what they mean, or

rather what the parties mean by the first part. Now, in my submission, that cannot be right and the reason for that is that it, it's the point I've already made, that it's not a necessary consequence of a limitation that the borrower be entitled to have this additional means of satisfying the liability. So it can't simply be, the second part cannot simply be an explanation of the first part.

McGRATH J:

Well not an exhaustive explanation of the first part.

MR CAMPBELL:

Not an exhaustive explanation?

McGRATH J:

What your real point, isn't it is, that they don't coincide in their scope directly?

MR CAMPBELL:

Yes, Your Honour.

BLANCHARD J:

Another way of putting that is, it doesn't say "to the intent only that".

MR CAMPBELL:

Yes Your Honour, I agree with that too. It's not the exclusive means by which the first part is given effect.

ANDERSON J:

It's like saying, "a result of which is"?

MR CAMPBELL:

In my submission, the reason that the two parts are linked by the words "to the intent that" and the reason that they're in the same clause rather than separated out is that, although the second part is not a necessary consequence of the first, here is the link in the sense that they're both consistent. If you have a limitation of liability then it makes practical sense, for

the reasons that my learned friend Mr Walker touched upon, to allow the borrower to discharge its liability by assigning the secured property.

ELIAS CJ:

And it means that there's no need for evaluation?

MR CAMPBELL:

Yes, that's the practical difficulty which the parties would be left with if they had just the first clause, though I should say that it's simply a practical difficulty. It doesn't mean that you would thereby say it's impractical and therefore we give no effect to it, that wouldn't be the case at all. What would happen in fact is that the borrower might decide well I think the value of these two items of property is presently $500,000 so I'll tender that to the lender in discharge of my liability. Now, the borrower would then be taking, well, the borrower would be taking the risk that maybe the value was actually higher than that. Equally, if the lender rejected that tender, the lender would be taking the risk that the value of the security was $500,000 or less. Now of course that's a great practical problem and that's why the parties would additionally have provided the second part of clause 11.1. They foresee that practical difficulty and one way to avoid it is to provide the option that's in the second part.

BLANCHARD J:

I suppose you would do that if you thought at the end of 10 years, you being the borrower, that it was underwater but wouldn't stay underwater and you would want to get the advantage of paying the cash and then only having to share 10% of the excess profits.

MR CAMPBELL:

Yes, Your Honour –

BLANCHARD J:

It's not a terribly likely scenario but I suppose it's possible.

ELIAS CJ:

The lender is obliged to take if the share acquisition agreement and the policy are tendered by the borrower. So that's another important effect of this.

MR CAMPBELL:

Yes, that's a very important effect of the second part and it's really the correlative of the buyer having the option to discharge its liability by transferring, or providing a transfer or assignment, of those two items of secured property.

ANDERSON J:

Is there any evidence or agreement about the shares being worthless at the time this additional disputed security was given, or purportedly given?

MR CAMPBELL:

I don't believe that it's in dispute that the two items of property have no value, the dispute is whose fault that is.

ANDERSON J:

I was just thinking back to this proposition that I mentioned earlier, that you could take a further security but you couldn't recover under it more than the value of the original security and you pointed us to clause 8. That only deals with the remedies available under the present mortgage, not the remedies that might be available under a further security. On this hypothesis, if the shares were actually worthless at the time the further security was taken, then it wouldn't be necessary to take a further security because there was nothing to secure.

MR CAMPBELL:

Yes Your Honour, I think that encapsulates part of our argument on clause 9.1 and the need in the clause, 9.1(d), for the, whatever the attorney does, to more satisfactorily secured the payment of the moneys.

ANDERSON J:

I know they refer to the payment of the moneys but on your argument, quite apart from this other one, the payment of the moneys is always going to be no greater than the liability, it's always going to be no greater than the value of the shares. It might be more than 1.4, on the other hand, it might be nothing and the liability could never be greater than that, whatever it was –

MR CAMPBELL:

Yes.

ANDERSON J:

– or 1.4 plus the contingent 10% of future profits. I'm just approaching it in this way because one has to try and reconcile, if one can, the apparently conflicting terms of the agreements.

MR CAMPBELL:

Yes, well a pointer to how that apparent conflict would be resolved, if the Court finds that there is one, is at the start of clause 11.1, "Notwithstanding any other term or provision of this agreement." Now, "agreement" I should say, simply refers to the loan agreement, that's defined in the loan agreement itself, it doesn't include the mortgage but it is clear from that opening phrase that it must take precedence over the mortgage as well because there are provisions in the mortgage which have independent payment obligations quite apart from the loan agreement.

The parties can't have intended that the limitation of liability really just be about the loan agreement and have nothing to do with the mortgage as well. So that is my indication of how the, any such apparent conflict might be resolved. It's a very, fairly strong indication. Even if those words weren't there, in our submission, it's obvious from the nature of clause 11 as a limitation of liability and a limited recourse provision, that it is a special provision as compared to clause 9.1(d) which is a general provision that you will find in most mortgage documents. There is a variant of clause 9.1(d) in the ADLS terms that are at tab 23 of the bundle.

I think I've said all that I was going to say about the meaning of clause 11.1 itself. At paragraph 49 of our synopsis we deal with another I think subsidiary argument that the appellant makes which wasn't pursued in my learned friend Mr Walker's oral submissions. But I wish to just note it and deal with it very quickly and the argument is, as I understand it, is that even if the respondent's interpretation of clause 11.1 is accepted, so that the limitation of liability operates independently and regardless of whether or not the option in the second part is exercised, the appellant says, well the value – the limitation is by reference to the value of the security provided and that must include any further security that we grant to ourselves under clause 9.1(d).

In our submission that would just turn the idea of a limited recourse on its head. There would be no point in clause 11.1 making specific reference to namely the policy and the share acquisition agreement. Indeed clause 11.1 would no longer be a limitation of liability or a limited recourse provision at all because on the appellant's argument it can, through clause 9.1(d), grant to itself a right over all of the respondent's present and after acquired property. And what you would call that is unlimited recourse, not limited recourse, and it wouldn't provide any limitation on the borrower's liability. So that really would be inconsistent with what, with the assumption on which the appellant makes this subsidiary argument, namely that the respondent's interpretation of clause 11.1 is accepted.

McGRATH J:

Sorry is this point really that while provided might be ambiguous as to when security is provided, the words "namely the policy and share acquisition agreement" make it plain it's what's provided when the document is executed?

MR CAMPBELL:

That's part of the argument Your Honour, yes.

McGRATH J:

But you're really using, you're really saying that you've got to, that those words make it clear, namely the policy and share acquisition agreement that provide it doesn't extend to further security. Is that, I'm sorry –

MR CAMPBELL:

That's the first part of my argument which is at 49(1) of the synopsis. The second, which is at 49(2), is to say that if, that on the appellant's interpretation we don't have a limitation of liability at all.

McGRATH J:

Yes.

MR CAMPBELL:

We don't have a limitation of recourse at all. It disappears. The appellants also submitted, and I think this has been put forward this morning by my learned friend Mr Walker, that the respondent's construction of clause 11.1 is just inconsistent with the rest of the agreement so it can't possibly be right but again without any words clause 11.1 makes it clear and contemplates that it is going to be inconsistent with other parts of, or at least qualify other parts of the agreement, that's the nature of a limitation of liability and one can't render it of no effect simply on the basis that there's some inconsistency. The opening phrase, "Notwithstanding", makes it clear that clause 11.1 is to prevail.

Now it might be helpful if I simply direct you to clause, sorry paragraph 54 of our synopsis which having said all that I wish to say about the meaning of clause 11.1, if the Court accepts that meaning, mainly that the limitation of liability in the first part has an independent life, then clause 9.1(d) can't be construed as authorising Totara to grant security over additional property, which is the issue that faces the Court, and that's because firstly it's implicit in clause 11.1 on that interpretation that the lender will not grant security over additional property and I've dealt with that point to some extent already. Secondly, clause 11.1 is therefore inconsistent with what – with the

appellant's preferred construction of clause 9.1(d) and thirdly in the event of an inconsistency clause 11.1 must prevail.

Now I'm not sure that I have to take Your Honours through that part of the argument. I don't understand the appellant to actually contest this particular part of the argument. They simply say that clause 11.1 does not operate in the way in which the respondents say that it does. In my submission it's really quite a straightforward proposition, that if you accept that there is an independent limitation of liability, and an independent limitation of recourse, it's completely inconsistent with that to allow the lender to go along the very next day after this, the agreements are entered into and the mortgage is granted, to the very next day grant to itself a general security agreement or general security deed over all of the borrower's present and after acquired property.

Now Your Honours I don't have anything further at this point to say about clause 11.01. I'm going to turn to clause 9.1(d) unless you have any further questions on that?

ELIAS CJ:

No, thank you.

MR CAMPBELL:

Our submissions on this in the synopsis commence at paragraph 62. The appellant's argument appears to be that just in the expressed terms of clause 9.1(d) that it authorises the appellant to execute securities in favour of itself but the important word "securities" is notably absent from the power of attorney provision. It's explicitly mentioned in the first part of 9.1 in the further security provision but clause 9.1, as my learned friend Mr Walker recognised, has these two distinct parts and it could equally be split into two clauses as its equivalent in the ADLS memorandum is. The first part is the really the further security provision that the mortgagor shall if requested by the mortgagee do all such acts and execute all such documents and securities as the mortgagee may require at its absolute discretion.

The second part, of course, is the power of attorney provision and that has four paragraphs, A, B, C and D. The one that we're concerned with, paragraph D, makes no reference to execution of securities. Granted it's in wide terms anyway. It allows the attorney to generally do, execute and perform all such further acts, deeds, matters and thing which may become necessary et cetera, but the very thing that Totara wants, sorry the appellant wants it to say, and which the drafters had no difficulty in saying in the first part of 9.1 and the further security provision, the very word that is absent "securities" is what the appellant wants to be there, but it's not.

ELIAS CJ:

But does it have to be if it's in the main body of 9.1?

MR CAMPBELL:

Yes Your Honour it does because the main body, the first part, is quite distinct from the second. The first part is a provision requiring the mortgagor to do various things if the mortgagee so requires. The second part, which begins with the capitalised letters, "Doth hereby irrevocably appoint" is the power of attorney provision and that's quite distinct from, it doesn't flow from the first part. It has a connection to it because the – in very general terms, the point of the power of attorney provision is often to allow the mortgagee, as attorney, to do the things that perhaps the mortgagor has refused to do and so ordinarily you might expect the power of attorney provision to mirror the first part, the further security provisions, but here it does not. It doesn't exactly mirror it and it doesn't use the word "securities" which is used in the first part.

ELIAS CJ:

But it does mirror the "do all such acts and execute all such documents". I'm not sure that it's not apt to pick up those words and the power of attorney provides the power to achieve that end. It just seems a slightly artificial argument to be dividing it up in this way to such an extent because obviously the power of attorney is granted in order to obtain further security. Or do any of the acts to make the security more secure.

MR CAMPBELL:

Yes, although the power of attorney provision is also wider in some respects than the further security provision and paragraph (b) for instance –

McGRATH J:

It's very wide. The language is very wide and it's the sort of language that's often, is it not, used in the context of explaining what's authorised by a power of attorney? I mean powers of attorney are expressed in that way and when it's intended to make them comprehensive in terms of powers.

MR CAMPBELL:

That may often be the case. The way in which you would expect – though it is surprising that notwithstanding the width of language that has been used, the drafter hasn't used the very word that there was no difficulty in using in the first part of the clause and indeed the very word that was present in the equivalent clause in the *Equiticorp v Smart* case which did refer in the power of attorney provision to execution of securities.

McGRATH J:

I don't know if I want to get into interpreting this clause by reference to what was used in a different case many years earlier. But I just really wonder whether you're pressing the argument by comparison a little far?

MR CAMPBELL:

Well Your Honour there are further points that, to be made which – although I would like to say a little bit more about *Equiticorp v Smart* not to compare the wording as such but just to say that in our submission it provides no assistance whatsoever to the appellant. If anything it provides a very useful contrast to this case, not because of the absence of the word "securities" but because in the *Equiticorp v Smart* case the loan agreement itself, and the mortgage, quite outside the power of attorney provision, explicitly said that the lender could require the borrower to execute further securities if the value of

the existing security fell below a certain level. That was absolutely explicit in the loan agreement itself.

McGRATH J:

It was a trigger?

MR CAMPBELL:

Yes. Now that's not –

McGRATH J:

It was also no doubt recourse to the borrower to the loan. It's just a different agreement isn't it really?

MR CAMPBELL:

Yes, though the contrast is stark where on the one hand you have an agreement which says, well here's the, you provide us with some initial security but we expressly reserve the right to require you to provide more if that security falls below a certain level. Whereas here the agreement is, you provide us with particular security and your liability is limited to the value of that security and if you like you can discharge your liability by delivering them to us.

McGRATH J:

This is really answering Mr Walker's point, isn't it? The way he used the *Equiticorp* case?

MR CAMPBELL:

Yes Your Honour. From paragraph 68 of the synopsis I deal with the point that Justice Anderson raised just a little earlier with me essentially and I don't think I need to go through it here which is that in any case clause 9.1(d) says that the, that there is a trigger, if you like, to the exercise of the power of attorney and that is that the grant of the security may become necessary or be regarded by the mortgagee as necessary for more satisfactorily securing the payment of the moneys hereby secured. Now that argument that follows

depends to a large extent on – well, depends to some extent on the Court accepting the respondent's interpretation of clause 11.1 which is if there really is a limitation of liability then how could the execution of further security ever better secure, or more satisfactorily secure –

ANDERSON J:

But more satisfactorily by taking the security that was more readily realisable than the shares in order to get whatever the value of the shares was.

MR CAMPBELL:

One of the difficulties with that Your Honour is that as I understood the exchange between my learned friend Mr Walker and Justice Blanchard this morning, some of the consequences of the exchange that I'm about to describe were not entirely clear to me but as I understood it the appellant is saying that if it takes further security in the way that it has, and maybe it did that on day 2, the day after the loan agreement is entered into. For some reason the LAQC subsequently acquires further property and some of them did and I can show you in a moment. As I understand the appellant's argument they would say that if there's a default they can go and exercise that further security and realise it. The difficulty then arises, maybe they've realised the security and found themselves with a million dollars in the pocket. What happens if the borrower then exercises what the appellant accepts is its undoubted right under clause 11.1 to assign the securities in full satisfaction of its liability.

ANDERSON J:

Then the extra security has to be released.

MR CAMPBELL:

Well the extra security has already been realised on the example that I'm providing Your Honour.

ANDERSON J:

Well they should have acted quicker. That's the risk they run. I just think there's a distinction between limiting liability to an amount and limiting remedies and on your, at least on your argument, there's a limitation of the amount of liability but that doesn't mean that the remedies are limited by the amount which is limited. If you could take out further securities but it would only be regarded as necessary or be treated as having been thought necessary, if on a realistic appreciation the securities did secure. So, if the original security was worthless, you couldn't take out a security over a million dollar property for example, as an additional security because you're securing nothing, you're just grabbing something. Since the agreements have to be interpreted at the time they're entered into, you can't assume that the shares will be worth nothing at any particular point in the future, or that the company buying the shares won't want to hang onto them even as a spec and would rather pay the money and speculate in the years to come. You can't make assumptions about that, you have to assume that all the powers and obligations are as at the date the documents were entered in to.

This is why I asked earlier was there any value for the shares at the time the initial securities were taken. If they were valueless and no one could reasonably think, I'd have thought, that you could get a more satisfactory security because there's nothing to secure.

MR CAMPBELL:

Your Honour, it seems to me that that argument applies, whatever the value of the security is.

ANDERSON J:

Yes.

MR CAMPBELL:

Whether it's zero, 1.4 million, $500,000 –

ANDERSON J:

Well no, it might be that the value is quite high but not as readily realisable as the mortgagee might like.

BLANCHARD J:

That might go to value.

ANDERSON J:

Yes.

ELIAS CJ:

In this case, is there – I'm just thinking about the property being of the mortgagor as purchaser under a contract, is it possible that better security might be required to make sure that the mortgagor completed the contract, for example?

MR CAMPBELL:

Not that I can contemplate in terms of better security over other property. In terms of the share purchase agreement itself, although it's not a matter that I've thought of in any detail, it would seem to me that the mortgagee, as mortgagee of that share purchase agreement, is already in a sufficient position for instance to protect its rights under the mortgage.

ELIAS CJ:

Well, if for example, the mortgagor was not completing the transaction, might not the mortgagee, exercising the power of attorney, take to itself the ability to complete the – I'm just trying to think of ways in which the power might in fact be ancillary and necessary to achieve the purposes of the parties in this case?

MR CAMPBELL:

In the example that you've just give Your Honour, undoubtedly the mortgagee could use the power of attorney to complete the purchase of the shares.

BLANCHARD J:

But you'd do that under 9.1(a).

MR CAMPBELL:

Yes, Your Honour.

McGRATH J:

If the LAQC has property over which further security could be taken and the borrower does something, say defaults under the insurance policy which is appointed, would that be the sort of situation in which it might reasonably be regarded by the mortgagee as necessary for the purpose to take further security, to restore the value of the property, to restore the value of its security to equate to the original property?

MR CAMPBELL:

Not on the interpretation of clause 11.1 that the respondents have put forward because if the policy has been avoided in the way that Your Honour contemplates –

McGRATH J:

I'm talking about 11.1 as you read it. What I suppose I'm getting at, I'm just quite attracted to the idea that rather than just read out 9.1(d) as repugnant, if one could try and reconcile it, so that's what I'm trying to do.

MR CAMPBELL:

Yes well, clause, sorry, paragraphs 68 and 69 are essentially an attempt to provide that reconciliation by saying that –

McGRATH J:

But you say it can't be done, don't you?

MR CAMPBELL:

Yes, well that doesn't mean necessarily that clause 9.1(d) is struck out or that it is repugnant. It might mean that it doesn't, in the circumstances of this

transaction, have any effect, that is to say it is redundant but that is not the same thing as simply striking it out.

ELIAS CJ:

Well it might be the additional property of a course of action against the insurer, perhaps a defaulting insurer?

MR CAMPBELL:

That would likely –

ELIAS CJ:

I'm just trying to tie it back into this agreement.

BLANCHARD J:

Yes, that would work, although that probably would again come within 9.1(a) because the insurance policy and the rights arising in it are part of the property.

ELIAS CJ:

And the rights arising out of it?

BLANCHARD J:

Mmm, the right to sue the insurer for not paying out for example.

ELIAS CJ:

Mmm. Well, it may just be belt and braces.

MR CAMPBELL:

It may well be Your Honour and in our submission it's not surprising when it is a general provision, whether you call it boilerplate or whatever else, it is undoubtedly general and it comes up against a quite specific limited recourse provision.

ELIAS CJ:

Yes, I understand that.

McGRATH J:

But it is not necessarily your argument that you don't – you accept that it might not be repugnant, it might continue to stand and have some potential effect, difficult as it can be to pin down?

MR CAMPBELL:

Yes, it is difficult to pin down Your Honour but one does that by concentrating on the trigger point, if you like, 9.1(d), for more satisfactorily securing and given the limitation of liability it's difficult to see when that trigger is going to be reached.

McGRATH J:

Yes, perhaps also looking to the words "regarded by the mortgagee" as "reasonably regarded by the mortgagee" would it be, would you do that, "reasonably regarded by the mortgagee as necessary"?

MR CAMPBELL:

Yes, well it is usual when a party has a contractual discretion to read that into it. The appellant relies on the words "in its absolute discretion" that appear at the start of 9.1 but I would, with respect to the Chief Justice, say once again that those two parts are quite distinct and those aren't repeated. Those words are there –

McGRATH J:

That's the first part, we're talking about the second part is the way you answer that.

MR CAMPBELL:

Yes, those words are there to deal to the argument that's not only made but usually accepted that discretions are constrained by reasonableness.

BLANCHARD J:

So in your argument, (d) is redundant but not repugnant?

MR CAMPBELL:

The appellant's construction is repugnant –

BLANCHARD J:

On your argument, it's not repugnant but it is redundant?

MR CAMPBELL:

Yes, although I –

ELIAS CJ:

So far as we've been able to imagine?

MR CAMPBELL:

Yes.

McGRATH J:

In the circumstances of this case –

MR CAMPBELL:

Of this transaction?

McGRATH J:

– that's how you're putting it I think, isn't it?

MR CAMPBELL:

Yes. Your Honours, I might move beyond 9.1 if I may?

ELIAS CJ:

Where are you going to move?

MR CAMPBELL:

To paragraph 74.

ELIAS CJ:

Sorry?

MR CAMPBELL:

Seventy-four. This deals briefly with the other clauses that the appellant relies –

BLANCHARD J:

Does he have to deal with those?

ELIAS CJ:

Well I don't know, I'm just turning up paragraph 74.

MR CAMPBELL:

Sorry, Your Honour, I'm going to deal now with the other provisions and the loan agreement and the mortgage which the appellant relies upon, because they contemplate the possibility that there might be other security for the –

ELIAS CJ:

Yes.

MR CAMPBELL:

– moneys hereby secured. The appellant's argument appears to be that the only explanation for this, for these clauses, must be that we're entitled to exercise 9.1(d) so as to grant to ourselves further security, but there are other explanations for each of those clauses. They each have a role to play in the ordinary course of loan agreements and mortgages. True to say, they may not have much role to play in the somewhat unusually tax-driven transactions with which we are dealing and, as Justice Blanchard pointed out this morning, it's evident from – I think I'm going to struggle to remember exactly which –

clause 11.3 of the mortgage, which refers to other securities for the time being, whether before or after the execution of this deed. If that –

ELIAS CJ:

We don't have the full – we have to look at the later agreement, do we, to get 11.3?

BLANCHARD J:

It's on page 105.

MR CAMPBELL:

The one at tab 13, page 105.

ELIAS CJ:

Yes, yes. Sorry, I had been looking at it 94, but that isn't…

MR CAMPBELL:

It's 11.3 of the mortgage, Your Honour.

ELIAS CJ:

Yes, all right, sorry, the mortgage, yes.

MR CAMPBELL:

These, as Justice Blanchard pointed out this morning, these clauses haven't been specifically crafted to this transaction because, if they had, there's be no point talking about the possibility of securities held before the execution of this deed. The reason that 11.3 to 11.7 of the mortgage refer to the possibility of other securities is that these are relatively standard general provisions that you'll find in a mortgage, that –

BLANCHARD J:

They look as though they've come out of a banking document.

ANDERSON J:

Or an accountant's office.

BLANCHARD J:

Where you will get a succession of securities.

MR CAMPBELL:

That's not unusual under most forms of financial ccommodation these days, Your Honour. And, likewise, if we turn back to the loan agreement itself, the other clauses on which the appellant relies are 10.3 and 10.8 of the loan agreement. Clause 10.3, which is on page 93, I might point out that clause 10 as a whole has the heading "general provisions". Clause 10.3 says, "The remedies are cumulative if there are any other agreements or securities granted either before or after the date of this agreement," again refers to "before", doesn't really deal terribly well with the actual transaction. Clause 10.8, the loan merger clause, again a standard clause the you'll find in banking documents to deal with the possibility of there being two securities and the lender wants to protect itself from any argument that exercising rights under security might prejudice its ability or, indeed, taking a further security might prejudice its ability to exercise rights under the present security.

BLANCHARD J:

Well, it's a bit odd, because the loan agreement arguably isn't a security. The security is the other document.

MR CAMPBELL:

Yes, well –

BLANCHARD J:

But I suppose you could say in equity maybe it is a security, because of the promise that there will be another document.

MR CAMPBELL:

Yes, Your Honour.

BLANCHARD J:

But again, it indicates that this hasn't been drafted with this particular transaction really in mind.

MR CAMPBELL:

Yes because what they are directed at is the possibility that there might be another transaction between the parties under which, independently, another security is granted and that did happen with some of the other LAQCs, not with these two respondents. If I take you to tab 21 of the case on appeal. This is the deed of assignment of debts and it's a very short point Your Honours, between Armour Fidelity Limited which was one of the lenders and the appellant Totara. In the schedules it sets out the various debts that have been assigned. If you look at page 143, you'll see that one of the LAQCs, (inaudible 15:26:11) Limited, thought that it had such a good deal first time round that it would enter into another one, although –

BLANCHARD J:

They were cross-collateralised. Presumably that was the effect of those clauses, that it cross-collateralised them.

MR CAMPBELL:

Presumably, Your Honour, but it's exactly that sort of situation that those clauses are directed at, and one sees the same on pages 153 to 155 of the next document, which is the assignment of debts from Asian Growth Fund Limited, which was another one of the lenders, supposedly, and in the schedule there you'll see on pages 153 to 155 just a sprinkling of other LAQCs who also thought that they didn't want to miss out on further opportunities when other such transactions became available. And, in any case, all of these provisions that I've just been looking at, 10.3 and 10.8 of the loan agreement and clauses in part 11 of the mortgage, are very accurately described in those documents themselves either as general provisions or miscellaneous. And if there's some inconsistency with the main

object of the transaction or with the very specific clause 11.1, in our submission, these general and miscellaneous clauses must give way.

Your Honours, I was going to say something about a contra proferentem, I wonder however whether that should wait for the break?

ELIAS CJ:

How much longer do you think you'll be Mr Campbell because we normally carry on until four but if you're –

MR CAMPBELL:

Five minutes?

ELIAS CJ:

– going to be much longer –

MR CAMPBELL:

Well, I don't feel the need for a break, I'd rather push on.

ELIAS CJ:

But how long do you think you'll be?

MR CAMPBELL:

I think about five minutes, Your Honour.

ELIAS CJ:

All right, carry on, thank you.

MR CAMPBELL:

Now as to ambiguity, I'm not sure that this particularly matters in terms of the first thing that I'm going to say in terms of the contra proferentem role. It is true that before the Court of Appeal the Latin phrase "contra proferentem" was not used. However, one of the now respondents' submissions was that if there was an ambiguity it should be resolved against the current appellant,

and we called in aid, among other things, the rule that now appears to be still not disputed by the appellant, namely the rule dating from the 19th century that powers of attorney are strictly construed against the donor. That is nothing more or less than a statement of the contra proferentem rule. So, turning to the rule itself, as I understood my learned friend Mr Walker's argument, he said that they're not really supporting the idea that the proferens could be the promisor, as a matter of general principle and I would agree that there's very little authority supporting that view of the contra proferentem to rule and what authority there is to support that tends to be confined to property cases which are really explained on the principle of non-derogation from grant, in my submission.

Secondly, my learned friend Mr Walker said that effectively that really leaves just two options. Either the contra proferentem rule operates as against the drafter or it operates against the person to whose benefit the clause is inserted. Now, on the second of those of course, any ambiguity must be resolved against the appellant. I don't think there's any dispute about that. So the only other possibility is that the rule operates as against the drafter. I say two things. Firstly, that of those two possibilities, in our submission, the *Bryant* case from the nineteenth century and the various authorities that have followed that, have made a fairly clear rule that draftspeople have been able to live with for well over a hundred years, that if you are drafting a power of attorney it's the donor of the power who is going to bear the risk of any ambiguity and particularly in the sort of transaction with which we're dealing, in which the power of attorney is simply, is essentially conferring on the lender the power to do various things in its favour as against the borrower. In our submission, that rule should simply be applied. Bowstead and Reynolds discusses in I think tab 2 of the bundle, I don't need to take you there. It says, this is a rule of longstanding, there's no real problem that it's construed against donors because most of these powers are drafted by lawyers.

The second thing that we would say is that even if that's not accepted and the Court wishes to apply the rule as against the drafter, the appellant has from the outset accepted that it bears the onus of proving that it was entitled to

execute the general security deed and part of that onus, if the Court is left with an ambiguity, part of that onus is if the contra proferentem rule depends upon proof of who the drafter is, it was for Totara to proof who the drafter was and if there is no evidence on that then they must fail on that very specific point. It's accepted, I should say, as our synopsis makes clear, that the contra proferentem rule is simply one of last resort which we would hope the Court doesn't have to go to, there has to be an ambiguity left once you've applied all the other principles of construction.

Your Honours, I don't wish to say anything else to our synopsis, unless you have any other questions.

ELIAS CJ:

No, thank you Mr Campbell. Yes, thank you Mr Walker.

MR WALKER:

I'm sure you're heartily sick of reading 11.1 –

ELIAS CJ:

I think we'll be reading it for a while yet, in our dreams perhaps.

MR WALKER:

I'll have to take you back to it I'm afraid. There's a number of other points to make but we've been talking about these boilerplate provisions. However much attention you think the parties may have made to them, there's no doubt about the fact that there's 9.1(d) plus clauses 11.3 through 11.7 of the mortgage which expressly contemplate in our submission, there will actually be further security. Now, you can say it's boilerplate but at least it's there and the parties drafting this agreement seem to have no problem with that being there. They didn't sort of express a view that this was absolutely inconsistent with their idea that the only security was to be the share purchase agreement and the insurance policy. So they don't help the other side. The other side really does need to convince you that 11.1 is a provision that limits what you can take by way of security, so that you have to effectively read 9.1(d) down,

or treat it as redundant or repugnant and you have to effectively ignore the other clauses as boilerplate. So we still come back to 11.1.

Now, some words have been put in my mouth which I should like to take out of my mouth. The first point and it is important. The point was made about clause 8.1 of the mortgage, that while we didn't say it, we would say that if the mortgagee has exercised the security, there is no potential for the borrower to satisfy their liability under clause 11.1. I didn't say that and I deliberately didn't say that, in fact I said the opposite in answer to a question. If you did take further security and you realised it, it's still a separate question what your liability was and you still have the option of satisfying your liability by paying the value of the share purchase agreement or applying or assigning that value. Once you do so, the net comes to you. So that's that critical distinction between liability and security. So you have to look at 11.1.

We've been talking very much about is it a limitation of liability or not and I'm going to talk to you about that but that's not the real question you have to address. The real question is, is it a limitation of security? So, let's just come back to those first words – I shouldn't say the first words, the words starting, "The lender acknowledges that" and the argument was put that all I'm really saying is that that shouldn't really be there because all you really needed was the words following "to the intent that", so I'm treating those two as correlative. I'm not saying that, I'm saying you have to read the clause as a whole. What happens when you read the clause, there is an acknowledgement that the agreement and the liability of the borrower hereunder is limited to the value of the security provided and I readily accept that if you stopped there you might have a more complex debate about what that phrase means.

I don't want to be taken to suggest that the only effect of that is what follows after "to the intent that" so that they're pure correlatives. I accept that right from the beginning of the agreement, those first words starting, "The lender acknowledges that" has an effect but the question is, what is that effect? It doesn't create what I call a closed loop where all we are concerned with is the share purchase agreement and the insurance policy, so that that represents

the limit of your obligation. What I mean by that is, clearly the other option which is to pay the principal and interest, subsists as a potential outcome and we can see that's clear from two things. The first which are the words that my learned friend didn't actually talk to you about at all are the ones at the end of 11.1, "If the borrower so applies or assigns all such moneys, value or benefit, this shall relieve the borrower from any further or personal liability." Implicitly, if you don't do that, you can still have further or personal liability and it's also clear from 11.2 which plainly contemplates that you may not apply or assign that benefit and you may instead retain the shares, complete the transaction, et cetera, et cetera.

So what the lender acknowledges that, that phrase starting with those words is doing, is it's saying your liability is limited throughout the term of this agreement and that the most that we can get from you is the value of the share purchase agreement and the insurance policy and then it's explaining what that allows you to do in terms of exercising it. I don't think it is a valid distinction to contrast on the one hand liability and satisfaction because clearly the first and second parts are linked even if they're not entirely co-extensive but then stepping back from this, what does any of this tell us about security? Now, on the understanding of this clause that Justice Blanchard was presenting earlier in my submissions, it's possible for example that the value of the security provided could be say 2.4 million under the Crismac agreement which is the amount that has to be repaid.

So conceivably, in 10 years time it might be worth at least that much money and it must be thought that's the case because otherwise you wouldn't have 11.2. They must be contemplating that these agreements could at least pass through that floor of the amount of capital and interest, the principal amount and the interest. Well, if we say that the share purchase agreement or the rights under that agreement were worth, say, $2.4 million in year 10, what does this tell us about your ability to get security for that? Yes, you could have come up with an arrangement where, even if it may not be adequate security for all purposes, will limit your security to the share purchase agreement and insurance policy. But they don't purport to do

that. We've got 9.1(d) where they say "further security", but if we look back at 11.1 it's telling you nothing about the security. It's acknowledging that the agreement, and it's acknowledged that means the loan agreement, and the liability is limited to the value of the security provided.

WILSON J:

Mr Walker, what's meant by the phrase "limitation of recourse" in the first line of 11.2?

MR WALKER:

Well, that's precisely my point. Limitation of recourse is used in the sense that those words are conveying. It says "limited recourse" and it says it again in the start of 11.2, but clearly 11.2, for example, is referring back to 11.1, it says so. So it says, "The borrower, in consideration of the limitation of recourse contained in clause 11.1." So you go back to 11.1 and say, "Well, what are they talking about?" Well, it's talking about the agreement, the loan agreement, and the liability being limited to the value. It's telling you nothing at all about security. So what it's saying is that you can get out of this at any time by applying or assigning the value of the agreement, and in that sense you have a permanent, if you like, ceiling on your obligations. But that's purely about the liability, it's not about security.

Now, what's unusual about this situation is – let me make a prior point. Let us go back to that scenario where the shares are worth, say, $2.4 million. Could the parties rationally agree that you might have security for more than $2.4 million, to cover eventualities, costs, doubt about whether you'd actually be able to realise the value, et cetera? It seems to me it is quite common practice for people to take security for a greater value than the amount of the liability. There's no problem in concept with that, and it reinforces the point that liability is one thing, security is quite a different thing.

ELIAS CJ:

Might you take, I'm sorry, it hadn't occurred to me before but might you take security to secure the top up payment?

MR WALKER:

Potentially you could, in the sense that it's an obligation under the agreement and therefore could fit within the definition of moneys owed, yes. But I think this current case it actually, on the facts, shows what might occur. Justice Anderson asked the question, "Is it common ground that the shares were valueless?" It's not common ground that the shares were valueless. What is common ground is that the purchaser was not able to exercise its rights under the share purchase agreement. We say that's because the purchaser repudiated that agreement with the vendor and the vendor cancelled. You've heard the respondents dispute that. But what we have here is a situation where, yes, the lender's taken on the risk of the share purchase agreement and insurance policy.

What they haven't taken on the risk of is the purchaser making it impossible for them to actually enjoy the rights under those agreements by bringing an end to the share purchase agreement, we say by repudiating it, and therefore being unable to exercise the insurance. So, what we have here is a situation where – the significance of that is twofold: it means that this can't be decided on the basis there was no value in respect of which security could be obtained –

ANDERSON J:

Well, it couldn't anyway, because what happened after the contract was entered into can't affect the interpretation of it. But hypothetical possibilities might have a bearing on interpretation.

MR WALKER:

Quite right. What we're contemplating here is the quite possible scenario that the security is compromised, so you can't actually get at the value of the share purchase agreement and insurance policy. And, after all, by their nature it's not like land, by their nature they are slightly ephemeral by way of security and perhaps riskier than the land, for example, might be. So it's not at all inconceivable that they thought you might require further security.

ANDERSON J:

The cases in matrimonial property, for example, show that you can have a value on something that is almost impossible to realise because the value attaches to the person running the company.

MR WALKER:

Yes. Well, what my learned friends must be saying is that not only are you saying, "The amount I have to pay you is limited to the value of that, but I'm also happy to only take that asset as the security and have no margin for my protection." Well, that's not a necessary situation, it's not a normal situation, even in secured lending, and it's not one that's driven by the words here. So, I don't want to belabour the point, but my learned friends need to pull out of those words of 11.1 not only that the agreement and the liability is limited to the value of security but also, implicitly, the words, "And by that we mean you can't take security over any other property." They're the ones that actually have to read in the words, not us.

BLANCHARD J:

Well, it's not too difficult to read them in, when it goes on to say, "Namely, the policy and the share acquisition agreement."

MR WALKER:

Well, no, because it's still got the words – "limited", "The liability is limited to the value of that."

BLANCHARD J:

I don't see how that gets you a right to require further security.

MR WALKER:

I'm not suggesting it does, I'm just saying it doesn't prevent you from getting further security. For this clause to help the respondents it has to bar you from taking further security, because we've got an express clause that allows you to take it. And, as I say, the respondents didn't even address the words, "If

the borrower so applies or assigns this shall relieve the borrower from any further or personal liability." Clearly the parties are expressly contemplating that there may be a situation in which the borrower doesn't apply or assign, in which case there'll be further liability. Well, that's a liability that can be secured, and 9.1 addresses what security can be provided for that. That's why I use that term "closed loop". This isn't a clause that's about creating a closed loop where we're only ever talking about the share purchase agreement and insurance policy. It truly is an option.

Now, I'll just address a couple of further points. Well, in respect of 9.1(d), my learned friend did rely on the contra proferentem argument and, if I understood him correctly, he said, "One possibility is for you to interpret it against other persons for whose benefit the clause is inserted." But the problem with that is, of course, that if that's the rule you might say that 9.1 is inserted for the mortgagee's benefit, but then 11.1 is clearly something that's for the benefit of the borrower, the mortgagor. So I'm not sure that that's going to take you very far.

What his argument really reduced to is the *Bryant* principle, which isn't – and *Bowstead* says it's not actually consistent with adoption of contra proferentem as such, but, as I say, we don't dispute it. You do construe it against the donor, but only in the sense that you require that the grant of power be express or implicit. That's all that means. So all I'm asking you to do is to say that 9.1(d) does expressly grant a power to take further security. My learned friend made the point that the word "security" doesn't appear in 9.1(d), but I think, I'd reply with the Chief Justice's point, which is that there may not be an exact correlation, but clearly the attorney and the further security provision are meant to be operating in the same, at least in the same direction. If that's not your point, that's my point at least. But the further –

ELIAS CJ:

I'd rather take it from you, it sounds a lot better.

MR WALKER:

But the further point is that how can it be that taking a security is not, "An act, deed, matter or thing which might more satisfactorily secure payment of the moneys hereby secured"? So I'm just saying it's expressly allowed for in that clause.

McGRATH J:

What do you say to Mr Campbell's point that there is in (d), (a), a trigger clause?

MR WALKER:

Indeed there's a trigger.

McGRATH J:

Yes, and he was comparing it, he remembered your submission in relation to the *Equiticorp* case was that you accepted there was a point of distinction, because there was clearly a trigger there.

MR WALKER:

Yes.

McGRATH J:

But I understood Mr Campbell was saying that there was a trigger clause in 9.1(d), the trigger being it's something that's regarded as necessary for the purpose of more satisfactorily securing the payment, and suggesting that that's something that had to be established, if you like.

MR WALKER:

Well, I completely accept that is a trigger –

ELIAS CJ:

Yes.

MR WALKER:

– but I think we've established that in the evidence, because we have Mr Reid's affidavit where he says the borrowers repudiated the agreements with the vendor, the vendor cancelled the agreements, which rendered those agreements valueless. So the only assets left to secure the indebtedness were the third party claims, and that was the only asset they could get at.

ANDERSON J:

The factual matter in issue is still to be tried, isn't it?

MR WALKER:

It is, but –

ANDERSON J:

And this case proceeded at all levels on the basis of pure construction.

MR WALKER:

That's right, that's right, yes.

McGRATH J:

So if that was an issue we'd have to go to trial?

MR WALKER:

Well, it would have to go to trial, yes. But what I take from that is that there's no onus on us to estimate here that that trigger was met, because it's been accepted that that's a matter for trial.

McGRATH J:

I understand what you're saying, yes.

MR WALKER:

The next point, and I'm on to the last one I believe – oh, last two. Just coming back to clauses 11.3 through 11.7 of the mortgage. My learned friend suggested that that was really meant to cover the situation where you'd taken

out two different loans. But I don't think that is a satisfactory explanation because in each case, here at least, you're talking about a security for the purpose of securing payment of the moneys hereby secured, which is the moneys due under this loan. So, yes, when you talk about cross-collateralisation for securing the payment of other moneys, that might be a point in his favour, but each of these clauses are actually dealing with securing the same money. And my point is simply you might try and call it boilerplate, but these parties have drafted a sort of illegal agreement in which they seem to expressly contemplate that there will be other security for the same money.

BLANCHARD J:

But if you're cross-collateralising that's exactly what you have. It works both ways.

MR WALKER:

Well, the –

BLANCHARD J:

I don't really think this is a particularly significant point anyway.

MR WALKER:

I don't think it is, Sir, but perhaps it does tie to the last point, which is that we're all agreed, I think, that the object is, if you can, to construe the documents together to make sense of the clauses, rather than to treat them as redundant or repugnant. You've got 9.1(d), you can try to call it boilerplate, but in this transaction it may have a different application than another transaction, but in this transaction its effect is to allow you to take security over other property, property other than the share purchase agreement and mortgage, that's the whole point of the clause. And the Court's task is to take 9.1 and 11.1 and say, "Is there a way where I can sensibly read these two clauses together?" There's a very obvious sensible and commercial way to read it, which is 11.1 is about limiting the borrower's liability, giving them the option of handing over the share purchase agreement and insurance policy, in

which case their liability is at an end and there's no need to have further security but, if they don't do that, they shan't be relieved from further liability. In any event, for as along as they have liability which they do on either view under that clause and, however much you measure it, you're allowed to take further security, that's 9.1(d). It's nothing odd or uncommercial and there's nothing in 11.1 that requires you to find the opposite.

So, unless you've got anything for me, that's my reply.

ELIAS CJ:

Thank you Mr Walker. Thank you counsel. We'll reserve our decision in this matter.

COURT ADJOURNS: 3.54 PM