IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

Application No. 384/2014
Warrant No. 385/2014

IN THE MATTER	of Rule 132 and/or 354 of the Code of Civil Procedure of the High Court 1981 and Sections 409(d) and/or (e) of the Cook Islands Act 1915 and Section 45(2) of the Judicature Act 1980-81
AND	
IN THE MATTER	of Applications for a Permanent Injunction, an Order for Vacant Possession and a Warrant of Execution
BETWEEN	**WESTPAC BANKING CORPORATION** a duly incorporated company having its registered office at Martin Place, Sydney, Australia Applicant
AND	**JANETTE PUARA BROWNE** of Rarotonga, Widow Respondent

Date of Hearing: 19 March 2015

Date of Judgment: 2 April 2015

Counsel: Mr Heinz Matysik for Applicant

Mr Norman George for Respondent

JUDGMENT OF HUGH WILLIAMS J

The Court's findings are:

[a] Mr Samuel's application for leave to withdraw from acting for Mrs Browne is granted.

[b] Mr George's application for adjournment of all these matters from 19 March 2015 was dismissed.

[c] Mrs Browne's application for special leave to appeal against the decisions of Doherty J and Weston CJ is dismissed there being no general or public importance in the matter, the magnitude of the interest affected does not warrant special leave to appeal given the comprehensive nature of the Settlement Deeds and the interests of justice do not require leave or special leave to appeal. That dismissal also applies to any separate application for recall of either Judgment.

[d] Mrs Browne's application for stay of execution of the injunction, and the warrant of execution are both dismissed.

[e] Mrs Browne's application for extensions of time to file her notices of appeal are likewise dismissed for the same reasons as above.

[f] Westpac's application for a writ of execution is granted but, in common with Doherty J and Weston CJ, the sealed order is directed to lie in Court for fourteen days from delivery of this Judgment to enable Mrs Browne to vacate the mortgaged property voluntarily.

[g] The costs of this application are reserved and counsel may file memoranda on the topic with that from Westpac to be filed within 21 days of delivery of this Judgment and that from Mrs Browne within 28 days.

Introductory

[1] At the heart of this proceeding is a claim by the applicant, Westpac Banking Corporation, to gain possession of the property in which the respondent, Mrs Browne, and her family live coupled with the desperate efforts by Mrs Browne to retain the property.

[2] Although, as will be seen, a number of other issues arise in this proceeding, it is convenient at the outset to note that there are two parcels of leasehold land involved in the case.

[3] The first is the 3213m^2 parcel known as Te Koiti Raukura Section 6C3 Ngatangiia Rarotonga ("Section 6C3"). This is the land on which Mrs Browne and her family live. According to the documents in the case, particularly her applications dated 30 October 2012 and 5 September 2013 to set aside orders made ex parte by Isaac J on 10 September 2012 granting leave to Westpac to enforce its mortgage over Section 6C3 and Mrs Browne's application dated 1 August 2014 to stay execution of the order for possession of the land, the owners of Section 6C3 are Mrs Browne's parents. They leased the land and the lease was assigned to Mrs Browne and her husband, Mr Lionel Browne, on 19 April 1990, i.e.prior to the events with which these proceedings are concerned. Pursuant to a loan agreement dated 8 November 2002 to which detailed reference will later be made, Mr and Mrs Browne mortgaged Section 6C3 to Westpac on 28 August 2003.

[4] On 16 September 2008 Westpac obtained an order to enforce its mortgage of Section 6C3 against Mrs Browne and, presumably, Mr Browne's estate, he having died on 21 April 2007.

[5] However, by 6 August 2012 Mrs Browne had become the sole lessee of Section 6C3, presumably obtaining that status by survivorship, and on that date she entered into a new lease of Section 6C3 for 60 years. That lease was approved by the Leases Approval Tribunal (*"LAT"*) on 2 July 2010 and, on 17 August 2011 Mrs Browne mortgaged Section 6C3 to Westpac pursuant to a Deed of Settlement entered into by those parties on 15 July 2011. That is the mortgage pursuant to which Westpac is endeavouring to exercise its powers to obtain possession of Section 6C3.

[6] Mrs Browne said that Section 6C3 was initially known as Manea Heights Villas but is now known as Te Moana Villas. It comprises 3 three bedroom villas rentable to tourists and the 2 bedroom house that is her home.

[7] In the circumstances later described, as a result of Orders made by Doherty J on 23 July 2014 and Weston CJ on 25 September 2014 there are in force Orders granting Westpac an injunction against Mrs Browne and her agents from interfering with Westpac's occupation and possession of Section 6C3 and restraining her from entering on the land after the expiration of 14 days from the making of the former Order. Mrs Browne's application to stay execution was dismissed by Weston CJ on

25 September 2014. Both Judges adjourned Westpac's application for a warrant of execution but reserved the right to Westpac to bring the matter on should the Orders made prove insufficient to enable Westpac to exercise its rights.

[8] The second parcel of land with which these proceedings are concerned is part Nukupure Section 3E Ngatangiia Rarotonga. ("Section 3E")

[9] Although differing nomenclature used in the affidavits does not make the position clear Section 3E appears to be the land on which the Manea Beach Villas are erected.

[10] In terms of title, in early 2012, Mrs Browne consulted a Mr Clarke. Mrs Browne is Mrs Clarke's niece. Mr Clarke is Executive Chairman of the Cook Islands Trading Corporation Limited and is a well-respected businessman and a highly-regarded and longstanding, though retired, barrister and solicitor of this Court.

[11] Mr Clarke filed two affidavits in support of Mrs Browne's application to this Court to set aside Isaac, J's Order of 10 September 2012.

[12] Mr Clarke was at pains to make clear that Mrs Browne does not and never has been on the title to Section 3E. In that, he appears to be correct. He put in evidence the Register of Title for Section 3E[1] which relevantly shows that on 7 August 2006 the owners leased 2236m^2 for 60 years as from 1 February 2006 to Mr Browne alone and that, on 1 September 2006 Mr Browne assigned the whole of his interest in that lease to Tepaki 1 Holdings Limited following which unit titles were issued for parts of the land. On 4 March 2014 by way of a Deed of Appointment of the Receivers and Managers to Tepaki 1 Holdings Limited dated 31 May 2010 the land was assigned to what would appear to have been the receivers.

[13] The parties did not say where the two parcels lie in relation to one another. Though a plan of Section 6C3 was attached to the lease of 6 August 2010 and an affidavit of a Mr Tepaki attached (but did not discuss) a plan of the *Manea Beach Bungalows and Villas* covering the 2236m^2 in Section 3E, there was no obvious correlation between the two plans. The plan of the *Manea Beach Bungalows and*

[1] Copies of the Register of Titles for Nukupure Section 3E and 3E2 were put in evidence. Naturally they varied, but what is said above as to ownership appears accurate for the purposes of this Judgment.

Villas depicted 7 numbered units and, on the other side of an area called *"Water Edge"* a larger construction designated *"Residence"*.

Applications for Decision

[14] This Judgment deals with Westpac's application for a writ of execution and also deals with Mrs Browne's applications for special leave to appeal against the decisions of Doherty J and Weston CJ, a stay of execution of the injunction granting vacant possession and a further application for extension of time to file a notice of appeal out of time.[2]

[15] Also to be dealt with are an application by Mr Samuel, Mrs Browne's counsel from late 2014, to withdraw and a further application by Mr George who appeared for Mrs Browne at the hearing on 19 March 2015, for all matters to be adjourned to at least the next sessions of this Court.

Narrative

[16] The issues for decision can either be dealt with briefly or at greater length.

[17] The brief approach would be to hold that Mrs Browne is bound by the terms of the two Deeds of Settlement she made with Westpac on 15 July 2011 and 29 November 2013 – especially the latter – and therefore:

> [a] That even if there is jurisdiction to grant Mrs Browne special leave to appeal to the Court of Appeal against the Judgments mentioned, her application should be dismissed; and
>
> [b] That Mr Samuel's application for leave to withdraw from the proceedings should be granted; and
>
> [c] That Mrs Browne's application to adjourn all matters between these parties to May 2015 was dismissed for the reasons set out hereafter.

[18] However, in light of the background complexities of the matters in issue between these parties, in deference to the many matters raised in the voluminous file

[2] Westpac also took the view that Mrs Browne's applications included an application for recall of the Judgments, an application which, if separately brought, was opposed. It is difficult to construe Mrs Browne's application as including a recall application and it requires no separate consideration in this Judgment.

and accepting that Mrs Browne and her family may be required to leave their home as a result of this decision, a somewhat fuller discussion of the issues is appropriate. What follows is not just based on the material that was before Doherty J and Weston CJ when they made their decisions, but also incorporates material from a helpful memorandum dated 12 February 2015 filed by Mr Samuel as a result of his research, coupled with detailed consideration of the many affidavits, pleadings and submissions on the file.

2002-2011

[19] On 8 November 2002 Westpac made a loan offer to Mr and Mrs Browne of $1,281,810 which consolidated an existing loan of $1,158,000 and advanced a further $750,000 *"to assist with purchase of (5) pre-cut villas to cost $600,000 and cost to construct them on your properties to cost $150,000"*. The loan was to enable the construction of what became known as the Manea Beach Villas. It was to be secured by existing first leasehold mortgages over Section 3E and part Taputapuatea Section 72D Avarua (which was a property owned by TJ Browne Limited). The existing securities also included guarantees by Mr Browne and his two companies, Cook Islands Gas Centre Limited and TJ Browne Limited, plus a debenture over Cook Islands Gas Centre Limited. In addition a new security was to be obtained by way of a first leasehold mortgage over Section 6C3 and guarantees by Mr Browne, TJ Browne Limited and Cook Islands Gas Centre Limited plus Mrs Browne.

[20] Mr Clarke put in evidence the Register of Title for Section 3E. It refers to a lease dated 14 June 1983 to Mr Browne and a subsequent lease dated 7 August 2006 also to Mr Browne. The Register shows no ownership interest in that lease ever being held by Mrs Browne and she, Mr Clarke said, in addition to having no ownership interest in Section 3E also had no ownership interest in either TJ Browne Limited or Cook Islands Gas Centre Limited.

[21] Mr Clarke was critical of the 8 November 2002 Westpac loan offer requiring Mrs Browne to guarantee the loan and mortgage Section 6C3, noting the loan offer includes *"none"* in the section for nomination of the borrowers' firm of solicitors and the offer discounts Westpac's establishment fee by 25% *"in recognition of your continuing and valued support"*, a comment Mr Clarke found at odds with Mrs Browne having no ownership interest in Section 3E.

[22] All that would seem to be correct, but a partial explanation may be that, according to an affidavit sworn on 1 August 2014 by Mr Tepaki, the purchaser of Manea Beach Villas from Mr Browne, Mrs Browne claims to have had no part in the transaction and is unversed in business. Mr Clarke expressed a similar view of her commercial experience. By contrast, Judges of this Court who have dealt with her have described her as "someone who has intelligence and the ability to deal with matters of some complexity herself"

[23] That notwithstanding, Mrs Browne, no doubt at her husband's request, signed the loan offer and the subsequent securities. As a counsel of perfection, it may have been prudent for the Brownes to seek independent legal advice – perhaps separately - concerning the loan, but that was a matter for them and authorities make clear an obligation to that effect on prospective lenders only arises in unusual circumstances, such as known disability on the part of a borrower. Here it is clear that Mr Browne at least had been a borrower from Westpac prior to the loan offer and there is nothing to suggest that Mrs Browne was under a disability known to the lender.

[24] Mr Samuel's memorandum commented on that situation explaining it by saying that *"Mr Browne was somewhat entrepreneurial"* and making the point that it was adverse to Mrs Browne's sole ownership of Section 6C3 after 6 August 2012 that it became subject to the Westpac mortgage and that she additionally guaranteed the debt for what, on the face of it, was her husband's enterprise and the recipient of the increased loan.

[25] Mr Samuel's memorandum suggested that Westpac's requirement for Mrs Browne's guarantee arose out of mistake as to the ownership of Section 6C3 but that comment is arguably misplaced since the security requirements in the 8 November 2002 loan offer are addressed to both Mr and Mrs Browne, Section 6C3 was then leased by both and the terms of the loan offer appear to be no more than a bank's usual requirement to ensure Westpac had adequate additional security for the advance.

[26] By 2006 Mr Browne had built the extra units utilising the increase in the loan funds but, most unfortunately, was found to be suffering from cancer. He died on 21 April 2007 leaving a Will which, so it is said, made no provision for Mrs Browne.

The documents contain no explanation for what is said to be the form of Mr Browne's Will but do not suggest Mrs Browne challenged it in any way.

[27] Mr Tepaki said that, in September 2006, he negotiated the purchase of the Manea Beach Villas from Mr Browne to redevelop the property and and trial the unit titling process enabled by the passing of the Unit Titles Act 2005. The price was $1,800,000 plus VAT (a total of $2,025,000) with what Mr Tepaki describes as *"an 'as is' price of $1,200,000 to be settled on taking possession and redevelopment price settled when upgrading of the property for redevelopment purpose is achieved".* In his affidavit, Mr Tepaki claims Westpac was *"happy with this arrangement"* as the *"as is"* price of $1,200,000 was *"the full valuation held by the Bank for security purposes"*.

[28] Mr Tepaki and associates then redeveloped the property with, Mr Tepaki says, Mr Browne wanting to buy into the redevelopment *"so I allowed him to purchase Manea 8 on a deferred settlement basis,"* an arrangement on which he elaborated. It is unnecessary to detail that material – and not all of it seemed to be on the file -, but it was plainly a complex arrangement involving, Mr Tepaki alleges, access to his money engineered by another lawyer, Mr Little, *"in collusion with minority unit title holders"* at Manea Beach Villas, the issuing of title to all purchasers in Manea Beach Villas apart from Mr Browne and Mr Tepaki's belief *"from beneficiaries that the Court has handed over ownership of Manea 8 to the Estate"*. He then said that:

> [a] *"On 20 February 2007 the sum of $100,810.89 was paid to extinguish the respondent's [Manea Heights Villas] debt as evident in the notation on her bank statement that states 'PAY OFF LGT&J BROWNE (MANEA HEIGHTS)' leading her to believe her [Manea Heights Villas] property was debt free"*.
>
> a statement he buttresses by reference to a Westpac bank statement in the name of Mr and Mrs Browne *"T/A Manea Height"* showing a debit of that amount with that notation on that day.

[29] On its face, Mr Tepaki's assertion that Mrs Browne thought the whole of her debt to Westpac on Manea Heights Villas was fully repaid on that date seems

implausible: the recipient of the payment is noted as Mr and Mrs Browne when Mrs Browne had no ownership interest in what Mr Tepaki calls Manea 8; the debit refers only to *"Manea Height"* in which both Mr and Mrs Browne are said to have an interest when Mrs Browne was not the sole proprietor of Manea Heights Villas/Section 6C3; and the amount of the payment would appear to have been far less than was owing by Mr Browne and his enterprises to Westpac as at that date.

[30] Mr Tepaki's evidence needs also to be seen alongside the fact that Mr George at this hearing produced a letter from the Police saying that Mr Tepaki had lodged a complaint of fraud against Westpac in February 2015 and that the subsequent investigation was ongoing. The letter does not state whether the subject matter of the complaint has anything to do with the issues raised in the papers relating to this dispute. Presumably it does, but the lack of detail in the letter means it is of no assistance in dealing with the issues in this case.

[31] It will be necessary to return to this issue, but the appropriate conclusion on this aspect of the matter at this stage of the discussion would seem to be that Mrs Browne could have no basis to believe that the whole of her indebtedness on Section 6C3 was repaid in 2007. If she held that view it may well be because of the Housing Loan repayment at that juncture later referred to, although the sums do not seem to match.

15 July 2011

[32] On 15 July 2011 Westpac and Mrs Browne entered into a Deed of Settlement in relation to a claim made by Westpac to recover the debt (or the balance of the debt) secured by the mortgage over the lease of Section 6C3.

[33] If there were proceedings between the parties which preceded that debt, they were not in evidence in this claim but it is of interest to note the salient terms of the Deed of Settlement.

[34] They include some of the recitals which, describing Mrs Browne as *"Janette"*, read:

> *"A By way of a loan agreement dated 8 September 2006 Westpac advanced a loan to Janette and Lionel George Tamarua Browne (deceased) in the sum of $730,000.00 ("the loan agreement").*

B *The loan was secured by a mortgage over the leasehold interest owned by Janette being all that parcel of land containing 3,213 m^2 on the land known as Te Koiti Raukura Section 63C, Ngatangiia as delineated in a Deed of Assignment between William John Estall and Pati Estall and Lionel George Tamarua Browne and Janette dated 19 April 1990, which leasehold interest has now been superseded by a Deed of Lease between the landowners and Janette dated 6 August 2010 in the same area as the former leasehold interest ("the leasehold interest").*

C *The loan was further secured by a guarantee provided by T.J. Browne Limited dated 20 August 2003 supported by a Third Party Deed of Mortgage ("the guarantee").*

D *Janette defaulted on her obligations under the loan agreement.*

E *Westpac obtained orders from the High Court of the Cook Islands on 16 September 2008 granting leave to Westpac to enforce it's [sic] aforementioned mortgages.*

F *The entire loan was called up by way of Call Up Notices served on Janette and T.J. Browne Limited on 2 October 2008.*

G *T.J. Browne Limited were released from any further liability pursuant to the loan agreement and the guarantee by way of payment made by T.J. Browne Limited to Westpac which Westpac acknowledges as having been received.*

H *Settlement has been agreed in terms of the ongoing liability of Janette pursuant to the loan agreement upon the terms recorded in this Deed."*

[35] The operative provisions of the Deed include:

"1. *The parties to this Deed agree that the amount to be paid by Janette to Westpac in full and final settlement of the debt owed by Janette to Westpac pursuant to the loan agreement is the sum of $550,000.00 ("the debt")."*

[36] The remaining provisions of the Deed provide for the debt to be financed by Westpac lending Mrs Browne $550,000 for twelve months – though the loan fell due in terms of the Deed on 15 June 2012, not 15 July 2012 – with the loan being secured by a new mortgage over Section 6C3 on usual banking terms. The Deed said that, should Mrs Browne not meet the loan in full on due date *"Westpac will immediately commence formal legal action for recovery of the debt"* and bound Mrs Browne, immediately after execution, *"to place on the market the leasehold section either as*

a single parcel or as subdivided sections for sale" with any proceeds being applied towards partial repayment of the debt.

[37] The Deed said each party had received independent legal advice before executing the Deed. Mrs Browne's signature was witnessed by her then solicitor, Mr Little.

[38] Mr Clarke is highly critical of the terms of the 15 July 2011 Deed based on two Loan Agreements, both dated 8 September 2006, he obtained during his research.

[39] The first is a Term Loan Agreement addressed to both Mr and Mrs Browne for $630,000 to be secured by all existing securities plus additional security comprising undertakings that the unit title over *"Manea Beach Manager Residence (8) will revert to Westpac upon registration of unit title"*, plus guarantees from Tepaki Group as the *"Unit Title purchase company"* to cover the debt and interest and to *"cover net investment return of 8% supported by… term deposit with sufficient funds to cover one year return assessed at $630,000 ÷ 8% = $50,400"*.

[40] The second agreement was a Housing Loan, again entered into by both Mr and Mrs Browne, for $100,000 with the security being existing securities and banking accommodation. The term was to be 15 years.

[41] Mr Clarke is therefore critical of the 15 July 2011 Deed referring in Recital A to *"a"* loan to Mr and Mrs Browne of $730,000, particularly when evidence he obtained during his research from Mr Little, then acting for Westpac, was that the $100,000 housing loan was fully paid off on 20 February 2007 from the Manea Heights cheque account.

[42] Mr Clarke said the $630,000 term loan was to fund Mr Browne's purchase of unit 8 at Manea Beach, a property in which Mrs Browne was never to have any ownership interest so he said she obtained no direct benefit from the borrowing. He went on to say that the dealings with regard to unit 8 Manea Beach have become complicated and difficult, with delays in resolving the issues, but he had been informed that the title to unit 8 has now been transferred with the transferee mortgaging the property to Westpac.

[43] Why the Term Loan agreement described the additional security for the loan as it did remains unexplained, and Mr Clarke's evidence on this aspect of the matter contrasts with that of Mr Tepaki and what would seem to be his ongoing dispute concerning Manea 8, but, as far as Mrs Browne and Section 6C3 are concerned, there seems no doubt that the Housing Loan has been fully repaid and that her indebtedness to Westpac may have been reduced by the payment.

[44] Mr Clarke made the futher point that Recital G of the 15 July 2011 Deed records the release of TJ Browne Limited from its guarantee by way of a payment – which Mr Clarke understood was of $200,000 – to Westpac.

[45] Mr Clarke's criticisms of the wording of the 15 July 2011 Deed are clearly justified, but their impact on the issues for decision in this Judgment is less clear since, throughout these proceedings, Westpac, beyond saying Mrs Browne has breached the Deeds of Settlement - especially that of 29 November 2013 – by not paying the agreed sums does not appear to have detailed what sum it says Mrs Browne still owes her. No doubt, as part of the conclusion of all matters outstanding between these parties, a statement of account by Westpac might justifiably be required, but that will be of little comfort to Mrs Browne and her family should they have lost their home in the meantime.

[46] The only other point which warrants making at this stage in relation to the 15 July 2011 (and, later, 29 November 2013) Deed is that, as set out in the Recitals, it was preceded by an Order made, ex parte, by this Court on 16 September 2008 giving Westpac leave to enforce its security against Mrs Browne.

[47] Such leave is required by section 646 of the Cook Islands Act 1915 which says that:

> *"No security given by a native over any property shall be enforceable, whether by the exercise of a power of sale or otherwise, without the leave of the High Court."*

[48] A practice has grown up for security holders to apply ex parte to this Court under section 646 for leave to enforce their security. Applying ex parte may not have been under challenge in 2008 but, as will be seen, the practice was challenged later in proceedings between these parties and may require revisiting given that R68(8) of the Code of Civil Procedure only entitles the making of ex parte

applications if delay by proceeding on notice might entail irreparable injury, the party in respect of whom the orders sought cannot be found – neither which applies in this instance – or that the application *"affects the party moving only or is in respect of a matter of routine or is of so unimportant the nature that the interests of any other party… cannot be affected thereby."* While it must be accepted that property owners against whom enforcement is sought of the securities they have given have the right, later, to contest the substantive proceedings in order to protect their position, it may be the case that applying for leave under section 646 ex parte should not be course adopted routinely as it arguably falls outside Rule 68(8).

15 July 2011-29 November 2013

[49] The file for this hearing does not disclose what efforts Mrs Browne made to sell Section 6C3 pursuant to the Deed of 15 July 2011 but at all events it is clear she signed a new mortgage over Section 6C3 on 17 August 2011 pursuant to a new 60 year lease of that land dated 6 August 2010. That lease was approved by the LAT on 2 July 2010.

[50] It also appears clear that Mrs Browne did not fully comply with the other provisions of the Settlement Deed of 15 July 2011, and, on 10 September 2012, leave was granted – again on an ex parte basis – for Westpac to enforce its security against her.

[51] By that stage Mr Arnold, an experienced lawyer, was acting for Mrs Browne and on 30 October 2012 he applied to set aside the ex parte order on the grounds it did not meet the criteria in R68(8). The application relied on Mr Clarke's affidavit sworn on 3 October 2012. That affidavit, after asserting that Mr Little's witnessing of Mrs Browne's signature to the 15 July 2011 Deed did not amount to independent legal advice, asserted there were the two loans , not one as the Deed said, and they were for $630,000 and $100,000. As earlier mentioned, Mr Clarke exhibited the Term Loan agreement for the $630,000 advance and the Housing Loan agreement for $100,000, and he was able to prove the $100,000 loan had been repaid in full on 20 February 2007, by reference to his receipt, in 2012, of information from Mr Little, then acting for Westpac. In dealing with this aspect of the matter in the way set out above, Mr Clarke stressed that Westpac had obtained a considerable advantage from

the transaction, but Mrs Browne had not only jeopardised her interest in her home on Browne family land, she had derived no benefit from the security rearrangement.

[52] Mr Clarke elaborated on the documents he had obtained from Mr Little which supported the statements in his first affidavit in a second affidavit sworn on 27 November 2012. That resulted in an amended application to set aside the ex parte order being filed on 5 September 2013. The amended application, relying on the documents exhibited by Mr Clarke, asserted Westpac was negligent or failed in its duty of care or its fiduciary obligations to Mrs Browne in relation to the loan described in the 15 July 2011 Deed. It also asserted the $630,000 was drawn down despite the required mortgage of Unit Title to Unit 8 not being issued with the funds being paid to Mr Petero's trust account and released to the Tepaki Group which then went into receivership without making good on its obligation to give clear Unit Title to Unit 8. The amended application also attacked the circumstances in which Mrs Browne guaranteed the Westpac loans.

[53] Westpac contested the application to set aside the order granting leave to enforce their security.

[54] That led to the parties agreeing, following a judicial settlement conference conducted by Grice J, to a consent order, made on 3 December 2013, striking out Mrs Browne's application to set aside the mortgage enforcement order and expressly providing for that order to remain in force.

[55] The parties also, this time on 29 November 2013, entered into a second Deed of Settlement.

[56] The Recitals include the following:

> *"1.3 **Debt** means various advances, interest and costs, together in excess of $950,000 as at the date of this deed, made by Westpac to the Borrower.*
>
> *1.4 **Dispute** means the application in the Proceeding to set aside the Order and all related matters at issue between the Borrower and Westpac.*
>
> *1.5 **Loan** means the loan for $630,000 made by Westpac to Lionel Browne (Deceased) and the Borrower recorded in an agreement dated 7 September 2006 and signed on 8 September 2006.*

1.6 ***Manea Heights*** *means the leasehold interest in all that Parcel of Land containing three thousand two hundred and thirteen square metres being part of the land named by the High Court (Land Division) Te Koiti Raukura Section 6C3, Ngatangiia, including the residence and the three villas located on the property.*

1.7 ***Mortgage*** *means the mortgage dated 17 August 2011 over the property of the Borrower known as Manea Heights in favour of Westpac.*

1.8 ***Order*** *means the Order dated 10 September 2012 in the Proceeding granting leave to enforce the Mortgage.*

1.9 ***Proceeding*** *means the matter of Westpac v Browne, Land Application No 388/2012 in the High Court of the Cook Islands.*

1.10 ***Settlement Sum*** *means the amount of $630,000.*

1.11 ***Settlement Date*** *means 30 May 2014."*

[57] The operative part of the Deed bound Mrs Browne to pay the *"Settlement Sum"* to Westpac on or before *"Settlement Date"* and bound Westpac to accept that sum in full and final settlement of the *"Debt"* and *"Mortgage"*.

[58] It also bound Westpac not to act on the *"Order"* of Grice J until 31 May 2013 and relevantly continued:

"4. ***Release***

4.1 Upon entering into this deed, but subject to 4.2, the Borrower releases Westpac from all Claims which the Borrower has, had or may have in the future against Westpac in respect of or arising in whole or in part, either directly or indirectly out of or in relation to:

(a) the Proceedings;

(b) the Debt;

(c) the Mortgage; and

(d) the Dispute.

4.2 Upon receipt of the Settlement Sum in accordance with clause 2 Westpac agrees to:

(a) discharge the Mortgage;

(b) discharge all other securities held regarding the Debt; and

(c) assign its rights in the Loan to the Borrower.

5. ***Income from Manea Heights***

5.1 Until payment of the Settlement Sum, the Borrower will pay the net income received from the management of Manea Heights to Westpac.

5.2 The net proceeds shall be after allowance for a reasonable wage for the Borrower.

5.3 Any payments made by the Borrower pursuant to clause 5.1 shall be credited by Westpac in reduction of the Settlement Sum.

6. ***Proceeds from the sale of Areara 12A***

6.1 The Borrower irrevocably instructs and authorises Charles Little or any other solicitor acting for the Borrower or the Bank of Cook Islands to pay the net proceeds of the sale of Areara 12A to Westpac.

6.2 The net proceeds of the sale shall be the sum remaining after the payment of the amount secured by the mortgage to Bank of Cook Islands and the legal costs and disbursements of the sale.

6.3 Any payments made by the Borrower pursuant to this clause shall be credited by Westpac in reduction of the Settlement Sum.

7. ***Default***

7.1 If the Borrower does not to pay the Settlement Sum by the Settlement Date pursuant to clause 2, the Borrower will be in default and the Borrower agrees:

(a) that Westpac may immediately take all necessary action to obtain payment of the Debt, including but not limited to enforcement of the Mortgage and any other security held by Westpac, and not be limited to the amount of the Settlement Sum.

(b) to immediately vacate and deliver vacant possession to Westpac of all of the villas and residence at Manea Heights.

(c) not raise or publicize any objection or impediment, whether by application to any Court or otherwise, to Westpac taking possession and exercising its power of sale under the Mortgage and to cooperate with Westpac in all respects.

(d) not to make any Claim against Westpac for or in any way arising out of any management of Manea Heights following the delivery of vacant possession to Westpac.

7.2 For the avoidance of doubt the provisions of this deed are intended to supplement and not to vary the rights and obligations of Westpac pursuant to the Mortgage that occur upon the default of the Borrower under the Mortgage.

*8. **Warranties and Representations***

8.1 The Borrower warrants that:

(a) she has taken independent legal advice as to the nature, effect and extent of this deed; and

*11. **Bar to Proceedings***

11.1 Westpac may plead this deed as a bar to any claims instituted by the Borrower, or anyone related to her or connected with her in respect of any matter whatsoever referred to in this deed.

11.2 The Borrower agrees to indemnify Westpac fully in respect of any costs (including costs incurred on an indemnity basis), charges, expenses, loss (including consequential loss), damages or any other detriment whatsoever arising as a result of the Borrower, or anyone related to the Borrower making any claim or instituting any proceedings in respect of any matter whatsoever referred to in this deed (save for proceedings for any breach of this deed by Westpac).

*13.5 **Reliance on own information***

The parties acknowledge that they enter into this deed fully and voluntarily upon their own information, investigation and legal advice. Each party to this deed acknowledges that it is aware that it or its advisers, agents or lawyers may discover facts different from or in addition to the facts that they now know or believe to be true with respect to the subject matter of this deed, but that it is their intention to, and they do, fully, finally, absolutely and forever settle all claims, actions and causes of action which may now exist, or may ever exist or may ever have existed in relation to the matters the subject of this deed on the terms set out in this deed."

[59] Those citations show that this was an unusually comprehensive Settlement Deed. Mrs Browne's signature to it was witnessed by Mr Mason, by then acting for her and also an experienced solicitor.

29 November 2013-23 July 2014

[60] Mrs Browne did not comply with the terms of the 29 November 2013 Deed. On 27 June 2014 Westpac applied for a warrant of execution plus an order for vacant possession in anticipation of execution being granted. This was coupled with an

application for a permanent injunction to restrain Mrs Browne or her agents from interfering with Westpac's exercise of any orders it obtained.

[61] The applications were opposed by Mrs Browne, acting on this occasion through a Mr Brown who is apparently a qualified lawyer but one without a practising certificate.

[62] On 18 July 2014 Doherty J first dealt with the matter by way of a Minute. After briefly recounting the history of the dispute between these parties the Judge said he had questioned Mrs Browne as to her defence but that she had *"been unable to articulate any defence to me and I think that her position is really that she is seeking the compassion of the Court not to force her off family lands"*. The Judge allowed Mrs Browne until 23 July 2014 to obtain proper legal representation and to file a notice of opposition to Westpac's applications.

[63] On 22 July 2014 Mrs Browne filed two lengthy documents setting out the grounds of her opposition, drawing heavily on the background to the matter as summarised in this Judgment, and adding further detail.

[64] All of that was, however, unavailing. On 23 July 2014 Doherty J again briefly recounted the history of the matter noting[3] that the 29 November 2013 Deed delay in payment to 30 May 2014 was to *"enable about a six month period the respondent to market and sell Manea Heights".[sic]*

[65] After recounting relevant paragraphs of the 29 November 2013 Deed and Mrs Browne's submission of a document[4] *"which purports to the evidence of payment of an additional $225,000 which has not been accounted for in the statement of her accounts… this appears have been the first time that this has ever been raised. It is dated the 20 February 2007 but has never been raised as part of the settlement in 2011 or the settlement in 2013." [sic]*. The Judge recorded:

> *"[13] I have some sympathy for the Respondent. It is clear that this property is important to her and her family. It is all that she has in one sense and she has been fighting for years "tooth and nail" to hold on to it. And she told me that in submission today, that that is her ultimate aim. She has tried to raise monies to hold onto it. She had hoped that the Applicant would be*

[3] Paragraph [5]
[4] Paragraph [15]

> *more sympathetic to her. But the Applicant has run out of patience, it wants its money.*
>
> *[19] In effect, what the Respondent has done is ask this Court for mercy to enable her to gain more time to refinance or sell or a combination of the two. I find it difficult to accept that the matters that she now raises have only just become apparent.*
>
> *[21] She impressed me as someone who has intelligence and the ability to deal with matters of some complexity herself, but I think that what she has been attempting to do here is to fight the rear guard action as best she can but with no ammunition."*

before granting Westpac's applications for a permanent injunction and for vacant possession. He declined the application for a warrant for execution to issue at that stage and gave Mrs Browne fourteen days to vacate, the Judge observing that[5] *"Should that not happen then the Applicant should have the opportunity to bring on the application for warrant for execution on three day's notice."* He adjourned the matter to the September 2014 sessions.

23 July 2014-25 September 2014

[66] On 1 August 2014 Mrs Browne applied for a stay of execution of the Orders made by Doherty J. Her application was supported by Mr Tepaki's affidavit earlier mentioned and a lengthy memorandum from Mr Brown.

[67] The application for stay came on before Weston CJ on 25 September 2014 and the Chief Justice, after again briefly recounting the tangled history of the matter held[6] that he needed only to go back to the 29 November 2013 Settlement Deed (though he noted that he had read the proceedings in 388/2012 and most of the issues referred to by Mr Clarke were[7] *"in play in that proceeding"*). He held that the issues *"have merged into the settlement deed of November 2013"*, and, in the end, concluded that, while sympathetic to Mrs Browne's position,[8] he was unable to find any possible basis to set aside Doherty J's Judgment. Accordingly, he rejected the application for stay. In a Minute issued that day concerning the warrant for execution, the Chief Justice declined to make the Order sought by the Bank but allowed Mrs Browne fourteen days to vacate the property voluntarily saying that if

[5] Paragraph [24]
[6] Paragraph [8]
[7] Paragraph [9]
[8] Paragraph [13]

she failed the application could be brought on and dealt with, if necessary by telephone conference.

25 September 2014-present

Narrative

[68] Mrs Browne did not vacate and on 23 October 2014 Mr Matysik applied for the warrant for execution to be dealt with by way of telephone conference.

[69] On 8 October 2014 Mrs Browne filed notices of an appeal against both Doherty J's and Weston CJ's decisions. The notices were out of time and, as the Chief Justice noted in a Minute issued on 16 December 2014, in any event the filing of an appeal does not either stay or affect the status of decisions of this Court.

[70] By 16 December 2014 it appeared that Mr Samuel had been instructed to act for Mrs Browne but the instructions came so late he was unable to argue the matter that day. The Chief Justice accordingly directed, following a telephone conference on 13 February 2015, that the application for the warrant of execution be determined in the March 2015 sitting of the Court and made timetable orders for the filing of notices of opposition and affidavits.

[71] On 26 February 2015 Mrs Browne, acting through Mr Samuel, filed an application for special leave to appeal to the Court of Appeal against Doherty J and Weston CJ's decisions, seeking a stay of execution as well, plus an extension of time to file her notices of appeal. The detailed grounds on which Mrs Browne relied included many of the issues recounted earlier in this Judgment but added allegations of negligence against Mr Little for surrendering her jointly-held lease and obtaining a lease in her sole name in 2010 and failing in the 15 July 2011 Deed to *"carry over the original co-guarantors of the original debt to this new advance by having them sign the new Deed of Settlement and mortgage"*. A new ground was that the LAT consent provided for four *"conditions"* which were claimed not to have been complied with. In addition it was asserted in relation to the 17 August 2011 mortgage that:

> *"the date for repayment of the Deed of Mortgage has not yet arrived because the proceeds of sale are not available and the applicant has therefore not been in default in terms of the mortgage in failing to make monetary*

> *repayments… [and] the purpose and function of the LAT was to vet and approve all leases, assignments of lease, subleases and mortgages and to be satisfied that the borrower had the means to repay the loan otherwise the loan would not be approved [and that] the LAT can overrule the bank."*

[72] Of the 29 November 2014 Deed, it was asserted there was no approval to what was said to be a variation arising from the insertion of a new settlement date of 30 March 2014. No approval was sought to the variation.

Submissions

[73] As mentioned, as part of his preparation to argue the matters before the Court Mr Samuel filed a comprehensive set of submissions on 12 February 2015, a month before he sought leave to withdraw. Those submissions followed three days of interviews with Mrs Browne and others and consideration of virtually all the documentary material discussed earlier in this Judgment. It also included a careful chronology and argument suggesting:

> [a] Mrs Browne saying she played no part in making the Westpac loan application for an additional $750,000 in 2002 and had no previous experience of Westpac. The result of the documents at that stage was that Mrs Browne guaranteed her husband's debt of $1,281,810 plus a further $750,000 for the five pre-cut villas. She entered into this transaction *"because Westpac… required it and her husband with whom she had trust and confidence in, had requested it"*. She had no ownership interest in Manea Heights where the villas were to be constructed which was in Mr Browne's sole name, but only in the jointly owned Section 6C3. He suggested Westpac made the mistake as to the ownership of Manea Heights and this lead to it requiring Mrs Browne's support.
>
> [b] In late 2006 Mr Browne sold the Manea Heights property to Mr Tepaki at a suggested purchase price of $1.2m with the side arrangement for Mr Browne to buy Unit 8 back from the developers once unit titles had issued. Unit 8 was worth about $600,000. Mr Samuel suggested no proper accounting had been provided by Westpac for the loan reduction on payment of the $1.2m and he suggested that the assignment between Mr Browne and Te Paki Holdings Limited was for $1.8m plus VAT, the price for which Unit 8 would in effect be held in trust to be transferred to Mr Browne on

completion. That arrangement would have been beneficial to all parties, but he submitted there was no proof the transaction was ever completed or additional security obtained from Mr Tepaki. Mr Tepaki would, as noted, contest those assertions.

[c] Mr Little confirmed on 22 February 2007 that the housing loan of $100,000 had been paid off that year from which Mr Samuel submitted *"it is not clear but later events strongly suggest that the security was released in respect of Te Koiti with Mr Browne's Will, though excluding Mrs Browne, stating that Te Koiti was to be hers unencumbered."* As mentioned, the Will was not put in evidence, and, if the "*unencumbered* "statement were made, Mr Browne must have known it was unachievable when the jointly held lease of Section 6C3 was encumbered with the Westpac mortgage securing all his indebtedness.

[d] Up until May 2008 the loan was apparently up to date but there was then the dispute with Mr Tepaki resulting in his stopping payments and $23,000 arrears being run up. Mr Tepaki accepts some of this. Mr Samuel said Mrs Browne was not advised that the interest had fallen behind, though accepting there was no obligation to advise her.

[e] He submitted that in 2010 the jointly held Section 6C3 lease was surrendered and the new lease transferred to Mrs Browne, presumably by survivorship, with the new lease enhancing Westpac's security but releasing Mr Browne's estate from the liability. He submitted the estate should have been required to enter into a deed to prolong its guarantee.

[f] He submitted that in 2011 Mr Little, who had been acting for Westpac in 2008, should not have acted for Mrs Browne in witnessing the Settlement Deed of 15 July 2011 and that the Deed detrimentally affected Mrs Browne's rights because it did not provide for the four other guarantors' liability to continue thus leaving Mrs Browne liable for the whole of the debt incorporated into the new loan though the principal was reduced from $713,000 to $550,000 by agreement.

[g] He further submitted that the lease approval at the time contained a condition that repayment should be from the proceeds of the sale of all or part of the leasehold interest, a condition which, Mr Samuel submitted, took precedence over the repayment date of 15 June 2012.

[h] Mr Samuel was critical of the Settlement Deed of 29 November 2013 with the loan now said to be a minimum of $630,000 and possibly much more, suggested variations in the mortgage for which LAT approval was required but not obtained and the loss of the guarantors' covenants by Westpac failing to obtain their consent to, or participating in, the new loan.

[74] All of that, Mr Samuel submitted, impugned the entire transaction, involved undue influence, lack of LAT approvals, conflicts of interest on Mr Little's part and serious detriment to Mrs Browne through loss of the co-guarantors' covenants. He submitted that any liability on Mrs Browne's part should be a maximum of no more than one fifth (i.e. pro tanto with the four former co-guarantors) of the amount owing to Westpac.

[75] Mr Matysik's submissions relied on the various iterations of the argument for Westpac advanced by him in earlier submissions but he made the additional points:

[a] Article 60(2)(e) of the Constitution and section 58(3) of the Judicature Act 1980-81 only provide for appeal to the Court of Appeal with leave of this Court if the question involved is of general public importance, the magnitude of the interest affected warrants it, or the justice of the case so requires. None, he submitted, applied here and there were no compelling reasons for granting leave to appeal out of time, all bar the LAT approval point having been raised and rejected at earlier stages of this matter.

[b] He relied on the detailed terms of the Settlement Deed dated 29 November 2013 including the release of claims, Mrs Browne's agreement not to impede Westpac's enforcement and the bar to further proceedings by her, a Deed she signed after assistance from experienced counsel.

[76] Of the allegations concerning the LAT consent, Mr Matysik pointed to the Leases Restrictions Act 1976 and the Leases Restrictions (Amendment) Regulations 2006 making little mention of mortgages, a term accepted as applying to assignments

of lease. Regulation 29 gives the LAT power to approve mortgages over leasehold land if satisfied of various conditions which can generally be described as understanding the nature of the transaction and having had an independent explanation. Mr Matysik made the point that the imposition of any other conditions is not mentioned, the Act gives the LAT no express jurisdiction to impose conditions on approvals and, as a statutory tribunal, the LAT can only do what it is empowered to do by the legislation. Conditions, beyond an understanding of the matter, would therefore be ultra vires. In addition, the form of the LAT Approval Certificate[9] contains no provision for including conditions but merely lists a description of what an applicant is seeking to have approved and the fact it has been approved. Inclusion of so-called *"conditions"* on Certificates is something that has evolved over time and, he submitted, has no binding force. In any event the, *"conditions"* are merely a statement of the main terms being approved not conditions *stricto sensu,* compliance with which is fundamental to the approval. Treating recitals of the terms of contracts as conditions akin to conditions forming part of a Court's Judgment would impose unreasonable problems for parties since any departure – however minor – by either party from the strict terms of the approved document would require a further approval to be sought and granted, often well after it had occurred. Mr Matysik also pointed the fact that the Court documents filed by Mrs Browne refer to the *loan* terms not the *mortgage* terms and the fairness of the *mortgage* is what is approved by the LAT. In this case there have been no variations in the *mortgage* terms.

[77] He submitted there was nothing supporting the argument that Mrs Browne is not in default because the sale proceeds are not available since clause 7 of the 2011 Deed of Settlement makes clear she was in default as soon as she failed to repay the debt by 15 June 2012. That has plainly occurred and is not something which can be modified by the LAT. In any event, that argument had been overtaken by the 29 November 2013 Deed, one signed by Mrs Browne when she was again advised by experienced counsel.

[78] All-in-all, Mr Matysik submitted that, even if there were power, there were no grounds for reopening any of the previous transactions; the points raised on Mrs Browne's behalf had been repeatedly decided against her; she is bound by the Deeds of Settlement; and, whatever practical problems may be caused to her and her

[9] Set out in the First Schedule to the Leases Restrictions Regulations 1977

family, there will accordingly be no injustice on legal grounds visited on Mrs Browne were her applications to be declined and Westpac's granted. Indeed, he submitted, her repeated attempts to raise the same issues in the face of repeated failures amounts to an abuse of process.

Discussion and decision

[79] As mentioned at the outset, there is either a short route or a much longer route to deciding the matters before the Court.

[80] The short route is to find that Mrs Browne is bound by the terms of the two Deeds of Settlement she has signed, particularly that of 29 November 2013, and, this being, at its heart, an application in terms of the latter, she has no defence to the claim. Accordingly all her applications for leave to appeal out of time, special leave to stay the warrant of execution (and, if sought separately, recall of the earlier Judgments) must be dismissed.

[81] Again as mentioned, the Settlement Deed of 29 November 2013 was unusually comprehensive in its terms. Not only does it constitute a settlement at $630,000 against a debt said to be $950,000 with payment being deferred to 30 May 2014, it releases Westpac from all claims, present or future, which Mrs Browne may have against, it binds her to pay the net income from the management of Manea Heights to Westpac and immediately vacate and deliver vacant possession to Westpac in the event of default (with a bar to raising any impediment to Westpac exercising its rights against her). Further, it entitles Westpac to plead the Deed as a bar to any claims instituted by her in respect of any matter between them. Tellingly, the Deed recognises that, even if further relevant facts may be discovered in the future, the parties *"fully, finally, absolutely and forever settle all claims, actions and causes of action which may now exist, or may ever exist"* in relation to the matter.

[82] It is trite law that Deeds of Settlement constituting an accord and satisfaction of parties' respective rights in relation to each other and amount to a discharge of all that has gone before. As was said in *British Russian Gazette & Trade Outlook Limited v. Associated Newspapers Limited* [1933] 2 KB 616, 643[10]:

[10] See also *Bank of Credit & Commerce International SAB v. Ali* [1999] ICR 1068, 1078

> *"Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."*

[83] Here, on two occasions, when in receipt of competent and experienced legal advice, Mrs Browne achieved the release of an obligation greater than that of the settlement sums and Westpac's agreement to advance her money to meet her obligations and give her time to do so. That amounted to an accord. Compliance would have constituted a satisfaction freeing her from any obligation to Westpac.

[84] Instead, she failed to comply with either Deed (or, more particularly, with the Deed of 29 November 2013, since it supplanted the terms of the Deed of 15 July 2011). Notably, she waived all rights in relation to the antecedent transactions in the latter and bound herself not raise those issues again, not to sue on them and not to impede Westpac's efforts to enforce the mortgage in the event of her default. She cannot now resile from the terms of the Deeds she signed on competent legal advice and continue to endeavour to re-litigate issues that have been conclusively determined against her, based on her own agreements, by Judges of this Court.

[85] That is particularly the case when, on the material on the file for this hearing, beyond the collateral issue of applying to set aside the ex parte Order of 10 September 2012[11], she has taken no proceedings to protect her position: there are no claims that she signed the Deeds by mistake, or following misrepresentations or that they do not correctly recite the position and should be rectified or any of the other ways contracts can be set aside. Similarly there are no proceedings against any of the persons and entities whom, she claims, have failed her in the ways described. All of that, when coupled with her factual failures (e.g. to sell the property or account for its receipts) and what Doherty J and Weston CJ concluded as to her aims in this litigation, influence against any discretion to grant her applications.

[86] Therefore, like the Chief Justice, the short answer to the applications before the Court goes no further than saying that Mrs Browne is bound by the terms of her Settlement Deeds, especially that of 29 November 2013, and therefore all her

[11] Not only an application she abandoned by consent in Grice J's Order, but one she agreed should remain valid

applications, including for stay of execution and for special leave to appeal,[12] must be dismissed.

[87] The longer route to the same terminus treks its way through the documents and chronology earlier canvassed. Repetition would be tedious but, in addition to what has already been said, the Court makes the following observations:

> [a] Though it is argued that Westpac was under some duty to Mrs Browne in relation to her entry into the various securities earlier discussed, a Bank is not normally under any obligation to those providing security to disclose anything more than something out of the normal which has taken place as an antecedent to the transaction[13]. While something of what took place between the late Mr Browne and Westpac and, later, involving Mr Tepaki, remains unexplained, the fact is that Mrs Browne has on a number of occasions signed documents which she must have known were security documents over or property she owned jointly with her late husband and nothing is shown about those security documents which would satisfy the test just enunciated, certainly nothing which would vitiate the securities.
>
> [b] The 2002 documents were Deeds. Were Mrs Browne to endeavour to impugn them at this stage, she may encounter limitation problems.
>
> [c] While Mr Clarke emphasised that Mrs Browne received no, what he called *"benefit",* from the loans and securities earlier described, all the securities were deeds and thus required no separate consideration to be valid. She may well have derived no *"benefit"* from the mortgages and loans in the sense of actually receiving money, but she would have derived benefit from them in the sense of assisting her husband in his business and in his entrepreneurial activities. Her present predicament may well stem from her putting her trust and loyalty in him and her preparedness, as a result, to jeopardise her interest in her family's land by mortgaging the lease of it which she held jointly with him.

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[12] And her belated application advanced through Mr George for adjournment of all these matters
[13] *Shivas v. Bank of New Zealand* [1990] 2 NZLR 327, 363; *Scales Trading Co Limited v. Far Eastern Shipping Co Public Limited* [2001] 1 NZLR 513 (PC)

[d] If she endeavoured to launch further litigation concerning the matters at the heart of this issue – whether against Westpac or anybody else – she would not only run into the difficulties with those issues which have been raised and decided against her in earlier litigation but might also encounter the effect of the rule in *Henderson v. Henderson* (1843) 3 Hare 100, 115 that estoppels can arise out of previous proceedings and may extend to issues which might have been put, but were not raised and decided, in those proceedings absent special circumstances. *Henderson v. Henderson* also gives Courts power to stay or dismiss actions where a claimant later endeavours to raise issues which were, or should have been, litigated in the earlier proceedings.

[e] It is also trite law that dealings by entities such as lenders with co-guarantors without the involvement of all co-guarantors can operate as a discharge of the guarantee[14] but, although the point is raised for Mrs Browne at this juncture, there is no information on the file as to the dealings which Westpac had with the co-guarantors and how any release of them came about. In any event, the Rule in *Henderson v Henderson* would seem likely to prevent her endeavouring to raise that issue at this juncture.

[f] Without needing to rehearse the detail again, the Court finds persuasive Mr Matysik's submission that the LAT has no power to impose conditions on its approvals. As Mr Matysik submitted, while the LAT may have evolved a practice of including the main terms of the document being approved in its consents, they cannot amount to contractual conditions non-compliance with which vitiates approvals. To hold otherwise would make the system unworkable since it would require fresh consents for every departure – however minor - by the parties from the terms of their documents.

[88] For all those reasons, this Court reaches the view that:

[a] Mr Samuel's application for leave to withdraw from acting for Mrs Brown is granted.

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[14] *National Bank of NZ Ltd v Murland* [1991] 3 NZLR 86

[b] Mr George's application for adjournment of all these matters from 19 March 2015 is dismissed.

[c] Mrs Browne's application for special leave to appeal against the decisions of Doherty J and Weston CJ is dismissed there being no general or public importance in the matter, the magnitude of the interest affected does not warrant special leave to appeal given the comprehensive nature of the Settlement Deeds and the interests of justice do not require leave or special leave to appeal.

[d] Mrs Browne's application for stay of execution of the injunction, and the warrant of execution are both dismissed (as is any separate application for recall of either Judgment).

[e] Mrs Browne's application for an extension of time to file a notice of appeal is likewise dismissed for the same reasons as above.

[f] Westpac's application for a writ of execution is granted but, in common with Doherty J and Weston CJ, the sealed order is directed to lie in Court for 14 days from delivery of this Judgment to enable Mrs Browne to vacate voluntarily

[g] The costs of this application are reserved and counsel may file memoranda on the topic with that from Westpac to be filed within 21 days of delivery of this Judgment and that from Mrs Browne within 28 days.

Hugh Williams J