

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA316/2022
[2024] NZCA 11

BETWEEN	WESTPAC NEW ZEALAND LIMITED Appellant
AND	NEW DAWN HOLDINGS LIMITED First Respondent
	COLIN KWOK YAN CHU Second Respondent
	JESSE SEANG TY NGUY Third Respondent

Hearing: 17 August 2023

Court: Cooper P, Gilbert and Goddard JJ

Counsel: B J Upton and S L Hawksworth for Appellant
R M Dillon for First and Second Respondents
No appearance for Third Respondent

Judgment: 14 February 2024 at 9.30 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B Summary judgment is entered for the Appellant against the First and Second Respondents for the amount due under the loan. Any dispute about quantum is to be determined by the High Court.**
- C The Appellant is entitled to costs in the High Court. Any dispute about quantification is to be determined by the High Court.**
- D The First and Second Respondents must pay costs to the Appellant for a standard appeal on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Gilbert J)

[1] Westpac New Zealand Ltd (Westpac) appeals against a High Court judgment declining to enter summary judgment on its claim in debt under a loan agreement with New Dawn Holdings Ltd (New Dawn) as borrower and Mr Chu as guarantor.¹

[2] Mr Chu is the sole director and shareholder of New Dawn. The loan was specifically sought and approved for the purpose of enabling New Dawn to purchase a residential property in Auckland (the property). Mr Chu was the named purchaser under the agreement, but he subsequently nominated New Dawn to be the sole purchaser of the property. Mr Nguy (through his firm Jesse & Associates) acted as New Dawn's solicitor in connection with the purchase and the loan from Westpac to help fund it.

[3] Although it was not disclosed to Westpac at the time, Mr Chu held 75 per cent of the shares in New Dawn on trust for Mr Nguy. The property was to be purchased as a joint venture investment and funded by Messrs Chu and Nguy in proportions reflecting their respective beneficial shareholdings, that is 25 per cent Mr Chu and 75 per cent Mr Nguy.

[4] As is common practice, Westpac instructed the borrower's solicitor (in this case Mr Nguy) to act for it on a limited retainer to complete and arrange execution of the relevant documents, including the loan agreement, guarantee and mortgage, and attend to registration of the mortgage on settlement of the purchase.

[5] On 30 January 2020, in anticipation of settlement, Mr Nguy wrote to Westpac attaching copies of the required documents, including the signed loan agreement and guarantee, director and shareholder resolutions, and his solicitor's certificate confirming, among other matters, that he would promptly register the mortgage.

¹ *Westpac New Zealand Ltd v New Dawn Holdings Ltd* [2022] NZHC 1118 [High Court judgment]. Leave to appeal to this Court was granted in *Westpac New Zealand Ltd v New Dawn Holdings Ltd* [2022] NZHC 3476.

He requested Westpac to transfer the full amount of the loan monies of \$1,321,600 into his firm's trust account.

[6] Westpac duly paid the funds into the trust account on 7 February 2020 as directed to enable settlement to proceed that day. However, unbeknown to Westpac at the time, Mr Nguy did not apply the loan monies to settle the purchase. Instead, over the following five months, he progressively misappropriated the monies for his own use and to settle his firm's debts. In the meantime, Messrs Nguy and Chu funded the interest payments due to Westpac under the loan agreement. These payments continued to be made for a little over 12 months until the interest payment due on 12 April 2021 was dishonoured and reversed.

[7] On 3 November 2020, Mr Nguy, purportedly acting for Mr Chu, consented to the High Court making an order by way of summary judgment requiring Mr Chu to settle the purchase on 1 December 2020. When settlement still did not proceed, the vendor cancelled the agreement by notice given on 22 January 2021. The property was subsequently sold to a third party.

[8] Mr Chu did not discover Mr Nguy's defalcation until after he instructed his present solicitors in late 2020 and made a formal complaint to the New Zealand Law Society. Westpac did not become aware of what had occurred until late March 2021.

[9] On 14 April 2021, Westpac made demand on New Dawn and Mr Chu for repayment of the full amount outstanding under the loan agreement on the basis that there had been various events of default entitling it to require repayment.

[10] New Dawn and Mr Chu deny liability to make any payment to Westpac, arguing that the loan monies were never in New Dawn's power or control, and thus were never drawn down. They contend that the loan monies were held by Mr Nguy in trust for Westpac pending settlement in terms of the limited retainer.

[11] Associate Judge Gardiner entered summary judgment on Westpac's claim against Mr Nguy for damages for breach of the limited retainer calculated as the amount of the loan plus interest. However, the Judge declined to enter summary

judgment on Westpac’s claim against New Dawn and Mr Chu finding it was arguable that Westpac retained control of the funds while they remained in Mr Nguy’s trust account.² The Judge considered that this question could only be answered at trial.

[12] Whether or not New Dawn and Mr Chu are liable in debt for the amount claimed under the loan agreement turns on whether the loan monies were advanced by Westpac to New Dawn. In other words, the question is whether the loan was drawn down by New Dawn in accordance with the terms of the loan agreement when the funds were paid by Westpac into Mr Nguy’s trust account, or alternatively whether Mr Nguy held the funds on behalf of Westpac unless and until they were used to settle the purchase of the property by New Dawn. We therefore commence by examining the relevant terms of the loan agreement.

The loan agreement

[13] The terms of the loan offer from Westpac, described as a Choices Home Loan, are detailed in a Loan Summary dated 16 December 2019 and include:

- (a) the Choices Home Loan Terms and Conditions;
- (b) the General Terms and Conditions brochure;
- (c) the Opening Accounts form; and
- (d) the Transaction and Service Fees brochure.

[14] The borrower’s details are set out at the top of the Loan Summary and the Choices Home Loan Terms and Conditions as “New Dawn Holdings Limited, Jesse & Associates Barristers & Solicitors, [address] Auckland”. The borrower is elsewhere referred to in the body of the documents as “you” or “I”. The loan limit was \$1,321,600. The term of the loan was 30 years. Interest was fixed for the first two years but would then be payable at a floating interest rate. The loan was to be secured by a registered first mortgage over the property. New Dawn’s payment obligation was

² High Court judgment, above n 1, at [77].

interest only for an initial period of five years with payments of principal and interest thereafter on a table loan basis — 300 monthly payments over the remaining 25-year period.

[15] Events constituting default by the borrower are listed in the Choice Home Loan Terms and Conditions and include if “anything has happened or happens which, in [Westpac’s] opinion, may have a Material Adverse Effect”. A Material Adverse Effect is defined to include a material adverse effect on the borrower’s ability to perform its obligations under the loan agreement.

[16] The Loan Summary stated:

Before you can draw down your Loan you need to

- sign and return a copy of this Loan Summary;
- if required by [Westpac], complete and sign any new Security or Choices Home Loan Terms and Conditions documentation and satisfy [Westpac’s] Security or pre-requisite requirements, [Westpac] will write to you or your lawyer as to what those requirements are;
- arrange for any other person required by [Westpac] to give Security, to sign that Security and satisfy [Westpac] Security requirements; and
- pay the establishment charge and any other credit fees and charges that are payable in connection with your Loan.

[17] The Loan Summary specified “Other Special Conditions” setting out the limited purpose of the loan application and the basis on which it had been approved:

Please note: As per your request, [Westpac] has only considered your application in relation to the purchase of [the property]. [Westpac] has not considered your ability to borrow any further funds to complete the subdivision or construction of a property. This approval is not a commitment of further funding and [Westpac] will not be liable to you if you are unable to complete any future planned project.

Drawdown of the new lending is conditional upon any of the property mortgaged to [Westpac] being either an owner occupied property or investment property as previously advised to [Westpac] and as detailed in the Schedule of Securities attached to the Loan Summary.

[18] The Choices Home Loan Terms and Conditions commenced with a section headed “Accessing your money” which included the following clauses:

1 Accessing your money

1.1 Drawing your Loan

Unless otherwise agreed by [Westpac], you can draw your Loan in one lump sum or in instalments.

At any time your Loan is on the Annual Fixed Interest Rate or the Annual Capped Interest Rate, you can only draw down amounts under your Loan on the first day of each Fixed Rate Period or Capped Rate Period.

1.2 Your Loan Account

Amounts drawn on your Loan will be debited to a Choices Home Loan Account (Loan Account) opened in your name.

[19] The “Drawdown Date” is defined as meaning “the day any part of your Loan is actually first drawn down”.

[20] The Schedule of Securities listed a registered first mortgage over the property and an unlimited deed of guarantee and indemnity by Mr Chu and New Dawn.

[21] Mr Chu signed the Loan Summary on 18 December 2019 in his capacity as a director of New Dawn confirming acceptance of the terms of the loan. He also signed the deed of guarantee and indemnity that day.

The limited retainer

[22] Westpac issued instructions to Mr Nguy by letter dated 16 December 2019. New Dawn and Mr Chu were together described in the letter as “the Customer”. The instructions recorded that Westpac had agreed to grant banking accommodation, described as “facilities”, to the Customer. The instructions expressly contemplated that Mr Nguy was acting for the Customer and the guarantor and that their consent would be required for Mr Nguy to also act for Westpac:

Acting for the Banks, the Customer and any guarantor

In issuing these instructions (the **Instructions**), the Banks require that you act for them with the consent of all other relevant parties in this transaction for whom you also propose to act (including the Customer and any guarantor).

...

If, for any reason, you do not believe you will be in a position to act for the Banks in this matter, please return these instructions to [Westpac] immediately.

[23] Westpac's instructions required the completion, execution and, where relevant, registration of the documents listed below, attending to disclosure as required by the Credit Contracts and Consumer Finance Act 2003, and arranging for Westpac's interests to be noted on all insurance policies:

- (a) solicitors certificate (discussed further below);
- (b) directors certificate (confirming, among other matters, that all necessary director and shareholder resolutions had been passed approving entry into the loan agreement, the documents had been duly executed and the company was solvent);
- (c) loan/facility agreement;
- (d) registered first and only mortgage over the property;
- (e) guarantee and indemnity from Mr Chu and New Dawn; and
- (f) waiver of independent legal advice by Mr Chu as guarantor.

[24] Under a heading "Availability of Facilities", Westpac listed various matters required "(t)o avoid any delay in drawdown". These included:

- advise [Westpac] of the date of drawdown as soon as possible;
- advise [Westpac] of your trust account number or of the Customer's account number into which the facilities are to be paid as soon as possible;

...

- have your Solicitors' Certificate delivered to [Westpac] at least three business days prior to drawdown together with all of the Documents which do not require registration.

...

[25] The instructions continued:

The facilities can only be drawn down following:

- receipt by [Westpac] of your completed Solicitors' Certificate;
- the Solicitors' Certificate endorsed on all Guarantee documents;
- satisfaction of any additional preconditions advised to the Customer;
- the Banks' being satisfied as to the priority position of the Banks and all other matters; and
- compliance with any conditions in the letter of offer (if any) signed by the Customer.

[26] Under a heading "General", Westpac instructed Mr Nguy to advise Westpac and seek further instructions if he became aware of anything which would affect the validity or enforceability of the bank's security. Mr Dillon, for New Dawn and Mr Chu, placed some emphasis on this provision so we set it out in full:

General

If:

- prior to the issue of your Solicitors' Certificate to the Banks; or
- after the issue of your Solicitors' Certificate but before you disburse the proceeds of any facilities, you become aware of anything which could affect the validity or enforceability of the Bank's security, please advise [Westpac] immediately and seek further instructions.

[27] The letter of instructions attached a document styled "Solicitors Instructions" containing general information and requirements. This document stipulated that if the solicitor was personally connected with the customer, including as a shareholder or beneficiary, the solicitor's certificate must be completed by an independent partner, or where (as here) the solicitor was a sole practitioner, by a partner of another firm. Mr Nguy did not disclose his connection with New Dawn, nor did he comply with the requirement for independent certification.

Payment of loan monies into Mr Nguy's trust account

[28] On 30 January 2020, Mr Nguy wrote to Westpac as follows:

Customers: New Dawn Holdings Ltd & Colin Kwok Yan Chu

Your Reference: 0006130098

We refer to your letter of instruction dated 16th December 2019.

We [attach the following] for drawdown:

1. Acceptance of lending offer;
2. Choices Home Loan Summary;
3. Choices Home Loan Term[s] & Conditions;
4. Guarantee & Indemnity;
5. Waiver of Independent Legal Advice Acknowledgement of Guarantor;
6. Director's Certificate;
7. Shareholder Resolution;
8. Director Resolution;
9. Westpac Certificate of Insurance;
10. Solicitor's Certificate;
11. A&I Form;
12. Our trust account deposit slip.

We would be appreciated (sic) if the extra sum of **\$1,321,600.00** can be transferred into our trust account as cleared fund[s] **Tomorrow, 31st January 2020** for settlement.

[29] The shareholder resolution recorded by way of background that New Dawn had entered into an agreement to purchase the property and was seeking a loan from Westpac in the sum of \$1,321,600 “in order to settle the transaction” and “to be applied towards the equity of the property”. Apart from the lack of independence, Mr Nguy’s solicitor’s certificate complied with Westpac’s instructions and included confirmation that he held a duly signed Client Authority and Instruction form for the dealing which had been pre-validated with Land Information New Zealand (LINZ) and that he would promptly lodge or submit in registrable form to LINZ all documents required by Westpac to be registered (the mortgage).

[30] On 31 January 2020, one of Mr Nguy’s employees telephoned Westpac to advise that settlement was delayed and would not take place until 7 February 2020.

Westpac therefore transferred the loan monies to Mr Nguy's trust account on 7 February 2020 to enable settlement to proceed. Having done so, Westpac wrote to Mr Nguy that day under the subject heading "Loan Advance Advice" as follows:

We confirm we have actioned the deposit for the Net Amount advanced to Trust Account [number] on the above date.

This payment is cleared funds. Notwithstanding this, in the event that settlement does not proceed please contact [Westpac] immediately on [number] to arrange repayment of the settlement funds to Westpac.

Customer Name(s)	Net Amount Advanced (\$)
New Dawn Holdings Limited	\$1,321,600.00
Total	\$1,321,600.00

[31] Mr Nguy's trust account records for New Dawn show the receipt of \$1,321,600 on 7 February 2020 alongside the notation:

From: WESTPAC LENDING SERVICES, LOAN DRAWDOWN PURCHASE
[OF THE PROPERTY]

[32] The Choices Home Loan bank statement issued by Westpac to New Dawn on 25 March 2020 records under the heading "Your transactions" the "Loan Drawdown" of \$ 1,321,600 on 7 February 2020.

High Court judgment

[33] The Judge considered it was arguable that Mr Nguy's obligations to Westpac did not end when he sent the executed documents and his solicitor's certificate. In particular, she found there was a tenable argument that Mr Nguy owed duties to Westpac in relation to the loan money while he held that money in his firm's trust account pending its application to the property purchase.³ The Judge's reasoning can be summarised as follows.

³ At [57].

[34] First, the Judge referred to the paragraph in the letter of instructions dated 16 December 2019 (quoted at [26] above) instructing Mr Nguy to advise Westpac and seek further instructions if he became aware of anything that could affect the validity and enforceability of the bank's security, including after he issued the solicitor's certificate but before he disbursed the proceeds of the facilities. The Judge said this supported New Dawn's argument that Westpac "considered it retained control of the funds for the interim period between the loan advance and the funds being dispensed from the trust account for the purchase".⁴

[35] Secondly, the Judge noted that Westpac's cause of action against Mr Nguy for breach of retainer was based on Mr Nguy owing Westpac obligations in relation to the loan money after he had completed the solicitor's certificate and after the money had been advanced by Westpac into his firm's trust account.⁵ In reliance on the instruction letter referred to above, Westpac pleaded various breaches of retainer by Mr Nguy including the two particulars set out below. The Judge considered it was arguable that these particulars were not consistent with Westpac's claim that the retainer was as limited as it contended:⁶

61. Mr Nguy breached his retainer to Westpac and Solicitors' Certificate.

Particulars

...

- (c) Mr Nguy did not advise Westpac that the Property purchase had not settled as expected, that the Property purchase had become the subject of an application by the vendor for specific performance, or that [it] was subsequently cancelled;
- (d) Mr Nguy did not return the Loan advance to Westpac as required (given the initial delay and then impossibility of settlement) and, instead, applied monies comprising the Loan advance to matters that were not associated with the Property purchase or to any matter beneficial to Westpac. ...

[36] Similarly, the losses pleaded by Westpac against Mr Nguy included the following particular:⁷

⁴ At [58].

⁵ At [59].

⁶ At [61] and [66].

⁷ At [65] and [67].

62. The breach of retainer has caused damage to Westpac.

Particulars

...

- (b) Westpac has lost the total amount of the Loan, being \$1,321,600, which was paid into the Jesse & Associates trust account and has not been returned to Westpac;

...

[37] The Judge accepted that Westpac's statement of claim is not determinative, but she found that New Dawn and Mr Chu had raised an arguable defence as to the status of the funds while in Mr Nguy's trust account and that this issue would have to be determined at trial.⁸

Submissions

[38] Mr Upton, for Westpac, submits that the loan monies were received by Mr Nguy as the appointed agent of New Dawn. The money in the trust account was held on trust for New Dawn alone. Following transfer, Westpac had no control over the money and its only rights were contractual as against New Dawn under the loan agreement and Mr Chu under his guarantee. Mr Nguy had an obligation to advise Westpac of any matters which might affect its security. This obligation extended to advising Westpac that settlement had not proceeded, and the mortgage could not be registered as a result. Mr Upton submits that Westpac's pleading at [61(d)] of its claim (quoted at [35] above) suggesting that Mr Nguy had a personal obligation to Westpac to return the money was erroneous, but this cannot affect the true position. As a matter of fact and law, he says there can be no doubt that the money in Mr Nguy's trust account was owned and controlled by New Dawn at the time it was stolen.

[39] Mr Dillon accepts that all relevant facts are before the Court and there is nothing material that could emerge at trial. He therefore accepts that this is an appropriate case for summary determination. We consider this to be an appropriate concession.

⁸ At [68] and [77].

[40] However, contrary to Westpac's claim, Mr Dillon contends that the monies were never advanced to New Dawn and accordingly there can be no repayment obligation. He submits that the funds in Mr Nguy's trust account were held by him as agent for Westpac subject to its instructions to apply the funds to settlement of the purchase or return the funds to the bank. Following receipt of the funds, he contends that Mr Nguy was not at liberty to apply them to some purpose other than that specified by Westpac even if he had been directed to do so by New Dawn or Mr Chu. In these circumstances, he says, New Dawn never had the loan monies in its power or control, never benefited from the loan advance and therefore has no liability to repay the bank. It follows that Mr Chu also has no liability. He says that Westpac's remedies are solely against Mr Nguy.

Assessment

[41] For the reasons that follow, we consider it is clear that Mr Nguy was acting as the solicitor and duly authorised agent of New Dawn in drawing down the loan advance on 7 February 2020, thereby triggering New Dawn and Mr Chu's repayment obligations in accordance with the terms of the loan and the guarantee. In our view, Westpac has satisfied the onus of showing that New Dawn and Mr Chu have no arguable defence to Westpac's claim in debt.

[42] Westpac agreed to make the advance for the purpose of enabling New Dawn to settle the purchase of the property. However, the decision as to drawdown rested solely with New Dawn. Subject to fulfilling the prerequisites to drawdown stipulated in the Loan Summary, New Dawn could choose when to draw down the loan and whether to do so in one lump sum or in instalments. It was entirely up to New Dawn to specify the account into which the monies were to be deposited.

[43] New Dawn and Mr Chu instructed Mr Nguy to act for them in connection with the loan and the purchase of the property. Mr Nguy was undoubtedly acting as their solicitor and authorised agent when he wrote to Westpac on 30 January 2020 directing that the full amount of the loan advance be transferred into his trust account. Equally, his subsequent direction to Westpac to pay the monies into his trust account on 7 February 2020 was also plainly given on behalf of New Dawn with its actual or

apparent authority. Having committed to making the loan on the agreed terms, Westpac was contractually obliged to comply with New Dawn's drawdown direction.

[44] The loan was fully drawn down by New Dawn from the moment Westpac transferred the funds to Mr Nguy's account, as directed. It will be recalled that the drawdown date is defined in the loan agreement as "the day any part of your Loan is actually first drawn down". The full amount of the loan having been accessed at the direction of New Dawn through its agent on 7 February 2020, there was no possibility of New Dawn making any further drawdown. In short, the event of drawdown of the loan by New Dawn was complete. The monies were advanced by Westpac to New Dawn on that date and this triggered New Dawn's and Mr Chu's obligations to make repayment in accordance with the terms of the loan agreement and guarantee.

[45] As noted, the contemporaneous records confirm that drawdown was effected on 7 February 2020. Westpac's "Loan Advance Advice" sent to Mr Nguy on that date confirms that it had deposited the "Net Amount advanced". Mr Nguy's trust account records for New Dawn record the receipt of the monies on 7 February 2020 as "loan drawdown" for the purchase of the property. The Choices Home Loan bank statement also confirms "Loan Drawdown" on 7 February 2020. Interest was paid by New Dawn to Westpac on the loan advance for over 12 months from that date, consistent with drawdown having occurred.

[46] This analysis is sufficient to dispose of the appeal because the primary issue is whether or not the monies were advanced by Westpac to New Dawn, in other words, whether the loan was drawn down. For the reasons given, we have no doubt it was. As between the lender and the borrower (and guarantor), the payment obligations thereafter were as set out in the loan agreement. There were indisputably various events of default as a result of which Westpac was entitled to demand repayment of the full amount of the loan plus interest. It follows that there is no answer to Westpac's claim in debt. However, given the concerns raised by Mr Dillon and accepted by the Judge regarding Mr Nguy's obligations to Westpac under the limited retainer, we briefly address this topic and its implications.

[47] Following payment by Westpac in accordance with New Dawn’s drawdown direction, the funds were held in Mr Nguy’s trust account for the benefit of his client New Dawn (not for Westpac). Mr Nguy was not at liberty to deal with these funds without New Dawn’s instruction. Mr Nguy’s obligation in this respect is implicit in his retainer by New Dawn and is confirmed by s 110(1) of the Lawyers and Conveyancers Act 2006:

Trust accounts

110 Obligation to pay money received into trust account at bank

- (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—
- (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—
 - (i) the practitioner; or
 - ...
 - (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[48] Westpac’s general instruction to Mr Nguy in the letter of instructions (quoted at [26] above) — to advise it and seek further instructions if he became aware of anything that could affect the validity or enforceability of the bank’s security prior to disbursing the loan monies — does not alter the fact that he held the monies for and on behalf of his client, New Dawn. Mr Nguy’s retainer with Westpac was to be completed by registering the mortgage and forwarding a post-registration search copy of the title and the registered mortgage. This instruction related to the period preceding mortgage registration and does no more than reflect the duty a solicitor has to disclose anything coming to their attention during the course of the retainer that may materially affect the client’s interest in relation to the transaction the subject of the retainer.⁹ This general instruction requiring disclosure and advice did not extend to giving Westpac the right to instruct Mr Nguy to return the money held in his trust account without New Dawn’s agreement. We do not consider this requirement of the limited retainer provides any support for New Dawn’s contention that the funds in Mr Nguy’s

⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 7.

trust account were held by him on trust for Westpac, or that it retained control of the funds pending settlement of the purchase or that Westpac retained control of the funds pending settlement of the purchase. Most importantly, it did not alter the fact of drawdown or affect the repayment obligations that arose as a consequence.

[49] Nor do we consider the “Loan Advance Advice” sent on 7 February 2020 (referred to at [30] above) assists New Dawn’s case. This document post-dates, and does not form part of, the retainer, the terms of which were fully detailed in Westpac’s 16 December 2019 letter of instructions and the accompanying “Solicitors Instructions” accepted by Mr Nguy. More importantly, Westpac’s request in this drawdown notice, addressing the position if settlement did not proceed, reflects the legal position and is entirely consistent with the funds having been advanced to New Dawn and held on trust by Mr Nguy for its benefit. The funds were advanced by Westpac and held by New Dawn (through its solicitor and authorised agent) solely for the purpose of the purchase. New Dawn was not entitled to use the money for any purpose other than that for which the loan was sought and approved. New Dawn therefore held the funds subject to a *Quistclose* trust.¹⁰ If the purpose of the advance failed for any reason, Westpac would have been entitled to demand New Dawn repay the loan monies under the resulting trust. Mr Nguy could be liable to Westpac for a breach of such a trust if he knowingly paid the monies away for another purpose. However, none of this means that Westpac controlled the funds pending settlement or that drawdown had not occurred.

Result

[50] The appeal is allowed.

[51] Summary judgment is entered for the Appellant against the First and Second Respondents for the amount due under the loan. Any dispute about quantum is to be determined by the High Court.

¹⁰ See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 569 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

[52] The Appellant is entitled to costs in the High Court. Any dispute about quantification is to be determined by the High Court.

[53] The First and Second Respondents must pay costs to the Appellant for a standard appeal on a band A basis and usual disbursements.

Solicitors:

Simpson Grierson, Auckland for Appellant

Queen City Law, Auckland for First and Second Respondents