

Construction Finance Documents, Risks and Structures under the Spotlight

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7 August 2005



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Development Funding in New Zealand

- Background
- Single Purpose Vehicles the norm
- Mezzanine Funders involved in most developments
- Guaranteed Maximum Price Contracts
- Cost Overruns

Timely Completion of Development

- Completion Delays common
- Impact of Building Act 2004
 - Issue of Code Compliance Certificate before settlement or possession
 - Contracting Out
 - Offence and Penalties
 - Minimising delay risk for developer
 - Satisfaction of sunset date conditions

Financier's Security

- Guarantees and Bonds
- Direct Agreements
- Westpac's Direct Payment Letter
 - Background to Letter
 - Form of Letter
 - Allocated Sum
 - Quantity Surveyor's Cost-to-Complete Certificates

Financier's Security (cont'd)

- Westpac's Direct Payment Letter (cont'd)
 - Bank's Ability to Withhold Payment – Withheld Payment Notice
 - Payment up to date of Withheld Payment Notice
 - Payment of Undrawn Allocated Sum on Practical Completion
 - Notification of Defaults
 - Acceptance of Letter by Major Contractors

Typical Securities

- Mortgage over Land
- General Security Agreement
- Specific Securities over Construction Contract, Presale Agreements and Agreements to Lease/Leases
- Impact of Contractual Remedies Act 1979 on Certain Securities

Typical Securities (cont'd)

*"11. **Assignees** - (1) Subject to this section, if a contract, or the benefit or burden of a contract, is assigned, the remedies of damages and cancellation shall, except to the extent that it is otherwise provided in the assigned contract, be enforceable by or against the assignee.*

(2) Except to the extent that it is otherwise agreed by the assignee or provided in the assigned contract, the assignee shall not be liable in damages, whether by way of set-off, counterclaim, or otherwise, in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the assignment."

Typical Securities (cont'd)

- No distinction between absolute assignments and assignments by way of security
- *Gray v UDC Finance Limited* [2000] 3 NZLR 192
- Risk for Financiers
- Possible Solution