

Banking & Financial Services Law Association Conference
2012

Intercreditor Terms - “After me you can be first”

Gerald Sare

Head of Strategic Business Services, Bank of New Zealand

Intercreditor Terms



- **“After me you can be first”** – the underlying premise. All interpretations and applications of the terms and conditions thereafter should achieve that.
- All designed to work around an enforcement scenario.
- The pivotal document when there are several competing claims on a security, especially where there is only one registered security charge held by a security Trustee and the only document that separates the claims and the behaviours is the Inter Creditor document.
- One of the most complicated documents giving rise to the most vexed disputes and arguments.
- If you are starting from second place you had better have a good understanding of why you elected to be there and your Risk & Reward.
- Simplicity is a core value and advantage. More often over-worked.

- What is fine today can become an inflexible nightmare in a future period.
- Banking 101 still applies e.g. what is the definition of “Date of Enforcement” (at which time a guarantee or other security change may kick in) ?
- Conflicts between underlying loan and transactional documents and inter-creditor documents. Poorly drafted invariably prove very costly.
- Any ambiguity creates opportunities for sub charge holder/s and challenges.
- Ambiguity creates time pressures that do not allow time to go to Court when immediate action may be required to preserve your security assets.
- When there are separate charges and the ranking is determined by the time of registration, an Inter-Creditor Deed (Priority) is still necessary to define behaviours such as when the subsequent charge holder can enforce etc.
- There is a danger that in good times there is a softening of covenants,

- Losses during the GFC were on lending done pre GFC.
- A change of parties, relationships and linkages can create havoc.
- Waterfall – clarity, clarity, clarity. The ability of the borrower to direct which facilities are repaid may not provide the fairest outcome when it comes to be exercised.
- The inability of one party/lender to provide certain facilities in different jurisdictions can become disadvantageous (e.g. foreign currency debt).
- These days you may have global parties and multi jurisdictions often involved.
- Check Intercreditor agreement carefully. Avoid side-letters and waterfalls that do not accord with security.
- Not for the inexperienced lender or solicitor.
- Human beings, lawyers, bankers, debtors, all will want to make changes.