

# JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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## ARTICLES

### **What is an “absolute” assignment? Further reflections on charges, “tacking” and marshalling – *Lee Aitken***

This article examines a number of important and interrelated matters that arise when taking any security interest. It focuses on recent cases in which the relevant issues set out below have been examined in detail. First, what is an “absolute” assignment of an interest? Secondly, assuming that the secured lender enjoys the benefits of an equitable charge, how is such a charge to be enforced as a matter of practice? Thirdly, if the secured lender enjoys the benefits of a number of securities, to what extent must he “marshall” them to prevent other creditors being unfairly treated in the realisation of the security. .... 93

### **The New Zealand Supreme Court speaks on bankers’ mandates and dishonest assistance – *Michael Lenihan***

Banks routinely undertake a wide range of activities in which the issue of dishonest assistance may arise. However, there is little judicial guidance on what might, or might not, be dishonest assistance in a given situation. This can place a bank in a position of difficulty if it has concerns about a transaction. The recent New Zealand Supreme Court and Court of Appeal decisions in *Westpac New Zealand Ltd v MAP & Assocs Ltd* are of interest. Westpac defended a claim for breach of mandate by pleading that following the customer’s instructions may have subsequently exposed it to liability for dishonest assistance. Both the Court of Appeal and Supreme Court agreed with Westpac that the transaction in question was indeed suspicious. The defence pleaded by Westpac failed, however. Despite this, the decisions of both courts provide valuable guidance for banks where it has suspicions about a proposed transaction. .... 104

### **Twinsectra versus Elizebethan Theatre: Comments on the nature of the Quistclose trust – *Andrew Pingree***

The circumstances in which Quistclose trusts have been found or argued for have been treated in different ways by different courts. This article poses and answers certain questions comparing the formulation in two different cases. It is found that existence of mutual intention is important, but whether a contract needs to exist is questionable. Further investigation is conducted into whether a direct relationship between settlor and trustee is needed and some suggestion is found that it is not. The contradiction as to whether the Quistclose trust is a resulting trust or an express trust is examined and it is found that a dual trust is necessary, and that the Elizabethan formulation is acceptable and the reasoning behind the Twinsectra formulation is flawed. Grounds are identified that show scenarios that may be looked upon as Quistclose trusts are best dealt with flexibly and not under one strict formulation. Both formulations are consistent with the beneficiary principle. Mutuality of intention is identified as a significant aspect that touches upon the circumstances of origination. .... 119

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