IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 794/83

BETWEEN BROADLANDS FINANCE LIMITED a duly incorporated company carrying on business as Moneylenders and having its registered office at Auckland

Plaintiff

AND THE MAYOR, COUNCILLORS AND CITIZENS OF THE BOROUGH OF HENDERSON a Corporation vested under the Municipal Corporations Act 1955

Defendant

Hearing: 8th August, 1984

Counsel: Grove for Plaintiff
Bryers for Defendant

Judgment: 24 AUG 1984

JUDGMENT OF SINCLAIR, J.

This action was commenced by the Plaintiff to seek a declaration directing the Defendant to withdraw from registration a certificate purportedly issued pursuant to S.643 of the Local Government Act 1974 and in respect of land situated at Henderson being all of the land contained in Certificate of Title Volume 1030, Folio 194, Auckland Registry. The certificate also affects two other pieces of land which are adjacent to the property just referred to and because of the Plaintiff's position as mortgagee it also sought the cancellation of the certificate in respect of the other two pieces of land being those contained in Certificate of Title Volume 1536 Folio 47 North Auckland Registry and Certificate

of Title Volume 1536, Folio 61, North Auckland Registry.

The Defendant by its defence contended, inter alia, that a building permit had been granted to the registered proprietor of the above pieces of land and that as a condition of the grant of a building permit a term was imposed that all the above three titles should be amalgamated into one title and that the certificate which had been issued under the provisions of S. 643 of the Local Government Act 1974 was necessary to give effect to the condition imposed in relation to the amalgamation of the titles.

The Council also counter-claimed maintaining that what had been done by it at the time of the grant of the building permit was in the exercise of the Council's powers pursuant to the provisions of the Town and Country Planning Act 1977 and that, as the Council was required to ensure that its district scheme was adhered to, an injunction ought to be granted to prevent the Plaintiff from exercising any right of sale it might have in respect of the land contained in Certificate of Title Volume 1030, Folio 194.

It is necessary to consider the background of this matter to properly appreciate the situation.

The three pieces of land belong to the Congregational Christian Church of Samoa, Henderson Trust Board. It desired to erect on two of the pieces of land, namely part Lot 6 and part Lot 7, on D.P. 19956, a church. Initially it did not own part Lot 5 which is that land which is in Certificate of Title Volume 1030, Folio 194, and which hereafter will be referred to as the house property. The other two pieces of

land, namely part Lot 6 and part Lot 7 will be referred to as the church property.

As a result of overtures made to the Plaintiff in 1981 it advanced to the Church moneys by way of mortgage, the amount involved being $150,000. That loan was secured over the house property by way of first mortgage and over the Church property by way of third mortgage, there already being two mortgages on the Church property, one to the Commercial Bank of Australia and the other to C.B.A. Finance. Both of those mortgages had been registered in November, 1980. At the time when the Plaintiff's mortgage was registered against the house property that particular area of land was unencumbered.

The total amount secured under the mortgages over the Church property was in the region of $600,000 and as no payments have been made under any of the mortgages for some considerable time, as at the date of the hearing of this action there was something in excess of $800,000 owed to the three mortgagees. It was the Plaintiff's desire to be able to exercise its power of sale in respect of the land and the house property, leaving the other mortgagees to deal with the Church property in due course.

Earlier there had been proceedings between the Church and the present Plaintiff wherein it had been alleged that the mortgage which had been executed on behalf of the Church Trust Board had not been validly executed, but by a decision dated 17th April, 1984 Barker, J. upheld the validity of the present Plaintiff's mortgage.

An examination of the documents which came in with the

evidence disclosed that in 1980 the Church Trust Board applied to build its church on part Lot 6 and part Lot 7, but that application was declined for a number of reasons, one of which was that there was insufficient on site parking. At or about the time of that Council decision the Church Trust Board acquired the house property and a further application was made to the Council for permission to build the proposed church; it was intended to use the house property in particular for parking and to also use it as a manse for the occupation of the minister.

That application was duly considered by the Henderson Borough Council and on the 25th February, 1981 it gave consent to the construction of the church, such consent being necessary as the area was zoned Residential 'A' and the Trust Board's application was in fact an application for a specified departure.

A number of conditions were imposed when that consent was granted, one of which was that all three titles were to be amalgamated into one title.

The building permit itself was issued on the 1st April, 1981 and then building began. There was no notation on any of the titles which recorded the fact that the Defendant required the three titles to be amalgamated, nor at that time was any step taken to register a certificate against the land pursuant to the provisions of S.643 of the Local Government Act 1974. In due course the solicitor for the Trust Board made application to Fay Richwhite & Co. Ltd for a loan of $150,000 to enable the complection of the church. He submitted a valuation from Scholes Oakley Ltd and the valuation shows that it was signed by Mr M. G. Winter, a Registered Valuer, and in

the absence of any evidence to the contrary one must accept that he was a valuer of good repute.

The evidence tendered on behalf of the Plaintiff was such that I am satisfied that at the time the loan was made, or at least at the time the negotiations for it were entered into, that valuation was in the hands of the Plaintiff. Indeed, Mr Bogan, the Credit Manager for the Plaintiff Company, was very frank when giving evidence in that he stated that when a loan such as this was being made a search of the title would be carried out but that nobody from his office would attend upon the Local Authority to peruse the Town Planning records. What would be required would be a valuation to be furnished in support of the application for a loan and his staff would rely upon the information therein contained. If any essential information happened to be missing I am prepared to accept that Mr Bogan would have had that information supplied by the intending borrowers' advisers.

When one has a look at the valuation it will be seen immediately that the valuer has divided the three properties into two segments, one which he has referred to as the house property in Lincoln Road, and the second one as the church property. The house property he correctly describes as being part Lot 5 and the church property he has correctly described as being part Lot 6 and part Lot 7.

So far as the zoning of the property is concerned the valuation reads as follows:

> "The properties have a Residential 'A' Zone. However, the Church property is the result of the granting of a specified departure which is subject to certain conditions including the amalgamation of the titles. The titles have yet to be so amalgamated."

I comment that the valuation is dated 31st July, 1981 which is four months after the issue of the building permit and some five months after the Town Planning consent had been granted by the Defendant. When one reads the extract I have just quoted from the valuation report, the natural conclusion is that the amalgamation relates to the two pieces of land on which the church was constructed and that the house property was not included in the amalgamation requirement. As there was nothing on the title of the house property relating to amalgamation that would reinforce an intending lender's belief that that property was not within the amalgamation requirement.

A decision was made by the Plaintiff to grant the loan and the instructions which were given by the Plaintiff to its solicitors was to prepare documents in relation to the loan of $150,000 with the security being a registered third mortgage over the Church property and a registered first mortgage over the house property. Those instructions were given on the 10th September, 1981.

There matters remained after completion of the loan documents until some time the following year when it became apparent that the Trust Board was not in a position to meet its financial commitments under the mortgage and steps were put in train by the present Plaintiff to dispose, at least, of the house property pursuant to the powers given to the mortgagee under the mortgage. However, the Trust Board changed its solicitor and as a result the new solicitors wrote to the Henderson Borough Council pressing it to issue a certificate pursuant to the provisions of S.643 of the Local Government Act 1974. The Council complied,

executing that certificate on the 19th October, 1982 and it was subsequently registered against the three titles concerned on the 23rd December, 1982. The Plaintiff protested as it now became apparent that if the certificate remained it appeared that its mortgage which had hitherto been a first mortgage over the house property could be relegated to a third mortgage as that mortgage was the last in point of time to be registered against the properties involved.

When the solicitors for the Plaintiff communicated with the Council a reply was received from the Council's solicitors who at that time appeared to be doubtful as to whether or not the Council could rely upon the certificate issued pursuant to S.643 of the Local Government Act 1974, a view which I might say now was perfectly justified on the facts as they have been disclosed. Because no resolution of the matter could be arrived at by all concerned, the present proceedings have been brought.

Firstly it is necessary to consider S.643 of the Local Government Act, 1974. It is a fairly long section and subsections (1), (2) and (3) are all that are necessary for the moment to consider. They read as follows:

> "(1) Where application is made to the council for a permit under bylaws made pursuant to section 684 of this Act authorising the erection of a building over land of the applicatn comprised or partly comprised of 2 or more allotments of an existing subdivision or existing subdivisions (whether comprised in the same certificate of title or not), the council may, as a condition of the grant of a permit, require that, except with the prior consent of the council, any specified one or more of those allotments shall not be transferred or leased except in conjunction with any specified other or others of those allotments.

> "(2) Every such condition shall be set out in a certificate authenticated by the council and signed by the owner, and shall be lodged with the District Land Registrar, who shall make an entry on the register copy of each certificate of title for any allotment (or part thereof) to which the condition applies to the effect that it is subject to the condition specified in that certificate.
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> (3) The council may refuse to grant the permit until it is satisfied that the District Land Registrar has made on the certificates of title the entry required to be made thereon by subsection (2) of this section."

It will be seen immediately that the power to use this particular provision in the Statute only comes about when an application for a permit under the bylaws is sought and where a building is to be erected over land of the Applicant comprised or partly comprised of two or more allotments of an existing subdivision.

Mr Bryers asked me to interpret the word "over" as being equivalent to "concerning". Such an interpretation would then have enabled Mr Bryers to argue that the church building, whilst built only over part Lot 6 and part Lot 7, was concerned with part Lot 5 to enable it to provide the parking which was necessary for the specified departure to be granted and to enable the development to take place. However, I am of the view that such an interpretation ought not to be applied when one has regard to the consequences of this legislation, and that the true interpretation to be applied to the word "over" is to treat it as being equivalent to "on". By adopting that interpretation it restricts the Council's power under this particular provision to the actual land on which the building is erected.

Such an interpretation will enable a Local Authority to

act under this section of the statute where a building is built on more than one allotment and it will prevent the effects of subsection (5) of the section from becoming oppressive or even draconian. Subsection (5) reads as follows:

> "(5) Where an entry specified in subsection (2) of this section is made on 2 or more certificates of title and any of the land less than the whole of the land comprised in all those certificates of title is at the time of the making of that entry independently subject to any mortgage, charge, or lien, the whole of the land comprised in all those certificates of title shall be deemed to be subject to that mortgage, charge, or lien, as if it had been registered against the land at the time of the making of that entry:
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> Provided that if any of that land is already subject to a registered mortgage, charge, or lien, that mortgage, charge, or lien shall have priority over the mortgage, charge, or lien extended over that land by the foregoing provisions of this subsection."

Thus once a certificate has been issued pursuant to S.643 in certain circumstances the rights of mortgagees and their priorities in relation to their securities can be altered. Therefore, in my view it is necessary to interpret this legislation strictly so as to interfere with rights as little as possible. This particular case illustrates what could occur to the present Plaintiff if the certificate is upheld in that its first mortgage over the house property could well be relegated to the position of a third mortgage. This highlights the necessity, in my view, for a strict interpretation of S.643 so that in the instant case it would not be competent for the Council to have included the house property within the ambit of the certificate as no part of the church building was erected upon it.

However, returning to the interpretation of subsection (1) of S.643, one finds that the Council's power may be exercised as a condition of the grant of a permit. In the instant case the use of S.643 was not even considered by the Council when it decided to grant the application in February, 1981 and in its letter of the 9th March, 1981 transmitting its decision to the Trust Board's solicitor and others, no reference is made by the Council to the Local Government Act 1974. It was not until October 1982, when the Trust Board changed its solicitors, that the new solicitors requested the Council to use this particular provision. Once the Council did decide to exercise this particular power it then did carry on as is authorised by subsection (2) to lodge the certificate with the District Land Registrar with the result that it became noted on the three titles. In fact subsection (3) highlights the situation somewhat in that the Council is empowered to refuse to grant the permit until such time as it is satisfied that the District Land Registrar has registered the certificate as against each of the titles.

If, of course, resort had been had to this particular legislation in February 1981, the present situation would never have arisen. However, on the facts I am satisfied that the Council has wrongly purported to exercise its powers under S.643 of the Local Government Act 1974 as it never made the grant of the permit in respect of the building of the church subject to the provisions of S.643.

Accordingly, in my view the Plaintiff is entitled to the declaration it seeks, namely an order directing the Defendant to withdraw the registration of the certificate under the

above provision of the Local Government Act 1974 and as against each of the three titles to which it refers. To simplify matters it may be more appropriate if this Court orders that the certificate be and is hereby cancelled.

It is now necessary to turn to the Defendant's counter-claim.

On the evidence which was tendered at the hearing I am satisfied that the Plaintiff, at the time it made its advance to the Trust Board, had no knowledge of the requirement of the Defendant that the three titles were to be amalgamated. It was Mr Bryers' submission that it was established practice, when dealings with a property were in contemplation, for enquiries to be made into matters which fell within the ambit of the Town Planning legislation. He referred to Emmet on Title, 17th Edition, which at page 842 states as follows:

> "Inquiries by persons proposing to lend: The essential requirement of such a person is that he shall have adequate security. Consequently, full enquiries should be made on planning matters, the intended mortgagee being in a position to refuse to lend the money if he is not satisfied with any answer given. The questions on planning matters to be answered by a solicitor making a report to a bank on title are specified in the Law Society's Gazette Vol. 53, P.79."

While Mr Grove was prepared to accept that on behalf of a purchaser it was incumbent on a solicitor to make enquiries into planning matters, he did not accept that that was the situation in New Zealand so far as a solicitor for a mortgagee was concerned, nor did he consider it was necessary for the mortgagee himself to check on planning matters. Certainly no evidence was given before me as to the practice in New Zealand, but I repeat what I have earlier set forth - that I am certain

the Plaintiff did have in its possession the Valuer's report and that it accepted what was therein contained as being factually correct.

In those circumstances it seems to me to have been reasonable for the Plaintiff to have accepted that at the time it made its loan the requirement as to amalgamation did not affect the house property. Thus it seems to me that the Plaintiff's title as mortgagee is by reason of the provisions of the Land Transfer Act 1952 indefeasible. That, I am satisfied, is in accord with the decision in Frazer v. Walker (1967) N.Z.L.R. 1069 . There is also a very helpful comment in a decision of Barker, J. of the 17th April, 1984 in The Congregational Christian Church of Samoa Henderson Trust Board v. Broadlands Finance Limited, A.820/82. I quote from page 3 of that decision:

> "Prior to the determination of Frazer v. Walker by the Privy Council, there had been considerable debate amongst legal writers on the Torrens system as to whether the principle should be one of deferred, as opposed to immediate, indefeasibility. The Privy Council ruled in favour of immediate indefeasibility. This concept confers on any bona fide registered proprietor or registered mortgagee (such as the defendant) all the benefits, rights and interests consequent upon registration, irrespective of any irregularity or error leading to the registration of the instrument, falling short of fraud on the part of the person seeking registration. This is clear from the advice of the Board delivered by Lord Wilberforce at p.1075; he pointed out that registration, once effected, must attract the consequences which the Act attaches to registration whether that registration was regular or otherwise. In other words, the fact of registration determines the rights and interests of the parties in relation to the land.
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> "It seems to me clear from a consideration of Frazer v. Walker itself that there can be no ground for distinguishing the present case in principle from Frazer v. Walker; the indefeasibility of the defendant's title as mortgagee is paramount. "

However, Mr Bryers, while accepting the indefeasibility rule, relies on the fact that there are certain exceptions to that rule and he refers to Land Law, Volume 1, Hinde McMorland & Sim, Para. 2.065. It is certainly true that there are certain exceptions to the indefeasibility rule, one example of course being recorded in Miller v. Minister of Mines (1963) N.Z.L.R. 560, but that is an illustration of a statute itself containing its own code in relation to mining licences. This is made very evident from the following quotation from the decision of the Privy Council at page 569:

> "The Mining Act 1926 provides its own separate and independent code for the registration of mining licences. They are granted by the Warden under s.58 and registered under s.180. A transfer of a mining privilege must be registered under s.179 and the effect of registration is provided for under s.185. If the licence is not registrable under the Land Transfer Act and the indefeasibility provisions of that Act are to override the grant, the licence would be of no value to the licensee except as against the original owner of the lands. Upon a transfer of the land the successor would be entitled in virtue of the provisions of the Land Transfer Act to determine the mining privilege. Their Lordships do not consider that this can have been the intention of the Legislature in enacting the compendious code for mining privileges in the Mining Act which are to exist for at least 42 years.
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> "Their Lordships were referred to cases in New Zealand where statutory rights over land were held to exist despite the fact that they did not appear on the register. It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is proper implication from the terms of the relative statute. "

Reference was also made to the decision in Paparoa County Council v. District Land Registrar (1968) N.Z.L.R. 1017. However, with respect it seems to me that that case does not really assist Mr Bryers at all because it was a case where the Local Authority had refused to allow a subdivision of land and despite

the Council's ruling the owner proceeded to lodge a plan of subdivision in the Land Registry office at Christchurch. The District Land Registrar entered his caveat on the title to the land against dealings with it in accordance with the subdivisional plan lodged on the ground that the Council had prohibited the proposed subdivision as being a detrimental work. However, on further consideration he withdrew his caveat and the action was brought to test the validity of that decision. It was held that in the circumstances it would be an improper dealing to sell or otherwise deal with individual lots in a prohibited subdivision or to attempt to register any instrument pursuant to such subdivision and that the Registrar therefore had power under S.211(d) to enter a caveat to prevent such actions. But that was a case where the District Land Registrar had actual notice of the Council's decision and it is not a case involving indefeasibility at all.

A further decision referred to by Mr Bryers was that in Wydgee Pastoral Company Pty Ltd v. Registrar of Titles (1963) W.A.R. 176. The effect of that decision was that the Registrar of Titles was justified in refusing to register a document when he had notice of facts which, if correct, would mean that the document was to achieve a purpose which on the face of the conditions imposed was made unlawful by the terms of the relevant Town Planning legislation. Again, that was a case where the Registrar had actual notice of the matters in issue.

It was Mr Bryer's contention that unless there was some obligation on persons such as the Plaintiff in the present case to check on the Town Planning requirements in relation to any given piece of land, the whole effect of the Town

Planning legislation could be defeated. However, I am of the view that that is over stating the position because it must be remembered that there is a world of difference between the title to a piece of land and the use to which that land may be put. The use to which the land can be put in accordance with the appropriate Town Planning requirements will not in any way affect the title to the land unless there is some specific requirement of the Local Authority which may affect the title. For example, amalgamation or the granting of a particular type of easement. But where a Local Authority makes a decision which may affect the title to a piece of land it can then acquaint the Registrar of that fact and request him to lodge his own caveat pursuant to S.211 of the Land Transfer Act 1952.

In any event, in the instant case the Council at all times had control of the situation if it had chosen to use that control, namely it could have refused to have issued the permit until such time as the titles had in fact been amalgamated. It failed to do so with the result that the present debacle has resulted.

There is nothing in the Town and Country Planning Act 1977 which in any way overrides the indefeasibility of title which is acquired by a person either as owner or as mortgagee of a piece of land and there is, in my view, no impediment in the way of the present Plaintiff from exercising its powers of sale under the mortgage. As was pointed out during the hearing, this may well result in the balance of the property becoming a non-conforming use, but that results merely from the failure to ensure that the titles were amalgamated before the permit was issued or, alternatively, it arises by reason of the fact that the Local Authority did not attempt to have

the District Land Registrar lodge his caveat against the titles under consideration.

In all the circumstances I am of the view that the Defendant is not entitled to the injunction which it seeks and there must therefore be judgment for the Plaintiff on the counter claim.

The Plaintiff having succeeded, it is entitled to costs which I fix at $800 and disbursements.

B. Davis J.

SOLICITORS:

Anthony Grove & Darlow, Auckland for Plaintiff
Martelli, McKegg, Wells & Cormack, Auckland for Defendant