

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.58/83

BETWEEN DEVELOPMENT FINANCE
 CORPORATION OF NEW ZEALAND

Plaintiff

A N D BANK OF NEW ZEALAND

First Defendant

A N D RONALDSON AVERILL
 SOLICITORS NOMINEES COMPANY
 LIMITED

Second Defendant

A N D HILLIONORE JEANETTE YATES

Third Defendant

A N D JOHN CAMPBELL CONSTRUCTION
 LIMITED

Fourth Defendant

A N D ANDREW CARRINGTON YATES

Fifth Defendant

A N D IAN GILTRAP LIMITED

Sixth Defendant

Hearing: 7 December 1984

Counsel: C.B. Atkinson, Q.C. for Plaintiff
 A.J. Forbes for First Defendant
 P.T. Harman for Second Defendant

Judgment: 19 DEC 1984

JUDGMENT OF HOLLAND, J.

The plaintiff moves for further directions pursuant to leave reserved following the judgment of this Court delivered on 20 June 1983. It is unnecessary to repeat the facts and conclusions set out in that judgment.

The judgment is subject to appeal but following its delivery the plaintiff has paid to the first defendant the sum of \$202,025, being \$170,000 plus twelve months interest thereon and the costs charges and expenses incurred by the Bank in enforcing its securities. A further sum of \$39,359.81 has been paid by the plaintiff to the first defendant under protest and without prejudice being interest on \$202,025 and a service charge incurred on the mortgage for the period from 29 September 1982 to 19 October 1983. The former date is the nominal date on which, on applying the judgment the parties agree that the plaintiff as purchaser at the mortgagee sale conducted by it was liable to pay the purchase money and the latter date is the day on which the plaintiff tendered the full sum of \$202,025 plus \$39,359.81 to the first defendant.

The dispute is between two mortgagees of land following the exercise of the power of sale of the land by the plaintiff as second mortgagee. In applying the judgment it follows that a deed between the plaintiff and the first defendant applies and provides that in those circumstances the amount secured by the first defendant under its mortgage being a mortgage prior to the mortgage in respect of which the power of sale was executed is reduced to \$170,000 plus twelve months interest and costs and charges as previously referred to. The sale took place on 28 July 1982. The plaintiff purchased the property through an agent for \$300,000. The property was offered for sale subject to the first

mortgage in favour of the first defendant to the extent that that mortgage had priority over the plaintiff's mortgage. The actual amount owing under the mortgage to the Bank at that stage was \$360,953.85 including more than 12 months' interest in arrears. The amount owing to the plaintiff on its mortgage was approximately \$220,000. The parties have concluded from the judgment that the date on which the purchaser of the property including the plaintiff was required under the contract of sale to complete was 29 September 1982.

No moneys passed hands on that date. An originating summons seeking declarations as to the parties' rights and obligations was heard on 17, 18 and 19 May 1983 and judgment delivered on 20 June 1983. The judgment was sealed in August 1983.

It is common ground that the first defendant would not release its security over the land except on payment to it of interest at the rate prescribed in the mortgage on the figure of \$202,025.00 from 29 September 1982 (the nominal settlement date) until 19 October 1983. On this latter date the plaintiff tendered payment of the amount claimed and no interest is claimed from that date on, although payment was not actually made until a short while later.

In brief the issue is whether the limitation of the amount in respect of which the first defendant has priority by way of security over the plaintiff's security can be enforced by the plaintiff as purchaser at the mortgagee sale against the first defendant so as to prevent interest accruing from the date of sale to the date of payment.

This land was clearly sold subject to the mortgage to the first defendant to some extent. Section 104(1) of the Property Law Act 1952 provides:-

"Where a person acquires any land by conveyance or transfer subject to any mortgage, the person acquiring the land shall, unless a contrary intention appears in the mortgage, and irrespective of whether he has signed the conveyance or transfer, become personally liable to the mortgagee for the payment of all principal money and interest secured by the mortgage, and shall also become personally liable to the mortgagee for the fulfilment and observance of any other covenant or agreement contained or implied in the mortgage as if he were an original mortgagor of the land and had covenanted with the mortgagee for such payment as aforesaid and for the fulfilment and observance of such covenants and agreements as aforesaid, and the mortgagee shall have remedy directly against that person accordingly, but nothing herein shall extinguish the liability of any original mortgagor under the mortgage or the liability of any intermediate transferee of the land acquired by him subject to the mortgage aforesaid."

In this case the sale was subject only to that part of the mortgage securing \$170,000 and twelve months' interest and charges, or \$202,025. It is not submitted that the purchaser is liable at the date of purchase for more than that sum. The question that arises for consideration is whether the purchaser is liable under the mortgage for interest and charges on \$202,025 from the date of purchase to the date of payment or tender.

Counsel for the plaintiff submits that because of the terms of the deed between the plaintiff and the first defendant as interpreted by the judgment there is no obligation on the plaintiff as purchaser to pay more than the sum due at the date of purchase no matter when payment is made. It is submitted that the first

defendant, if unpaid, could have made a demand for payment and exercised its power of sale if payment were not made. Such a submission gives little effect to the provisions of section 104 of the Property Law Act. But it is no doubt possible for the parties by contract so to regulate their position that those provisions do not apply.

The terms of the deed are set out in pages 8 and 9 of the judgment. The deed itself does no more than regulate the priorities between the plaintiff and the first defendant as mortgagees. The obligation to fulfil and observe the covenants and agreements contained or implied in the mortgage after the date for completion of the sale under the Property Law Act arises by virtue of the plaintiff being purchaser. Had some purchaser other than the plaintiff purchased the land at the mortgagee sale it could hardly be argued that the terms of the deed were such as would convey a benefit to a purchaser. There is nothing in the deed to indicate that it was in the contemplation of the parties that the provisions would apply to a purchaser of the land at a mortgagee sale whether the purchaser were the plaintiff or not. It accordingly cannot be argued that the provisions of the deed operate in favour of the plaintiff once it became the purchaser of the land. The deed merely regulates priorities between mortgagees.

It has been submitted that there is some injustice in this conclusion. Counsel for the plaintiff submitted with some force that the delays in settlement had arisen because of the intransigent attitude of the first defendant which had been held to be wrong. In this case there was undoubtedly intransigence on both sides. The remedy available to the plaintiff was to have tendered

the full amount which it alleged to be owing to the first defendant. Had it done so it may well have been relieved of its obligation to pay interest. But despite the intransigence no such tender was made until October 1983.

It was common ground at the hearing that the claim for the annual charge under the mortgage of \$850 stood or fell with the argument over interest. It follows that the total amount paid by the plaintiff to the first defendant was properly payable by it and is the property of the first defendant. The formal motion to the Court seeks direction on the following questions:-

- "(1) as to whether or not the Defendant is entitled as against the Plaintiff to interest on the amount secured by mortgage 251470/4 as reduced by the Judgment of this Court Clause 1(b) in addition to the interest already provided therein in the sum of \$38,889.81 or any lesser sum; and
- (2) directing whether a commitment fee of \$850.00 due to the First Defendant by the Fifth Defendant is recoverable pursuant to clause 1(b) and directing that the costs of the Plaintiff of and incidental to this application and the order thereon be fixed and be the costs of the Plaintiff".

The answer to question (1) is that the first defendant is entitled in the circumstances to recover from the plaintiff as purchaser the sum of \$38,889.81. The answer to the second question is that the commitment fee of \$850 due to the first defendant by the fifth defendant is recoverable from the plaintiff as purchaser of the land.

It is appropriate that costs should follow the event. The costs however should not be as for the costs of an action. The hearing was a step taken in the proceedings commenced by the originating summons.

There will be an order that the plaintiff pay to the first defendant of and incidental to this motion and and the order made thereon the sum of \$875 by way of costs together with disbursements and witnesses expenses, if any, to be fixed by the Registrar. Counsel for the second defendant appeared at the hearing but took no part in the argument. There will be no order for costs in respect of the second defendant.

W. H. Harman

Solicitors

Weston Ward & Lascelles, by their agents Stone & Co, Wellington,
for Plaintiff
Duncan Cotterill & Co, Christchurch, by their agents Buddle Findlay
Wellington, for First Defendant
T.D. Harman & Son, Christchurch, for Second Defendant