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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 9/87

BETWEEN JUDITH MARY LEGGETT

Plaintiff

A N D DAVID FRANCIS DONOVAN

Defendant

Hearing: 10 February 1987

Counsel: Hindle for Plaintiff
Finnigan for Defendant

Judgment: 26th February 1987

JUDGMENT OF THORP J

The Plaintiff's case is that she is a bona fide purchaser for value of the Clevedon farm property owned by Mr and Mrs Donovan, the Defendants, having entered into and completed a contract of purchase of the property from Marac Hong Kong Limited, (Marac) in which that company purported to be exercising power of sale under its registered first mortgage over the Defendant's property.

The contract was dated 18 December 1986, and provided for settlement and possession on 23 December. Settlement was in fact completed on 24 December 1986. It was common ground that the Plaintiff then received a memorandum of transfer, purportedly in exercise of the power of sale, and the relevant certificates of title, and lodged these in the Land Transfer Office at Auckland, but that at the time this application was argued no memorials completing the registration had been entered by the District Land Registrar.

In the present proceedings Mrs Leggett seeks orders:

(a) For possession of the Clevedon property;

(b) For an enquiry into the losses suffered by her as a result of the Defendants' refusal to deliver up possession of the property on 24 December last; and

(c) For costs.

The Defendants have themselves commenced an action (CP 18/87) against Mrs Leggett as First Defendant, a Mr Farmer, the person who negotiated the purchase from Marac and is said both by Mrs Leggett and by Mr Farmer to have done so as her agent, as Second Defendant, and Marac as Third Defendant. It was agreed that all affidavits filed in both actions should be read on this application.

It is also relevant to note that the mortgage in question secures the Donovans' guarantee of a loan of $US320,000, which for some reason was made to the company D.F. Donovan Limited, of which Mr and Mrs Donovan are directors and shareholders, although the funds were ultimately used by Mr and Mrs Donovan in the purchase in their names of the farm which is the security for the mortgage. That farm, which was purchased in October 1981 for $1.16m, was financed as to part by the first mortgage advance already mentioned and as to a further $464,000 by mortgages back to the vendors.

Part of the difficulty I have experienced with this matter stems from the Donovans' tendency to talk about the loan as if it were one made to them personally, and from the awkwardness of the security documents. I have considered whether, although the original loan offer was clearly to D.F. Donovan Limited, those arrangements may have been varied so that the loan was indeed made to Mr and Mrs Donovan personally. No such re-arrangement is suggested in the the affidavits filed by Mr Flaus, who acted both as solicitor and N.Z. attorney of the mortgagee, but it would have explained why:

(i) Although the loan proposal stated that the monies were advanced to enable the company to purchase the property, it was purchased in Mr and Mrs Donovan's names: and

(ii) The mortgage over the farm was drawn in a form more appropriate to secure primary liability than to secure a guarantee.

However the fact that the mortgage is declared to be given in consideration (inter alia) of the mortgagee providing finance "pursuant to a loan offer dated 5 February 1982", which is clearly a reference to the offer by Marac to make a loan to the company which was to be supported by the guarantees of Mr and Mrs Donovan, and the fact that all subsequent correspondence, at least until the question of exercising mortgagees' power arose, was addressed to the company, satisfy me that Mr Finnigan's contention that the loan was to the company and that the Donovans' were guarantors of that loan must be correct.

Farm income was insufficient to meet loan commitments as they fell due, and in 1984 both first and second mortgagees sent out section 92 Notices. Marac's notice given in November 1984 demanding payment of $US8,000 for an instalment of principal and "interest of Swiss Francs 25,274.60", seems to have been satisfied during the next few months. That section 92 Notice, which was of course addressed to the Donovans, was followed by a letter to D.F. Donovan Ltd advising that "our loan in your favour is in default as defined in Clause 13 of our loan offer", and that Marac had instructed its solicitor to commence action to recover "all monies due to us". The letter then confirmed "the amount due to us following the default", claiming the whole outstanding capital and interest in a sum stated in Swiss francs.

A second Section 92 Notice was given by Marac to Mr and Mrs Donovan in August 1986 in the following terms:

"(a) You have failed to pay principal repayments being payments in swiss francs equivalent to the followng U.S. dollar amounts on the following dates;
(i) 8,000 United States Dollars on 15 May 1985
(ii) 16,000 United States Dollars on 15 November 1985
(iii) 16,000 United States Dollars on 15 May 1985

(b) You have failed to pay accrued interest due on 30 June 1986 amounting to 101,745.12 Swiss Francs.

(c) You have failed to provide copies of the balance sheets and profit and loss accounts for yourself and D.F. Donovan Limited within 10 days of the end of the annual accounting periods.

The total amount now in arrears is a sum in swiss francs of US$40,000 and CHF 101,745.2

REMEDY:

You are hereby required to remedy the said monetary defaults by payment in swiss francs of the aggregate of:

(a) Such amount in swiss francs as is equivalent on the date of payment to 40,000 United States Dollars, and,
(b) 101,745.12 swiss francs.

You are hereby required to remedy the default in providing financial information by now providing the information required."

A mortgagee's auction, based on the notice give by the second mortgagee, was held on 3 September 1986, with $916,000 reserve. There were no bidders.

Strenuous efforts were made by the Donovans t extricate themselves from their financial difficulties. Thes included preparation of subdivisional plans for the sale of th property in several lots, but difficulty was experienced bot in obtaining firm approvals from the local body concerned an firm and unconditional agreements from purchasers.

On 20 November 1986 a deed, which was called "the Moritorium Deed" was completed by Mr and Mrs Donovan, Marac Hong Kong Limited, and Mrs B.D. Wilcox, the surviving vendor/mortgagee.

The deed recited that both Marac and Mrs Wilcox had issued notices under Section 92, that they had expired, and that the parties had come to an agreement as to the manner in which the mortgaged property should be disposed of. It provided that one section should be put up to auction that day and the remainder of the property withdrawn from the auction. The Donovans were given until 9 December 1986 to provide confirmation of payments available from purchasers and of local body consent to the proposed subdivision. The deed further provided that it was not to constitute a waiver of powers of sale under the section 92 Notices but merely suspend their operation for the period and on the conditions specified. If those conditions were not met the deed would cease to have any effect, and Marac and Mrs Wilcox be free to exercise their respective powers of sale as if the deed had not been entered into.

The best offer obtained at auction for the lot which was put up for sale was $283,000. It was withdrawn from sale, and later sold privately for $360,000.

The Donovans were unable to meet the conditions of the moritorium deed and on 18 December 1986 Marac entered into the agreement for sale on which Mrs Leggett relies, the purchase price being $735,000. She then proceeded to enter into a contract with a sharemilker to carry on town milk supply from the property. He was refused entry to the property by the Donovans, who maintained that the sale was not a lawful sale by the mortgagee in that they had been "prevented from redeeming the mortgage", repeated enquiries by them and their solicitors for a statement of the precise amount owing and the way this was made up, (the mortgage being one which involved payment in foreign currency and possible switching in currency

between different overseas countries), not having been complied with. They also alleged that fraudulent collusion between Marac, Mr Farmer and Mrs Leggett had resulted in the sale of the property to Mrs Leggett at an undervalue.

The Donovans' refusal to deliver up possession created a crisis, as the sharemilker and his herd had no satisfactory alternative resting place. Interim injunction proceedings brought by Mrs Leggett were heard on 15 January, at which time I concluded that the papers did not disclose any credible evidence of fraud or collusion affecting the sale to Mrs Leggett, and directed the Donovans to deliver up possession to Mrs Leggett and her agents of the whole of the property except the dwelling house and an adjacent area of approximately 10 acres until further order of the Court.

I also said that in my view the proceedings brought by the Donovans, which included an application for an interim injunction enjoining the District Land Registrar from completing registration of the transfer to Mrs Leggett, should have joined the District Land Registrar as an additional defendant. When the present application came on for hearing I was informed that an application had been filed for the joinder of the District Land Registrar in the other action. Mr Hindle, for Mrs Leggett, and Mr Hubble, who appeared in CP 18/87 for Mr Farmer, had no objection to an order for joinder, and this was accordingly made.

It was obvious that if registration of the transfer to Mrs Leggett were completed the principles of Frazer v Walker (1966) NZLR 331 and Mardon v Holloway (1967) NZLR 372 would determine the more important issues in these proceedings against the Donovans; and on 16 February, in response to the application for interlocutory relief in the Donovan's actions, but essentially to allow sufficient time to consider the issues in these proceedings, I enjoined the District Land Registrar from completing registration of the transfer until further order of the Court.

The principles which should guide this Court in considering applications for summary judgment, as settled by the Court of Appeal in Pemberton v Chappell (CA123/86 judgment 20/11/86), can be summarised as follows:

1. The object of the summary judgment rules is to enable a plaintiff to obtain judgment "where there is really no defence to the claim made:"
2. The onus is on the plaintiff to establish that there is no defence:
3. In the ordinary case, the plaintiff's Statement of Claim verified by or for him and his sworn statement of belief that there is no defence is sufficient to discharge that onus, as if a defence is not evident on the plaintiff's pleadings, a defendant wishing to resist summary judgment must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue:
4. In order to satisfy the Court that there is no defence the plaintiff must take the Court to the position where it is "confident, sure, convinced, persuaded to the point of belief, is left without any real doubt or uncertainty":
5. Where the only arguable defence is a question of law which does not require findings on disputed facts or the ascertainment of further facts, the Court should normally decide it on the application for summary judgment:
6. Where the defence raises questions of fact upon which the outcome of the case may turn, it will not generally be appropriate to enter summary judgment: but
7. There may be cases in which the Court can be confident that the statements by the defendant as to matters of fact are baseless, and accordingly there may be the need to scrutinise the affidavits to see that they pass the necessary threshold of credibility.

As Mrs Leggett has fulfilled her initial obligation of establishing a "case to answer", it becomes necessary to consider the grounds of opposition raised by Mr Finnigan to see whether these disclose sufficient reasons to decline judgment.

Stated as briefly as possible these are:

1. That the Section 92 notice dated 15 August, 1986, was invalid in that:
   (a) The claim for a sum in Swiss francs was not warranted, as the loan was for an amount in United States currency;
   (b) The amount payable should have been stated in New Zealand currency; and
   (c) No sum was due and payable by the Donovans until after demands had been made on D.F. Donovan Limited, and there was no evidence of any such demand.
2. Marac's failure to give particulars of the balance payable under the mortgage was in breach of the Donovans' rights to redeem or assign under sections 81 and 82 Property Law Act 1952, which rights gave them an equitable interest in the land enforceable not only against their mortgagee but against a bona fide purchaser for value having notice of the mortgage:
3. The sale was a collusive bargain between Marac, Mr Farmer and Mrs Leggett amounting to fraud: and
4. The sale involved a breach of fiduciary obligations between Marac and Mr Farmer whose obligations "as agent for Mrs Leggett" affected any purchase by her.

The third and fourth of those grounds of opposition were substantially the same as the principal arguments put forward against the claim by Mrs Leggett for interim relief heard on 15 January, at which time both were rejected. Certainly the present allegation that the sale was "a collusive bargain" rests essentially on the same material as was then tendered, and I see no reason to change my earlier finding that it did not provide a credible evidentiary basis for that allegation.

The assertion of breach of fiduciary obligation was acknowledged by Mr Finnigan to depend on his being able to disclose a sufficient evidentiary basis for the proposition

that there was some special relationship between Marac and Mr Farmer which would create fiduciary obligations. He claimed that such a relationship could be legitimately inferred from the following matters:

1. Marac is within the NZI group of companies, and both that group of companies, and the Freightways Group of Companies, of which Mr Farmer is an officer, have membership in the Roundtable organisation;
2. Mr Farmer has obtained loans from the South British Guardian Trust organisation, which is a subsidiary of NZI;
3. Marac/NZI sold the land at a figure $5,000 less than the amount of an offer made by another party, assuming that the other offer were made free of agent's commission; and
4. Marac/NZI had obtained and at the time of the sale to Mrs Leggett held a valuation which placed a market value of $1.33m on the property.

I am unable to see how those matters, even if they were sufficiently established by evidence, could justify an inference that there was some special relationship between Mr Farmer and the mortgagee which could affect his negotiation of a purchase from the mortgagee on behalf of Mrs Leggett.

I accordingly conclude that there is no sufficient basis in evidence for either the third or the fourth of the grounds of opposition put forward on the Defendants' behalf.

Considering next the various attacks on the validity of the section 92 Notice, the first asserted that "the claim in Swiss francs was unauthorised as the loan was for an amount in US dollars". This was based on an analysis of the loan offer and its complex provisions as to "Eurocurrency options" and the circumstances in which loan currency could be changed.

Mr Finnigan contended that a change from the currency originally nominated, US dollars, could only properly

be made at the instigation of the borrower, D.F. Donovan Limited. That contention seemed to me to have some merit, and was not the subject of direct challenge by Mr Hindle. However, in the absence of any argument from Marac, which is of course not a party to these proceedings, I do not believe it is appropriate to reach any final decision on the point unless it is necessary to the determination of the present proceedings to do so, and I do not believe that it is.

Assuming for the purposes of these proceedings that the point were valid, the consequence could not amount to more than that the notice would have mis-stated the amount of the interest owing, the type of error which was considered in Clyde Properties Limited v Tasker (1970) NZLR 754 and Parker v Rock Finance Corporation (1981) 1 NZLR 488 and there held not to invalidate the notices. It would not produce the "fundamental error" situation discussed in Jaffe v Premier Motors Ltd (1960) NZLR 146.

The same reasoning would suffice to answer the second attack on the Notice, namely that it should have stated the amount owing in New Zealand currency, though the more direct answer to that complaint is that the loan was clearly one in overseas currency which required the borrower to repay in overseas currency. A notice expressed in New Zealand currency would have been misleading and in disregard of that basic obligation.

The third attack on the section 92 Notice was based on the language of Clause 13 of the Loan Memorandum and of the principal covenants in the mortgage.

As already noted, the security documents do not easily fit the circumstance that this was a loan to D.F. Donovan Limited guaranteed by Mr and Mrs Donovan. But there can be no doubt that the securities were intended to secure such a loan, that purpose and the Court must seek a construction which gives them that significance, if such a

construction can be found without straining the language.

The Memorandum of Mortgage is expressly made "in consideration" of Marac doing one or more of a number of things. The first is "providing finance pursuant to a loan offer dated 5 February 1982", which it clearly did. A second is the making of loans to the Donovans. A third is making advances to third persons at the request of the Donovans. All three types of accommodation are declared to be covered by and included within the phrase "the monies hereby secured".

The term "the principal sum" is stated in the definition clause to mean monies advanced by the mortgagee to the mortgagors (i.e. Mr and Mrs Donovan). It follows that the first three Mortgagors' covenants, in which Mr and Mrs Donovan as Mortgagors covenant to repay the principal sum and expenses and interest on the principal sum "on demand", are covenants which govern the Donovan's liability to Marac in respect of advances to them.

By contrast, Covenant 4, in which the Donovan's covenant to meet third party liabilities, is clearly a guarantor covenant. That covenant and the immediately following general covenant to pay and give security by way of mortgage are set out below in full:

> "4. If any person shall make default in payment of any of the Moneys Hereby Secured on the date on which the same or any part thereof are due and ought to be paid then the Mortgagor will indemnify and hold harmless the Mortgagee from and against all losses costs claims and expenses arising from the non-payment on due date of the Moneys Hereby Secured including any and all losses exchange costs damages and expenses occasioned by the non-payment and without prejudice to any other rights or remedies that the Mortgagee may have the Mortgagee also shall be entitled to charge and recover simple interest on any moneys so due and unpaid (including moneys due as interest) in the case of an advance to which the Moneylenders Act, 1908 applies at the rate specified in the Memorandum of Terms of Loan Contract relating to such loans as being

applicable to moneys in arrears and in all other cases at the rate determined in accordance with Clause 3 preceding on a daily basis from the date the moneys were due until actual payment and such additional interest losses costs claims and expenses shall form part of the Moneys Hereby Secured and be charged on the Land.

The Mortgagor hereby covenants with the Mortgagee that it will repay the Moneys Hereby Secured as and when the same become payable. The Mortgagor hereby covenants with the Mortgagee as set out in the Schedule of Conditions herein which forms part of this mortgage and for the better securing to the Mortgagee the payment of the Moneys Hereby Secured and the due and faithful observance and performance of the covenants conditions and agreements herein contained, the Mortgagor hereby mortgages to the Mortgagee all the Mortgagor's estate and interest in the mortgaged property."

Just as, in my view, the monies advanced by Marac to D.F. Donovan Limited come within the term "moneys hereby secured" but not within the term "principal sum", the liability of Mr and Mrs Donovan in respect of the monies advanced to the company must arise under Covenant 4, not under Covenants 1, 2 and 3.

Whatever significance should be given to the "on demand" references in Covenants 1, 2 and 3, there is no similar provision in Covenant 4 requiring demand to be made on the mortgagors before they become liable thereunder to pay monies not paid by the principal debtor on due date.

The construction of Clause 13 of the Loan Memorandum is also difficult. It reads:

"13. <u>EVENTS OF DEFAULT</u>

All the sums due hereunder shall become immediately due and payable at our Client's first demand and our Client's obligation to advance the Loan will cease on the happening of any of the following events:

(a) The Borrower fails to pay any sum due hereunder on its due date or fails to adhere to any of the other terms of this Loan offer.
(b) The Borrower shall become insolvent or shall cease or threaten to cease carrying on or shall attempt to dispose of its business or any substantial part thereof.
(c) Any loan, debt, guarantee or any other obligation constituting indebtedness on the Borrower's part becomes due prior to its specified maturity date, or the Borrower is in breach of or in default under any debenture, agreement, deed or mortgage under or pursuant to which such indebtedness shall have been incurred.
(d) A breach of any of the security itemised in Clause 10 hereof occurs."

Other clauses of the Loan Memorandum make it clear that the facility it offered was a loan of $US320,000, to be drawn down no later than 17 May 1982, that the amount of the loan was to be reduced by stated instalments on the 15th days of May and November in each year until 15 May 1988 when the balance of the principal sum was to be repaid, and that interest was payable at the LIBOR (London Inter Bank Offered Rate) plus 4.5%, on the 15th days of May and November, with a concessional rate of LIBOR plus 3.5% if payment were made promptly on due dates.

Mr Finnigan's contention was that Clause 13 had the effect that monies due in terms of the loan arrangements only became due for the purposes of creating a default which would authorise the issue of a section 92 Notice after demand had been made upon the debtor company.

That indeed is an available construction of the language of Clause 13, if it is considered on its own and without relating it to the rest of the Loan Memorandum.

Another construction, and one which gives the clause a significance which accords with the purpose and intent of the document as a whole, is that it prescribes that all monies secured by the mortgage shall become immediately

due and payable if any of the defaults described in sub-paragraphs (a) to (d) occur and demand is then made.
That construction has the further advantage that it gives point to the use of the two different terms "due" and "immediately due" in the first line of Clause 13, and must in my view be preferred to that for which Mr Finnigan contended.

It follows that in my view neither Clause 13 nor the mortgage itself created any requirement that demand be made on the company, or the Donovans, before the latter became liable to pay monies not paid by the company at the times prescribed for payment, or before non-payment by the Donovan's in terms of that liability gave the mortgagee justification for the issuing of a section 92 Notice.

Put another way, as the section 92 Notice on which the mortgagee proceeded called only for payment of instalments and interest which had become due and payable in terms of the loan documents, no demand was necessary.

It follows that all three attacks on the validity of the section 92 Notice are in my view without foundation

There remains the contention that Marac acted in disregard of the Donovan's rights of redemption or assignment in terms of sections 81 and 82 Property Law Act 1952, and that those rights gave the Donovans an equitable interest in the land enforceable not only against Marac but against a bona fide purchaser for value having notice of the mortgage.

This submission relied on a statement in Hinde, McMorland and Sim's Land Law vol. 2 para. 8.036 which reads:

> "This right to redeem developed into the equity of redemption, which was recognised as an equitable interest in the land, and which could therefore be enforced not only against the mortgagee personally but also against anyone to whom he conveyed the fee simple except a bona

> fide purchaser for value without notice of the mortgage."

As the authors make plain two pages later (in para. 8.038), that passage refers to the situation which arose when mortgages were created by way of conveyance of title accompanied by a covenant to reconvey when the loan was repaid, and the term "equity of redemption" is really a misnomer when used to describe the situation of a mortgagor of land held under the Torrens system.

Of course the essential question in these proceedings is not whether Marac may have acted in breach of any obligation it owed to Donovans, but whether any such actions can effect Mrs Leggett's claim as a bona fide purchaser for value from Marac to be given the benefit of her contract. A finding in her favour on that issue does not either determine or prejudice any claim which the Donovans might otherwise have against Marac for damages resulting from any proven breach of its obligations to them.

That being said, and notwithstanding the sympathy which one cannot but feel for the Donovans having regard to the difficulties experienced by them in obtaining a statement of the sum owing under the mortgage, if there were no breach of their rights under sections 81 and 82, that would necessarily be fatal to this ground of attack on the sale to Mrs Leggett. For that reason I should note that I do not accept that the Mortgagor's right to redeem land subject to a Torrens system mortgage gives him any actionable right against his mortgagee until the mortgagor has either tendered the monies owing to his mortgagee or at least made a firm offer to redeem. Certainly the basis of claim asserted by Mr Finnigan finds no support in the discussions of the topic in <u>Balls' Law of Mortgages</u>, see pp.261 et seq., or in <u>Crofts Mortgagees' Property Sale</u>, the latest Australian text on the topic, see pp.122/3.

Much more to the point in these proceedings is the support both texts give to the proposition that the right to redeem is extinguished if and when the mortgagee enters into a binding contract for sale of the mortgage property unless that contract is not a bona fide sale: see Ball p.266 para. 735, and Croft p.123 para. 196, in which the first authority cited in support is Waring (Lord) v London and Manchester Assurance Company Limited (1935) Ch 310. Although that decision related to a "deeds mortgage", not a mortgage of Torrens system land, the ratio of the decision is just as relevant in the case of Torrens system securities, and seems to me unanswerable. At the foot of p.317 Crossman J, having described the power to sell as "a power by selling to bind the mortgagor", said:

> "If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor."

It follows that in my view this ground of opposition is also incapable of being sustained.

I should for completeness note that on Friday last, when this judgment had been drafted, I received through the Registry an application made by Mr Hindle for leave to adduce further evidence. In my view the Court should be particularly hesitant to admit further evidence in its summary judgment jurisdiction, and I do not believe that the matters advanced by Mr Hindle to justify a grant of leave would have persuaded me to do so. However because of the determination already reached it became unnecessary to consider his

application. I record that I have not taken into account any of the matters indicated in his memorandum as capable of proof.

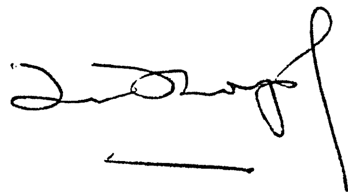
Although I have finally come to the conclusion that judgment should be for the plaintiff, it seems to me not only proper but desirable that some time be allowed to the defendants to wind up their affairs at Clevedon and arrange other accommodation.

There will accordingly be judgment in favour of the plaintiff in terms of paragraphs (a), (b) and (c) of her Statement of Claim. That judgment is to lie in Court for 14 days.

Leave is reserved to both parties to seek further directions as to the conduct of the enquiry directed in terms of paragraph (b).

The question of costs is reserved and counsel may apply to be heard on that matter if necessary.

The injunction preventing registration of the transfer which was made on Monday 16 February to permit due consideration of the present application should not be continued, and it is rescinded.



Solicitors:

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AUCKLAND REGISTRY

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BETWEEN	JUDITH MARY LEGGETT
	Plaintiff
A N D	DAVID FRANCIS DONOVAN
	Defendant

JUDGMENT OF THORP J

Reserved decision ~~of~~ ~~to~~ delivered this 25th February 1987 @ 9.30am. by [signature]

Received Copy Judgment