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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP1431/87

3

	BETWEEN	FIRST CITY CORPORATION LIMITED
~~LR 690~~ 691		Plaintiff
	AND	DOWNSVIEW NOMINEES LIMITED
LR 9		First Defendant
	AND	J.G. RUSSELL
		Second Defendant
	AND	GLEN EDEN MOTORS LIMITED (IN RECEIVERSHIP
		Third Defendant

Hearing: 24 November 1987

Counsel: Harrison & Simpson for Plaintiff
Bogiatto for First and Second Defendants
Chamley for Third Defendant

Judgment: 11 January ~~1987~~ 1988

JUDGMENT OF THORP J

In September 1986 the plaintiff (First City) agreed to make advances to the third defendant (Gemco) which was in business as a motor dealer in Auckland, 99.9% of its shares being held by its Governing Director, Mr Peterson. The advances were secured by a debenture.

Gemco was required by a term of First City's debenture to maintain "a 30% equity", that is to say to maintain shareholders' funds at not less than 30% of the value of its assets excluding goodwill and other intangible assets.

During the period from 31 January 1987 to 6 March 1987 First City received four consecutive estimates from Mr Peterson which, taken at face value, showed the net equity to be less than 30%. As a result of receiving those returns, First City on 10 March 1987 accordingly appointed receivers under its debenture.

Gemco had previously given a debenture to the Westpac Banking Group, and by appropriate priority documents completed at the time the First City debenture was taken out the Westpac debenture was given priority over the First City debenture to the extent of $230,000 plus two years' interest and costs and expenses.

At some date not accurately fixed by the affidavits, but declared to have been between 10 and 23 March 1987, the first defendant (Downsview) purchased the Westpac debenture and appointed the second defendant, Mr J.G. Russell, receiver under its debenture.

That development was supported by Mr Peterson who hoped that Mr Russell would be able to trade Gemco out of its difficulties and preserve at least in part Mr Peterson's investment in it. By contrast, First City then contended, and contends even more strongly today, that Gemco, which owes it over $850,000, was and is losing money at a rate which has put the second debenture advances made by First City at risk.

On 27 March 1987 First City endeavoured to solve the problem and avoid the threat which it saw to its security by offering either to buy Downsview's debenture or sell its own, in either case sale to be at par of secured funds. Downsview responded with an offer of $250,000 for the second debenture.

By letter to Downsview dated 13 August 1987 First City then advised that it considered it was entitled

as "further encumbrancer" to an assignment of the first debenture on payment of the amount secured by it, asked for a statement of that amount, and forwarded a deed of assignment of the debenture for execution by Downsview.

Downsview responded that it was prepared to consider assigning, but on stated terms, and when Mr Russell had been able to complete receivership accounts. First City was not prepared to accept the stated terms or the delay involved in that proposal. On 8 September 1987 it issued the present proceedings claiming:

1. An order pursuant to sections 82 and 83 Property Law Act 1952 requiring Downsview to assign its debenture to First City on payment by First City of the amounts secured by the first debenture: or
2. In the alternative, an order appointing Messrs Chilcott and Chatfield, the receivers appointed by it under the second debenture, as receivers under the first debenture: and
3. In either event, an enquiry as to the loss suffered by the plaintiff as a result of breaches of duties by the three defendants.

It also moved for interim relief in the form of an order requiring the assignment of the first debenture to the plaintiff but leaving for further determination any question of enquiry as to loss.

On 13 November 1987 an Amended Statement of Claim was filed which added to the claims under sections 82 and 83 claims against Downsview and Mr Russell for damages for breaches of duties alleged to be owing by them to First City and, as further alternatives, claims for the amount owing under the second debenture and for certain declarations.

On the same date it also filed an Amended Application for Interim Relief seeking:

1. An injunction restraining Downsview and Russell from exercising powers pursuant to the first debenture and more particularly from appointing or acting as or purporting to appoint or act as a receiver of Gemco:
2. An injunction directing Downsview to assign the benefit of the first debenture to First City pursuant to sections 82 and 83: or
3. An order appointing receivers, nominated by the Court, of all the property and assets of Gemco.

All defendants indicated their intention to oppose the first application for interim relief, on a variety of grounds. Downsview and Mr Russell attacked the validity of the plaintiff's debenture, and denied that either had any duty of care to First City. Gemco contended that it had not been in breach of its obligations under the second debenture at the time of the appointment of receivers by First City, and that it would be wrong and inequitable for the Court to assist First City to rectify troubles it had created by its precipitate and unlawful appointment of receivers.

All defendants also contended that in any case a second debenture holder, such as First City, has no right under sections 82 and 83 to call for assignment to it of a prior debenture.

After a series of fixtures for the hearing of the first application for interim relief had been vacated because of lack of sitting time, the amended application was given a one day fixture for 24 November last. Mr Chamley, as counsel for Gemco, applied for the adjournment of that fixture upon the grounds that the grounds for relief in the amended application would require the consideration of evidence and questions of fact and increase the time required for the hearing of the application to 2 or 3 days, which time was not available.

Mr Harrison responded that to prevent any further delay First City would limit the grounds to be advanced in support of its application for interim relief to those set out in the first cause of action in the Amended Statement of Claim, the contention that the plaintiff was entitled to acquire the debenture now held by the first defendant in terms of sections 82 and 83.

The application for adjournment was heard by Tompkins J, and in a minute completed by him on 20 November 1987 he noted that:

> "Provided the argument is limited to that issue, Mr Chamley accepted that there would be no need to call evidence and that the matter would be able to proceed next Tuesday. It will proceed accordingly."

When the matter came on for hearing before me on 24 November, Mr Chamley said he felt obliged to renew the application for an adjournment. He argued, and persuasively, that it was not possible for the Court to determine the lawfulness of the appointment of the receivers under the second debenture on the evidence before it, and that it should hear the evidence relating to the financial state of Gemco before and since the appointment of the First City receivers before effectively giving control of Gemco to First City.

Mr Harrison then advised that the plaintiff believed the prospect of obtaining any substantial benefit from its claims against Gemco was so slight that First City was prepared to discontinue against Gemco, and if necessary would file a formal discontinuance to confirm the advice he was giving from the bar. On that basis, and in view of an acknowledgement by Mr Bogiatto for the first and second defendants that he would find it difficult to argue against the validity of the First City debenture, I could not see any matter which would prevent the Court from considering, as between the plaintiff and the first and second defendants,

the issue whether or not the plaintiff was entitled as a further encumbrancer to call for a transfer of the first debenture. The argument accordingly proceeded on that basis.

Mr Chamley mentioned that he and Mr Bogiatto had come to Court with the intention that each would argue part of the case for the defendants on that issue. It was agreed that Mr Chamley should appear with Mr Bogiatto to argue that point on behalf of the first and second defendant. Accordingly, while Mr Chamley is noted at the commencement of the judgment as appearing as counsel for the third defendant, for the whole of the argument of the issue whether or not First City could call for a transfer of the Downsview debenture he in fact appeared as second counsel for first and second defendants.

That argument centred on the two questions:

1. Does a subsequent debenture holder have a right to require an assignment from a first debenture holder upon tender of the money secured by the first debenture? and
2. If so, can such a right be enforced on an interim injunction application, when it is one of the remedies sought in the substantive proceedings?

So far as counsel and I have been able to ascertain, the first question has not been the subject of direct judicial authority. In Vitali v Nathan Finance Ltd (Auckland M.575/84, unreported decisin of Casey J delivered 13/6/84,) Casey J assumed that the holder of a second instrument by way of security had the right under section 83 as a subsequent encumbrancer to have a prior instrument transferred to him. However the point was not the subject of lengthy consideration, nor was it necessary for determination of the issues before him, so that the decision is no more than persuasive authority on the issue now requiring determination.

On that issue Mr Harrison contended that

First City's claim for an assignment of the first debenture could be supported on three independent bases:

1. The equitable right of subsequent encumbrancers, on which he cited 4 Halsbury Vol. 32 para. 573, Pearce v Morris (1869) 5 Ch.App. 227; and Tarn v Turner (1888) 57 L.J.Ch. 452:
2. The rights given to subsequent encumbrancers by sections 82 and 83 Property Law Act, 1952: and
3. The duty of receivers to exercise receivers' powers for a proper purpose: arguing that Mr Russell's primary obligation was to recover the amount owing under the first debenture, that he owed duties in carrying out that function both to Downsview and First City, and that the only possible inference from his refusal to accept repayment was that he was using his powers for some extraneous or collateral purpose: for which he cited Expo International Pty Limited v Chant & Ors (1979) 2 NSWLR 820, and American Express International v Hurley (1985) 3 All ER 564.

Mr Chamley and Mr Bogiatto denied that the plaintiff could claim rights "both at common law and under the Property Law Act", and contended that the Property Law Act gave rights only to mortgagors of land.

In relation to both the first and second legs of the plaintiff's argument they also contended that in any event:

1. The principles stated did not apply to debentures, let alone debentures by way of floating charges, and that there had not been any such event as would have crystallised the debenture charge:
2. The most the plaintiff could seek was a discharge of the first debenture on payment of the monies secured by it, including reasonable costs and charges of the receiver under the first debenture: and
3. The Court was not sufficiently informed to be able to determine the amount secured by the debenture, so that

if it was inclined (contrary to the defendants' arguments) to order a conveyance or transfer, it should allow the receiver 28 days in which to make up an account for the amount payable at the end of that period, he to have the rights to receive all monies due to the company meantime.

As to the plaintiff's third basis of claim, the defendants denied that Downsview or Mr Russell owed any duty to the plaintiff, or that any duty they did owe gave the right to call for a transfer of the first debenture.

Finally, on the second principal question requiring determination, the defendants submitted that the Court was being asked to grant a mandatory injunction, which would effectively conclude the substantive dispute between the parties, and that those circumstances should incline the Court against granting the injunction sought; citing to Sim and Cain 12th Edn para. 86/3 and the cases there referred to, particularly Northern Drivers Union v Kawau Island Ferries (1974) 2 NZLR 617, Cayne v Global Natural Resources (1984) 1 All ER 225, and Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited (1985) 2 NZLR 189.

I did and still do find difficulty accepting that this issue was open to the defendants. It is in my view difficult to reconcile the availability of such an argument with the defendants' agreement, on the hearing before Tompkins J, that it would be appropriate to confirm the fixture provided the plaintiff restricted its argument on the present application to the one ground of availability of a right to call for a transfer of the first debenture, that being clearly regarded by all parties and by the Judge as a question of law. However, in any event it appears to me that the matter is determined against the defendants by the line of authority which opened with Woodfall v Smith (1970) 1 WLR 806 and was developed in such decisions as Manchester Corporation v Connolly (1970) 1 Ch. 420, Shepherd Homes v

Sandham (1971) Ch. 340, Mayfield Holdings v Moana Reef Limited (1973) 1 NZLR 309, Cayne v Global Resources (supra), and more particularly Klissers v Harvest Bakeries (supra) and Films Rover International Limited v Cannon Films Sales Limited (1986) 3 All ER 777. Those authorities make it in my view reasonably clear that:

1. The overall justice of the case is the ultimate issue in all these applications:
2. The mandatory/prohibitory distinction is of less significance than the question whether the injustice caused to the defence if the plaintiff were granted an injunction and later failed at trial would outweigh the injustice caused to the plaintiff if an injunction were refused and he succeeded at trial:
3. In cases where the relief sought would be wholly or substantially determinative of the rights of the parties, the Court would naturally act with particular care and endeavour to ensure that it was not preventing a necessary enquiry into matters of fact that needed enquiry: but nevertheless -
4. If a question of law capable of being determined on the application does wholly or substantially determine the issues between the parties, the justice of the case may well be better served by determining it there and then.

The subject was discussed at length in Films Rover v Cannon Film Sales Limited. There Hoffman J preferred to characterise the principle in terms of the risk of injustice that would result in the wrongful grant of an injunction at the interlocutory stage. Referring to a statement by Megarry J in Shepherd Homes Limited v Sandham that:

> "The Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightfully granted":

Hoffman J said that this was:

> "Another way of saying that the features which justify describing as an injunction as 'mandatory' will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the Court feels 'a high degree of assurance' that the plaintiff would be able to establish his right at a trial".

Having noted that point, he took the position, with which I respectfully agree, that:

> "Semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren".

He reaffirmed earlier dicta to the effect that if the Court were assured of the correctness of the applicant's claim, it would normally be appropriate to recognise that circumstance.

If then, as appears to be the case here, the substantial issue really is one of law and not of fact, the Court should in my view determine the application according to its finding on that question of law; and there is nothing that I can see in the circumstances of this case that would require it to take any different position in order to achieve overall justice.

Neither the plaintiff's claim that the rights given to mortgagees and encumbrancers in equity and the statutory rights created by the Property Law Acts co-exist, nor the defendants' contrary contention that what were described as the "common law" rights of subsequent encumbrancers were subsumed by the statutory provisions, was supported by reference to authority.

I prefer the plaintiff's argument on that issue. None of the New Zealand texts have expressly considered the relationship between rights declared by the

Property Law Acts of 1905, 1928 and 1952 and the rights established at common law and by equity affecting the like subject matters, but it is commonplace to find the provisions of those Acts interpreted in the light of the old authorities. Further, as consolidating statutes the Property Law Acts are presumed not to alter pre-existing law more than their language requires. The long title of the 1905 Act declared that its purpose was "to consolidate, extend and simplify the law related to property". Its successors have sought merely to "consolidate and amend" that law.

The first reported decision on the 1905 Act, NZ Loan & Mercantile Agency Co. v Mitchell (1906) NZLR 433, which dealt with the assignment of choses in action, declared that the right recognised by equity to assign equitable choses in action made statutory declaration of such a right "unnecessary". It clearly proceeded on the basis that the statute could be called in aid of, but did not replace, existing rights.

At the same time the question whether a particular statutory provision amends or consolidates existing law, particularly in an area of such general importance as that involved in this case, ought not to be determined without the benefit of full argument if the Court need not do so.

The matters already noted at least support the view that there is no cause to "read down" the ordinary meaning of sections 82 and 83 Property Law Act 1952. In my view, given a normal interpretation and considered in the light of the authorities bearing on this area of the law, that is, in the same manner as the Court has previously approached the interpretation of the provisions of the Property Law Acts, sections 82 and 83 do support the plaintiff's claim.

They provide:

> "82. Mortgagor may require mortgagee to assign instead of reconveying - (1) Where a mortgagor is entitled to redeem he shall by virtue of this Act have power to require the mortgagee, instead of discharging, and on the terms on which he would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly.
> (2) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary; but does not apply where the mortgagee is or has been in possession.
>
> 83. Encumbrancer to have the like right - The like right to require a mortgagee to assign the mortgage debt to a third person shall belong to and may be enforced by each encumbrancer or by the mortgagor, notwithstanding any intermediate encumbrance; but a requisition of an encumbrancer shall prevail over a requisition of the mortgagor, and, as between encumbrances, a requisition of a prior encumbrancer shall prevail over a requisition of a subsequent encumbrancer."

For their proper interpretation it is necessary to refer to the definitions of "mortgage" and "property" in section 2 of the Act, namely:

> "(a) 'Mortgage' includes a charge on any property for securing money or money's worth: and 'mortgage money' means money or monies worth secured by a mortgage: and
> (b) 'Property' includes real and personal property, and any estate or interest in any property real or personal, and any debt, and anything in action, and any other right or interest."

The next matter of relevance is the change which was made in 1952 to the provision dealing with the right of a mortgagor to ask for an assignment in lieu of a discharge. The opening clause of section 71 of the 1908 Act, (the predecessor of the present section 82,) read:

(1) Where a mortgagee of land is entitled to redeem ....". (emphasis added)

Section 82 omitted the words underlined. It is totally improbable that this was accidental or unintentional, and the alteration is most easily explicable as a statutory abrogation of the decision in Schollum v Maxwell (1914) 33 NZLR 1407. In that case Stout CJ, considering a debt secured by chattel security and a mortgage of a leasehold interest, said that section 71:

> "Had no relation to the chattel security. It is only the 'mortgagor of land' that has the privilege of demanding an assignment".

But whether or not that omission from the section was in response to Schollum's case, the intention of the omission, particularly having regard to the retention of similar limitations both in the preceding and in later sections in Part VII, must have been to widen the ambit of the section beyond mortgages of land.

Mr Chamley argued that any "right to redeem" must be found in section 81, which plainly deals with the equity of redemption of a mortgage of land, with a specific extension to mortgagors of both land and chattels.

From that he argued that sections 82 and 83 must be similarly limited in their operation.

I am not satisfied that the debentures in question, at least following crystallisation, may not have been mortgages of both land and chattels. But Mr Chamley's argument is much more plainly disposed of by the circumstances:

1. That it does not give any purpose at all to the omission of the words "of land" from the first line of section 82(1): and
2. That it cannot be open to serious argument that a mortgagee of chattels has a right to redeem them (see

e.g. 4 Halsbury Vol. 32, para. 572, and Johnson v Deprose (1893) 1 QB 512), and in my view it would be extraordinary if that right were somehow fundamentally altered by inference from the language of a consolidating statute.

The argument that the sections do not apply to charges evidenced by debenture seems to me to be equally unsupportable.

On the appointment of Mr Russell as receiver under the Downsview debenture the charge under that debenture became, in terms of Clause 12 of that debenture "fixed or enforceable". The First City debenture was in terms of clause 7 of that document "a fixed and specific charge" in respect of the company's land, fixed assets, including plant, machinery, fixtures and fittings ...". Insofar as it was a floating a charge it became in terms of clause 17 "affixed and enforceable" on the appointment of a receiver. It follows that both debentures were crystallised on the appointment of Mr Russell as receiver, if not earlier, and the charges thus resulting must in my view come within the statutory definition of "mortgage".

I add that it is at least doubtful whether the fact that the debentures may either in whole or in part have had the character of floating charges would have prevented them coming within the ambit of sections 82 and 83. It is sufficient in that regard to recall Viscount Haldane's strictures in Kreglinger v New Patigonia Meat Co. Limited (1914) AC 25 at pp40/41 about the importance, in this area, of looking at the substance rather than the form of transactions, and his finding that it was not:

> "Conclusive in favour of the appellants that the security assumed the form of a floating charge. A floating charge is none the less a pledge because of its floating character ....".

That decision also points strongly against

any reading down of the broad language of the statutory definition of "mortgage" to exclude charges created by debentures.

The contention that sections 82 and 83 envisage an application for assignment to "a third person" also seems to me to offer no substantial assistance to the defendants.

By section 83 the encumbrancer is given the "like right" granted to the mortgagor in section 82. That is, the encumbrancer is given the right to require the mortgagee to assign the mortgage to "a third person". The encrumbrancer is a third person in the sense that he is neither the mortgagor nor the mortgagee.

A note on the analogous English section, (section 95 Law of Property Act 1925 UK) in Vol. 27 Halsbury's Statutes 3rd Edn p.492 states that "a first mortgagee was however bound to accept payment from and convey the property to a second mortgagee". The note is supported by reference to Smith v Green (1844) 1 Coll. 555, a decision on a section of a statute of George II not significantly different from the provisions which presently require consideration.

Finally I note the submission made for the defendants that the provisions of section 82, and therefore of section 83, were not available because the appointment of a receiver "had the same effect as the entry of a mortgagee into possession," which in terms of section 82(2) would exclude the operation of that section.

Both debentures in the present case follow the usual custom of providing that receivers appointed in terms of those debentures or "shall be the agents of the company," not of the debenture holder.

The role and duties of receivers was recently considered in Expo International v Chant (1979) 2 NSWLR 820. In that case Needham J (i) expressed support for the statement by Wynn J, in R v Board of Trade Ex Parte St Martin's Preserving Co. Ltd (1965) 1 QB 603, that the agency created by the appointment of receivers was "special and limited", (ii) recognised that the powers of a receiver are broader than those of a mortgagee and that the duties the receiver owes to the mortgagor are different from those which a mortgagee in possession will owe to his mortgagor, (iii) adopted the statement of Jenkins LJ in Re Johnson & Co. Builders Ltd (1955) Ch 634 at 631 to the effect that the duties of receivers are as primarily to debenture holders: and (iv) noted (with apparent approval) the statement in Visbord v FCT (1943) 68 CLR 354 at p.36 by Starke J said:

> "But we must not lose sight of the substance of the appointment. It was made for the benefit of the mortgagee and to protect the mortgagee from liability as a mortgagee in possession or as a principal".

All those dicta point against the proposition urged for the defendants, which accordingly is rejected.

I accordingly find that none of the arguments raised by the defendants are sufficient to exclude the right of First City Corporation, as a subsequent encumbrancer, to call for a conveyance of the first debenture in terms of sections 82 and 83 of the Property Law Act 1950.

I prefer, because of my firm views on the availability of sections 82 and 83, not to deal at any length with the third basis upon which the plaintiff claimed a right of conveyance of the debenture, namely that Mr Russell as receiver was under a duty to accept the tender of the money owing.

In Expo (supra) at 844 the Court said:

> "A nice question could arise in a case like the present, where the receiver is in a position to discharge the first mortgage but did not do so. It may be that the Court treating what ought to have been done as done, would treat him as a receiver and manager for the second mortgagee".

That proposition would appear to support Mr Harrison's third basis of claim, but I am less than enthusiastic about determining the present application on that basis because it seems to me that the duties of Mr Russell to First City may be affected by the factual circumstances of the case, which of course are only before the Court in a very limited form at this time.

It follows that the decision, which I now formally declare, that First City Corporation is entitled to require Mr Russell to assign to it the first debenture upon payment of all monies secured thereunder, including the receiver's reasonable costs and expenses to this date, is made on the basis that that right is given by sections 82 and 83 Property Law Act 1952.

I am not prepared to go beyond that point and accept, as Mr Harrison invited me to do, that the Court should fix "an appropriate sum" for payment into Court or some suitable depository, leaving the final determination of the amount to be paid by the plaintiff until determination of the plaintiff's claim for an enquiry into damages resulting from the failure to assign, the only matter left outstanding in the substantive proceedings.

In my view having declared the plaintiff's entitlement to a conveyance or assignment of the first debenture, it is appropriate from that point to adopt the proposal made by Mr Bogiatto that the first and second defendants be permitted to prepare an account of the amount required to repay the first debenture 28 days after the

delivery of this judgment.

The Court's judgment, which must therefore be an interim judgment, is accordingly:

1. That the ~~second~~ first defendant is directed to assign the benefit of the first debenture to the plaintiff upon receipt from the plaintiff of the monies secured by the first debenture including proper and reasonable costs involved in the receivership conducted by the second defendant as receiver appointed under that debenture by the first defendant:
2. That at the request of the first and second defendants the obligation to complete anddeliver up such assignment is deferred for 28 days from the date of this judgment, subject to the first and second defendants within 21 days from judgment supplying to the plaintiff full and complete particulars of the amount claimed by them to be secured by the debenture:
3. That leave is reserved to either party to apply to the Court for directions in the event of the parties being unable to settle between them the amount payable for the assignment of the first debenture or for any other reason necessary for implementation of the foregoing decision:
4. Costs reserved.

Solicitors:
Brandon, Brookfield for Plaintiff
Grove, Darlow & Partners for First and Second Defendants
Thorne, Thorne, white & Clarke-Walker for Third Defendant

rmk 4/2/88

DEPARTMENT
OF JUSTICE
HIGH COURT

In reply
please quote

P O Box 60 AUCKLAND, Telephone 778830, DX 190

5 February 1988

The Editor
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WELLINGTON

LR 9, blue label.
amended ✓

FIRST CITY CORPORATION LTD v DOWNSVIEW NOMINEES LIMITED AND OTHERS - CP.1431/87

The above judgment of Mr Justice Thorp, delivered on 11 January 1988 contains an error in paragraph one on page 18. Please amend your copy in accordance with the attached memorandum from the Judge.

Yours faithfully

T E Mosley
DEPUTY REGISTRAR

M E M O R A N D U M

TO: Civil Registry

FROM: Thorp J

DATE: 2 February 1988

RE: CP1431/87 FIRST CITY CORPORATION LIMITED v DOWNSVIEW NOMINEES LIMITED & ORS

1. I have read Mr Smythe's letter of 13 January, and your hand written memorandum asking for instructions concerning the entry of judgment.

2. Mr Smythe is correct that the reference in para. 1 on p.18 of the judgment to the second defendant should have been a reference to the first defendant, and the judgment should be amended accordingly.

3. The draft judgment should be sealed subject to appropriate correction of the reference to the defendant in clause 1.

4. Please send a copy of this memorandum to all persons to whom the judgment has been distributed.

.....