

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

**NOT
 RECOMMENDED**

1679

M 1394/89

UNDER

the Land Transfer Act 1952

IN THE MATTER

of an application for an
 order that caveat C.012335.1
 shall not lapse

BETWEEN

JAMES ALFRED HOGG

Plaintiff

AND

DAVID MATHEW VAUGHAN

First Defendant

AND

JOHN PATRICK O'MALLEY

Second Defendant

Hearing: 31st October 1989

Counsel: J Holland for plaintiff
 C J Tennet for second defendant

Judgment: 31st October 1989

ORAL JUDGMENT OF TOMPKINS J

The plaintiff has filed an application for an order for stay of proceedings pending the hearing of his appeal. He has also filed an application for security of costs. The plaintiff had applied for an order that a caveat he had lodged in respect of a second mortgage in which the plaintiff is the mortgagor and the first defendant is the mortgagee, should not lapse. The application came before Master Gambrill on 9th October. In a reserve decision delivered on 20th October, she refused the application and ordered that the caveat lapse. The plaintiff has appealed to the Court of Appeal against that decision.

He now seeks an order for stay in order to preserve the caveat pending

the hearing of the appeal. Mr Hawk, who appeared for the first defendant at the hearing before Master Gambrill, did not appear on the present applications but Mr Tennet for the second defendant advised the Court that Mr Hawk's attitude was that the first defendant would abide the decision of the Court.

Put shortly, the contention on behalf of the plaintiff is that if the stay is not granted, then the transfer of the second mortgage from the first defendant to the second defendant will be registered, as a consequence of which the plaintiff will be deprived of his opportunity of pursuing his projected action against the first defendant claiming specific performance of what the plaintiff contends to be an earlier agreement pursuant to which the first defendant, the plaintiff alleges, agreed to sell the second mortgage to the plaintiff.

To appreciate the significance of these rival contentions I note that the second mortgage is for \$128,500 plus interest of approximately \$17,000. It is the plaintiff's claim that the first defendant had agreed to sell the second mortgage to the plaintiff for \$50,000. It is I understand, common ground that the first defendant has agreed to sell the second mortgage to the second defendant for the same figure, namely \$50,000. Pursuant to that agreement, the second defendant has paid \$50,000 to the first defendant for the mortgage. It is urged by Mr Holland that to refuse a stay would render the appeal nugatory because the plaintiff would not be able to enforce specific performance on his claimed agreement with the first defendant, once the transfer of the second mortgage to the second defendant has been registered

Mr Holland submits that the alternative remedy of damages may be worthless because the first defendant may not have the resources to meet substantial damages.

Mr Tennet for the second defendant resists the application on the grounds of prejudice to the second defendant. I understand this prejudice is said to arise principally because of the possibility that the first mortgagee, Invincible Life Assurance Limited, may proceed with a mortgagee sale and if that were to occur, the second defendant would then be in the difficult position of not knowing whether he was the second mortgagee with an interest in perhaps buying in at the mortgagee sale, or whether he is not, in which case buying in at the mortgagee sale may well be inappropriate.

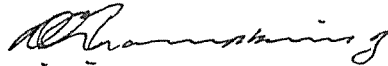
I have no reason to doubt that the plaintiff's appeal is bone fide, but there are two matters concerning the application for stay which causes me concern. The first is that the plaintiff has not commenced his proceedings for specific performance against the first defendant. The second is the possibility that, as Mr Tennet submits, the second defendant may be prejudiced if the first mortgagee proceeds with the mortgagee sale.

Having considered these two concerns I am satisfied that the appropriate course is to order a stay of proceedings but with two provisos. The first is that the plaintiff is to file in this Court and serve on the defendant his action for specific performance in respect of his claimed agreement with the first defendant to purchase the second mortgage. If those proceedings are not filed and served by 5.00pm next Tuesday, 7th November, the order for stay will lapse.

The second proviso relates to the second defendant's concern as to the possible consequence of the mortgagee sale. I believe that that concern can be met by expressly reserving to the second defendant, leave to revoke the order for stay if the first mortgagee commences proceedings for a mortgagee sale. In that event, it would be open for the defendant to endeavour to satisfy the Court that the possibility

of a sale may prejudice the second defendant to such an extent as to justify revoking the order for stay even if to do so may render the plaintiff's appeal nugatory.

Concerning the application for costs, it seems that there have been some preliminary discussions with the Registrar, but no order has been made as there were differences between counsel as to the proper order. I resolve that by ordering that the plaintiff provide security for costs in the sum of \$750 to each defendant, that is a total of \$1,500. Costs in respect of the present applications are reserved.



Solicitors for the plaintiff:

Kennedy & Co (Auckland)

Solicitors for the first defendant:

Jackson Russell Dignan Armstrong (Auckland)

Solicitors for the second defendant:

Martelli McKegg Wells & Cormack (Auckland)