IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 1451/90

BETWEEN FAI METROPOLITAN LIFE ASSURANCE COMPANY OF N.Z. LIMITED

Plaintiff

825

A N D P P MADARASZ

Defendant

Hearing: April 18th, 1991

Counsel: Mr Godinet for the Plaintiff
Mr D Patel for the Defendant

Judgment: 14 MAY 1991

RESERVED JUDGMENT OF MASTER TOWLE

This application for summary judgment sought an amount of $91,327.50 plus interest being the balance claimed as outstanding of a loan for a term of five years made by the plaintiff previously called Metropolitan Life Assurance Co of N.Z. Ltd. The advance was made on the 14th May 1987 for $150,240 and secured by a mortgage over the defendant's property at Ruakaka. The interest rate was 19% and there was no provision for any higher rate by way of penalty interest. The evidence is not disputed that the defendant made default under the mortgage almost

from the outset and that the property had eventually been put up for sale through the Registrar of the High Court of Whangarei on the 23rd June 1989. As a result of which there was produced a net amount of $112,143.36 in reduction of the monies outstanding under the mortgage. The plaintiff's affidavit in support of the summary judgment application deposed that the plaintiff had subsequently also applied the proceeds from the surrender of two life insurance policies which had realised a further sum of $15,874.58 towards reducing the outstanding advance and that as at the 30th September 1989, after bringint to account the proceeds of the sale and of the life policies there remained owing an amount of $78,097.54. The claim was for this figure plus ongoing interest at 19% from the 1st October 1989.

The documentary evidence filed in support of the claim initially was both inadequate and inaccurate. It included a photocopy of the mortgage document dated 4th May 1987 as registered in the District Land Registry in Auckland on the 1st October 1987. (No properly certified copy of the registered mortgage has been provided.) That document is on the face of it somewhat incomplete in that the portions relating to the date of advance, the commencement of interest and the date of repayment are all left in blank. Attached to it was an undated schedule signed by the defendant as debtor (but not

witnessed) which related to the payments required. This shows that there was to be an initial period of broken interest stated as $2434.92 and that thre were to be 59 instalments of principal and interest on the 16th of each month stated to be $147,122.26 each (!!) following the commencement of the term. The only other documentary evidence filed was a copy of a letter of demand on the defendant on the 27th July 1990 claiming the amount of the shortfall after sale without any details of how the amount was made up.

The application was first called before me on the 11th October last year but the defendant had only been served on the 3rd October and had not had opportunity to prepare a notice of opposition and affidavit. Accordingly I adjourned the matter to the 1st November by which date a notice of opposition had been filed. Subsequently the plaintiff filed a further affidavit and I will return to the substance of this and the defendant's affidavit shortly.

The principal ground on which the defendant opposes the application is that the plaintiff did not observe the stringent requirements of the Credit Contracts Act 1981 in relation to the initial disclosure made when the advance was made. It was not disputed that the mortgage was a controlled credit contract within the meaning of

that Act, that the plaintiff was a financier and that the mortgage was prepared by the plaintiff's paid legal advisers so that there existed an obligation to make initial disclosure in terms of that Act. It was advanced in the notice of opposition that the mortgage was never duly completed, that it contained blanks relating to the dates of the advance, commencement of the term and date of repayment and that the finance rate was not stipulated. Other inadequacies were alleged, lack of proper disclosure relating to the collateral security taken over the defendant's life policies. The notice went on to allege that in selling the land pursuant to the power of sale in the mortgage the plaintiff had acted unlawfully and in breach of the Act and that because of the plaintiff's failure to make the initial disclosure of the mortgage contract the plaintiff was now liable for penalty interest pursuant to s.25(2)(a) of the Act and that this sum had not been credited when the present claim was prepared. A further ground advanced was that the plaintiff had exercised its powers under the mortgage in an oppressive manner and that the defendant was justified in seeking to have the contract reopened. Further criticism was made that the plaintiff had acted negligently and in breach of a duty of care in connection with the application to the Registrar of the High Court for sale after default had occurred and that the sale had to be postponed and readvertised after amendment to the

conditions of sale. Further criticisms were made that the plaintiff's statement of claim was defective and as to the quality of the pleading in the plaintiff's statement of claim. The essential grounds of opposition, and in my assessment, the only areas where the matters put forward by the defendant are worthy of serious consideration, relate to the question of compliance with the Credit Contracts Act and of the adequacy of the documentary evidence put forward by the plaintiff in support of the application for summary judgment.

With his notice of opposition the defendant filed a short affidavit in which he claimed the plaintiff had failed and continued to fail to make initial due disclosure of the mortgage contract to him. In referring to the photostat of the document annexed to the plaintiff's original affidavit he drew attention to the omissions in the dates to which I have already referred. As to the question of the two life policies which had been surrendered and applied in reduction he claimed that his wife had been the beneficial owner of those policies and that the plaintiff had been and was still was receiving premium payments from her by automatic bank authority and that she had never been notified that the policies had been surrendered. At the hearing this aspect to the claim was acknowledged by Mr Godinet for the plaintiff but this hardly helps the defendant in that the credit of

copy of the mortgage in which the three gaps identified had been filled but this still contains at least one obvious error in that the date of repayment is stated as being the 16th May 1987 when it should have been 16th May 1992 for a five year term for the loan. The amendment showed that the 59 instalments were to be of $2434.92 each. Once again in the schedule of payments there is no mention of the amount of broken interest. The plaintiff apparently believed that Mr Warburton's firm had acted on its instructions and had made the further disclosure correcting the errors and omissions and went ahead and made the advance.

An approach was made by the plaintiff to Mr Warburton recently to find out what was done following the letter of the 19th May 1987 but no affidavit has been filed by him which might have been able to verify that proper compliance was eventually made. There is adequate proof provided that the advance was actually made on the 14th May 1987 and that from the initial amount of $150,240 there was deducted a service fee of $240 plus an amount of broken interest from the 14th May 1987 to the 31st May 1987 an amount of $1407.78 calculated at $1407.78 leaving a net amount advanced of $148,592.22.

The plaintiff also produced evidence that it had written direct to Mr and Mrs Madarasz on the 19th May confirming

that the mortgage advance had been paid to their solicitors on the 14th May and went on to describe the deduction of the $1407.78 for broken interest and recorded that the first of the 59 monthly deductions from the bank account was to be paid by the 16th June 1987 for $2,434.92 being the interest rate at 19%. The defendant did not pay the due instalment and indeed did not pay any of the monthly instalments of $2,434.92 at all. A further communication was sent by the plaintiff to Mr and Mrs Madarasz on the 4th September 1987 pointing out that there were then three instalments for June, July and August of $2,434.92 each due, and warning that if the default was not rectified a formal Property Law Act notice would issue.

There is no detailed evidence relating to the subsequent steps leading up to the actual mortgagee's sale by the Registrar but equally there is nothing to suggest that the plaintiff had not complied with the strict obligations of s.92 of the Property Law Act or that the sale was not properly conducted by the Registrar.

The second affidavit also provided for the first time an adequate breakdown of the calculations relating to the actual sale conducted by the Whangarei Registrar in showing precisely how the net amount of $112,143.36 received was made up.

The overall position therefore is that the defendant has received the full benefit of the advance made in May 1987 but never made any attempt to meet any obligation during the currency of the loan and the only repayment has been from the proceeds of sale.

In a summary judgment context I do not need to question that the necessary documents relating to the sale were all submitted and eventually approved by the Registrar who had full control over the conduct of the sale. No complaint was made at any stage after the defendant had been served with the notice under the Property Law Act relating to any want of compliance with the procedural requirements of that Act or the Credit Contracts Act. No attempt was made by him to try and prevent the sale and indeed it was not until after the summary judgment proceedings had been instituted and served that any suggestion was raised that there might have been a failure to comply with the strict initial disclosure requirements of the Credit Contracts Act. Indeed the whole exercise on the defendant's behalf in opposing the summary judgment has been to try and seek out some want of compliance with that Act to try and frustrate the plaintiff's claim to be repaid the balance of the advance. There is nothing meritorious in the defendant's defence and nothing that I can detect in the original

loan terms or the prescribed interest rates (which had no provision for any penalty rates) which give any suggestion of oppression or hidden items of credit. Although there were obvious deficiencies in the documentation as originally filed by the plaintiff in support of the summary judgment application the question is whether the subsequent documentation is sufficient for the plaintiff to be able to satisfy me that there was adequate compliance with the Credit Contracts Act to make that initial disclosure. If there was not, then the plaintiff cannot satisfy the onus of showing that there is no reasonably arguable defence since the provisions of penalties for failure to disclose under sections 24 and 25 of the Act are quite draconian.

I am informed that the particular solicitor in Mr Warburton's office who handled this matter is no longer with that firm. No further affidavit has been obtained from any other solicitor in that firm or from Mr Warburton himself. There were clearly deficiencies in the original disclosure and even though I am enjoined by the Court of Appeal to show a robustness in dealing with matters of this nature I cannot rule out the possibility that the final documentation on which the plaintiff is forced to rely may not have been adequate to ensure that the disclosure was brought to the defendant's attention at the time of the original advance and in particular

covered the matters referred to in sections 20 and 21 and the Second Schedule to the Act. If that is so then the defendant may be able to contend for a measure of reduction pursuant to s.25of the Act and on the material provided in the affidavits I simply cannot say with confidence that such a defence may not succeed. With some reluctance therefore I come to the view that because of the inadequacy of the documentation and the lack of evidence from the solicitors most closely involved to establish exactly what happened I cannot say that the suggested want of compliance defence is wholly without merit.

The application for summary judgment accordingly is declined and the matter will have to be resolved by ordinary procedure. The plaintiff may wish to file an amended statement of claim seeking rectification of the contractual documents or alternatively validation in terms of the Credit Contracts Act and if so should do so within 21 days of the date of this decision. The defendant is permitted a further 14 days after service of any amended statement of claim to file a statement of defence and further orders may be sought as necessary for timetabling or other matters so that the claim can be brought to finality with a minimum of further delay. As to costs I fix these in relation to the summary judgment in an amount of $1500 but the final incidence is to be