

BETWEEN WADSWORTH NORTON
 SOLICITORS NOMINEE
 COMPANY LIMITED

Appellant

A N D D.J. EDMONDS

Respondent

Hearing: 1 August 1991

Counsel: Mr D.R.I. Gay for Appellant
 Mr R.K. Hawk for Respondent

Judgment:

JUDGMENT OF TEMM J.

This appeal involves a comparatively small amount of money but it raises a very important point of conveyancing practice. It throws into relief the importance of the presence or absence of the phrase, "the receipt whereof is hereby acknowledged" in a mortgage document.

The appellant is a solicitors' nominee company which arranged a conveyancing transaction for the sale and purchase of a house. The purchasers were a Mr and Mrs Hapi who were acquainted or related to the respondent. Mr and Mrs Hapi, the purchasers, did not have enough money to complete their agreement and arranged with Mr Edmonds, the respondent, to assist them. The mechanics of the transaction, as organised by the solicitors, were that the purchasers would give

security over the house they were buying and would obtain \$7,600, which they needed, from the respondent. To provide this money the respondent had to mortgage his own separate property and then lend that money on to the purchasers to complete their contract. The solicitors acting for all parties drew up the appropriate mortgages and, in the mortgage given by the respondent to the plaintiff, the purchasers, Mr and Mrs Hapi, were included as covenantors by way of guarantors.

The appellant was mortgagee in each case. The solicitors took a shortcut in their accounting records and advanced the respondent's money from the account of the appellant, direct to the account of the purchasers Mr and Mrs Hapi. It was this move that has proved to be of special significance. The solicitors did not advance the money from the mortgagee appellant to the respondent mortgagor.

In proceedings in the lower Court the appellants sought to obtain judgment against the mortgagor, as defendant, because the mortgage was in default and they required payment. As it happened the mortgage could not be registered and they were suing on the personal covenant contained in the security. The learned Judge in the Court below listened to various arguments advanced by the mortgagor/defendant who complained that he did not intend, at any stage, to take out a mortgage over his property but only to guarantee what the purchasers needed to borrow to bridge the gap between the price and the money they had available. The Judge rejected

that defence and the case comes before me on appeal because of the other ground on which he found for the defendant.

His Honour followed closely the solicitors' trust accounting records and concluded that there had been no money advanced by the mortgagee to the mortgagor. He held that because the appellant had failed to prove that the money had been paid by mortgagee to mortgagor, that the mortgage was unenforceable for want of consideration.

On appeal the appellant has argued, firstly that this finding was wrong and secondly that, by virtue of the special definition of the term "mortgagor" in the Memorandum of Mortgage, the mortgagee is entitled to judgment. A third argument offered is that there was a term to be implied in the mortgage by which the mortgagor authorised the principal sum to be advanced to Mr and Mrs Hapi.

Dealing with the first ground I have come to the conclusion that, on the facts, the learned Judge in the Court below was quite correct. There was no advance made under the mortgage to the respondent, and since he was not paid the money, there was no consideration for the mortgage itself. It is unenforceable on that ground at least.

For that reason I uphold the learned Judge's finding of fact and the consequence is that judgment for the defendant was the proper decision in respect of that particular issue.

On appeal however, the appellant raised a new ground which was not argued in the Court below. The appellant points out that in the form of mortgage the following provision appears:

"COVENANTOR

13. The expression "Mortgagor" includes all persons or corporations executing this mortgage (whether as Mortgagor or Covenantor) and the covenants herein contained and implied shall bind all such persons or corporations jointly and severally and any Covenantor as a principal debtor."

With that definition in mind the appellant then argued that the opening sentence of the Memorandum of Mortgage is to be interpreted as including the lending of the principal sum in the mortgage to the covenantor (Mr and Mrs Hapi) which is what physically happened. The opening sentence is familiar and reads as follows:

"IN CONSIDERATION of the principal sum lent or agreed to be lent to the Mortgagor by the Mortgagee the Mortgagor and the Covenantor hereby covenant and agree with the Mortgagee as herein set forth AND for the better securing to the Mortgagee the payment of the principal sum interest and other moneys the Mortgagor hereby mortgages to the Mortgagee all the Mortgagor's estate and interest in the land."

The mortgage comprises four printed pages, three of which contain covenants commonly found in such instruments, together with modifications of the covenants, powers and conditions implied in mortgages by the Fourth Schedule to the Property Law Act 1952. A number of other details are included to enable the mortgage to be appropriate for a wide variety of

commercial transactions.

But the memorandum does not include the important clause relating to the principal sum that "the receipt whereof is hereby acknowledged".

Dealing first with the argument that the opening sentence relating to the consideration is apt to cover this particular case, where the money was in fact advanced directly by the mortgagee to the covenantor, I cannot uphold the appellant's argument. While the definition in cl.13 is appropriate when reading the provisions in the mortgage relating to covenants, and has the effect of binding the covenantor to these covenants, and as a principal debtor, yet the opening sentence upon which the appellant relies does not make sense if that meaning is given to the word "covenantor". In the opening sentence the words "mortgagor" and "covenantor" appear side by side and they must be given the obvious meaning that "mortgagor" relates to Mr Edmonds and that "covenantor" relates to Mr and Mrs Hapi (the guarantors). If the extended meaning is given, (so the word "mortgagor" includes both mortgagor and covenantor) the sentence becomes nonsense.

Interpreting the contract in the light of the background facts, which is the standard practice for interpretation of such a document, it is clear to me that, in the opening sentence where the consideration for the mortgage is expressed, the word "mortgagor" does not carry the extended meaning given by cl.13 when used in conjunction with the term

"covenantor". That extended meaning is appropriate in almost every other place where the word "mortgagor" is not used in conjunction with "covenantor" in the mortgage; but it is not intended to be the meaning given to that word in the important sentence declaring the consideration for the contract of mortgage. On this point therefore I find against the appellant and the judgment is not to be set aside on that ground.

Another subsidiary argument advanced on appeal is that there was an implied authority given by the respondent mortgagor authorising the mortgagee to pay the money directly to Mr and Mrs Hapi as purchasers. There are several difficulties in the way of this argument. In the first place the submission involves the inclusion of an implied term into this written Memorandum of Mortgage, that the mortgagor authorises the mortgagee to pay the money direct to the purchasers. But it is an express term of the Memorandum of Mortgage that the money has been advanced to the mortgagor. A term cannot be implied in a contract, whether of mortgage or of sale or of any other kind, unless it satisfies all the conditions which are laid down for the implication of such a term. Those conditions are that the term to be implied must be reasonable and equitable; it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; it must be so obvious that "it goes without saying"; it must be capable of clear expression; and it must not contradict any express term of the contract (see Devonport Borough Council v Robbins

[1979] 1 NZLR 1, 23 and 29.) In this particular case this "implied" term is not necessary to give business efficacy to the contract. It also contradicts an express term of the contract of mortgage, namely that the money has been advanced to the mortgagor. In those circumstances the term cannot be implied and the authority for which the appellants contend as authorising payment to someone other than the mortgagor is lacking.

It is an important point of conveyancing law that, when a mortgagee hands over to a solicitor the moneys loaned under a mortgage, the mortgagee must have a receipt from the mortgagor. It is for that reason that most documents of that kind include the phrase, "the receipt whereof is hereby acknowledged". The presence of that phrase brings into operation s.56 of the Property Law Act 1952. That section makes it unnecessary for the mortgagee to do any more than prove that the moneys advanced under the mortgage had been handed over to the mortgagor's solicitor. The need for this provision can be seen in the case of Sims v Lowe [1988] 1 NZLR at 656. The judgment of Bisson J. sets the matter out very neatly in the following passage:

"It may be that when loan moneys in the trust account of a solicitor acting for both parties are transferred to the credit of the borrower by journal entry whereby the amount of the loan moneys is debited in the ledger account of the mortgagee client and credited to the ledger account of the mortgagor client the solicitor is purporting to receive payment of the loan moneys on behalf of the mortgagor client. But having done so the solicitor must be able to produce for the protection of his mortgagee client a receipt by the mortgagor of the loan moneys. Such a receipt usually appears in the

mortgage document itself which is set out in the judgment of Somers and Gallen JJ. This section has a two-fold purpose. It provides sufficient authority for a mortgagee, usually the mortgagee's solicitor, paying over the loan moneys to the solicitor who produces a mortgage containing the mortgagor's receipt for the loan moneys; and, secondly it relieves the solicitor who produces such a mortgage from producing any separate or other authority that he is entitled to receive the loan moneys on behalf of the mortgagor.

In this case as the mortgage document did not contain any such receipt the solicitor in his capacity as solicitor for the mortgagee cannot rely on s.56 of the Property Law Act. The mortgage document is neither a receipt by the mortgagors for the loan moneys nor an authority from the mortgagors for their solicitor to receive the loan moneys on their behalf.

Without the benefit of a mortgage document which contains a receipt signed by the mortgagors for the loan moneys, the solicitor for the mortgagors in this case must be able to prove by other written or oral evidence that he had authority to receive the loan moneys on behalf of the mortgagors and to give a good and sufficient receipt on their behalf to the mortgagees for the loan moneys so as to prove that the loan moneys were in fact received by the mortgagors. How the loan moneys were then disbursed is a matter as between the solicitor and his mortgagor clients and will be relevant to the issue whether the loan moneys were advanced to and received by the mortgagors." (p.663)

In these circumstances where the moneys were not advanced in fact to the mortgagor respondent and where there is no receipt from the mortgagor produced to and held by the mortgagee appellant, the learned Judge was right to hold that the mortgagee had failed to prove its case and that there should be judgment for the defendant.

The consequence for the appellant and its solicitors are unfortunate but the facts of the case illustrate how shortcuts in accounting procedures and a failure to include the common

phrase in the form of the mortgage can have disastrous results. The appeal is dismissed with costs according to scale and disbursements as fixed by the Registrar.

J. Russell Dignan

Solicitors:

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Jackson Russel Dignan Armstrong, Auckland for
Respondent