IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

18/3

1723
~~1754~~

C.P. 44/92

IN THE MATTER of Memorandum of Mortgage No C.06354.3F

BETWEEN EILEEN HELEN JOBBITT

Plaintiff

AND C. KENNEDY SOLICITORS NOMINEE COMPANY LIMITED

Defendant

MEDIUM PRIORITY

Hearing: 3 July 1992 (At Auckland)

Counsel; Miss Nelson for plaintiff
S. Henderson for defendant

Judgment: 3 July 1992

(ORAL) JUDGMENT OF BARKER J

This is an application for an interim injunction to stop a mortgagee sale due to take place in 55 minutes time, namely 1.p.m. today in Whangarei. The application was filed ex parte in the Whangarei Registry on 30 June 1992. On 1 July 1992, I directed that the application be on notice; a hearing has taken place today under conditions of extreme urgency.

On more than one occasion, Judges of this Court have protested at the actions of mortgagors seeking to invoke the jurisdiction of the Court to prevent mortgagee sales at the

last minute; there always is sufficient time created by the S.92 Property Law Act Notice within which to apply to the Court in a timely fashion. In this case, the intention of the mortgagee to sell was well-known to the mortgagor for a long time and the mortgagor made efforts to refinance but did not file proceedings.

The mortgage was dated 15 September 1989. It was taken out by the plaintiff, a widow aged over 70, over her home for the sum of $50,000. The mortgagee was a solicitor's nominee company representing another client of the solicitor with moneys to invest. The mortgage was to assist the son and daughter-in-law of the plaintiff who were in financial difficulties. They gave a third mortgage back to the plaintiff their home but this mortgage is of no value.

The memorandum of mortgage signed by the plaintiff did not contain the statement in respect of the proposed advance "the receipt whereof is hereby acknowledged"; this omission bears some significance. The inference from the affidavits is that the advance never went to the plaintiff but went directly to her son and daughter-in-law.

The uncontroverted evidence is that the same solicitor, the late Mr Christopher Kennedy, acted for the plaintiff, her son and daughter-in-law and the defendant mortgagee in the same transaction. The plaintiff in her affidavit is rather vague as to what Mr Kennedy told her at the time. She says that she was not told that she should have an independent

solicitor advise her, though she cannot recall Mr Kennedy's specific advice.

Even assuming in favour of the late Mr Kennedy that he may have said to the plaintiff that she should should be independently advised, the fact situation from his point of view can be no better than that in **Mouat v Clark Boyce** (1991) 1 NZ ConvC 190, 917, a recent decision of the Court of Appeal which has caused some concern for solicitors who act for more than one party in a transaction.

In that case, the Court of Appeal held that a solicitor failed in his fiduciary duty to an elderly widow who mortgaged her house to provide finance for her son. The solicitor in that case actually told the plaintiff that she should get other advice but she did not want to do so. The Court of Appeal held that the solicitor was failing in his duty in not insisting that she receive independent advice.

So it would seem, on the face of it, there is a cause of action against the estate of the late Mr Kennedy. I am informed from the Bar that his estate is insured against any claim of this nature which might be made either by the plaintiff or by the investor.

The affidavits reveal efforts made by the plaintiff or her advisors to obtain alternative finance. There is a suggestion that, if these efforts are unsuccessful another son and daughter-in-law would be prepared to mortgage their

house rather than have the plaintiff's house sold from under her.

The explanation for the plaintiff's delay is not particularly satisfying. It seems that the solicitors were hoping for alternative finance; probably the truth is that the significance of the legal situation did not really occur to them until recently in terms of **Mouat v Clark Boyce**. However, one can only speculate.

Counsel for the plaintiff relied principally on the decision of Anderson J in **O'Kane v ANZ Banking Group (NZ) Ltd** (1992) 2 NZ ConvC 191, 234. In that case, an elderly mother mortgaged her home-unit to secure advances from the bank for her adult son. The plaintiff and her son went to a solicitor's office where the mortgage was signed. The solicitor acted for the plaintiff, the son and the bank. There was conflicting evidence whether the plaintiff was made full aware of the security documents she had signed; her signature was witnessed by a legal executive. The plaintiff alleged, inter alia, a breach of fiduciary duty by the solicitor. Anderson J confirmed an interlocutory injunction granted ex parte restraining the mortgagee bank from selling. Anderson J was satisfied there was a serious question to be tried and said -

> "An absence of any indication that the plaintiff was invited to seek alternative advice or was told of the risk to her in giving security over her only asset for no personal advantage whatever but really for the mutual advantage of the bank and her son."

Anderson J decided to continue the injunction because, on the papers before him, there was a duty on the solicitor which was apparently overlooked.

I can see no basic difference between the present case and **O'Kane's** case. Particularly in the light of **Mouat v Clark Boyce**. The balance of convenience in **O'Kane's** case was found by the learned Judge to be with the plaintiff, an elderly lady who faced the loss of her home.

The situation is similar here. I consider that the balance of convenience, despite the reprehensible delay by the plaintiff, is in favour of the plaintiff.

Also of relevance is the decision of Temm J in **Wadsworth Norton Solicitors Nominee Company Limited v Edmonds** [1992] 1 NZLR 596; that dealt with a mortgage such as the present which did not have contained the words "receipt whereof is hereby acknowledged". Because it seems that the advance was never paid to the plaintiff and there is no presumption created by the use of those words, there could be an argument, as there was found in Temm J's decision, that the mortgage could be unenforceable for lack of consideration.

I do not ignore Mr Henderson's potent argument on the question of delay and in particular on the detriment suffered by the contributor to the nominee company who is an investor in good faith who relied on his solicitor to make a proper investment. However, to some extent the investor

must bear the consequence of acting through a solicitor's nominee company controlled by the solicitor.

I take into account in fixing the balance of convenience the intimation given to me from the Bar by counsel for the defendant that the estate of the late Mr Kennedy is insured against claims of professional negligence. Therefore, it seems to me that the investor might possibly have a claim; of course one cannot give an authoritative ruling on that.

Accordingly, in the exercise of my discretion I issue an interim injunction. In view of the delay of the plaintiff I indicate I should not be prepared, even if the plaintiff succeeds ultimately, in awarding costs against the defendant on this injunction. The plaintiff must bear those costs herself as a penalty for the inordinate delay there has been in making this application.

I think too that I should follow the example of Anderson J in **O'Kane's** case and require the plaintiff to sue also the estate of the solicitor, as the solicitor was sued in **O'Kane's** case. That course would enable the existing defendant, if desired, to file a cross-claim.

Accordingly, the plaintiff is to file and serve an amended statement of claim within 21 days and I join the estate of Mr Kennedy as a further defendant.

Liberty to apply is reserved in respect of timetable orders.

R J Barker

Solicitors: Thorne Dallas & Partners, Whangarei, for applicant
Henderson & Reeves, Whangarei, for respondent