IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

13/10

CP 86/95

1379

BETWEEN JOHNSTON LAWRENCE ELDER SOLICITORS NOMINEE COMPANY LIMITED

Plaintiff

AND LIONEL EDWARD ALEXANDER

Defendant

Hearing: 26 September 1995

Counsel: B.A. Corkill for Plaintiff
P. Michalik for Defendant

Judgment: 2 October 1995

ORAL JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
Johnston Lawrence Elder, Wellington for, Plaintiff
Morrison Morpeth, Wellington, for Defendant

In this case the plaintiff ("Nominees") has a first registered mortgage over the defendant's dwelling house at 14 Atlanta Grove, Brooklyn, Wellington. The mortgage was granted in November 1992. The principal sum was $100,000. The mortgage was due for repayment on 24 November 1994. At the hearing it appeared that since 24 June 1993 (well over two years) the defendant has been in default. However since the hearing counsel have submitted a joint memorandum showing that the plaintiff has received some monthly interest payments during 1995 it seems through inadvertence on the part of Mr Alexander's bank. However the amount due under the mortgage as at 21 September 1995 is principal $100,000 and arrears of interest $26,455.56. The plaintiff applied for summary judgment seeking possession of the land and buildings. On 23 August 1995 an order was made. Plaintiff's counsel however at that time gave an undertaking not to seal the order to allow an application for stay to be made. It is that application which is now before me. Affidavits have been filed in support and opposition to the application. In addition to his house the defendant is the owner of property in Oriental Bay and he owns sections in Karori ("Bushlands"). Respecting the Oriental Bay properties, Mr Alexander entered into an arrangement with a company called Forthwith Shelf Company No. 95 Limited. That arrangement has recently been the subject of litigation in the High Court and a judgment by Ellis J. In his judgment at page 4 he says:

> "The History of the Transaction
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> Lionel has been interested all his working life in developing and holding properties. As at the end of 1993 he owned Oriental Bay, Bushlands and Brooklyn. Due principally the development costs of Bushlands he was deeply in debt. The Bank was owed over $1m and held first mortgages over Oriental Bay and Bushlands. Nominees was owed over $200,000. It had a second mortgage over Oriental Bay and Bushlands and first and second mortgages over Brooklyn. He had other unsecured debts. He had also agreed with James that James would be the developer of Bushlands. The proposal was that James would buy Bushlands, develop it and sell the sections. To this end James registered for the payment of GST, did the development and paid the bills from money provided by Lionel. I was told the total cost approached $700,000.

> James did not take title, the sections did not sell. Lionel's income appears to have been from letting the houses on Oriental Bay although one has been occupied rent-free by James. His cashflow was poor and he operated by capitalising his interest. This became a chronic situation. The Bank and Nominees refused to indulge Lionel further. The Bank and Nominees each issued default notices and by 8 November 1993 each was in a position to proceed with a mortgagee's sale. Nominees instructed agents to proceed to sell Brooklyn on that day saying they had not received any constructive proposal from Lionel and the Bank was holding back taking action itself. It is very plain indeed that by November 1993 Lionel's insolvency was very serious and compounded by his intransigent refusal to sell Oriental Bay, or part of it, his inability to sell Bushlands, and his very natural desire not to sell Brooklyn.

Mr Garnham, a solicitor and director of Forthwith Shelf Company No. 95 Limited was involved in the arrangement which Ellis J had to consider. The dispute centred around whether the arrangement entered into was properly to be construed as an agreement for sale and purchase or as a mortgage. The Court held that the arrangement was a mortgage.

In the course of his judgment Ellis J was required to make findings concerning the credibility of the witnessess and at page 8 of his judgment he says:

> "But it is time to say that I found Lionel's evidence unsatisfactory and I do not accept it when it is in conflict with that of other witnesses. I observe in passing that this is not the first time his evidence has been so assessed: *Alexander v. Tse* [1988] NZLR318."

By deed dated 29 June 1995 the plaintiff assigned debts owed to it by Mr Alexander to a Nominee of Forthwith Shelf Company No. 95 Limited, namely Benign Capital Limited.

Counsel for Mr Alexander argues that it would be unjust to allow the summary judgment to be executed because Johnston Lawrence Elder Solicitors Nominee Company Limited is only the nominal plaintiff. He says it is very clear that Benign Capital Limited (Michael Robert Garnham) has the primary interest in

enforcing the judgment. It is claimed that the previous actions of the Forthwith Company resulted in Mr Alexander getting deeper and deeper into default. Thus it would be unjust to now allow the present judgment to be enforced as this would have the result of evicting Mr Alexander and his wife from their family home which they have lived in for some 20 years. Both apparently are now in their 70s.

Mr Michalik made a strong attack on the credibility of Mr Garnham based on the affidavits filed and, also sought to place a sinister connotation on the deed of assignment. Here again I refer to the judgment of Ellis J at page 13 where he says:

> "However Lionel had at least two other options available to him for acceptance as at 4 February 1994, and I reject the contention that Mr Garnham victimised him or dealt with him in circumstances where it is contrary to conscience that the bargain as a whole should be accepted. Nor do I think there is a marked inadequacy of consideration. Finally there was no procedural impropriety. At all times Lionel had the advantage of strong unequivocal and independent legal advice. This last factor must dispel any doubt about the matter."

As to the deed of assignment itself I do not see anything improper in the present plaintiff making arrangements to tidy up its affairs in the best commercial way it saw fit.

Mr Corkill says the plaintiff certainly has nothing to hide in this matter nor has Forthwith Company. The latter happily discovered the deed of assignment in the proceedings before Ellis J. I conclude that there is nothing in the affidavits, or in the submissions of Mr Michalik, which brings me to the view that it would be unjust to allow the judgment to be enforced.

The other ground put forward for seeking a stay is that it is urged that now that the Forthwith Company litigation has been concluded Mr Alexander is in a position where he can get on and sell Oriental Bay or the Karori property and clear his debts. Oriental Bay is or has been subject to an agreement to sell to a Doctor Donald. Mr Alexander claims that Mr Garnham has taken steps to sabotage that agreement for his own ends. That is strongly refuted by Mr Garnham, who deposes that he has indeed done all he can to bring about a successful conclusion to that sale. In any event it seems that the agreement has now fallen through and the first mortgagee is to take steps to auction the property. Mr Corkill produced a statement showing both the defendant's solicitor's assessment of the position and the plaintiff's own assessment of the situation if Oriental Bay is sold at a realistic marketable price. He points out that both assessments must lead one to conclude that there will be no moneys available from Oriental Bay even if sold at market value with which to clear the mortgage. Mr Michalick says Mr Alexander instructs him he has a cash sale for the Karori sections and which would provide a source to pay off the plaintiff's mortgage. Mr Alexander in his affidavit also gives evidence of an arrangement that he has been negotiating to obtain overseas finance over all his properties, including his house, which would enable payment to be made. However as Mr Corkill points out since judgment was given the defendant has already had a month to take steps to pay off this debt and he has not done so and further, that all previous potential sales have up to now, come to nought.

The law to be applied on an application for stay is set out in the judgment of Wylie J in *Amalgamated Finance Limited v. B.E. Fairlie & Anors* unreported A.1232/83 Auckland Registry, Judgment 3 September 1986. It is, that a stay may be granted where a substantial miscarriage of justice would be likely to result. In page 10 of his judgment he said:

> "In the context of R.565 when I take into account the traditional marked reluctance of the Courts to deprive a successful litigant of the fruits of his judgment I have little difficulty in concluding that "likely" in R.565 does carry the connotation of probability rather than possibility."

Clearly if this judgment is not stayed the result will be that Mr Alexander will have to quit his family home. That is of course a very unfortunate situation for the defendant to find himself in but in that respect he is in no different position than any other defaulting mortgagor. The necessity for the defendant to quit his home is the result of the process but that cannot in any way be relied on to claim substantial miscarriage of justice. Furthermore it is apparent that in the immediate future Mr Alexander will face charging orders in respect of the recent litigation, against the property.

I conclude therefore that no ground has been made out which should lead the Court to conclude that it should grant a stay. The application is accordingly refused. There is however the logistal problem involved in the defendant vacating his home and I think he should be given some time to leave the property and remove his belongings. However given that the defendant must, or should, have expected that there was a real probability that the Court would not grant stay, I think that 14 days would be a reasonable time for the plaintiff to quit the property. An order for stay is therefore granted until 14 days from today for the sole purpose of enabling the defendant to quit the property.

I reserve the question of costs and will accept a memoranda concerning same.

Master J.C.A. Thomson