

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

CP 90/96

BETWEEN      ORANGE BUILDERS LTD

Plaintiff

AND            JOINT VENTURE PARTNERS LTD

First Defendant

AND            HARMAN & CO SOLICITORS NOMINEE  
CO LTD

Second Defendant

AND            ROSS TREVOR CHRISTOFFERSEN and  
GREGORY BRYAN TAYLOR

Third Defendants

AND            DEREK JOHN MARSHALL and ORS as  
WOOD MARSHALL

Fourth Defendants

NOT  
RECOMMENDED

Hearing: 11 November 1997

Judgment: 19 NOV 1997

Counsel: E J Tait for Plaintiff  
P B McMenamin for First and Third Defendants  
S P Rennie and D J McCarthy for Fourth Defendants  
No appearance for Second Defendant

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RESERVED JUDGMENT OF MASTER VENNING

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## Applications Before the Court

The Plaintiff applies for consolidation of these proceedings with proceedings in CP 107/95 and also for further and better discovery from the First and Third Defendants.

The Third Defendants apply to strike out three of the four causes of action pleaded against them in the Plaintiff's amended statement of claim.

The Fourth Defendants oppose the consolidation and seek a stay of CP 90/96 until after the determination of proceedings CP 107/95.

## Background

The Plaintiff is a builder. The First Defendant is a property developer. By agreement dated 21 July 1994 the Plaintiff agreed to build a townhouse for the First Defendant. The Plaintiff has completed the building and sues the First Defendant for \$53,273.62 being the balance due to it under the contract.

The substance of the First Defendant's defence and counterclaim is that the contract required the Plaintiff to site the townhouse 4.5 metres from the Wai-iti Terrace boundary, that in breach of the contract the Plaintiff sited the townhouse 5.63 metres from the Wai-iti Terrace boundary and as a consequence the First Defendant was unable to erect the remaining two townhouses provided for on the plans and anticipated by the development. The First Defendant counterclaims for the loss of \$97,000 which it says it has suffered.

The Second Defendant is a solicitors nominee company. It advanced monies to the First Defendant. The advance was secured by a first mortgage registered over the property in question.

The Third Defendants are directors and shareholders of the First Defendant. The building contract between the Plaintiff and First Defendant provided (in clause 22) that where the First Defendant failed to make payment of the contract price or any monies due under the contract, the First Defendant would, upon demand, give and execute in favour of the Plaintiff a registerable

memorandum of mortgage. When the First Defendant failed to pay the balance claimed by the Plaintiff, the Plaintiff made demand under this clause and registered a caveat against the property owned by the First Defendant. In addition to the first mortgage held by the Second Defendant solicitors nominee company, the Third Defendants, and with them a Glenys Anne French, held a second mortgage over the property.

The Second Defendant as first mortgagee gave notice to the Plaintiff as a caveator of the First Defendant's default under the terms of the mortgage to the Second Defendant. Following receipt of that notice the Plaintiff's solicitors wrote to the Second Defendant's solicitors on 16 March 1995 and advised inter alia:

"In the event that the default is not remedied by 1 April 1995, our client would look to take a transfer and assignment of Harman & Co Solicitors Nominee Company Limited's mortgage. We will at that point forward transfer to you. Please forward to us statement of amount required to settle the mortgage at that point.

In the event that you consider that you are not under an obligation to proceed in the way we propose above and propose to proceed with your notice, please ensure that you advise us as to whether you intend to sell the property privately or by auction. If privately, please advise us how you intend to market the property so that we have an opportunity on our client's behalf to be involved in that process."

The Second Defendant did not respond but by transfer dated 14 July 1995 the Second Defendant transferred the first mortgage to the Third Defendants.

In late January 1995 the First Defendant mortgagee had entered agreements to sell the townhouse to a Somboon Thanapoomikul at \$430,000 and the balance bare land to S A and L M Baker for \$285,000. After taking the transfer of the first mortgage from the Second Defendant the Third Defendants apparently entered identical agreements dated 14 July 1995 with the same parties. The Third Defendants then, in exercise of the power of sale under the mortgage, transferred the property to Samboon Thanapoomikul and S A and L M

Baker on or about 18 July 1995. It appears that the Plaintiff's caveat was cleared from the title by the registration of the transfer pursuant to the mortgagee sale.

The First Defendant instructed the Fourth Defendant solicitors to act for it in relation to these later transactions.

### **The Plaintiff's Claim**

In addition to claiming the balance of the monies due under the contract from the First Defendant, the Plaintiff claims against the Second Defendant mortgagee that it transferred the mortgage to the Third Defendants without notice to the Plaintiff in breach of the obligations owed by it to the Plaintiff.

The Plaintiff also claims against the Third Defendants inter alia that they breached the duty they had as mortgagee to act in good faith in the sale of the property; alternatively that they exercised the powers in the mortgage mala fide and for ulterior purposes; alternatively that the Third Defendants had no authority to transfer the property, there being no default; and finally as against the Third Defendants the Plaintiff claims that it is entitled to a proper taking of account between the First Defendant and Third Defendants as second mortgagee.

As against the Fourth Defendant solicitors the Plaintiff claims that the solicitors owed the Plaintiff a duty of care in certifying the documents of transfer from Second Defendant to Third Defendants, and from Third Defendants to S A and L M Baker and that such certification was made negligently. Alternatively it is pleaded the solicitors have acted in breach of the Fair Trading Act.

### **Proceedings in CP 107/95**

In the proceedings CP 107/95 the Plaintiff has cited only the First Defendant as defendant. It claims the sum due under the contract. However, a

third party notice has been issued by the Plaintiff against the Christchurch City Council arising out of the counterclaim by the First Defendant.

### **Preliminary Procedural Matters**

At the outset of the hearing I raised with counsel for the Plaintiff whether the City Council as a party to CP 107/95 had been served with the application for consolidation. Counsel confirmed it had not been. He also accepted that the matters covered in the Plaintiff's claim against the First Defendant in CP 107/95 could and should be covered in the existing proceedings, CP 90/96, by an amended statement of claim, and that that would be a more appropriate way of the Plaintiff pursuing the claim against the First Defendant and the other Defendants, rather than consolidation.

At the Plaintiff's request therefore, the proceedings in CP 107/95 were discontinued with costs reserved. The application for consolidation is also dismissed, costs reserved.

### **The Position of the Fourth Defendant Solicitors**

Counsel for the Plaintiff and Mr Rennie for the Fourth Defendants reached an accommodation on the issue of a stay of the Plaintiff's claim against the Fourth Defendant solicitors. The claim against the solicitors is not the prime focus of the Plaintiff's claim. If the Plaintiff recovers from other parties there will be no need for the Plaintiff to pursue its claim against the Fourth Defendant solicitors.

By consent there will be an order staying the Plaintiff's claim in these proceedings against the Fourth Defendant solicitors until further order of the Court.

### **Application for Further and Better Discovery**

Given that the pleadings in CP 107/95 have been discontinued and the Plaintiff is to file an amended statement of claim against the First Defendant

in these proceedings, both Mr Tait for the Plaintiff and Mr McMenamain for the First and Third Defendants accepted that the Plaintiff's application for further and better discovery should be adjourned sine die to await the filing of the amended statement of claim. It may be there will be no need for the Plaintiff to pursue the application. The application will therefore be adjourned sine die on the terms set out at the conclusion of this decision.

### **The Third Defendants' Application to Strike Out**

The Plaintiff pleads four causes of action against the Third Defendants. The Third Defendants apply to strike out the first three causes of action against them. They accept, for present purposes, that there is a proper issue to be tried on the fourth cause of action which seeks a taking of account. Essentially it is the Third Defendants' position that a taking of account will show that there are no monies owing by them to the Plaintiff. For that reason Mr McMenamain submitted the Third Defendants took a pragmatic attitude to the fourth cause of action and did not seek to have it struck out.

During the course of submissions and discussion with the Court Mr Tait accepted that the Plaintiff had a major difficulty with the third cause of action pleaded against the Third Defendants, and conceded that the Plaintiff could not pursue that cause of action. That concession was properly made. There will be an order dismissing the third cause of action against the Third Defendants as pleaded in paragraphs 47-52 inclusive of the amended statement of claim.

The Plaintiff's second cause of action against the Third Defendants is really the other side of the coin of the first cause of action. The first cause of action pleads a breach of the mortgagee's duty to act in good faith, while the second cause of action pleads that the Third Defendants exercised powers in the mortgage for an ulterior purpose or for purpose mala fide. The second cause of action adds nothing to the first cause of action. To the extent that it has any validity, it could and should be pleaded as part of the first cause of action. It cannot stand as a true alternative. It must be dismissed.

## Principles

This is a striking out application under R186. The principles the Court operates under are clear. The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied it has sufficient material and necessary assistance from parties to reach a definite and certain conclusion: Abrahams Wools Exchange Ltd v Norlake Wool Ltd 1 PRNZ 101.

“It is well recognised that since it is a strong step to keep the plaintiff from the judgment seat the jurisdiction is not exercised except in plain cases where the claim is plainly untenable.” per Eichelbaum J in Innes v Ewing [1986] 4 PRNZ 10 p19

The essence of the Plaintiff's claim against the Third Defendants is that as directors of the First Defendant they colluded with the First Defendant to remove the Plaintiff's caveat over the property owned by the First Defendant. They did so by taking an assignment of the first mortgage from the Second Defendant, and then exercising the power of sale under the First Defendant's mortgage.

The Plaintiff says that the notice given by its solicitors in the letter dated 16 March 1995 was a requisition under s83 of the Property Law Act and that the Second Defendant was obliged to assign the mortgage debt to the Plaintiff. The Second Defendant did not assign the mortgage debt to the Plaintiff but rather transferred the mortgage to the Third Defendants. The Plaintiff says the Third Defendants took the mortgage subject to the equities and notice imposed on the Second Defendant's, and particularly the notice given by the Plaintiff to the Second Defendant.

Mr McMenemy submitted there were two fundamental flaws in the Plaintiff's argument. First, the Plaintiff's claim was based on its status as an encumbrancer, which could not be sustained, and second, that the Plaintiff had sustained no loss by reason of the Defendants actions in any event.

## Encumbrancer

The Plaintiff's claim against the Third Defendants is based on its status as an encumbrancer. Fundamental to its claim is its right under s83 as an encumbrancer to require assignment of the first mortgage. It relies upon its caveat supporting the right to a mortgage to establish its status. In the pleadings the Plaintiff acknowledges that it was in breach of contract by building the townhouse in the wrong place. In those circumstances Mr McMenemy submitted that it was inconceivable that the Plaintiff could obtain an order for specific performance of that part of the contract requiring the grant of a mortgage to him by the First Defendant.

It is necessary to consider the wording of the clause relied upon by the Plaintiff. In full it is:

“22(i) Where the owner has failed to make payment of any portion of the contract price or any other moneys due and payable to the Registered Master Builder hereunder on the due date for payment, then the owner will forthwith upon demand give and execute in favour of the Registered Master Builder a registerable memorandum of mortgage over the land to secure the amount owing from time to time from the owner to the Registered Master Builder ...”

It may well be that despite the fact the Plaintiff is in breach of the contract by siting the townhouse otherwise than in accordance with the plans, there may be no loss sustained by the First Defendant. That can only be determined in the proceedings. If there is no loss, or even if there is a loss which leads to a reduction in the amount owing by the First Defendant to the Plaintiff, there could still be “other moneys due and payable” to the Plaintiff in terms of the contract which would support the mortgage and in turn the caveat.

For those reasons, in my view, it must be arguable at this stage that the Plaintiff could properly claim that it was entitled to lodge the caveat.

More fundamentally, however, an issue arises as to the status of the caveat and whether the Plaintiff as caveator is an encumbrancer. The right under



s83 only applies to encumbrancers. In s2 of the Property Law Act "encumbrance" is defined as:

"Includes a mortgage in fee or for less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum; and encumbrancer has a corresponding meaning, and includes every person entitled to the benefit of an encumbrance, or entitled to require payment or discharge thereof."

A caveat is of a special nature. A caveat against dealings, when lodged, is in the nature of a statutory injunction which enables the caveator to preserve the status quo until he has had the opportunity of having the validity of his claim tested in appropriate proceedings: *Barry v Heider* [1914] 19 CLR 197; *Miller v Minister of Mines* [1963] AC 484,497. It is a notice of an equitable claim: *Abigail v Lapin* [1934] AC 491,500.

In Youngs '*Law of Mortgages of Land in New Zealand*' Butterworths 1995 the author states, after referring to s104 of the Land Transfer Act which sets out priorities in the application of the monies arising on a sale by mortgagee:

"Under this section where the holder of an unregistered second mortgage has lodged a caveat to protect that mortgage and the first mortgagee exercises the power of sale, the caveat will prevent the registration of the transfer to the purchaser unless the provisions of s141 of the Land Transfer Act 1952 as amended in 1982 and 1985 apply. If they do not, a caveat will prevent registration even where the registration of the caveat is subsequent to the mortgage. Before the transfer can be registered the caveat must first be removed. This is because the caveat is not itself an encumbrance: it is merely the means whereby if necessary the matter can be tested in Court. In many cases of a second mortgage protected by a caveat the caveat will be able to be removed by the straightforward procedures in the caveat."

The definition of "encumbrance" in the Property Law Act does not in my view extend on its natural meaning to a caveat given the nature of a caveat. That is reinforced by the conclusion in Youngs text.

For the above reasons in my view Mr McMenemy's first submission is correct in that the Plaintiff as caveator was not an encumbrancer for the

purposes of the Property Law Act and accordingly could not rely upon s83 of the Act.

It is apparent that the Plaintiff's claim as pleaded against the Third Defendant depends upon the failure of the Second Defendant to assign the mortgage debt to the Plaintiff as an encumbrancer. The claim against the Third Defendant is based upon the premise that the Third Defendant took the mortgage from the Second Defendant subject to the equities and obligations imposed on the Second Defendant. The equities and obligations arose out of the caveat and the notice given on behalf of the Plaintiff as encumbrancer. In light of the above finding that the Plaintiff was not an encumbrancer, the pleading cannot be sustained.

In the alternative, Mr McMenamin submitted that the terms of the alleged requisition were not sufficient to constitute a requirement under s83.

It is necessary to consider the exact wording of s82 and s83 in this context. They read as follows:

"82 (1) Where a mortgagor is entitled to redeem he shall by virtue of this Act have power to require the mortgagee, instead of discharging, and on the terms on which he would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly. ..."

83. The like right to require a mortgagee to assign the mortgage debt to a third person shall belong to and may be enforced by each encumbrancer or by the mortgagor, notwithstanding any intermediate encumbrance; but a requisition of an encumbrancer shall prevail over a requisition of the mortgagor, and, as between encumbrancers, a requisition of a prior encumbrancer shall prevail over a requisition of a subsequent encumbrancer."

Clearly, the sections require a subsequent encumbrancer to give notice to the prime mortgagee of their intention to exercise their rights under the sections and to require the assignment of the mortgage debt to them.

"Requisition" is defined in the *'New Shorter Oxford English Dictionary'* as:

"The action or an act of formally requiring or demanding that a duty etc be performed; a written demand of this nature."

It is necessary to consider whether the Plaintiff's solicitors' letter of 16 March 1995 meets this definition. The letter does not expressly state that the Plaintiff required the first mortgagee to act in accordance with s83. The operative part of the letter is:

"... our client would look to take a transfer and assignment of Harman & Co Solicitors Nominee Company Limited's mortgage. We will at that point forward transfer to you. Please forward to us statement of amount required to settle the mortgage at that point."

In my view that wording is insufficient to amount to a requisition under s83. It is a statement of intent on behalf of the Plaintiff. It was not followed up or pursued further. It is no answer that the letter then goes on to refer to an obligation on the part of the mortgagee, as the basis of the obligation is not made clear. In my view even when the letter of 16 March 1995 is read as a whole it does not amount to a requisition for the purposes of s83.

Therefore, even if the Plaintiff was regarded as an encumbrancer, for the reason that the letter of 16 March 1995 did not amount to a requisition under s83 I find that the Plaintiff's claim against the Third Defendants cannot be sustained.

### Loss

Mr McMenamain then submitted that even if the Plaintiff was an encumbrancer and the requisition was valid the Plaintiff had suffered no loss as it was not entitled to a transfer. He submitted that s83 makes it clear the second mortgagee would always have been entitled to a transfer of the mortgage from the first mortgagee in priority to the Plaintiff as caveator. That is so. The mortgage was, however, not transferred to the second mortgagee. The second mortgagee was the Third Defendants and Glenys Anne French. The first mortgage was transferred to the Third Defendants only. In my view there is no force in this submission.

## Mortgagee's Obligations

Although it is strictly unnecessary to deal with the more general submissions in light of the above findings, in deference to counsel's submissions I propose to briefly refer to them. The obligations upon a receiver and manager in the exercise of its power of sale was recently considered in Downsview Nominees v First City Corp [1993] 1 NZLR 513. In delivering the opinion of the Privy Council Lord Templeman stated:

"... when a receiver and manager exercises the powers of sale and management conferred on him by the mortgage, he is dealing with the security; he is not merely selling or dealing with the interests of the mortgagor. He is exercising the power of selling and dealing with the mortgaged property for the purposes of securing repayment of the debt owing to his mortgagee and must exercise his powers in good faith and for the purpose of obtaining repayment of the debt owing to his mortgagee. The receiver and manager owes these duties to the mortgagors and to all subsequent encumbrancers in whose favour the mortgaged property has been charged." p222

The statement of principle clearly applies to the duties owed by a mortgagee exercising the power of sale in a mortgage.

The power of sale is given to the mortgagee for his own benefit to enable him to realise his debts and a Court will not inquire into the motives of the mortgagee in effecting a sale: Belton v Bass Radcliffe & Gretton Ltd [1992] 2 Ch 459.

The position in the present case is this. After taking a transfer of the first mortgage from the Second Defendant, the Third Defendants sold the property to Somboon Thanapoomikul and S A and L M Baker. Those sales were at exactly the same prices that the First Defendant had negotiated itself with those parties earlier in the year. No criticism is made of the sale price. It is the transfer of the mortgage by the Second Defendant and the motives for the sale by the Third Defendants that the Plaintiff challenges in the proceedings.

Mr Tait submitted that the Third Defendants as mortgagee were under an obligation to act in good faith and that it was a fraud on a power if the

appointer's purpose and intention was to secure a benefit for himself or some other person not an object of the power: Re O'Brien [1974] 1 NZLR 58.

However, the case of Re O'Brien concerned a power of appointment by deed and the exercise of that power. The obligations in relation to the exercise of such powers are particular to the exercise of those types of power. The obligations of mortgagees are clearly spelled out in a separate line of authorities of which the most recent is the Privy Council decision in Downsview Nominees v First City Corp (supra).

In this case the First Defendant had entered agreements for the sale and purchase of the land. The First Defendant would have had to settle with the Plaintiff as caveator as a sale by the First Defendant as registered proprietor would not have removed the Plaintiff's caveat. However, matters moved on from there in that the First Defendant fell into default under its first mortgage held by the Second Defendant. The Second Defendant was entitled to exercise the power of sale in that mortgage. It issued Property Law Act Notices. If the Second Defendant had sold, then pursuant to s141 Land Transfer Act the Plaintiff's caveat would have been removed by registration of the transfer. The Second Defendant was entitled to transfer that mortgage and with it the right to sell for the existing default. That is what occurred. The Second Defendant transferred its mortgage to the Third Defendants. For the reasons given above the Plaintiff was not an encumbrancer and was not entitled to demand a transfer under s83. The Third Defendants then, in exercise of the power of sale, sold the property at a price which is not challenged. The sale process, by reason of s141 of the Land Transfer Act, led to the removal of the Plaintiff's caveat by operation of law.

The Plaintiff's complaint is that its position as caveator, with the degree of security given by the caveat, was lost to them by the events that occurred. However, even without any action on the part of the Third Defendants a sale by the Second Defendant first mortgagee would have led to the same result. For these additional reasons, in my view the Plaintiff's first two causes of

action against the Third Defendants as currently pleaded cannot be sustained at law and must be struck out.

Paragraphs 38 to 43 inclusive and 44 to 46 inclusive of the amended statement of claim are struck out accordingly.

The Third Defendants having succeeded on their application are entitled to costs. Costs are fixed in the sum of \$1,500 together with disbursements as fixed by the Registrar.

**Timetable**

- (a) The Plaintiff is to file an amended statement of claim by 12 December 1997.
- (b) The Defendants are to plead to the amended statement of claim by 27 January 1998.
- (c) If the Plaintiff wishes to pursue the application for further and better discovery that is currently adjourned sine die, it is to seek the relisting of the application in a chambers list by letter to the Registrar. The letter is to be sent by 20 February 1998.
- (d) Any further interlocutory applications by any party are to be filed by 20 February 1998.
- (e) This case is to be listed for call in the chambers list on 9 March 1998 for any further directions.

  
MASTER VENNING

*Solicitors:*

Malley & Co, Christchurch for Plaintiff  
K J McMenamin & Sons, Christchurch for First and Third Defendants  
Harman & Co, Christchurch for Second Defendant  
Rhodes & Co, Christchurch for Fourth Defendants

