IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2009-463-478

IN THE MATTER OF	SECTION 200 OF THE PROPERTY LAW ACT 2007
BETWEEN	LAKE TERRACE INVESTMENTS LTD Applicant
AND	LAKELAND ENTERPRISES LTD (IN RECEIVERSHIP) First Respondent
AND	WYNDHAM STREET PROPERTIES LTD (IN RECEIVERSHIP) Second Respondent
AND	ROSS HAROLD FITCHES Third Respondent
AND	DOMINION FINANCE GROUP LTD (IN RECEIVERSHIP AND IN LIQUIDATION) Fourth Respondent

Hearing: 13 October 2009

Counsel: T J G Allan for Applicant
No appearance by or on behalf of First, Second or Fourth Respondents
Mr R H Fitches, in person, Third Respondent

Judgment: 22 October 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 22 October2009 at 11.00am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

The application

[1] Lake Terrace Investments Ltd (Lake Investments), the first mortgagee of a property known as the Lake Terrace Resort, in Taupo, seeks the Court's assistance in the sale of the property, under s 200 of the Property Law Act 2007 (the Act).

Background

[2] The resort is situated at 282 Lake Terrace, Taupo. It consists of a number of residential units, a conference centre, a manager's house, a spa, a swimming pool and a tennis court. The facilities (other than the residential units) are located on blocks of land that are described as auxiliary to principal units 65 and 66.

[3] Before 13 October 2006, Lake Investments owned the resort. It was leased to Lakeland Resort Ltd, which carried on a hospitality business from the premises. Mr Barry Taylor was the sole director of both Lake Investments and Lakeland Resort Ltd.

[4] On 13 October 2006, Lake Investments entered into an agreement to sell the property to J & J Offerings Ltd (as trustee for the Pihanga Trust) and Lakeland Enterprises Ltd (Lakeland) (as trustee for Lakeland Trust), as tenants in common in equal shares. Both purchasing entities were controlled by Mr Ross Fitches, the sole director of each company.

[5] The purchase price was $9,300,000. Clause 22 of the agreement for sale and purchase gave the purchasers a right to elect to borrow purchase moneys from the vendor. Assuming notice was given in terms of the contract, the purchasers were entitled to obtain finance of $7,000,000, from that source. Interest on any borrowed money was payable at the rate of 10% pa, six monthly in advance.

[6] The purchasers elected to take advantage of the offered vendor finance. On settlement, Lake Investments provided $7,000,000 to the purchasers to complete acquisition. The purchasers took out a second mortgage from Dominion Finance

Group Ltd (Dominion), for about $3,450,000, (as I understand it) to fund the balance of the purchase price and to provide some working capital.

[7] Settlement took place on 15 May 2007. The land was conveyed into the name of Lakeland. Lake Investments took a first mortgage over the land to secure its advance, as well as a general security agreement over Lakeland's undertaking. Dominion took a second mortgage. Both mortgages were registered at the same time as the land was put into the name of Lakeland, on 18 May 2007.

[8] The first mortgage in favour of Lake Investments was supported by covenants to repay the debt from both Mr Fitches and one of his companies, Wyndham Street Properties Ltd (Wyndham). A general security agreement was taken over the undertaking of Wyndham.

[9] On 13 May 2008, Lake Investments served notices under the Act to require Lakeland and Wyndham to pay $7,408,859.58 together with interest accruing thereon at a daily rate of $2,684.93 from 1 May 2008. Payment was demanded on or before 12 June 2009. The amount demanded was not paid.

[10] Lake Investments appointed receivers and managers to both Lakeland and Wyndham, under their general security agreements. The receivers (Messrs Tietjens and Chatfield) decided to sell the resort as a going concern. Having marketed the resort during October 2008, the highest offer they received was $4,500,000, plus GST (if any). Around 19 November 2008, the receivers sold the resort's business to Lakeland Resort (2008) Ltd (another of Mr Taylor's companies), for $1,000,000, resulting in a net deduction of the mortgage debt by $732,500.

[11] Lake Investments' debt remains unpaid. Exercising its power of sale under the first mortgage, Lake Investments has entered into an agreement for sale and purchase of the land for $6,000,000 to 282 Lake Terrace Ltd. That company is also controlled by Mr Taylor. The agreement for sale and purchase is conditional on this Court's approval, under s 200 of the Act.

The law

[12] Section 200 of the Act deals with the circumstances in which this Court will assist a mortgagee to sell a property, once the underlying debt owing has become payable.

[13] Section 200 provides:

> **200 Sale by mortgagee through court**
>
> (1) A mortgagee who is entitled to sell mortgaged property may apply to a court for assistance—
>
> > (a) in exercising the power of sale; or
> >
> > (b) in completing the transfer of the property to the purchaser (if the property has already been sold by the mortgagee).
>
> (2) The court may make all or any of the orders specified in subsection (3) if it is satisfied that—
>
> > (a) there has been a default that has not been remedied or, in the case of personal property, the property is at risk; and
> >
> > (b) the mortgagee has become entitled under the mortgage and subpart 5 to exercise a power of sale in respect of the mortgaged property.
>
> (3) The orders are as follows:
>
> > (a) an order directing the sale of the whole or any part of the mortgaged property:
> >
> > (b) an order that the sale be conducted by the mortgagee or by the Registrar:
> >
> > (c) an order making conditions concerning all or any of the following matters:
> >
> > > (i) the advertising of the sale:
> > >
> > > (ii) other marketing of the mortgaged property proposed to be sold:
> > >
> > > (iii) the conditions of sale:
> > >
> > > (iv) the manner in which the sale is to be conducted:

(d) an order permitting the mortgagee to become the purchaser at the sale otherwise than under section 196:

(e) an order permitting the current mortgagor or any other person entitled to redeem the mortgaged property to redeem it otherwise than under subpart 4 or section 195:

(f) an order vesting the property, for any estate or interest that the court thinks fit, in the purchaser (including the mortgagee if the mortgagee is the purchaser) or discharging any mortgage or other encumbrance:

(g) an order directing the Registrar, or, if it is more convenient, appointing a person other than the Registrar, to execute or register a transfer or assignment of the property to the purchaser (including the mortgagee if the mortgagee is the purchaser) or a discharge of any mortgage or other encumbrance:

(h) an order determining the priority of mortgages or other encumbrances over the property.

(4) An order under subsection (3)(f), or a transfer, assignment, or discharge executed or registered under subsection (3)(g), has the same effect as a transfer or assignment instrument for the mortgaged property executed or registered by a mortgagee under section 183, or a mortgage discharge instrument for a mortgage duly executed or registered in accordance with section 83, as the case may be.

[14] An order under s 200 can be made on conditions. Section 202 provides:

202 Miscellaneous matters concerning orders under section 200

(1) An order under section 200 may be made on any conditions the court thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of the sale or to secure the performance of any other condition of the order.

(2) The court may make an order under section 200—

(a) even if a person who has an interest in the property or in the mortgage—

(i) is not before the court; or

(ii) opposes the making of the order; and

(b) without first determining the priority of encumbrances over the property.

[15] Section 200 changes the pre-existing law. Before the Act came into force, a mortgagee who desired to acquire the mortgaged property for his or her own benefit was required to sell through the Registrar of the High Court and to bid at an auction

conducted by the Registrar: see *Re Benjamin and Jacobs* (1890) 9 NZLR 152 (SC) at 155. However, the Court can now approve such a sale, without the need for an auction that is conducted through the Registrar: s 200(3)(d).

[16] Section 200 has been considered in two decisions of this Court. Both involved undefended applications. In *Re Canterbury Building Society* (High Court, Christchurch, CIV 2009-409-562, 1 May 2009, French J), the Court approved the purchase by the first mortgagee of two units within a development for nominated considerations. In doing so, French J observed that s 200(3) does not set out criteria by which the Court's jurisdiction is exercised. However, Her Honour considered that "it would seem axiomatic that the application must be considered in the context of the mortgagee's obligations when conducting a mortgagee sale: namely the duty to exercise the power of sale in good faith and to obtain the best price reasonably obtainable": at para [20].

[17] In *Re Propertyfinance Securities Ltd* (High Court, Christchurch, CIV 2009-409-1336, 29 July 2009, Fogarty J) approval was given for a mortgagee to acquire the property after an auction, at which no bids were received. While two offers were made after the auction, both were rejected. The Judge was satisfied that to accept offers of the amounts involved "would have breached the duty of the applicant to obtain the best price reasonable available": at para [5].

[18] In relation to the circumstances in which s 200 could legitimately be used, Fogarty J said:

> [8] On the face of it s 200 can be used for a mortgagee to apply to the Court for assistance prior to the first round of marketing and auction. I am satisfied, however, that s 200 can be used in situations like this after an auction has failed and after the market has been tested. But I would not want to suggest that use of s 200 in this way will become a perfunctory exercise by the High Court. Each case will depend on its facts. On these particular facts though I am satisfied that it is appropriate that this Court make an order under s 200 (3)(d) permitting the mortgagee to become the purchaser at the sale on the terms which I have set out above and which are the basis for this application.

[19] Both judgments were delivered orally, on uncontested applications. The Judges' observations about the scope of s 200(3) must be read in that context.

Neither Judge, I am sure, was intending to define the metes and bounds of the jurisdiction. That was emphasised by Fogarty J, at para [8] of *Propertyfinance Securities Ltd.*

[20] Although Mr Fitches, who appeared on his own behalf, was unable to assist me on legal issues, the factors he raised to oppose the application highlighted considerations different from those which arose in both *Canterbury Building Society* and *Propertyfinance Securities Ltd.*

[21] Subpart 7 of the Act deals with the topic of a mortgagee's power of sale. The specific ability to sell through the Registrar of the High Court or through the Court is set out in ss 187-202 inclusive.

[22] Section 187 permits a mortgagee sale through the Registrar of the High Court, in accordance with the procedure set out in ss 188-198. Section 196 deals with the circumstances in which a mortgagee may purchase at a sale by public auction conducted by the Registrar under s 187. Section 196(2) provides:

> **196 Mortgagee may purchase at sale through Registrar**
>
> …
>
> (2) If, at the sale, the vendor mortgagee is declared to be the purchaser of the land, or, if the land is sold as separate lots, the purchaser of all or any lots, the vendor mortgagee is bound to purchase the land, or the lot or lots, at a purchase price equal to the greater of—
>
> (a) the amount of the vendor mortgagee's successful bid; or
>
> (b) the discharge sum nominated by the vendor mortgagee for the land or the lot or lots.
>
> ….

[23] In my view, the Court's jurisdiction to make an order under s 200(3)(d) must be exercised having regard to the principles set out in the Act which outline the obligations of a mortgagee who seeks to sell mortgaged property to pay a debt:

a) A mortgagee who exercises a power to sell mortgaged property owes a duty of reasonable care to the mortgagor and any covenantor

(defined to include a guarantor) "to obtain the best price reasonably obtainable as at the time of sale": s 176(1).

b) That duty exists even though the power to sell is exercised by the Registrar under s 187 or through a Court order under s 200: s 176(1).

c) A mortgagee who exercises a power to sell mortgaged property can only become a purchaser if the sale is effected through either s 196 or s 200: s 176(2).

In addition, the scope of the discretion implicit in s 200(3)(d) will be informed by the nature of other orders that may be made under s 200(3).

Competing contentions

[24] Mr Allan submitted that the receivers of Lakeland had endeavoured to sell the property, after taking adequate advice and marketing in an appropriate manner. He referred to a valuation report from Veitch Morison, valuers, Taupo, dated 8 August 2008, in which the land and buildings were valued on a summation basis at $7,520,000 and $5,055,000 on a capitalised income basis. On a "freehold going concern" basis the property was valued at $7,000,000, while the "leasehold going concern" was assessed at $1,000,000.

[25] There is evidence that one of the receivers, Mr Tietjens, authorised minor remedial work and then embarked upon a marketing strategy in September 2008, with a view to completing a sale before Christmas 2008. That would have allowed any purchaser to obtain the advantage of increased occupancy rates over the summer season. A screening process was undertaken to weed out those who responded to the advertisement who were not, genuinely, interested in purchasing the property.

[26] Of the offers made as a result of that programme one comprised a "letter of intent" offering $5,000,000 plus GST (if any) and the other $4,500,000 plus GST (if any) on the basis of 50% vendor finance. Neither interested party would increase his offer, so both were rejected as being too low.

[27] Mr Allan submitted that it was unnecessary, to obtain an order under s 200(3)(d), for a mortgagee first to conduct an auction. He submitted that the evidence was sufficient to justify an order.

[28] Mr Fitches contends that the sale is for much less than the property is worth and that he would be exposed on his guarantee if the Court were to make the order sought. In his notice of opposition, Mr Fitches says:

> …
>
> 4. The mortgagee tender process as documented in the affidavit of Barry Taylor appears to have been constructed to produce a result as low as possible so as it could be used to support this application; and
>
> 5. The option to sell the property as a going concern without exploring the option to sell the units separately especially the development unit resulted in low offers being made, far less than what could be achieved; and
>
> 6. Parties that made contractual offers in the standard sale and purchase forms that were in excess of the amount were discouraged from participating by Barry Taylor's legal representative Chris Cargil; and
>
> 7. I am in possession of an offer to purchase the Lakeland Resort property that greatly exceeds the highest offer purportedly obtained by Stephen Teitjens yet this offer was excluded; and
>
> 8. If such an offer was allowed to proceed on its merits there would be no outstanding amount owing under the mortgage and in fact there would be surplus funds available to other creditors; and
>
> 9. There would clearly be no claim against my personal guarantee; and
>
> ….

[29] Before me, Mr Fitches made submissions that reflected his grounds of opposition. His objections can be reduced to four specific concerns:

a) If the mortgagee were to have approval to sell the property for $6,000,000, under s 200(3)(d), that may prejudice any defence he may wish to raise to a claim on his guarantee.

b) The efforts made by the receivers of Lakeland, on behalf of Lake Investments (as appointor under a general security agreement in its

favour), to market the property for sale were insufficient. In particular, Mr Fitches was critical of the failure to treat Units 65 and 66 and their accessory units in a different way from the residential units.

c) A concern that (what he regards as) limited attempts to market the property for sale adequately occurred as a result of a deliberate decision made by Mr Taylor, on behalf of the first mortgagee, to manufacture a situation in which Lake Investments could acquire the property at an undervalue.

d) The property, on available valuations, was worth considerably more than the $6,000,000 that the nominated purchaser is prepared to pay.

Jurisdictional issues

[30] Section 200(3)(d) deals only with the authorisation of a sale to the mortgagee. In this case, Mr Allan seeks an order authorising sale to a sister company, 282 Lake Terrace Ltd.

[31] Even though the proposed purchaser is a related entity, a sale could proceed, other than in accordance with s 196 or s 200(3)(d). While the pre-existing law, prevented the mortgagee from acquiring the property other than through an auction conducted by the Registrar of the High Court (*Re Benjamin and Jacobs)*, a mortgagee is not forbidden from selling the property to a company in which it has an interest or to some other entity with which it has a relationship: see *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 (PC) and *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA) at para [51] (upheld on appeal *Apple Fields Ltd v Damesh Holdings Ltd* [2004] 1 NZLR 741 (PC)) and *Agio Trustees Co Ltd v Harts Contributory Mortgage Nominee Co Ltd* (2001) 4 NZ, ConvC 193,480 (HC) at paras [80] and [88]. Such a sale remains subject to the mortgagee's duty to obtain the best price reasonably obtainable at the time of sale: *Apple Fields Ltd v Damesh Holdings Ltd* (in the Privy Council), at para [25] and s 176(1) of the Act.

[32] Notwithstanding that jurisdictional issue, Mr Allan made it clear that he wished to pursue the present application. He was content for it to be treated as one authorising a proposed sale to Lake Investments, rather than 282 Lake Terrace Ltd. Should such an order be made, it would be open to Lake Investments (as purchaser) to nominate a party to which the land should be conveyed.

[33] Formally, I amend para 1.1 of the application, to show Lake Investments as the intended purchaser. While I deal with the application on that basis, the fact that a sale could be made directly to 282 Lake Terrace Ltd is a factor I am entitled to take into account in exercising my discretion to make an order under s 200(3).

[34] There are two other jurisdictional prerequisites imposed by s 200(2). For the purposes of this case, Lake Investments must satisfy me that:

a) There has been a default under the mortgage that has not been remedied.

b) It has become entitled under the mortgage and subpart 5 of the Act to exercise a power of sale in respect of the mortgaged property.

[35] I am satisfied from the evidence that the principal sum owing under the mortgage has not been paid, notwithstanding valid demand. That satisfies the prerequisite of an unremedied default set out in s 200(2)(a).

[36] Subpart 5 of the Act deals with restrictions on the exercise of powers conferred on mortgagees. Before a power of sale may be exercised a notice complying with s 120 of the Act must be served on the person who, at the date of service of the order, is the current mortgagor and, by the end of the period specified in the notice, the default must remain unremedied: s 119(1) and (2). A copy of the notice under s 119 must be served on covenantors: s 121(1)(b).

[37] Service has been effected, so the terms of s 200(2)(b) have been satisfied.

[38] I am satisfied, on the evidence adduced, that all prerequisites have been met. On that basis, I proceed to analyse whether it is appropriate to exercise the discretion to approve a sale, on the facts of this particular case.

Analysis

(a) Will Mr Fitches be prejudiced in defending claims on his guarantee?

[39] An order under s 200(3)(d) simply authorises the mortgagee to purchase the property without the need to go to an auction conducted by the Registrar. The limited purpose such an order is emphasised by the terms of s 200(1). For present purposes, it provides that the mortgagee can apply to the Court for assistance in exercising the power of sale.

[40] Although the Court will require evidence of the circumstances in which the need (or desirability) of a sale to the mortgagee has arisen, there is nothing in the section to suggest that any approval is being given by the Court to the amount fixed as the purchase price. That, in my view, remains a matter of commercial judgment for the mortgagee to exercise. Indeed, s 176(1) expressly preserves the mortgagee's duty of reasonable care to the mortgagor and any covenantor to obtain the best price reasonably obtainable as at the date of sale in a case where a sale is completed through a Court order under s 200(3)(d).

[41] Mr Allan accepted that Lake Investments did not seek to strip Mr Fitches of any defence he might have to a claim on his guarantee. The types of issues that Mr Fitches has raised in the present proceeding (eg the adequacy or otherwise of marketing processes and valuation issues) are ones that directly go to the duty to obtain the best possible price. I hold that the making of an order under s 200(3)(d) does not affect Mr Fitches' right to advance defences of that type to a subsequent claim in debt on his guarantee.

[42] Were that not the case, I would have declined to make an order. I do not see it as part of the Court's function, on a summary application of this type, to make

findings (without the benefit of cross-examination) which could remove defences that might otherwise be available. The Court cannot, at this stage of the process, make any determinative judgments on whether particular grounds of defence do or do not exist.

(b) Was the marketing programme adequate?

[43] Mr Fitches takes issue with the marketing strategy adopted by Mr Tietjens, as receiver of Lakeland. There are two discrete aspects of the complaint. The first relates to a failure to market for sale units 65 and 66 (and their accessory units) separately from the balance of the units making up the resort. The second relates to the approach taken to sell the units.

[44] On the first point, Mr Fitches believes that units 65 and 66 should not be treated in the same way as the residential units. For that reason, he disagrees also with a valuation approach which equates the likely consideration payable for those two units, with their accessory units, with individual residential units. To emphasise his point, Mr Fitches said he had no objection to an order being made allowing the mortgagee to acquire all residential units for $6,000,000, with units 65 and 66 and the accessory units being sold separately at auction.

[45] The real value, according to Mr Fitches, of units 65 and 66 lies in the ability to develop the land comprised in the two accessory units. One of them contains the manager's residence and a conference centre, while the other includes areas on which a tennis court, swimming pool and spa pool stand. Mr Fitches asserts that there is a right to develop each of those units into 80 further residential units, something that has not been taken into account in the sale process. He contends there is nothing in either the relevant district plan or body corporate rules which would prevent that from being done.

[46] On the second issue, Mr Fitches objects to the methodology employed to market the property for sale. He contends that the most appropriate method of marketing would have been to approach a major real estate agency (eg Bayleys Real Estate) and to have given instructions for an extensive campaign to be launched, both

in New Zealand and overseas. Mr Fitches points out that the sale of this type of property requires specialised knowledge, persistence and marketing directed at a range of persons who may wish to purchase; including developers who might be interested in acquiring the auxiliary units for development.

[47] Mr Allan took me through the evidence of the steps taken by Mr Tietjens to market the property. There were three stages to the process:

a) The resort was advertised over a period of three weeks in three newspapers: *The New Zealand Herald*, *The Dominion Post* and *The National Business Review*. Colour advertisements, approximately 10cm x 2cm, were placed in the *New Zealand Herald* on three days and in the *Dominion Post* on two. The same advertisement was run on two occasions in the *National Business Review*. The first of those advertisements was placed on 1 October 2008 and the last on 11 October 2008. Mr Tietjens also contacted real estate agents in Taupo and Auckland and indicated an "introduction fee" would be paid if a successful buyer was introduced by an agent.

b) On receipt of initial expressions of interest, a screening programme was undertaken to identify genuine purchasers. Mr Tietjens did not want to disrupt the operation of the resort by having non-genuine people shown around the resort.

c) Once a genuine buyer had been identified, negotiations were undertaken. Two offers of significance were made: for $5,000,000 and $4,500,000 respectively (both plus GST, if any). Neither proceeded.

[48] Mr Allan sought to answer Mr Fitches' criticisms by reference to the valuation report of Veitch Morison of 8 August 2008. After advising that 64 units could be sold at $112,000 each, the valuers continued:

> The above sale price per unit has been calculated on a basis that a sale would be made as a going concern and therefore no GST payable. The costs have

> been calculated on an exclusive of GST basis. The above value figure of $5,170,000 is exclusive of GST.
>
> Given the current apartment market and the three and a half years it took to sell the majority of units in the Twin Peak complex, even the above sales timeframe may be somewhat optimistic.
>
> The above calculation, including the estimate of value of each individual unit is made on the basis that the unit title arrangement recognises that the owners of the individual units also own, as common property, the remaining land and building improvements including what is shown on the attached unit title survey plan as Units 65 and 66 and the accessory units at present associated with Unit 65. This is <u>not</u> the present situation in the unit title survey. (original emphasis)

The valuers' observation that units 65 and 66 and the accessory units associated with unit 65 were common property is at odds with Mr Fitches' contention that they were on land available for further development. On the present application, I am unable to resolve that difference. It may become relevant if steps were taken to recovery any deficit from Mr Fitches under his personal covenant.

[49] Likewise, it is impossible for me, on the present application, to make an informed judgment over whether the marketing strategy was good, bad or indifferent. If Mr Fitches were sued on his personal covenant, the adequacy of the steps taken would be sharply in issue, in terms of any likely argument about whether Lake Investments breached its duty to obtain best price reasonably obtainable as at the time of sale.

[50] There has been no prior attempt by Lake Investments to sell under the first mortgage. All marketing to date has been undertaken through receivers of Lakeland, appointed under Lake Investments' collateral security, the general security agreement over Lakeland's undertaking. I do not consider anything turns on this point. Any assessment of whether Lake Investments breached its statutory duty to obtain the best price reasonably obtainable as at the time of sale would necessarily be assessed by reference to the receivers' attempts to sell the property earlier. It would be idle to draw a distinction between the steps taken by the first mortgagee and the receivers respectively, in relation to efforts made to sell the property on behalf of the same secured creditor.

[51] I do not consider an assessment of adequacy of the marketing programme is required. Mr Fitches' position is protected, for reasons given previously: see paras [32]-[42] above. Mr Fitches' ability to raise these issues in proceedings brought on his covenant militates against refusal of relief on this ground.

(c) Is Lake Investments acting for an improper purpose?

[52] Mr Fitches contends that Mr Taylor has driven the sale process in a cynical endeavour to manufacture a situation in which one of his companies acquires the resort for inadequate consideration.

[53] A summary application is not the time for the Court to determine that issue. Having said that, the evidence presently before me is, in any event, insufficient to justify a finding of misconduct. Indeed, the evidence is that Mr Tietjens, an experienced receiver, has been in control of the marketing process.

[54] I am not prepared to infer bad motives against either Mr Taylor or Mr Tietjens on available evidence. If a proper evidential foundation were to exist for an allegation of that magnitude, it would be open to Mr Fitches to raise it in defence to the claims against him on his personal guarantee.

(d) Valuation issues

[55] This issue merges with the first of the two points discussed under the marketing strategy defence. It revolves around the value to units 65 and 66 and the accessory units attaching to them.

[56] The extract cited from the Veitch Morison valuation report of August 2008 (para [48] above) addresses this issue, so far as it can be answered in the context of the present application. The valuation held by Mr Fitches is not sufficiently recent to justify a contrary finding. There is nothing in the point sufficient to require me to refuse relief.

(e) Is there a need for an order?

[57] Strictly, for the reasons given at paras [32]-[38] above, there was no *need* for an application to be brought. The land could have been conveyed to 282 lake Terrace Ltd without contravening any provisions of the Act.

[58] Having said that, there is a general discretion to make an order under s 200(3) once the prerequisites set out in s 200(2) are met. The orders are generally of a mechanical nature, suggesting that the purpose is to make a direction that brings certainty to the stage of the process in issue.

[59] I consider an order is desirable (though not necessary) because there is likely to be a challenge to the whole sale process when a claim is made against Mr Fitches on his personal covenant. I see an order under s 200(3)(d) as something that removes one issue (the amount of the deficit) from the scope of the likely battle that lies ahead.

Conclusion

[60] The amount outstanding as at today's date exceeds $8,000,000. A settlement statement prepared for the sale of the business shows that, as at 18 March 2009, a total of $7,506,384.32 was owing; and that is after taking account of the money paid to Lake Investments from the sale of the business. In addition, interest continues to accumulate. Since 18 March 2009, over $570,000 in interest has accrued.

[61] I consider that it is in the best interests of the mortgagee, the mortgagor and Mr Fitches for the property to be sold to the mortgagee for a consideration of $6,000,000. Whatever may be the outcome of any subsequent inquiry into the appropriateness of that purchase price, it has the effect of capping the principal sum owing to Lake Investments for the purposes of any claims it may make against Mr Fitches.

Result

[62] I make an order under s 200(3)(d) of the Act as follows:

> The plaintiff is permitted to sell the land and buildings at 282 Lake Terrace, Taupo (as comprised and described in deposited plan 61955) to itself for the sum of $6,000,000.

[63] I reserve all questions of costs. I direct the Registrar to arrange a telephone conference before me on the first available date after 9 November 2009 so that I can hear from the parties on timetabling directions required to determine questions of costs.

[64] When considering questions of costs, I would invite Mr Allan to consider whether the benefits derived from this process and the exercise of the Court's discretion to make an order, notwithstanding the lack of any need to do so, militates against any order for costs being made in favour of Lake Investments.

_____

P R Heath J

Delivered at 11.00am on 22 October 2009

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