IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-488-379

BETWEEN	ALL PURPOSE FINANCE LTD Plaintiff
AND	TE NGARO WHENUA LTD First Defendant
AND	J P FOSTER Second Defendant

Hearing: 4 May 2009

Appearances: G E Slevin for Plaintiff
No Appearance for First Defendant
M Sullivan for Second Defendant

Judgment: 9 June 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 9 June 2009 at 4 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Wynne Williams & Co, PO box 4341, Christchurch
Carson & Co, PO Box 37-403, Auckland
Jackson Russell, PO Box 3457, Auckland

[1] This is an application for summary judgment by the plaintiff, All Purpose Finance Ltd, against the second defendant, J P Foster

[2] Pursuant to a loan agreement dated 20 December 2006, the plaintiff advanced to the first defendant $600,000 to be paid on demand and pending demand by 30 April 2007. The loan was secured by way of first mortgage registered against the title to properties owned by the first defendant at units 5, 6, 7, 9 and 12, 225 State Highway 1, Tauranga-Taupo. Interest was fixed at 13.5% per annum to 30 April 2007. The loan was guaranteed by the second defendant who is a director of the first defendant.

[3] As the loan was not repaid on 30 April 2007 it was extended to 31 August 2007 pursuant to an agreement in writing executed by both the first defendant as borrower and the second defendant as guarantor. In terms of that agreement, the defendants agreed to pay a further processing fee of $2,000.

[4] The first defendant was in default of its obligation to repay the loan on 31 August 2007. Letters of demand were sent to both defendants on 6 September 2007. In that letter, the plaintiff advised the defendants as follows:

> The above Loan repayment has not been made on the maturity date of 31 August 2007.
>
> All money owing by you to All Purpose Finance Limited trading as St Kilda Finance is repayable upon demand (in accordance with the Loan Agreement). The obligations under the Loan Agreement are secured by a Mortgage over Units 5, 6, 7, 9 & 12; 225 State Highway 1, Tauranga-Taupo.
>
> All Purpose Finance Limited hereby demands repayment of the full outstanding sum (including all interest accrued) pursuant to the terms of the Loan Agreement and the Mortgage.
>
> If this demand is not met within 5 working days of receipt of this letter, All Purpose Finance Limited intends to issue a formal notice of default under section 92 of the Property Law Act 1952 and enforce its Mortgage and all other securities held.
>
> Any payments received subsequent to this letter, less than the full loan amount, will be received without prejudice to this letter of demand and any Property Law Act Notice which may be served as a result.

[5] On 22 November 2007, Allan Hewitt, on behalf of the plaintiff, sent an email to the second defendant stating as follows:

> The facility expired on 31st August 07, and has been running overdue since. A notice issued under Section 92 of the Property Law Act expired on 19th October 2007.
>
> The facility has outstanding interest and costs as detailed below. You have requested (2nd November 2007) Chris to hold any action while you negotiate a sale of the property, and we note that process is under way.
>
> We are able to accommodate this request for a limited period until say 22nd Dec 2007, subject to your immediately paying interest arrears.
>
> Any payments received less than the full loan amount, will be received without prejudice to the letter of demand dated 6 September 2007 and the Property Law Act notice referred to above.
>
> Regretfully failure to bring the payments up to date immediately will result in our commencing marketing of the property for mortgagee sale as soon as this can be arranged, probably next week.
>
> Interest outstanding is:
>
> | | |
> |---|---|
> | Interest due 24/9/07 | 6,879.45 |
> | Dishonour fee | 25.00 |
> | Penalty Interest | 2,547.95 |
> | Legal Fees | 635.87 |
> | Interest due 23/10/07 | 6,761.07 |
> | Dishonour fee | 25.00 |
> | Penalty Interest | 2,504.10 |
> | Interest due 22/11/07 | 7,099.59 |
> | Penalty Interest | 2,632.76 |
> | Legal Fees | 593.04 |
> | | |
> | Total Arrears | $29,703.83 |
>
> We regret having to take this action but acknowledge that the loan is now showing as an impaired asset in our books and as such comes under the close scrutiny of our auditors and directors.

[6] On 24 November 2007, the second defendant emailed Mr Hewitt as follows:

> I understand your position on the facility, I have been endeavouring to keep Chris updated as to our progress with re-payment. As you have seen we have a trade deal that I'm working on at the moment. I have just finished with Gordon this morning with regard to the trade on some income earning commercial property in Auckland.
>
> I am happy to raise the $29,703.83 to cover the fees and arrears, I was happy paying the monthly direct debit as per our previous arrangement, when Chris notified me of the PLA I cancelled the transfer of funds as I was covering them personally.

> I would like to have a catch up with you on Monday if possible to arrange the funds for you and to talk over some funding options I have arranged through John Chapman at Strata Funding, I believe John is known to you.

[7] On 29 November 2007 the second defendant paid the plaintiff a further $25,000.

[8] On 8 February 2008 the first defendant settled the sale of unit 9, one of the units providing security for the plaintiff's advance. To enable this sale to proceed, the plaintiff agreed to a discharge of its mortgage over unit 9 on payment of $88,308.88 on the conditions set forth in a letter to the first and second defendants' solicitors of 5 February 2008. In that letter the plaintiff advises that the $88,308.88 is to be applied as follows:

Interest arrears as at 23 January 2008	$13,849.26
Penalty interest and legal fees outstanding as at 23 January 2008	$ 9,811.38
Principal Reduction Required	$64,248.24
Partial Discharge Fee	$ 500.00
TOTAL	$88,308.88

[9] The plaintiff goes on to say:

> This discharge of mortgage is provided to you **without prejudice** to All Purpose Finance Limited's rights to require remedy of the defaults under its expired Property Law Act Notices and to exercise its power of sale in respect of the property (where the required repayment is not made) and in respect of the other properties referred to in those notices. The Mortgagor agrees to waive any claim or assertion that it might otherwise have had based on the provision of the enclosed discharge of mortgage and settlement figures to the Mortgagor by the Lender.
>
> You are authorized to register a partial discharge of the above mortgage via Land online e-Dealing on the basis that you undertake not to register such discharge until the above monies have been repaid and deposited into our bank account (a copy of a deposit slip has been attached) and you confirm by facsimile that has been done.

[10] When these proceedings were commenced, the plaintiff sought summary judgment for the sum of $573,436,82 with interest at 18.5% per annum compounded monthly from 22 May 2008 until payment.

[11] On 27 April 2008, the plaintiff instructed Westerment Realty Ltd to proceed with sales of the four remaining units. At the auction of the units, the highest bids were significantly lower than the agreed reserve prices. Mr Hewitt attended the auction on behalf of the plaintiff. The first defendant, although not at the auction, was available by telephone.

[12] According to Mr Hewitt, in a telephone conversation with the first defendant immediately following the auction, the parties agreed as followed:

a) The properties would be sold by the first defendant for the best price achievable.

b) Mr Hewitt would negotiate with the highest bidders on behalf of the first defendant to secure the sale.

c) The plaintiff would give the second defendant six months to settle the residual debt following completion of the sales.

d) No interest would be charged on the residual debt if it was settled as agreed.

[13] Agreements for sale and purchase were eventually executed by the first defendant. The first defendant's solicitors acted on behalf of the vendors in respect of those sales.

[14] After the sale of the securities, a balance of $296,918.63 is still payable. As the defendants have failed to pay that balance and consequently have not paid the residual debt within the six months required in terms of the agreement following the auction of the properties. The plaintiff now seeks to recover the full amount including the interest for that six month period. An amended statement of claim seeking recovery of the full amount was filed in March 2009.

Case against first defendant

[15] On 23 March 2009, following the issue of these proceedings, the first defendant was put into liquidation on. Consequently, because of s248(1)(c) of the Companies Act 1993, the plaintiff must obtain leave if it wishes to proceed with its action against the first defendant. The plaintiff wishes to consider the position and accordingly the application for summary judgment against the first defendant has been adjourned until 2 June 2009.

Case for plaintiff in respect of claim against the second defendant

[16] The evidence adduced by the second defendant in support of his defence to this application for summary judgment brings into issue the conduct of the plaintiff in organising the sale of the remaining four units and in particular alleges that the plaintiff, in breach of its duties under the Property Law Act 1952, failed to achieve the best possible price for the units when conducting the mortgagee sale. In anticipation of this defence, counsel for the plaintiff submits that the plaintiff did not conduct a mortgagee sale. Consequently, the defendants cannot have a defence based on any breach of the plaintiff's obligations as mortgagee when conducting a mortgagee sale. In any event it is submitted that the plaintiff did endeavour to obtain the best possible price.

Case for the defendants

[17] It is submitted on behalf of the defendants that the evidence of the defendants establishes a possible defence based on the fact that the plaintiff did conduct a mortgagee sale. It is further submitted that the Court cannot rule out the possibility that the plaintiff did not use its best endeavours to get the best possible price. Consequently, there is evidence to justify a conclusion that the plaintiff was in breach of its obligations as mortgagee. They submit that it is therefore not appropriate to enter summary judgment. If the defendants' submissions are correct, the proceedings will need to be adjourned for a hearing to fully investigate their defence.

Whether there was a mortgagee sale and whether the plaintiff was in breach of its obligations to obtain the best possible price.

[18] In his evidence, the second defendant points out that he did not want the properties marketed as a forced sale and that he did not have a say in the advertising or marketing. He claims that he did not see the auction terms, that he did not attend the sale and that he had no choice but to comply with the plaintiff's demands. He considered he was forced to give the appearance that he was selling the properties. He claims he had no choice but to agree to the reserve prices fixed by the plaintiff, that he was not aware of the way in which the properties were marketed, and in particular, he was not aware that in the marketing of the properties reference was made to a "catch and release" of the properties and the vendor demanding a sale. He also raises issues as to the relationship between two of the purchasers and the auctioneers, pointing out that one of the purchasers was Tiffany Battell who is the wife of Peter Battell one of the agents employed by Westermans Bayleys who were instructed to conduct the auction. He also claims that unit 6 was purchased for $70,000 when it had been valued at $175,000 and that unit 5 which was purchased for $63,000, was on-sold for $78,000, the valuation obtained by Mr Foster being $176,000.

[19] According to Mr Hewitt, from August 2008 onwards he made it very clear to the second defendant that the plaintiff would exercise its rights as mortgagee if the loan was not paid Mr Hewitt says he told the second defendant that he would prefer to work with him to ensure the best prices could be obtained for the properties. Mr Hewitt points out that although the second defendant had made real efforts to sell the properties, only one sale had been achieved by April 2008.

[20] On 22 April 2008, Mr Hewitt instructed Westerman Realty Ltd to auction the properties. In his instructions to Westerman Realty Ltd, Mr Hewitt states:

> I now attach signed authority to proceed with the mortgagee's sale of the above properties.

He also states:

> Jeremy Foster (the second defendant) will sign the sales agreement and this will not be a mortgagees auction.

[21] According to Mr Hewitt, the note reflects a discussion he had with the second defendant about that time to the effect that the sales could no longer be put off. Mr Hewitt says he explained to the second defendant that he might get better prices for the properties if they were marketed as "a forced sale rather than mortgagee sale" which was the view taken by the agent. Mr Hewitt also says he explained to the second defendant that if the properties were sold by the first defendant, it might be possible to liquidate the company and not to be held personally liable for the GST component on the sales. Mr Hewitt says that the second defendant agreed to this arrangement.

[22] In a flyer prepared by Westerman Realty Ltd to market the properties, reference is made to the following:

> Looking for a holiday home, fishing crib or just a "catch & release" investment Units 5, 6, 7 & 12 up for Auction as one lot or separately. Vendor demanding a sale.

There is evidence that the properties were advertised extensively throughout the Taupo-Tauranga region and on the internet.

The terms and conditions of auction were referred to the defendant's solicitors who were Carson & Co. of Auckland and not the plaintiff's solicitors.

[23] Prior to the auction, Mr Hewitt says he discussed the valuation schedules with the second defendant and agreement was reached on reserves as follows:

Unit 5 $102,000

Unit 6 $102,000

Unit 7 $107,000

Unit 12 $150,000

He goes on to say that agreement was reached that in each instance they would negotiate with the highest bidder and that they would need to be in a position to make a quick decision whether or not to accept the highest bidder.

[24] On the night of the auction Mr Hewitt telephoned the second defendant when the bidding began. The bidding of the first unit stalled at $50,000 which was less than half its valuation. Consequently, according to Mr Hewitt, the second defendant telephoned his lawyer Mr Carson. Mr Carson then telephoned Mr Hewitt to discuss the situation. In the course of that discussion, Mr Carson asked Mr Hewitt to consider doing a deal with the second defendant to give the second defendant more time to repay the plaintiff as it was apparent there was going to be a greater shortfall than expected following the auction. After some discussion with Mr Carson, Mr Hewitt says he agreed that it would be best to sell the properties at auction that day rather than pass them in and re-advertise them for auction by the mortgagee. He also agreed to allow the second defendant six months to repay the shortfall and to charge no interest over that period. Mr Carson agreed that Mr Hewitt should negotiate with the bidders to get the best possible prices on the night.

[25] On 10 June 2008, the parties entered into the following agreement:

> **Te Ngaro Whenua Limited (borrower) and Jeremy Paul Foster (guarantor)**
>
> I refer to our recent discussions and email correspondence, in respect of the sale by auction on 6 June 2008 of your above client's property, being units 5, 6, 7 & 12,225 State Highway One Tauranga-Taupo.
>
> We note that your client has agreed to execute the sales and purchase agreements (the documents) that resulted from the auction (as attached).
>
> Subject to the guarantor agreeing to:
>
> 1. providing a sworn statement of assets and liabilities by this Friday that does not vary from the statement of position dated 10/06/08.
>
> 2. executing the documents as vendor (for and on behalf of Te Ngaro Whenua Limited)
>
> 3. delivering the documents to Bayleys Real Estate before 5pm today (by fax), originals to follow tomorrow (by courier)

4. executing any subsequent offer (for not less than $62,000) that Bayleys Real Estate may present in respect of Unit 5 (if the offer made on 6th June is withdrawn).

5. make no further contact with the purchasers or their agents.

6. make repayment of fifty percent of the residual principal loan amount by 28 December 2008, with the final fifty percent by 30 June 2009.

All Purpose Finance Limited trading as St Kilda Finance (the lendor) will

1. from the date of this agreement, zero rate interest on the residual balance that remains after settlement of Units 5, 6, 7 and12.

2. agree to extension of the summary judgment hearing against Jeremy Paul Foster from 21 July 2008 until 28 December 2008, with agreement for a further extension to 30 June 2009 if the 28 December 2008 payment is made.

In the event that the borrower/guarantor defaults in respect of the aforesaid principal payments the lender will have the right to immediately and without further notice seek summary judgment against the guarantor for the full value of the debt including all interest, penalties and costs.

We request that your client if in agreement executes this agreement at the foot of this page and return it by facsimile today.

[26] The agreements for sale and purchase of the four units were duly executed by the first defendant as vendor. The first defendant executed the memoranda of transfer.

[27] I accept that the second defendant was under pressure to complete a sale of these properties. However, that pressure resulted from the defendants being in default of their obligations under the mortgage and the difficulties encountered by the first and second defendants in negotiating a sale of the properties at a price acceptable to them having regard to what was clearly a falling market. Although the second defendant placed considerable reliance on valuations obtained in October 2007, the fact that the first defendant could only achieve $95,000 for the sale of unit

9 when that unit had been valued in October 2006 at $160,000 is indicative of the market trend.

[28] I also do not accept that the second defendant had no option but to agree to the sale of the units. Mr Hewitt's evidence is that he discussed options available to the defendant with the second defendant's solicitor Mr Carson. One of the options was to arrange a further mortgagee sale. Clearly, that option was not acceptable.

[29] Consequently, I am satisfied that the parties specifically agreed to avoid a mortgagee sale because of their concern that marketing the properties as a mortgagee sale would depress the value.

[30] I consider there to be no basis for the second defendant's claim that Mr Hewson and the plaintiff had misrepresented the situation to the second defendant and been guilty of oppressive conduct. On the contrary, Mr Hewson had attempted to obtain the second defendant's co-operation with regard to a sale of these properties in an effort to obtain the best available price.

[31] The second defendant was aware of the relationship between one of the purchasers Peter William Battell and the auctioneers. The agreement executed by the first defendant which includes the second defendant as director contains the following statement:

> The vendor acknowledges that the purchaser was previously a sales consultant with Bayleys, Turangi.

[32] Furthermore, there is absolutely no evidence to support the second defendant's contention that the plaintiff did not use its best endeavours to get the best possible price. The fact that the property was marketed on the basis that the vendor was a keen seller and that a purchaser could regard an investment in the properties as a "catch and release" opportunity would clearly encourage bidders who could possibly in their enthusiasm, bid up the value of the property.

[33] In these circumstances, I conclude that the second defendant has no defence and that the plaintiff is entitled to judgment with interest. In addition, the plaintiff is entitled to costs on a 2B basis with disbursements as fixed by the registrar. Counsel

[34] for the plaintiff should submit a memorandum as to the amount of judgment together with calculations as to interest and costs.

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Associate Judge Robinson