IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-6189

BETWEEN	WESLEY JOHN LIDDLE AND ASTRID ANNA LIDDLE First Plaintiffs
AND	PROPERTY TRUST Second Plaintiff
AND	HARVEST TIMES LIMITED Third Plaintiff
AND	CORINTHIAN HOMES LIMITED Fourth Plaintiff
AND	BANK OF NEW ZEALAND First Defendant
AND	BARFOOT AND THOMPSON LIMITED Second Defendant

Hearing: 1 October 2009

Counsel: E Orlov for the plaintiffs
R J Gordon and B White for the defendants

Judgment: 29 October 2009

REASONS FOR JUDGMENT OF POTTER J

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Introduction

[1] The plaintiffs seek an interim injunction preventing sale of five properties by the first defendant, Bank of New Zealand ("the Bank"). They also seek an order preventing sale for eight months from the date of granting of the order and/or until hearing of the claim.

[2] The application was opposed by the Bank. No steps have been taken by the second defendant Barfoot & Thompson Limited.

[3] Following an urgent hearing on 1 October 2009 I declined the plaintiffs' application and said that the reasons would follow. These are those reasons.

Background facts

[4] The plaintiffs' application relates to a group of five properties owned by various of the plaintiffs. All are secured to the Bank by way of first-ranking mortgages. The mortgages secure in favour of the Bank a total indebtedness of currently more than $3.1m. The plaintiffs' accounts with the Bank are substantially in arrears and interest alone has not been fully serviced for many months. The total unpaid debt increases at a rate of over $12,700 per month.

[5] Demand in respect of the overdrawn current accounts was made by the Bank on 27 May 2009, and not complied with. On 18 June 2009 notices under ss 119 and 222 of the Property Law Act 2007 ("the Act") were issued by the Bank.

[6] The notices were not complied with and accordingly as at 28 July 2009 a power of sale accrued to the Bank over all the properties.

[7] The five properties are:

a) 60 Rewarewa Road, Te Atatu Peninsula property is in the names of the first plaintiffs and is their primary residence. The Bank has issued

summary judgment proceedings to obtain vacant possession of this property to facilitate sale.

b) 1 Stonebridge Park Road, Rotorua is an investment residential property registered in the name of the third plaintiff, Harvest Times Limited and tenanted by it. Counsel for the Bank advised in a memorandum dated 25 September 2009 filed for the call of this matter in the Duty Judge List on 28 September 2009, that Harvest Times Limited has been struck off the Companies register.

c) 100 Barry Road, Glendene is an investment residential property owned by the first plaintiffs and tenanted by them.

d) 40 Farquar Road, Glendene is owned by Harvest Times Limited and tenanted by it.

e) 23 Corban Avenue, Henderson are land and buildings comprising factory premises owned by the first plaintiffs and leased by them.

[8] Apparently the plaintiffs own the Rewarewa Road property as trustees of the Property Trust, named as second plaintiff. At the request of Mr Orlov, counsel for the plaintiffs, on 28 September 2009 I granted an application to change the name of the second plaintiff to Wesley John Liddle as trustee of Property Trust.

[9] The current position in relation to the properties is set out in an affidavit of Ian Barend Gerber, Manager – Strategic Business Services for the Bank sworn 30 September 2009. This evidence was not challenged except that in Mr Liddle's opinion, the sale prices under (c) and (d) were to low:

a) 60 Rewarewa Road – tenders closed on 22 September 2009. Only one offer of $500,000 was received. The advice of Barfoot & Thompson Limited to the Bank is that a better price was likely to be achieved if normal and proper access could be made available to the property. Mr Gerber states that Mr and Mrs Liddle who remained in occupation

have refused access to the real estate agents or to permit them to show the property to the market and have physically intimidated potential purchasers who attended "kerbside viewings" arranged by the agents. Accordingly the Bank has sought vacant possession of the property to enable it effectively to carry out its mortgagee sale in anticipation that a better price will be received.

b) 1 Stonebridge Park Road, Rotorua – the marketing campaign had not commenced. The marketing appraisal was received from the agents instructed on 31 August 2009, they also having encountered difficulties with access to the property. Mr Gerber states that the marketing programme will run from 1 October 2009.

c) 100 Barry Road, Glendene – the tender conducted by Barfoot & Thompson Limited closed on 22 September 2009. Again the agents were not provided with any co-operation from either the owner or the tenants. The highest offer received at the tender was $385,500. That tender has been accepted and the Bank entered into an agreement for sale and purchase on 25 September 2009. Mr Gerber states that the tender received was in line with the market indications provided to the Bank by Barfoot & Thompson Limited which took account of prevailing market conditions, the fact that this was a mortgagee sale and lack of co-operation by the occupiers.

d) 40 Farquar Road, Glendene – the situation is similar to that for 100 Barry Road. The highest offer realised at the tender was $432,756.78 which was higher than the market indications provided to the Bank by Barfoot & Thompson Limited. The tender has been accepted and an agreement for sale and purchase was entered into by the Bank on 25 September 2009.

e) 23 Corban Avenue – as at the date of Mr Gerber's affidavit, 30 September 2009, the Bank had not received any appraisal and marketing of the property for sale had not begun. Barfoot &

> Thompson Limited received an offer from the current tenant of the property on or about 22 September 2009 for $850,000. Because that offer was considerably below the market indications provided by the agents, the Bank has not accepted that offer. The Bank proposes to carry out a full marketing campaign for the property in order to provide the best opportunity for a higher price to be received.

Applicable principles

[10] The principles which apply in relation to interim injunctions in New Zealand are well established by *American Cyanimid Co v Ethicon Ltd* (1975) AC 396 and *Klisers Farmhouse Bakers Ltd v Harvest Bakers Ltd* [1985] 2 NZLR 140 (CA). The Court must consider whether there is a serious question to be tried in the proceeding and where the balance of convenience lies; then it must stand back and consider the overall justice of the situation.

[11] There is a further principle that is applicable when the injunction application relates to the exercise of a mortgagee's power of sale that a mortgagor is required to first pay the amount secured into Court before granting an injunction restraining the exercise of the power of sale is granted: *Parry v Grace* [1981] 2 NZLR 273. The plaintiffs have not paid or offered to pay the relevant amount into Court. Their counsel, Mr Orlov, argued that the principle does not apply in the circumstances of this case. I shall return to that aspect later.

Is there a serious question to be tried?

First cause of action

[12] The first cause of action pleaded in the statement of claim is that the defendants have breached the duty of care owed to the plaintiffs under s 103A of the Property Law Act 1952. Why the pleading refers to a provision that has been repealed was not explained. Presumably the reference intended was to s 176 of the Act which requires a mortgagee to take:

> ... reasonable care ... to obtain the best price reasonably obtainable at the time of sale.

[13] The particulars allege two grounds:

a) The properties have been marketed "via a three week tender process" which is said to be "insufficient time to property (sic) market" which has reduced the price and value of the properties.

This allegation is patently incorrect. For two of the five properties marketing has not even begun. For the three Auckland houses the tender process was conducted over four weeks, not three, and was based on professional advice obtained by the Bank from Barfoot & Thompson Limited. Four weeks is a perfectly normal time period, as is the method of testing the market for sale, namely by a tender process.

b) The Bank has offered or entered into a contract for "the factory" (presumably a reference to 23 Corban Avenue):

> ... for a sum of $500,000 while knowing or recklessly indifferent to the fact that the market value is far in excess of this sum.

This allegation also is patently incorrect. The Bank received a verbal offer from the tenant of $850,000 which it rejected as being too low. A full marketing campaign will now proceed, but at the time of Mr Gerber's affidavit had not begun.

[14] Not particularised in the pleading, but the subject of complaint in submissions for the plaintiffs, was that the Liddles were in negotiations for the sale of the factory to the lessee for $1.4m which, it is claimed, were "completely destroyed" by the approach of the agents to the lessee's principal at a lower price, $680,000, that:

> The lessee who was prepared to buy at a higher figure is now only willing to buy from the Bank at a figure told to him before the close of the tender process, thus defeating the entire closed nature of the tender process.

[15] The inaccuracy of these claims and assertions is only too obvious. The offer from the tenants was $850,000 (not $680,000 or $500,000) which was rejected by the Bank as being too low. The tender process had not closed; in fact it had not commenced. Mr Liddle at paragraph 7 of his affidavit dated 22 September 2009 simply asserts that he had negotiated with the lessee:

> ... roughly a price idea of around $1.3m to $1.4m subject to various issues being resolved.

[16] There is no information about the "various issues", nor confirmation that the lessee shared Mr Liddle's view of the value of the property or would have committed to a purchase at or anywhere near that price. The lessee's subsequent offer of $850,000 seems to indicate otherwise. However, if the lessee is willing to increase its offer the open tender process will provide the opportunity, as it will to test the market generally.

[17] The case of *Earlston Farms Ltd v Trusteebank Wanganui* (1986) 2 NZCPR 528 cited by Mr Orlov in support of the plaintiffs' contentions that an interim injunction should issue where the conduct of the defendant has led to the price being affected in a negative way, does not assist the plaintiffs, even if there were evidence of negative conduct, which there is not. In *Earlston Farms* there had been a mistake made by the mortgagee in describing the property for sale which could have affected the price realised. The Court was prepared to grant an interim injunction given the "ungraspable issue of how much such an error might affect prospective purchasers" at 6. Here there is no mistake or misdescription. The property is to be put to the open market through a professionally managed tender process. The Bank will be concerned to sell to the highest bidder at a price, which it is anticipated, will exceed the $850,000 verbally offered by the lessee.

[18] The plaintiffs' position seems to be as stated at paragraph 2(g) of Mr Liddle's affidavit dated 22 September 2009, that on Mr Liddle's estimate the five properties have a total value of about $3.7m, that the total loans are about $3.1m and he believes that given sufficient time he would be able to sell the properties to reduce the mortgage and regularise his payments. However, I note that in placing values on the various properties at paragraph 2 of his affidavit, Mr Liddle refers to 2006

valuations and in one case an estimate made approximately two years ago. Such out of date valuations and estimates cannot provide a proper basis for assessing current market values, which will best be tested by an open sales process.

[19] The Bank's duty under s 176 is simply to take reasonable care in the sales process it undertakes. It has a contractual right to realise the securities it holds given the defaults of the mortgagors. While obliged to take reasonable care in the sales process, it does not follow that the best price reasonably obtainable will actually be achieved: *Agio Trustees Co Ltd v Harts Contributory Mortgages Nominee Co Ltd* (2001) 4 NZConvC 193,480 at para 70; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513. Nor is the mortgagee under any obligation to wait in the hope that an improving market might yield a better price: *Harts Contributory Mortgagees Nominee Co Ltd v Bryers* HC AK CP 403-IM/00 19 December 2001 at para 43(e).

[20] In this case there is no evidence to suggest that the Bank is proceeding with the mortgagee sales other than with the reasonable care required by s 176. Protestations by the plaintiffs that different marketing approaches should have been taken lack credibility when the reports from the Bank's agents record lack of co-operation by owners and tenants in gaining access to the properties. The Bank has taken and is acting upon independent professional advice as to the sales processes, and the Court will not intervene: *Taylor v Westpac Banking Corporation* (1996) 5 NZBLC 104,105 (CA). There is no serious question to be tried.

Second cause of action

[21] The plaintiffs allege that by words and conduct the Bank made promises or representations upon which the plaintiffs relied to their detriment. They allege that a letter from the plaintiffs dated 18 April 2009 and the Bank's response of 28 April 2009 and subsequent conversations, created a situation whereby the plaintiffs believed the Bank would give them an opportunity to put in a detailed proposal for repayment of the loan and would be given a period of twelve months to be up to date with their repayments. They further allege the Bank represented that it would not

accelerate any payments due under the mortgages or exercise its power of sale. They claim they acted on these promises and representations to their detriment.

[22] Alternatively they allege that the letter of 18 April 2009 constituted a request for waiver of a "credit contract" due to hardship which was accepted by the Bank on 28 April 2009.

[23] This head of claim has even less merit than the first.

[24] In his letter of 18 April 2009 to the Bank Mr Liddle sought a final opportunity for the Bank to re-evaluate the possibility of providing a controlled draw-down facility of $150,000 to assist with the re-capitalisation of Corinthian Frames Company, a business venture of the plaintiffs.

[25] The Bank's reply on 28 April 2009 is very clear. It is signed by Mike Taylor and Ian Gerber on behalf of the Bank and relates to Harvest Times Limited, the Property Trust and Corinthian Homes Limited. It states:

> We refer to the meeting held on Friday 24th April 2009. As discussed the Bank of New Zealand ("Bank") has a number of concerns in respect of the Company and its overall financial position and recent performance, which we consider appropriate to record formally, in no particular order of importance the Bank's concerns include:
>
> - Weak financial position, Group undercapitalised
> - Poor trading performance year to date
> - Inadequate cash flow (loan arrears a& interest)
> - Account conduct and unarranged excess's
> - Financial information to the Bank, unreliable
> - Management – inability to collect debtors
> - Funds/cash being diverted from the trading account (Corinthian Homes Ltd) held with the BNZ, resulting in Term loan commitments and interest not being met.
>
> The above factors have impacted upon the confidence the Bank has in the Group. Your request (18/04/09) for increased funding of $150k has been declined (as advised in our earlier email to you 21/04/09).
>
> As discussed:

1. Exposure for the group is not to increase and the debt is capped until further notice.

2. The Bank has no appetite to increase our level of debt.

3. We require a formal repayment proposal/cash flow (for the next 12 months) from you of how the group will be repaying:

- In the short term, the current unauthorised excess, arrears and interest to the Bank and

- Long term, how the group intends to fund (future commitments) and demonstrate debt servicing going forward. We agreed that you should (seek advice) meet your accountant to discuss alternate investment/cash injection opportunities (unlock capital) either within or outside the group.

We require the information stated in point 3 above by the 7th May 2009. The Bank will then review its position and we make no commitment to continue to provide funding to the group beyond this date.

The bank reserves all its rights and remedies available to it, in terms of the loan and security documentation, in respect of the various defaults and on-demand facilities.

[26] The Bank's letter, as stated in its submissions, clearly speaks for itself. The Bank refused a further advance of $150,000 and states that it has no appetite to increase the level of debt. It states that the group's exposure for indebtedness is not to increase and the Bank's debt is capped until further notice. Further, the Bank requires a formal repayment proposal/cash flow for the next twelve months setting out how the group intended to repay its various debts.

[27] Finally, the Bank states that it requires this information by 7 May 2009 and that it will then review its position. It clearly states that in the meantime no commitment is made to continue to provide funding to the group beyond that date, i.e. 28 April 2009. The Bank expressly reserves all its rights and remedies in terms of the loan and security documentation.

[28] It is simply not possible to interpret or spell out of the Bank's letter of 28 April 2009 any promise or representation of the nature claimed by the plaintiffs, let alone one which could give rise to an estoppel. The Bank is abundantly, perhaps brutally, clear that it makes "... no commitment to continue to provide funding to the group beyond this date" (28 April 2009).

[29] The plaintiffs had previously been warned in an email from Mr Taylor on 21 April 2009 in relation to the request for the additional loan facility of $150,000, that the group was unable to afford to service the level of debt it had, based upon current income streams. The email pointed out that the Bank had already provided the group by default with an additional $30,000 across the group over the past six weeks. The email stated the Bank's view that it did not have sufficient security and that equity in the properties owned by the various group entities needed to be unlocked.

[30] The immediate background to the 28 April 2009 letter only lends support for the position of the Bank clearly stated in that letter that there was no commitment for further funding beyond 28 April 2009.

[31] Nor could the Bank's letter of 28 April 2009 possibly constitute a waiver under the Credit Contracts and Consumer Finance Act 2003 or otherwise, even assuming Mr Orlov's submission that the five mortgages should be treated together as a "contract primarily for personal, domestic, or household purposes", to bring the mortgages within the meaning of "a consumer credit contract" under that Act, has any merit. I do not need to determine this point but I seriously doubt it has any validity.

[32] There is no question to be tried, let alone a serious question, in relation to the second cause of action.

Third cause of action

[33] This cause of action pleads that the Bank has transferred its mortgage to third parties and does not have the power of sale or has wrongfully failed to provide proof that it is entitled to exercise the power of sale.

[34] This cause of action is entirely misconceived. The Bank is the mortgagee of the five properties and registered as such under the Land Transfer Act 1952.

[35] Mr Orlov referred to a decision in the United States District Court in the District of Ohio (Case No. No.1:07CV2282 & others), where Judge Christopher A

Boyko stated a requirement for Plaintiff-Lenders in a number of pending foreclosure cases to file a copy of the executed Assignment demonstrating Plaintiff was holder and owner of the Note and Mortgage as at the date the Complaint was filed, or the Court would enter a dismissal. It appears that the Plaintiff alleged it was the holder and owner of the Note and Mortgage while the Note and Mortgage identified the mortgagee and promisee as the original lending institution, i.e. a party other than the Plaintiff. The Court held the plaintiff had not satisfied the burden of demonstrating standing at the time of the filing of the Complaint. This authority (to the extent it has any relevance at all, given that it is concerned with the law in Ohio, not New Zealand where there is a system of registration for land and interests in land under the Land Transfer Act 1952), is concerned with the right of a party other than the party named as mortgagee or promisee in a security document, to foreclose. The opposite situation applies here. The Bank is the mortgagee named in the mortgages and on the Certificates of Title as the holder of the relevant first mortgages, which seeks to exercise its rights under those securities.

[36] There is no question to be tried arising from the third cause of action.

Other matters

[37] Mr Orlov raised a number of other matters in submissions. They have no merit. I refer to them briefly.

(a) *Service*

[38] Mr Orlov submitted that the notices under the Act were not properly served. I note this is not pleaded in the statement of claim.

[39] The relevant provisions in the Act are ss 352(c), 353, 359(b) and 360(c). The last mentioned of these provisions is important here: a notice is received by a person when it is otherwise received in writing by that person.

[40] At paragraph 6(i) of his affidavit of 22 September 2009 Mr Liddle acknowledges that the Property Law Act notice was sent by email and also sent by post but claims "it was never served on us properly".

[41] Receipt of the notice is acknowledged. It was in writing. The requirements for service under s 360(c) are clearly satisfied.

(b) *Proposal under Part 5 Insolvency Act 2006*

[42] Mr Orlov sought to make something of the fact that the Bank has not participated in Mr Liddle's proposal under Part 5, sub-part 2 of the Insolvency Act 2006 and has "not even acknowledged its existence". He contended this shows the Bank is adamant in ignoring the plaintiffs' sincere efforts towards a fair and amicable solution.

[43] Again this submission is entirely misconceived. The bank is a secured creditor. Under s 243 of the Insolvency Act it has the options of realising the properties subject to a charge, or valuing the property and proving in the bankruptcy as an unsecured creditor for the balance due after deducting the amount of the valuation, or surrendering the charge to the Official-Assignee for the general benefit of creditors and proving in the bankruptcy as an unsecured creditor. Under s 325 a "debt" is a debt that is provable in the insolvent's bankruptcy. The Bank's debt is not a provable debt because it has elected to exercise its rights as a secured creditor to realise the properties subject to the charges in its favour, being one of the options available under s 243. Mr Liddle's insolvency proposal thus does not affect the Bank's rights and interests.

[44] In passing, I observe that "insolvent" means a person who is not a bankrupt but who is unable to pay his or her debts as they become due: s 325(1). Mr Liddle in his application under Part 5 describes himself as "insolvent". Yet counsel for the plaintiffs commenced written submissions dated 30 September 2009 by stating that the plaintiffs are able to pay their bills as they fall due and there is sufficient equity in the plaintiffs' assets to meet with creditor obligations and demands. Mr Liddle's application under Part 5 is inconsistent with the claims made in his counsel's

submissions, a matter of concern to this Court from which the plaintiffs sought injunctive relief.

(c) *Valuations required*

[45] Mr Orlov submitted that the Bank is required to obtain registered valuations pursuant to its duty of care under s 176. That is not so: refer *Southern Cross Building Society v Vuletic* HC AK CIV 2008-404-008684 11 August 2009, Andrews J at [20], [22] and [23].

Conclusion

[46] The plaintiffs fall well short of establishing that there is a serious question to be tried.

Where does the balance of convenience lie?

[47] I have no doubt that the balance of convenience lies heavily with the Bank.

[48] The Bank is owed in excess of $3.1m by the plaintiffs who are insolvent. They have been unable to meet even interest arrears and are not in a position to make payment into Court in accordance with the principle in *Perry v Grace*.

[49] They seek a delay in the sale of properties for eight to twelve months but provide no explanation other than that they might be able to market them better than the Bank in that period, and the market may improve. However, in the meantime interest will continue to accrue, increasing significantly the plaintiffs' liability to the Bank. The current accrual rate is approximately $12,700 per month but if the principal component of the debt is not rapidly reduced, the amount accruing on a monthly basis will increase. The Bank is under no obligation to wait to realise its securities: *Harts Contributory Mortgagees Nominee Co Ltd v Bryers*. Given the significant sum outstanding and the rapidly increasing debt burden, the Bank's

commercial decision to proceed to mortgagee sales must surely be justified. Indeed delay may well prove detrimental to both parties as the mortgage debt increases.

[50] Two of the properties have been sold and the position of the successful tenderers must be considered. There is no reason why settlement of the sales into which they have independently entered, should be delayed.

[51] Finally, but importantly, this is a case where any failure to take reasonable care on the Bank's part which might ultimately be established, could readily be compensated by an award of damages. There is no question that the Bank would be able to meet any award against it and damages would be an adequate remedy for the plaintiffs.

Where does the overall justice lie?

[52] For the reasons given under **balance of convenience**, the overall justice clearly favours the Bank. The plaintiffs pleaded claim fails to establish any proper basis for intervention by this Court. Indeed, it completely lacks merit. The plaintiffs' application must therefore be refused.

Result

[53] For the reasons given above I declined the plaintiffs' application for an interim injunction.

Costs

[54] The Bank is entitled to costs. I did not hear from the parties concerning costs. The Bank will have a contractual entitlement to costs under its securities and I would expect any issues as to costs to be resolved by agreement. However, leave is reserved for application to be made within 21 working days if necessary.