IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-854

BETWEEN	ANZ NATIONAL BANK LIMITED Plaintiff
AND	MICHAEL FREDERICK COORY Defendant

Hearing: 1 October 2009

Appearances: Mr Barker for Plaintiff
Mr Jai Moss for Defendant

Judgment: 6 November 2009 at 11 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***6.11.2009 at 11 a.m.**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……..…

Counsel:
Buddle Findlay, P O Box 2694, Wellington
GCA Lawyers, P O Box 3241, Christchurch

Background

[1] This is an application by the plaintiff ("the Bank") for summary judgment for the balance of an unpaid loan and overdraft owing to it by the defendant. It is a claim for debts owed by the defendant after the completion of a mortgagee sale of a property at 64 Scarborough Road, Christchurch ("the property") by the Bank.

[2] The liability owed by the defendant to the bank is not disputed. I have therefore taken much of the following statement of background from the plaintiff's submissions.

[3] The defendant and his domestic partner, Ms Kirk, (who was the registered proprietor of the property) had been attempting to sell the property themselves for some time. These efforts continued following service of the Property Law Act 2007 notices by the plaintiff. They conducted their own sale process via Harcourts (from late October 2008). This culminated in the Harcourts auction on 11 December 2008, but the property was not sold on that occasion.

[4] As a preparatory step to arranging its own sale, the plaintiff obtained two valuations. The first, dated 22 January 2009, estimated that on a forced sale basis the property would realise $2.0 million. The second, dated 25 February 2009, estimated $1.6 million was the forced sale value.

[5] The property went to auction on the 7th of March 2009 and was passed in at $1.5 million. The bidders to that price, Mr Scott Molina and Ms Erin Baker, ("the purchasers") subsequently offered $1.56 million, which the plaintiff accepted a few days later.

[6] The defendant opposes judgment, asserting that when the Bank as mortgagee exercised its power of sale over the property (which was security for the debts he owed), it breached the duty under s 176 of the Property Law Act 2007 ("the Act") to take "reasonable care […] to obtain the best price reasonably obtainable as at the time of sale".

[7] The defendant alleges:

(a) That the Bank sold the property at an "under market price";

(b) That the Bank sold chattels within the property when its mortgage security only extended to the interests in the land; and

(c) That the advertising of the property for sale was "incorrect", because there was reference to the dwelling having three bedrooms (rather than what he says could have been four or possibly five).

Sales at undervalue

Introduction

[8] Essentially, the defendant claims that the plaintiff has not properly exercised its power of sale and has thereby caused him loss. This is a pleading, in effect, that the plaintiff has acted in breach of the duty contained in s 176 of the Act. That section reads as follows:

> 176 Duty of mortgagee exercising power of sale
>
> (1) A mortgagee who exercises a power to sell mortgaged property, including exercise of the power through the Registrar under section 187, or through a court under section 200, owes a duty of reasonable care to the following persons to obtain the best price reasonably obtainable as at the time of sale:
> (a) the current mortgagor: […]
>
> (2) A mortgagee who exercises a power to sell mortgaged property may not become the purchaser of the mortgaged property except in accordance with section 196 or an order of a court made under section 200.

[9] The principles governing the mortgagee's duties to obtain the best price reasonably obtainable as at the time of sale were examined in the judgment of Fisher J in *Harts Contributory Mortgages Nominee Company Limited v Briars* (HC AK CP 403-IM00 19 December 2001). The statutory enactment that Fisher J considered in that case is substantially similar to the current s 176.

[10] Fisher J held in *Harts Contributory Mortgages Nominee Company Limited* that the following principles governed the mortgagee's duty:

[43] […] I would summarise the principles for the purpose of this case as follows:

[a] The overriding requirement is to take reasonable care to obtain the best price reasonably obtainable: *Cuckmere Brick Co Ltd & Another v Mutual Finance Ltd* [1971] 1 Ch 949 (CA).

[b] The mortgagee has the power to decide, purely in the interests of the mortgagee, if and when to sell (ibid; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513). Consequently, it is only the best price reasonably obtainable at the time of sale that matters.

[c] Where the security is substantial, or specialised property is involved, it will usually be necessary for the mortgagee to obtain and act upon specialised advice as to the method of sale: *TSE Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 (PC). Appointing a competent agent to sell does not discharge the mortgagee's duties, but since its duty is ultimately only one of reasonable care, putting the matter in the hands of a competent agent will usually go a long way towards discharging the mortgagee's duties.

[d] In the normal course the proposed sale will need to be advertised with an adequate description of the property's attributes and, within reason, widely enough to attract all possible purchasers. In some cases this will need to extend to both general and specialist publications: see Kwong supra at p 61; *Ansell v NZI Finance Ltd* (unreported, Wellington Registry, A434/83, Quilliam J, 14 May 1984).

[e] There is no obligation to postpone the sale in the hope of a better price later, or to break up the assets and sell in a piecemeal manner if this can only be carried out over a substantial period or at a risk of loss: Kwong supra at p 59.

[f] When assets are sold by tender or auction, a reasonable period must usually be allowed for purchasers to inspect the property and arrange finance before submitting bids: see *Fairer Fishing Co Ltd v Broadlands Finance Ltd* (unreported, Timaru Registry, A35/77, 17 August 1984); discussed by Ross, supra, along with Ansell v NZI Finance Ltd.

[g] Those are simply detailed examples of the way in which the duty to take reasonable care to obtain the best price reasonably obtainable might be discharged in particular cases. In the end, the mortgagee's performance can only be assessed by reference to each particular case.

[h] The fact that a mortgagee has acted in good faith does not mean that it has necessarily discharged its equitable duty to take reasonable care to obtain the best price reasonably obtainable: *Moritzson Properties Ltd v McLachlan* [2001] 9 NZLC 262, 2448 at 2662,457 to 262,458, paras 59 and 10.

> [i] On the other hand, in evaluating judgments made by or on behalf of the mortgagee it should not be forgotten that in the absence of bad faith, the mortgagee shares with the mortgagor and guarantor an incentive to maximise the price obtained. It is not lightly to be assumed that the mortgagee has acted in a way that was contrary to its own interests as well as the interests of others.

[11] I respectfully adopt the above statement of principle.

Defendant's position

[12] Mr Moss, for the defendant, made the following points:

a) The real estate agent instructed by the Bank did not have the necessary expertise to manage the sale of a luxury home, the marketing of which called for specialist knowledge and skills;

b) The property was misdescribed in the advertising arranged by the agent, being referred to as a three bedroom when in fact it had a media room which could double as a fourth bedroom. Purchasers at the indicated price level for this property, it was said, would be looking for a property with four or more bedrooms, and the failure to clarify that there was at least potentially a fourth bedroom would have meant that there was a pool of potential buyers who would have been dissuaded from enquiry;

c) All of the above matters point to the fact that the sale was at a substantial undervalue which, in turn, probably resulted from the Bank not having taken all reasonable steps to obtain the best price it could for the property.

[13] Mr Moss said that while it was accepted that the agent (Mr Farrant) was an employee of a substantial and well-known real estate franchise, the Ray White Group, that did not mean that the plaintiff had selected the appropriate agent to carry out the marketing of the property. He said that Mr Farrant was based in the Opawa suburb of Christchurch, which was geographically remote from Sumner where the property was located. There was no evidence explaining why the plaintiff had instructed an agent who was not based in the area. Mr Moss also said that the marketing of the property should have been entrusted to someone like a Ms Atkin

(from Harcourts) who had undoubted experience in marketing properties of this kind. Indeed, Ms Atkin had been instructed by the defendant and Ms Kirk to arrange the ultimately unsuccessful sales campaign that lead to an earlier auction at which the property was not sold.

[14] Mr Moss said that the plaintiff's marketing programme had resulted in a relatively low price being obtained for the property, if one compared it with the valuation that had been obtained by the Bank from Ford Baker Valuers in January 2009. The sale only achieved 75% of what those valuers had estimated was the likely price on a forced sale namely, $ 2 million. Mr Moss said that a second valuation, which the plaintiff obtained from Fright Aubrey which indicated a forced sale value of $1.6 million, was flawed. He said the valuer who prepared the latter valuation had confined himself to considering properties only in the Sumner area and not in other parts of the city as he should have done if he was to form a clear picture as to what this property, which had unique features, was likely to realise. This was one of the top properties available for sale in Christchurch, Mr Moss said, and it should have been compared with other properties of similar calibre, but was not.

[15] For the bank, Mr Barker rejected any criticism of the bank's handling of the mortgagee sale. He pointed out that Mr Farrant's plan for marketing the property was 'peer reviewed' by the principal in the Ray White franchise for whom Mr Farrant worked (Mr Prier). He also pointed to the fact that a very large number of enquiries had been forthcoming – some 94 people had made enquiries or inspected the property. The property had been publicised widely on the Internet, in local newspapers and the National Business Review.

[16] As to the complaint about the erroneous description as a three-bed-roomed property, Mr Barker pointed out that even the valuers had described it as such and indeed Ms Atkin herself, at least in initial advertising, had described the property as three bed-roomed. If this was such an obvious point that that would put off a significant pool of buyers, why, Mr Barker asked, did Ms Atkin make a similar error? Mr Barker said that the property was in fact set up as a three-bedroom property at the time arrangements were made to market it. The fact that one of the rooms – which seems to have been described as a 'media room' – could have been

converted for use as a bedroom was irrelevant. Overall, the marketing of the property had been more than adequate Mr Barker said, drawing enquiries from as far afield as London and Western Australia.

[17] As to the difference in the valuations, Mr Barker rejected any criticism of the Fright Aubrey valuation. In his view the market may well have been still declining in early 2009 and, if any explanation of the difference between the two valuations other than genuine differences in judgment was required, that may well be the explanation as to why the Fright Aubrey valuation was lower than the Ford Baker valuation.

Conclusion on Section 176 issue

[18] My conclusion is that the defendant has not established that there has been a breach of the duty of the mortgagee under s 176. Mr Moss made many assertions about inadequacies of the marketing but there is no basis in evidence for the various complaints that he made. I agree with Mr Barker that the sale was given very wide publicity and the detailed diary–type notes which the agent made of the inspections of the property and enquiries made about it provide reassurance that everything was done that could reasonably be expected of any agent in marketing the property. While Mr Moss complained that an agent without the appropriate expertise was used to market the property, he did not tell me in what specific way the ideal agent would have marketed the property differently from Mr Farrant – apart from describing it as a four-bedroom house. As to that, in my view I regard it as no more than speculation that if the property had been described as Mr Moss suggested a larger pool of suitable purchasers would have come forward. I consider that the keen public interest in the sale and the number of enquiries – some of which at least are likely to have been genuine - demonstrate that the marketing was acceptable. The property was correctly advertised as having three bedrooms, in addition to the office and home theatre room. Further, prospective purchasers had a full opportunity to inspect the property and ascertain for themselves the number of bedrooms and/or the configuration that they would intend to use in the property.

[19] The Bank says, and I consider correctly, that it took reasonable care to obtain the best price reasonably obtainable as at the time of the sale of the property. It says it sought recommendations from a reputable real estate agency, and that it accepted the professional advice provided to it. It also says that it then conducted a mortgagee sale auction that was well advertised and well attended. I do not overlook Fisher J's observation in Harts that appointing a competent agent will not necessarily be sufficient. But in the overall circumstances of this case, it is my view that the marketing arrangements were acceptable. I do not therefore accept that there is an arguable defence that the plaintiff breached s 176.

The chattels issue

[20] The fourth ground in the defendant's amended notice of opposition, which I granted leave to be filed, was to the following effect:

> 4. [The plaintiff] breached its duty of care owed towards the mortgagor to ensure that the instructions of the mortgagor in respect of the chattels, worth approximately $80,000 were not carried out, and therefore the chattels were not returned to the Defendant following the sale of the property.

[21] The first point to note is that the defendant was not in fact the mortgagor: rather, Ms Kirk was. However it would seem that in terms of s 176 of the Property Law Act 2007, a mortgagee's duty is owed to a 'covenantor', which would include the defendant. The second point to note is that, because the defence relates to s 176, it must relate to "mortgaged property", as the term is used in that section.

[22] If proper care were not taken to exercise the power of sale over the mortgaged property, which would extend to fixtures which were part of that property, the plaintiff would be liable to a counter-claim and arguably to an equitable set-off. It follows that the s 176 duty would not extend to chattels belonging to the mortgagor, Ms Kirk or the defendant. It is conceivable that those two persons, as the owners of the chattels, might have a claim against the bank arising out trespass, conversion or other tortious actions committed in respect of the chattels. Quite what effect such a claim would have, I will consider below.

[23] Mr Barker, for the Bank, realistically did not argue that if there was a claim arising out of the treatment of the chattels that it would not be available to the defendant to resist the bank's claim for summary judgment to recover the amounts advanced.

[24] I was taken through various communications relating to the chattels issue. Those communications took place between Mr Coory and Ms Kirk on the one part and on the other, the Bank, Mr Farrant and the bank's solicitor Mr Toebes. There is, as Mr Moss commented, some confusion disclosed by the evidence about what was going to happen to the chattels in the house.

[25] Initially, the Bank's solicitors appeared to accept that items such as the stove and the rangehood in the house were chattels and were at the disposal of the defendant or Ms Kirk. However on 6 March 2009 Mr Toebes for the bank wrote to the agent, Mr Farrant, confirming the following:

> The dwelling may presently contain certain items which could be described as chattels – e.g carpets, drapes and light fittings. They remain chattels that do not form part of the mortgage security or what is sold to the purchaser. During the period between any successful bid at auction and settlement of that sale, the Bank will be making arrangements (in controlled circumstances) for those items to be removed unless the purchaser negotiates a separate purchase of same from the owner.
>
> You have authority to give this letter to prospective genuine bidders.

[26] It would appear from the affidavit of Mr Farrant that the conditions of sale agreed with the purchasers had annexed to it a copy of Mr Toebes' letter of 6 March 2009, setting out the list of items which were 'not considered to be chattels', being those described in the letter that I referred to above.

[27] But confusingly, the conditions of sale seem to have included yet another document of different intent - a list of chattels that had been prepared by the defendant. This document was headed:

> Items which are not included in the Mortgagee sale of 64 Scarborough Road

[28] There were then set out items such as the stove (which had of course been included in Mr Toebes' earlier list) which said they were not chattels and were therefore included in the auction.

[29] I was told that a dispute has arisen between the defendant and the purchasers as to what chattels were included in the sale and which were not. If the two contradictory lists of chattels were included in the conditions of sale, as Mr Farrant apparently deposes, then there may be doubt and uncertainty on the part of the purchasers and the owners of the chattels, the defendant and Ms Kirk. Some further analysis has to be undertaken in order to determine whether this state of affairs gives rise to a defence of any kind.

[30] The mere wrongful purported sale of the chattels belonging to the defendant would not amount to a conversion on its own: Laws of New Zealand "Tort – Conversion", at paragraph 232:

> 232. Selling or disposing to another.
>
> A person may be liable for the tort of conversion by conduct which deprives the plaintiff of possession of goods or of the right to possession. A mere agreement to sell goods if unaccompanied by delivery is not normally conversion, because the plaintiff is not deprived of possession and such an agreement passes no property in the goods. However, a wrongful purported sale of the goods of another person which confers no title on the buyer will amount to conversion where the sale is accompanied by delivery of the goods or of documents of title; in such a case both the seller and the buyer are liable to be sued. Where the buyer obtains a good title despite the wrongful sale, the seller is liable for conversion even without delivery, because the owner's right of possession is impaired. It is no defence that the seller was innocent of the lack of the authority of the owner. For example, an auctioneer who receives goods into his or her custody and then sells and delivers them to the purchaser with a view to passing the property is liable as having converted the goods. (footnotes omitted)

[31] If the above statement of the law is correct, and I take it to be so, it would seem that the chattels that were agreed not to be included in the mortgagee sale (such as the dishwasher, wine racks and other items,) may have remained in the property when the defendant and Ms Kirk relinquished or lost possession. The evidence shows that the mortgagee changed the locks on the property on 11th March 2009 to prevent either the defendant or Ms Kirk (or, presumably, any authorised person)

further access to the property. It is reasonably arguable that the actions of the plaintiff in relation to the chattels could give rise to a claim by the owners of the chattels against the mortgagee arising out of the detention of items that were not the subject of the Bank's charge.

[32] I understand that the defendant has issued proceedings in the District Court against the purchasers, seeking either recovery of 'his' chattels or payment of $79,500 for them, although that dispute is not directly relevant to the present proceeding.

[33] Further, the width of the scope of equitable set-off now recognised pursuant to the authority of *Grant v New Zealand Motor Corporation Ltd* [1989] 1 NZLR 8 could amount to an arguable defence in the present proceeding.

[34] Rule 12.2 of the High Court Rules states:

> 12.2 Judgment when there is no defence or when no cause of action can succeed
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to [a cause of action in the statement of claim or to a particular part of any such cause of action].
>
> …….

The defendant's cross-claim

[35] The next issue is what status should be accorded the defendant's cross-claim. If it is fairly arguable that it amounts to an equitable set-off, then it should be treated as a defence.

[36] In the Court of Appeal decision of *Australian Guarantee Corp (NZ) Ltd v McBeth* [1992] 3 NZLR 54 the Court referred to the then Rule 136 which was to the following effect (at p 61):

> 136. Judgment where no defence –
>
> (1) Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the

> statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant.

[37] I interpolate that the current Rule 12.2 is differently worded:

> 12.2 Judgment when there is no defence or when no cause of action can succeed
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to [a cause of action in the statement of claim or to a particular part of any such cause of action].

[38] I did not receive any submissions on what effect a possible wrongful dealing with the defendant's chattels might have on the dispute between him and the Bank. The fact that he may have a counter-claim against the Bank does not defeat the Bank's right to summary judgment. The defendant could only achieve that result if he could establish that he had an equitable set-off against the bank's claim.

[39] For a counter-claim or cross-claim to constitute an equitable set-off, it is necessary that it be closely related to the plaintiff's claim and 'impeach the demand'. I consider that the following passage from Spry, Equitable Remedies (4th ed) Law Book Co, 1990) is authoritative (at p174):

> What must be established is a relationship between the respective claims of the parties which is such that the claim of the defendant has been brought about by, or has been contributed to or by, or is otherwise closely bound up with, the rights that are relied on by the plaintiff and which is also such that it would be unconscionable that he should proceed without permitting a set-off.

[40] As the Court of Appeal said in *Australian Guarantee Corp (NZ) Ltd v McBeth* [1992] 3 NZLR 54 (at p61):

> There will be other cases where it would be unjust to give summary judgment, even on the part of the claim, without allowing the cross-claim, set-off or counterclaim to be brought into account. As Somers J stated in Grant v NZMC Ltd [1989] 1 NZLR 8, 12-13:
>
> "The principle is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account."

[41] But the Court of Appeal also said in McBeth (at p 62) that there was:

> [N]o reason to prevent judgment being given for an amount which is indisputably due and owing but which is only part of the claim and therefore not the whole of the relief sought under the particular cause of action.

[42] And again (at p 62):

> On the other hand it is equally unjust that by raising some dispute as to a part of a claim the defendant should be entitled to prevent the entry of judgment at all. That would seem to defeat the purpose of the summary judgment procedure.

[43] Further, the defendant's claim would only negate a small proportion of the plaintiff's claim. Subject to one issue, it would not seem to be correct in such circumstances to rule that the plaintiff cannot proceed with its claim for the large amount that is indisputably due to it. The one issue is that care must be taken to insure that adequate provision is left to cover the quantum of the defendant's set-off. Some attempt, therefore, must be made to assess the quantum of the defendant's set-off. It is not a fixed sum. Firstly, I do not know the extent and value of the chattels in dispute. Further, there may be a modest general damages component which the defendant is able to include in his claim. I will deal with this difficulty by firstly taking the value and extent of the chattels at the highest possible figure ($79,500) and then providing an amount for general damages. A figure of $30,000 for general damages should be adequate provision for any claim in that regard.

[44] My conclusion is that in this case, the set-off is not of a kind which is inextricably tied up with the plaintiff's claim as, for example, might be the case where the set-off derives from the plaintiff being culpable for the whole state of affairs which resulted in the defendant being liable to the plaintiff in the first place. In the latter circumstances it would be unjust to allow the plaintiff to proceed with its claim in isolation from the defendant's set-off. But that is not the case here. In this case, there can be no argument as to the validity of the plaintiff's claim in debt. The most that can be said for the defendant is that he has a claim which would not have arisen but for the fact that he and the plaintiff entered into a contract which resulted in the creation of a debtor-creditor relations; and that the later events which give rise to the defendant's claim would not have occurred had he not been the plaintiff's debtor. But the events giving rise to the defendant's claim do not call into question the plaintiff's claim. The defendant's claim stems from the way in which the

plaintiff exercised a contractual power, about the existence of which there can be no argument. There are no circumstances present which make it unjust to recognise the plaintiff's claim.

[45] In my view the appropriate course to take is for the counter-claim to be recognised by granting a stay of execution as to part of the plaintiff's claim until the counterclaim has been dealt with.

Judgment

[46] Adopting that approach, in my view summary judgment is to be entered against the defendant for a principal sum of $777,324 together with contractual interest from March 2009 to date, $29,246.82 for a total of $806,570.82. As well, a stay of execution of the following amount is ordered:

(a)	Amount of chattels claim to be deducted	79,500
(b)	Plus general damages to be deducted	30,000
(c)	**Total for which execution of this judgment is stayed**	**109,500**

(d) The terms on which the stay is granted are as follows:

(i) The stay is to enure until further order of the Court;

(ii) Continuance of the stay is conditional upon the plaintiff taking reasonable steps to expedite the hearing of his counterclaim.

[47] The parties should confer on, and ought to be able to agree, the issue of costs. If they cannot, a one hour fixture is to be allocated before an Associate Judge to determine that issue.

_____

J.P. Doogue
Associate Judge