

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV 2009-409-002289

BETWEEN	PETER GEOFFREY MORGAN BASS AND JANICE CHRISTINE BASS First Plaintiffs
AND	PETER GEOFFREY MORGAN BASS AND JANICE CHRISTINE BASS AND PETER WILLIAM JOHN PAALVAST AS TRUSTEES OF THE BASS FAMILY TRUST Second Plaintiffs
AND	DREAM CATCHER PROPERTIES LTD Third Plaintiff
AND	WESTPAC NEW ZEALAND LIMITED First Defendant
AND	WARWICK TODD LIMITED Second Defendant

Hearing: 24 November 2009

Counsel: PGM and JC Bass (In Person)
PWJ Paalvast (as Trustee with First Plaintiffs)
C R Vinnell and C T Jolliffe

Judgment: 24 November 2009

JUDGMENT OF FOGARTY J

[1] In these proceedings Peter and Janice Bass for themselves and as trustees with Peter Paalvast are applying to the Court for an interim injunction to stop Westpac conducting a mortgagee sale of the home of Peter and Janice at West Melton.

[2] They have also added to the statement of claim two companies, Dream Catcher Properties Ltd, which is in liquidation, and Dream Catcher Ltd. I have heard submissions from Mr Peter Paalvast as trustee of the Family Trust and a submission from Janice Bass.

[3] The Westpac sale is being conducted as one would normally expect to see a sale under the Property Law Act 2007. I have an affidavit by Mr Thornley, manager of the Recoveries Unit of the first defendant, who has exhibited in his affidavit the mortgage documents giving the Court advice as to the indebtedness and explaining how the bank has sought advice from qualified property consultants, being real estate agents, as to an appraisal of the subject property and how it should be marketed. The property has been marketed according to those recommendations over a period of a month. It is a rural property.

[4] The auction was about to commence when it was abandoned by the auctioneer on advice in the course of the auction that an application for an interim injunction had been lodged in the High Court. These proceedings have been filed without the benefit of legal advice and the statement of claim is voluminous and there are numerous affidavits and appendices.

[5] The overall picture is a familiar one. Mr and Mrs Bass had a number of credit facilities with Westpac. They had other properties, credit card facilities and this mortgage over their home. They were running a business resettling people coming into the country and looking after them for accommodation. The income and resources simply fell short of meeting the financial commitments that they had entered into. Over a period of time their personal bank manager was accommodating. But there was a shift they say in policy of the bank during this recession in 2008 and a chain of events took place ending now with the situation where the bank is seeking to enforce its first mortgage over their home.

[6] The statement of claim alleges that such was the relationship that Peter and Janice Bass had with the bank that the bank had placed itself in a position where it did not have the ability to exercise unilaterally, as it were, its rights as mortgagee. That is essentially a summary of a much longer set of arguments.

[7] Peter and Janice, through Mr Peter Paalvast, were not able to produce any previously decided case which would have justified the argument that they were putting up. There is a reference to ss 55 and 57 of the Credit Contracts and Consumer Finance Act 2003 whereby there are provisions in that Act for a debtor to seek the terms of the debtor's obligations to be changed and to apply to the creditor to agree to that change on grounds of unforeseen hardship. I am satisfied that these provisions do not apply for at least one but sufficient reason that the defaults predate any possible application, even if it was made informally under that Act.

[8] The principal argument that I heard this morning from Peter Paalvast is that the bank had not produced to this Court the original "*note*", as he calls it, the mortgage. He is arguing that he has good grounds to believe that the bank has securitised this mortgage and is not entitled thereby in law to enforce the mortgage.

[9] The affidavit of Mr Thornley which exhibits the mortgage was made not being aware of this proposition and so is worded in the normal way. It recites in paragraph 3 that Mr and Mrs Bass are the mortgagors and that the first defendant, Westpac, is the first mortgagee. It exhibits a copy of the certificate of title and exhibits photocopies of the mortgage and memorandum of mortgage saying that they are true and correct copies.

[10] There is no reason at all to doubt this sworn affidavit of Mr Thornley. This affidavit was filed in this Court on 14 October 2009 and there has been no prior notice given that the contents of this affidavit were to be disputed. I am quite satisfied that this is a regular normal affidavit. There is no reason, even in the absence of earlier notice, for me to call for further evidence. I do have that as a reserve power but I see no basis to exercise it.

[11] Mr Vinnell, senior counsel for Westpac, both in his written submissions and orally has assured me that since learning of this argument of Mr Peter Paalvast he has obtained instructions from his client and has been assured that there has been no securitisation, in effect, that there is nothing in the background which is contrary to the sworn affidavit of Mr Thornley, already on the file.

[12] Mr Peter Paalvast's belief appears to be based on discussions with people he has had in the banking industry. It mentioned a person who had been either in or familiar with the workings of Dominion Finance. I have listened to those arguments with the latitude which this Court allows when applicants to this Court are not legally represented. But I am quite satisfied that they have no force and cogency in this proposition. I am sure that I am looking at a standard exercise by a mortgagee to enforce its rights given by the instruments of mortgage, that is, the mortgage documents.

[13] I have discussed at various times this morning with Peter Paalvast, and just now with Janice Bass, the power that mortgagees have to choose between entering into compromises, postponing exercising their remedies, or deciding to exercise their remedies. The law is very clear that mortgagees are given the power to choose when to exercise their remedies upon a default and this Court cannot intervene in response to arguments by the parties who owe the mortgagee money to say that it is not fair or the timing is wrong.

[14] There has been no suggestion that the advertising or marketing of the property has been inappropriate. As it happens, these proceedings have stopped the auction.

[15] Mr Vinnell has advised me that as a matter of policy the bank will not sell properties after 11 December. I can understand the reason for that, and that if this application is dismissed the sale process will start again in the New Year. He has assured me that the market will be revitalised by further advertising. Interest has been expressed in the property and is recorded in the affidavits that have been filed reporting to the Court on the results of the marketing exercise so far.

[16] An interim injunction is only granted by this Court if the Court is first satisfied that there is a serious question to be tried and then satisfied that the balance of convenience calls for refusal of an injunction.

[17] Both conditions are essential and we have focussed this morning on the first question of whether or not there is a serious question to be tried here. I am firmly of

the view that there is not and that Westpac are entitled by law to take the course that they are taking at the present time. They are also entitled to change that point of view. But there is no serious argument that this Court can entertain whereby this Court might grant a final injunction or other remedy stopping the sale and it follows there is no basis for an interim injunction.

[18] In the absence of any serious question to be tried the application for an interim injunction therefore fails and is dismissed.

[19] The bank has its own measures to recover costs in the mortgage documents and I do not see any need for a costs order.

[Discussion with counsel]

[20] Having heard from Mr Vinnell, I will reserve costs. If the bank wish to seek costs against any of the parties I will receive the papers and then arrange for a timetable whereby fair opportunities to reply to those arguments are heard.

[21] As was summed up in the opening words of this judgment, Peter and Janice Bass appear in their own right as mortgagors and as trustees of the Bass Family Trust. I have in the preliminary discussions this morning changed the parties to these proceedings by substituting Peter and Janice Bass and Peter Paalvast as trustees of the Bass Family Trust as second plaintiff for the current intituling of Bass Family Trust, second plaintiff.

Solicitors:
Anthony Harper, Christchurch, for Defendants
cc: PGM and JC Bass and P Paalvast