

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

**CIV-2009-404-005934**

BETWEEN ANZ NATIONAL BANK LIMITED  
Applicant/Plaintiff

AND ANDREW IAN BALL  
First Defendant

AND MICHELE CHRISTINE BALL (ALSO  
KNOWN AS MICHELE ARTHUR  
Second Defendant

Hearing: 11 November 2009

Appearances: E Tobeck for Applicant  
Respondents in Person

Judgment: 11 November 2009

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**ORAL JUDGMENT OF VENNING J**

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Solicitors: Morgan Coakle, Auckland  
Copy to: A I and M C Ball, Auckland

## **Introduction**

[1] This is an application for summary judgment by the plaintiff bank against the first and second defendants. The Bank seeks to recover the shortfall owing to it following realisation of securities held by the Bank to secure borrowings by:

- the first and second defendants personally;
- trusts of which they were trustees, Michele Arthur Family Trust, the Malano Trust; and
- a company Balvast Property Limited that they had guaranteed.

[2] The defendants have filed a notice of opposition. The matter has been heard before me this afternoon.

## **Background**

[3] There is a long background to the dealings between the parties. I take a summary of it from counsel's submissions. On 18 November 2005 the defendants as trustees of the Michele Arthur Family Trust and Malano Trust entered two flexiplus agreements with the Bank enabling them to borrow up to \$60,000 and \$100,000 respectively.

[4] On 19 December 2006 the defendants took out a personal loan under which they borrowed \$426,196 and also opened a current account.

[5] On 18 January 2007 a property at 34 Comins Crescent was remortgaged by the defendants to the Bank. I interpolate here that the defendants or the interests associated with them owned property at 34 and 34A Comins Crescent.

[6] On or about 22 January 2007 the defendants as trustees of the Malano Trust and the Michele Arthur Family trust borrowed an additional \$144,151.

[7] On 24 July 2007 the trusts borrowed a further \$450,000.

[8] On 14 December 2007 the defendants guaranteed the borrowings of Balvast Property Limited, a company of which they were sole directors and sole shareholders. On the same day Balvast Property Limited entered a written agreement with the Bank to borrow \$394,070. That borrowing was secured by a mortgage the company gave in favour of the Bank on 17 December 2007 over a property at 42 Baird Street, Howick.

[9] On 18 January 2008 the defendants executed an interlocking guarantee in relation to all borrowings of the Michele Arthur Family Trust, the Malano Trust, and Balvast Property Limited. On that day the defendants as trustees of the Malano Trust and the Michele Arthur Family Trust borrowed a further \$71,225.

[10] The defendants and their associated entities and trusts and the company fell behind in their obligations to the Bank under the various loan agreements. On 29 July 2008 the Bank issued a notice pursuant to s 119 of the Property Law Act 2007 which was served on Balvast Property Limited and on the defendants in their capacity as trustees of the Michele Arthur Family Trust and the Malano Trust.

[11] On 31 July 2008 a notice pursuant to s 122 of the Property Law Act was served on the first and second defendants as guarantors.

[12] At the defendants' request the Bank agreed to allow a private sale of 34 and 34A Comins Crescent as opposed to taking that to a mortgagee sale. The properties were sold and on 26 August 2008 the net proceeds of sale were credited to the accounts of the first and second defendants in respect of their personal loan and in respect of their borrowings as trustees of the two trusts.

[13] On 24 November 2008, following a mortgagee sale process 42 Baird Street, the property owned by the company, was auctioned and sold. On settlement the proceeds of that sale were credited to the Balvast Property Limited account.

[14] As at 14 July 2009, the debt by Balvast Property Limited and guaranteed by the defendants, including costs, stood at \$142,119.96. On the same date the defendants' personal account stood overdrawn at \$138,084.51. In addition there was a separate overdraft account with a balance of \$15,212.43 owing. The trust's debt as at 14 July 2009 totalled \$349,458.09 including interest and costs. Further interest has accumulated on those sums since July 2009. The total sum for which judgment is sought today (including interest) is \$662,684.19.

### **Defendant's position**

[15] The defendants have filed a notice of opposition to the application for summary judgment. With respect to that notice of opposition, aspects of it are incomprehensible and go nowhere near suggesting a defence. However, Mr Ball has addressed the Court this afternoon in a careful and coherent manner. He has outlined the position that the defendants are in. Although a lot of what Mr Ball said is essentially evidentiary and should have been in an affidavit, I summarise it as follows.

[16] Mr Ball and his wife were engaged in a financial services business in 2001. During that time they placed a considerable amount of business with the ANZ and National Banks. They also obviously, from the above summary, borrowed significant sums from the Bank in their personal and related business and trust capacities.

[17] Their ability to service the commitments to the Bank were severely affected by two factors:

- a) first, the Bank's decision to reduce the commission to mortgage brokers, including the defendants; and
- b) second, the effective crash of the property market in 2008 with the result there was a significant, if not absolute downturn in business for mortgage brokers such as the defendants.

[18] At that stage the defendants fell into default and were unable to meet their commitments to the Bank. Mr Ball made the point that the defendants were not irresponsible borrowers. Two properties that sold in August 2008 for \$785,000 had current valuations of \$1.38 million when the borrowing was drawn down in relation to them.

[19] Mr Ball said that the Bank had also now, because of their financial difficulties, advised them it was no longer willing to do business with them.

[20] Mr and Mrs Ball, unlike a number of other people, did not sit on their hands when faced with this situation. They sought to renegotiate their outstanding loans with the Bank and put a proposal to it on 10 March this year. Mr Ball said that that offer was rejected by email on 8 May this year when they were advised the Bank intended to commence legal action to recover the balance.

[21] Despite the difficulties the defendants have experienced over the last few years, Mr Ball said that they have refocused their business, that they are now in a position where they are able to meet their obligations on a day to day basis and intend to put in place a repayment proposal under the Insolvency Act if necessary. To that end they have already considered obtaining advice about that from an insolvency practitioner.

[22] When I discussed with Mr Ball the matters set out in the notice of opposition, Mr Ball said that he questioned whether the loans should have been made in the first place and had assumed that the Bank would not lend if, in the event the Balls were unable to make the payments there would be insufficient equity in the property to cover the outstanding balance. As events have shown there has not been sufficient equity in the properties to meet the outstanding balance.

### **Summary judgment principle**

[23] As an application for summary judgment the onus is on the plaintiff to satisfy the Court the defendants have no defence to the claim made against them. In a case of this nature the claim is made out by establishing the advances made by the Bank

to the various entities and the obligation of the defendants to repay the advances, either because they have borrowed the money personally or they have guaranteed to borrow.

[24] The evidence put before the Court by the Bank satisfies the Court that the advances have been made and that Mr and Mrs Ball either borrowed the money directly themselves or, where the money was borrowed by other entities, they have personally guaranteed the payment of the balance due to the Bank. The guarantee documents and other security documents that the Bank relies on are in order.

[25] On the evidence, which is unchallenged, the sums claimed by the Bank are due after crediting all moneys that are properly credited to the defendants' accounts following the sale of the securities.

### **Opposition/Defences**

[26] There are really three matters that need to be addressed by way of possible defences to the claim.

[27] The first is the suggestion that the Bank may not have achieved what it should have achieved in terms of the sales. As Ms Tobeck pointed out only one of the properties was actually sold by the Bank by a mortgagee sale. That was the property owned by Balvast Property Limited. The other properties at Comins Crescent were sold by the defendants with the Bank's agreement.

[28] Section 176 of the Property Law Act 2007 obliges the mortgagee in exercising the power of sale to obtain the best price reasonably obtainable at the time of sale. The section largely incorporates the established common law principles about that issue.

[29] The authorities confirm that to comply with that duty the Bank should act reasonably, which includes employing a reputable real estate agent and conducting an active and open marketing campaign. I refer to *Harts Contributory Mortgages Nominee Co Ltd v Bryers* HC AK CP 43-IM00 19 December 2001 Fisher J and

*Southern Cross Building Society v Vuletic* HC AK CIV-2008-404-008684 11 August 2009 Andrews J. In this case the Bank engaged The Professionals, a recognised real estate agent acting in the area. That company engaged in a three week auction campaign for the property, including a number of advertisements, photo signs and other marketing efforts. I note the Bank also obtained a valuation from a registered valuer and property consultant Sheldons. The valuation from that firm confirmed a current market value of \$360,000 with a forced sale recommendation down to \$300,000 because of the fall in property market and different economic situation as at August 2008. In the event the property sold at \$316,000 which, while below the estimate of current market value, was above the forced sale valuation. I note that the property sold by the defendants themselves sold at a price somewhere between a forced sale and fair market value assessment made by the same valuer.

[30] On the evidence before the Court the Bank has taken reasonable steps to obtain the best possible price obtainable at the time of the sale and has satisfied its obligations under s 176. The Balls will know from their experience in the property industry that property markets fluctuate. They do not always rise. The fact that the sale price is significantly less than the property may have been valued at, at the time the original mortgage advance was made, does not lead to any remedy or defence to the Bank's claim at this time.

[31] The next matter raised by Mr Ball in his submissions to the Court was the issue of the Bank's action in ceasing to instruct Mr and Mrs Ball. That followed from their financial position and cannot provide a defence. As to the Bank's decision to reduce commissions to mortgage brokers, there was no sworn evidence about that, but accepting Mr Ball's evidence for the moment, there is no evidence that it was anything other than a genuine commercial decision made by the Bank at the time. It provides no basis for a defence to the Bank's claim.

[32] The last matter that Mr Ball raised with the Court was a request that the Court exercise its discretion and not enter judgment against the defendants today on the basis that they were taking steps to try and resolve their indebtedness and the debts they had to all creditors. Essentially it was a request for further time to put a proposal to creditors rather than face the possibility of bankruptcy. As I have

attempted to explain to Mr Ball that is not a matter that the Court can properly take into account at this stage of the process. At this stage the Court is inquiring into whether the Bank is entitled to the judgment it seeks. On the basis of the evidence before the Court it is entitled to the judgment it seeks. The matters that Mr Ball has raised are matters for the Court at a later stage if the Bank takes bankruptcy proceedings against Mr and Mrs Ball. It will then be at the discretion of the Court as is provided for by the statute whether those orders are appropriate.

## **Result**

[33] It follows that I conclude the Bank is entitled to the judgment it seeks. The Bank has proved its claim. There is no defence.

[34] There will be an order for summary judgment in favour of the Bank against the defendants jointly and severally in the sum of \$662,684.19 including interest to today's date. In addition the Bank is to have costs on a 2B basis together with disbursements and filing and other approved fees of \$1,320.

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Venning J