

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

CIV 2008-404-8684

BETWEEN SOUTHERN CROSS BUILDING
 SOCIETY
 Plaintiff

AND ITA VULETIC
 Defendant

Hearing: 15 June 2009

Appearances: J Toebes for the Plaintiff
 R Hucker for the Defendant

Judgment: 15 June 2009

**JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

Solicitors/Counsel:

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R Hucker, Hucker & Associates, Auckland - hucker@huckerlaw.com

[1] Southern Cross lent a sum of \$4,958,000 to the defendant's company Ravita Holdings Limited (Ravita). The defendant and her company's Hurstmere Limited (Hurstmere) and Ravita Investments Limited (RIL) completed relevant loan documents as covenantors. Security for that loan and separately for the plaintiff's separate advance of \$1,020,000 to the defendant personally, was provided by the grant of first mortgages over:

- a) Hurstmere's property at 97A Grafton Road;
- b) The defendant's property at 19 Young Access Road, Silverdale;
- c) RIL's property at 214 Karangahape Road; and
- d) Ravita's property at 2 Anzac Street, Takapuna.

[2] The loans fell into default and Property Law Act notices were duly served. The notices were not complied with and mortgagee sales were arranged.

[3] The Grafton Street property was sold on 24 September 2008 (by the plaintiff as mortgagee) for \$850,000 plus GST. That sale settled on 11 November 2008.

[4] The Karangahape Road property was sold by tender on 24 September 2008 by the plaintiff as mortgagee for \$2M, zero-rated as a going concern. That sale settled on 7 November 2008.

[5] The Anzac Street property was sold by tender on 23 September 2008 (by the plaintiff as mortgagee) for \$2,626,000 zero-rated as a going concern. That sale settled on 31 October 2008.

[6] The Young Access Road property was scheduled for auction on 15 October 2008 but was destroyed by fire in early October. The auction proceeded on 20 October 2008 but was unable to be sold by the plaintiff as mortgagee.

[7] The net proceeds of sale after payment of costs were applied in reduction of, but did not repay in full, the debt outstanding to the plaintiff under the Ravita loan agreement.

[8] In opposition to the plaintiff's summary judgment application the defendant asserts:

- a) The plaintiff breached its duty to the defendant to obtain the best possible price for the property sold at mortgagee sale.
- b) The plaintiff is noted as one of the secured parties on a policy of insurance in respect of the Silverdale property and has been in discussions with the insurer NZI but relevant details have not been disclosed to the defendant.
- c) The defendant has an equitable set-off as a result of the plaintiff's conduct.
- d) Liability for the debts under the subject loan agreements is not disputed per se because the evidential basis of the claim has been established. The defendant's opposition alleges the plaintiff breached its duty under s176 of the Property Law Act 2007 which is take "reasonable care... to obtain the best price reasonably obtainable as at the time of the sale".

[9] In her affidavit in opposition she stated she did not accept the properties were sold at value. She said she raised with Mr Oates of the plaintiff her concerns that it was conducting a fire sale of the properties (accepting the Silverdale property which was burnt down), and was not obtaining the best price available for them. She said these issues were the subject of correspondence between solicitors. She said she was arranging to obtain further documentation from third party sources "to verify the position including documentation relating to the involvement of Bayleys. Bayleys had sold the Karangahape Road property to her and also acted for the plaintiff in reselling the building back to the original vendor. She purchased the building for

\$3.7M about one year before the mortgagee sale when it was sold for \$2M. She said a purchaser “who was to buy the property at \$3M” and had signed the agreement for sale and purchase, was discouraged by a Bayleys’ representative from proceeding with the purchase. She believes no valuations were obtained prior to sale. She is concerned she was denied the right to be present at the opening of the tenders for the Karangahape Road property.

[10] The defendant’s primary concern appears to be the process for the sale of the Karangahape Road property.

Defendant’s submissions

Considerations

In March 2009 the plaintiff has concluded a mortgagee sale of the Silverdale property and has applied the net proceeds of \$407,193.09 in reduction of the outstanding debt owed to it. In April 2009 the plaintiff have received from NZI a payment of \$208,125 under the mortgagor’s insurance policy, which money has also been applied in reduction of the outstanding debt owed to it.

In this summary judgment proceeding the plaintiff has the responsibility of satisfying the Court there is really no defence to its claim i.e. there is an absence of any real question to be tried. Claims of a conflict concerning material facts will likely be disregarded unless supported by record or reasonable inference.

Although by her notices of opposition the defendant alleged the plaintiff breached a legal duty “to obtain the best possible price for the property sold at mortgagee sale”, in fact what s176 of the Act requires is observance of a duty to take “reasonable care... to obtain the best price reasonably obtainable as at the time of sale”. This obligation is not meant to constrain a mortgagee’s own commercial decision about whether, and if so at what time, to sell mortgaged property: *Mullen v Rodney District Council* (High Court Auckland CP 31/SD00, 22/02 at [42] per Heath J). Although the current market value of a property will usually be the best price reasonably obtainable at the time of sale, I accept Mr Toebes’ submission that there will be

situations when a lower “forced sale value” may still be the best price reasonably obtainable. The fact of a failure to achieve an assessed market value does not give rise to any inference that the mortgagee has breached its duty to take reasonable care.

[11] As adverted in *Schollum v Graham* (Court of Appeal, CA 30/97, 5/5/98) a mortgagee discharges its duty to take reasonable care by acting on the basis of sound professional advice provided to it. This should include the undertaking of a marketing campaign designed by a professional real estate agency with the appropriate expertise and experience in such matters. If orthodox procedures are adopted in consequence of receiving independent professional advice, then the Court should not second-guess the course adopted by the mortgagee.

[12] I am satisfied the plaintiff sought recommendations from a professional estate agency (Bayleys) as to the appropriate methodology for sale of the properties. Marketing and sales campaigns were specifically tailored to each individual property. The signage, press publications, mail outs, website advertising. References made to marketing in the Chinese print media to attract interest from migrant investors. The properties were marketed extensively over a five-week period. I agree with Mr Toebes’ submission that there is evidence that Bayleys’ recommendations actually worked, that in the context of a depressed commercial property market an extremely good level of interest was generated resulting in four tenders for the Karangahape Road property and 13 tenders for the Anzac Street property. There is evidence that rather than accepting the highest tender prices Bayleys’ agents went back to the tenderers to attempt and did achieve an increase in the offers made.

[13] There is reason to discount the defendant’s claims regarding the sale of the Karangahape Road property. She said she had purchased it a year earlier but in fact she acquired it more than three years beforehand. Since then there was no longer a guaranteed income stream from signage erected on the property; a resource consent relevant to the potential development of the building had lapsed; and there were vacant tenancies and repairs and maintenance needing to be done.

[14] The defendant's claim that the Karangahape Road property was sold at under value arises from a conditional agreement she had to sell the property to New North 81 Limited for \$3M. That agreement was made well after the Bayleys' advertising campaign was under way. In the outcome the property did not sell at the price of \$3M and the agreement did not become unconditional.

[15] Taking into account the funds received from the sale of the Silverdale property including the proceeds of the insurance policy, the sum owed by the defendant inclusive of interest and costs as at 4 June 2009 is **\$990,075.94**.

[16] **Judgment is entered for that sum accordingly.** Also the defendant will **pay plaintiff's costs** calculated on a **2b basis** together **with disbursements** as approved.

Associate Judge Christiansen