

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

CIV-2011-404-2668

BETWEEN ASB BANK LIMITED
Plaintiff

AND DAVID JASON HARTLEY
First Defendant

AND FLEUR DIANE HARTLEY
Second Defendant

Hearing: 7 November 2011

Appearances: Mr S Barker for plaintiff
Mr J McBride for Defendants

Judgment: 11 November 2011 at 4:00 PM

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

*This judgment was delivered by me on
11 November 2011 at 4pm, pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

Solicitors:

*Buddle Findlay, P O Box 2694, Wellington, by email: scott.barker@buddlefindlay.com /
natalya.king@buddlefindlay.com*

Mr Josh McBride, Solicitor, Auckland – josh@joshmcbride.co.nz

Procedural history

[1] An application was made for adjournment of the fixture in this matter to Associate Judge Abbott which he dealt with on 3 November 2011. The defendants have sought the adjournment on the grounds that they might wish to adduce “rejoinder” evidence following the filing of evidence in reply from the plaintiff. The expanded background is as follows.

[2] The plaintiff issued proceedings on 6 May 2011. It had previously exercised a power of sale over the property which is the subject of these proceedings at Picton Street, Freemans Bay on 3 December 2010. The gross amount recovered on that mortgagee sale was \$1,050,000.00. The net amount that the plaintiff was paid after the costs of sale was \$891,556.89. The plaintiff was left with a shortfall, it claims, and by its proceedings it sought two amounts due under two separate bank facilities; one of \$184,429.58 together with interest and other charges; and under the other, judgment in the sum of \$1,000,000, again together with interest and costs. The plaintiff sought summary judgment on its claim and on 8 July 2011 the defendants served a notice of opposition which stated:

2. The ground on which the respondents oppose the making of the order(s) is that they have a defence to the causes of action pleaded in the statement of claim, namely that the plaintiff failed to use reasonable care to obtain the best price for the property reasonably obtainable.

[3] The plaintiff filed affidavits in reply to the notice of opposition and the affidavit in support of opposition filed by the defendants. Affidavits were given for the plaintiff and filed in the proceeding from a real estate agent who had planned the marketing of property and carried it out, Mr Watson, and from a bank officer, Mr Kirschberg. Broadly speaking, the affidavits detailed the steps that the plaintiff and its agents took to market the property for sale. These set out to demonstrate the extent of the advertising and website coverage given to the defendants’ property. The defendants filed an amended notice of opposition on 12 October 2011. It will be helpful to set the grounds given in that notice of opposition out in full:

2. The ground on which the respondents oppose the making of the order(s) is that they have defences to causes of action pleaded in the statement of claim, namely:
 - (a) the plaintiff failed to use reasonable care to obtain the best price for the property reasonably obtainable;
 - (b) the plaintiff has refused to allow them access to their files and “personal information”, as defined in the Privacy Act 1993, meaning they are unable to properly defend themselves; and
 - (c) the summary judgment application is an abuse of process, as it relies on “reply evidence” that is not properly evidence in reply ...

[4] It will be seen that in the amended notice of opposition, the defendants again advance a defence that the plaintiff failed to take reasonable care to obtain the best price for the property reasonably obtainable. It was common ground between the parties at the hearing before me that that defence was pleaded in reliance on s 176 of the Property Law Act 2007. The additional grounds of “defences” in the amended notice of opposition asserted that the plaintiff had refused to provide the defendants access to the information contained in the plaintiff’s bank files about their loans and secondly, that the plaintiff had not introduced any evidence about the circumstances of the mortgagee sale until it filed evidence in reply.

[5] It was against the foregoing background that the defendant sought an adjournment which the plaintiff opposed. The application was declined. Associate Judge Abbott set out the following matters as the basis for his decision:

[5] I informed counsel in the conference that I could not see that the outcome to the complaint to the Privacy Commissioner could assist on the question as to what steps had been taken by the plaintiff in the conduct of the sale (noting the advice of counsel for the plaintiff that all relevant material had been provided in the “reply” affidavit). I also took the view that the points appeared to have been addressed by the amended Notice of Opposition, and that there was no evidence before me as to evidence that the defendants might be able to adduce in rejoinder, and thereby potential prejudice flowing from the late provision of the “reply” evidence as to the conduct of the sale.

[6] Against the above background, I made the following orders:

- (a) ...

- (b) The defendants have leave to file an affidavit (or affidavits) as to the prejudice they have suffered by reason of the plaintiff's failure to provide evidence as to the conduct of the sale process earlier, or as to the potential relevance of information that could become available from the Bank's file (being information other than information as to the conduct of the sale, already available in the "reply" affidavit)

[6] As I read his Honour's minute, he did not see anything objectionable in the provision of evidence as to the circumstances in which the mortgagee sale was carried out by medium of the affidavit in reply which the plaintiff's filed. What he did leave open was the possibility that the defendants might consider that they could demonstrate that injustice was going to be caused to them because there was additional material on the bank's file which might relate to the conduct of the sale which had not already been placed before the Court.

[7] However, the affidavit which the defendants filed is, as I have said, a rejoinder affidavit directed to the merits of the plaintiff's claim. In the rejoinder affidavit, the defendants made no attempt to pinpoint evidence about the conduct of the sale process "that could become available from the Bank's file (being information other than information as to the conduct of the sale, already available in the 'reply' affidavit)". In the affidavit actually filed, there was a refutation of various points that were made by Mr Kirschberg in his evidence in his affidavit in reply in which he apparently deposed that the Hartleys did not make any repayments on the bank advances. Mr Kirschberg's affidavit in reply in its second part dealt with the issue that "[t]wo and a half years after the Bank granted the Facilities, the Hartleys had not obtained subdivision consent". Thirdly, it dealt with an assertion made by the plaintiff that it had made an offer to enter into a further arrangement with the defendants, subject to them paying \$100,000 to the bank to reduce their debt. This subject was described in the rejoinder affidavit by the heading "C. That Mr and Mrs Hartley advised the Bank that they could not pay the \$100,000".

[8] The last part of the affidavit is headed "D. Relevance of information on the Bank's file".

[9] It seems to me that the affidavit that Mr Hartley filed by way of “rejoinder” is likely to fall outside the terms of Associate Judge Abbott’s grant of leave. However the Court’s intention in granting leave to file another affidavit is not entirely clear. I granted leave for the affidavit to be put before the Court on a provisional basis at the hearing on 7 November 2011 and I reserved the question of whether the affidavit should be allowed into evidence.

[10] What I am clear about is that the Judge did not intend that evidence should be introduced by way of “rejoinder” affidavit which was addressed to a matter that had not been put forward as a defence in the notice of opposition filed.

[11] But as I have noted, the defendants, although they filed an amended notice of opposition, relied upon the s 176 issue. They also added what seemed to be complaints about procedural matters. Those are that they had not had discovery of the contents of their file (although they did not use the word “discovery”) and that the summary judgment application was an abuse of process as it relied upon evidence in reply that ought not to have been filed.

[12] First, it would seem that the defendants never sought leave to file an amended notice of opposition. That issue was not dealt with at the hearing before Associate Judge Abbott. However, even if the amended notice of opposition can be read, and I am minded to do that, it does not seem to contain any further matter that could amount to a defence against the substance of the plaintiff’s claim.

[13] When the matter was called before me on 7 November, Mr McBride made it clear that the defendants no longer relied upon a breach of the duty to take reasonable steps to obtain the best price reasonably obtainable for the mortgagee sale. Rather, in his submissions he ventured into new territory. It now appears that the defendants wish to base their opposition on breaches of contract on the part of the plaintiff. Essentially, the defendants claim is that rather than proceeding to a forced sale, the plaintiff ought to have provided additional funding so that the defendants could complete the development of the house property at Picton Street, Freemans Bay. I will consider that aspect of matters next.

Whether the plaintiff breached the contract

[14] The plaintiff entered into two term loan agreements advancing \$2,000,000 to the defendants. This was secured by mortgage over the Freemans Bay property and over another property that the defendants owned at Eastern Beach. The uncontradicted evidence is that both of these facilities were in default by 1 January 2010 (the loans being required to be repaid on 1 January 2009 and 1 January 2010 respectively). There was an additional revolving credit facility loan for \$300,000.

[15] During 2010, the defendants' development was stalled and they were in default under the loans. Nonetheless, they considered that if they were able to bring the development project on the property at Freemans Bay to completion, it would worth a lot more than they had paid for it, \$1,330,000, all of which had been borrowed from the plaintiff. The Hartleys, it must be said, had a very difficult run during 2009 and 2010, including being embroiled in litigation over a leaky home which they had purchased — this being the Eastern Beach property. As well, problems had emerged with the Freemans Bay property. There was a gas leak on the property and they were required to evacuate it by the Council while work was done to repair the problem. When they eventually returned they found that the house on the property was "in an appalling state". As well, there were problems with a retaining wall on the property which existed before the defendants purchased the Freemans Bay property. Notwithstanding all of this, the defendants obtained a valuation and the position could be summarised in early 2010 as follows.

[16] The defendants had finally obtained subdivision consent for the property which, it was agreed on both sides, would substantially improve the value of the property even without improvements being made. It was necessary in order to complete the subdivision for a garage with access onto Picton Street to be constructed because this was a condition of the Council's consent. A quote had been obtained for construction of the garage at \$140,000 plus GST. The larger plan, though, was that the defendants would build a new house on the part of the property which was to be subdivided off. Mr Hartley describes the position in these terms in his first affidavit:

55. There was now a clear exit strategy for us and for the bank. We owed them approximately \$2.3 million. We had a valuation recording that the developed site would be worth \$3.75 million. My preference was to do the whole development, including the construction of the new townhouse, and sell both sites. Even if the development cost us, say, \$1 million (and the quotes were substantially less than that) then we would still be well ahead. We would repay the bank and in fact make some money for ourselves. Alternatively, we could just build the garage and get the subdivision through, without the new townhouse. Again, we would still be ahead and the bank would be repaid.

[17] Unfortunately for Mr and Mrs Hartley, the plaintiff refused to advance the funds for the completion of the development to either level as proposed. The most it was prepared to do was that, if the defendants paid in the \$100,000, they would show them leniency on the recovery of the deficiency claimed.

[18] Mr Barker, counsel for the plaintiff, submitted to me that the defendants had a mistaken view of the bank's obligations under the loan agreements. He directed my attention to cl 2.1 of the bank's general terms and conditions which applied and which stated that in the event of a default, the bank was not obliged to provide accommodation under a facility. There had been a default in this case; that is not argued. A default included a failure to make a payment on time and exactly that had happened in the case of the two facilities that ought to have been repaid in 2009 and 2010.

[19] In my judgment, the defendants cannot overcome that point.

[20] I have a great deal of sympathy for the defendants who have had a very trying few years with their property transactions. However, what they are in effect trying to advance is that the bank, having provided finance at the commencement of a development project, assumed an obligation to entertain still further applications for finance as they became necessary in order for the defendants to complete their project. There is no provision in the contract to this effect and I am not able to see any grounds upon which an implied arrangement to that effect might be considered by the Court.

The remaining grounds of opposition

[21] The defendant in [2] of the amended notice of opposition dated 12 October 2011 raised additional grounds which I have already set out earlier in this judgment at [3]. In effect, as I have already noted, the defendants contend for a right to discovery in summary judgment proceedings. Mr Barker referred to the leading authority in this area which is *NZI Bank Ltd v Philpott*¹ where his Honour made the following remarks:

In practical terms, it may well be that discovery will have only minor importance in summary judgment matters. Generally, I suggest, it will not be granted prior to first hearing of the summary judgment application itself. Even at that hearing, such orders will not be granted at all unless “necessary”. Such orders hardly will be “necessary” where a defendant, bereft of any significant defence framework, simply wishes to go fishing oceanwide to see if something can be trawled up. It will not be necessary in the converse situation where quite apart from questions of discovery the Court is not satisfied the defendant has no defence, and the summary judgment application therefore is to be dismissed on ordinary principles. Its likely significance will be in the relatively narrow band of marginal cases where an outline defence is made out, but the Court encounters genuine difficulty in determining whether or not there is no defence, and has a substantial reason to believe discovery in the proceeding will or may well assist that determination. Even in that limited range of situations, a Court encountering such difficulties might prefer to dismiss the summary judgment application under its general discretion, as a simple matter of caution and justice, rather than prolong matters through discovery, but the latter course would be open. Unjustified applications for discovery can of course be suitably dealt with by costs.

[22] The question that needs to be addressed is whether the defendants have established that they have an outline defence available to them which would justify them seeking discovery from the plaintiff. Based upon my discussion of the issue concerning the proposition that the plaintiff had a continuing obligation to provide funding — a proposition for which I do not consider there is any support — it follows that the defendants do not have even an outline defence available to them arising in that area. For that reason, no injustice would be done to them by proceeding with the hearing of the summary judgment application and giving judgment on it without first directing that the plaintiff provides discovery of the contents of their files.

¹ *NZI Bank Ltd v Philpott* (1988) 1 PRNZ 560 (HC) at 565.

Whether there has been an abuse of process by plaintiff filing evidence in reply

[23] The argument for the defendants was, in summary, that the affidavit evidence which the plaintiff filed dealing with the circumstances of the conduct of the mortgagee sale at the reply stage was not something that was contemplated by the rules.

[24] Mr Barker did not accept that was a correct statement of the position but, anyway, that is beside the point as I see it because the evidence that the plaintiff did adduce was directed to the question of whether it had breached its obligations under s 176 of the Property Law Act 2007. That particular head of defence being abandoned, the issue of whether evidence had been properly adduced is no longer an issue in the case, if it ever was. I do not need to investigate this point further but I will conclude by noting that what has occurred in this case is far from unusual. The plaintiff, as often happens in cases of this kind where there has been a mortgagee sale, pleads that fact alone and other facts which explain how the defendant became indebted to it. It is not required to anticipate that a defence under s 176 is going to be raised. Therefore it is incumbent upon the defendant to give notice in its notice of opposition and to provide evidence as to why it considers there is an arguable defence that s 176 was breached because of the way in which the mortgagee sale was conducted. Having laid out the defendants' evidence in this way, simple justice requires that the plaintiff, who has not to that point had an opportunity to comment on the evidence about the circumstances of the mortgagee sale, must, and does, have a right to file evidence in reply. Once any admissible evidence in reply, which is properly confined to replying to matters raised for the first time in the defence, is filed, the affidavits are closed. The defendants do not have a right themselves to file rejoinder evidence to the applicant's affidavits in reply. Rejoinder evidence may be filed in special cases which so justify the Court taking that course. But such cases are very much the exception, in my experience. The instant case is not within this category.

Conclusion

[25] It is my view that the defendants do not have an arguable defence to the plaintiff's claim. The defendants' mistaken belief that there was a continuing obligation on the part of the plaintiff to continue financing the defendants' property development venture, even when they were in default under pre-existing loans, is understandable but wrong.

[26] In any case, such a defence ought to have been raised in the notice of opposition but was not. It would be contrary to principle to allow the defendants to adduce evidence at this late stage supporting this ground of defence. That being the case, and because the defendants have abandoned the s 176 defence that they originally contended for, there must be judgment for the plaintiff. I therefore make the following orders:

- a) I rule that the "Rejoinder affidavit of David Hartley" dated 3 November 2011 is inadmissible and is to be removed from the Court file;
- b) There will be judgment for the plaintiff in terms of the relief sought in the claims for relief which appear immediately after paragraph 21 of the statement of claim. There is one exception to the relief which the Court now orders and that concerns the matter of costs. I would suggest that the parties confer on the matter of costs to reach agreement on what costs ought to be awarded. If they are unable to agree, they are to file memoranda 21 days after the date of this judgment (in the case of the plaintiff) and 14 days thereafter in the case of the defendant.

J.P. Doogue
Associate Judge