IN THE COURT OF APPEAL OF NEW ZEALAND

CA59/2016
[2016] NZCA 182

BETWEEN	GLOVER NO 2 LIMITED Appellant
AND	BANK OF NEW ZEALAND Respondent

Hearing:	13 April 2016
Court:	Kós, Clifford and Brewer JJ
Counsel:	R C Knight and T M Kelly for Appellant F B Barton and A M Cunninghame for Respondent
Judgment:	6 May 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed. The Property Law Act notices issued by the Bank of New Zealand on 20 April 2015 do not entitle it to sell the Tranche Two properties pursuant to the equitable mortgage over those properties created by the 2009 general security agreement.

B The respondent must pay costs to the appellant for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Glover No 2 Ltd, has beneficial interests in nine separate properties in Waimarie Street, St Heliers, Auckland (the Waimarie St properties). In 2013 and 2014 Glover No 2 Ltd registered caveats to protect those interests. Bank of New Zealand (BNZ), as mortgagee exercising powers of sale over the Waimarie St properties, applied in June 2015 under s 143 of the Land Transfer Act 1952 (LTA) to remove those caveats. That application was heard by Associate Judge Sargisson in the High Court at Auckland on 10 December 2015.

[2] By the time of that hearing agreement had been reached between Glover No 2 Ltd and BNZ as regards the removal of caveats over five of those properties (the Tranche One properties),[1] including as to conditions relating to the conduct of the mortgagee sales and the application of any surplus proceeds. Agreement could not be reached as regards the caveats on the remaining four properties (the Tranche Two properties).[2] In essence, Glover No 2 Ltd argued that further conditions should be imposed by the Associate Judge on any mortgagee sale of the Tranche Two properties to reflect what it said were the lesser rights BNZ had with respect to those properties.

[3] The Associate Judge rejected that argument.[3] She ruled that the caveats on the Tranche Two properties were to be removed following mortgagee sales on the same conditions as applied as regards the mortgagee sales of the Tranche One properties.

[4] Glover No 2 Ltd now appeals that decision.

Facts

[5] This dispute between Glover No 2 Ltd and BNZ reflects the breakdown of the marriage of Mr Gregory Olliver and Ms Sarah Sparks. Mr Olliver and Ms Sparks were independently successful business people, in particular as property

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1 16A (CTNA 22B/1248); 18 (CTNA 1855/91); 22–24 (CTNA 49C/1486); 28 (CTNA 798/58); and 30 (CTNA 2038/73) Waimarie Street.

2 14 (CT 163298); 14A (CTNA 44A/276); 16 (CT 31658); and 20 Waimarie Street (CTNA 34D/425).

3 *Bank of New Zealand v Glover No 2 Ltd* [2015] NZHC 3366.

developers. Glover No 2 Ltd's beneficial interests in the Waimarie St properties arise under a joint venture created by Mr Olliver and Ms Sparks before their relationship breakdown, but at a time when Mr Olliver was facing severe financial difficulties.

[6] In December 2008 a creditor filed an application to adjudicate Mr Olliver bankrupt. That application threatened Mr Olliver's interest in a range of property including the Waimare St properties.

[7] In February and early March 2009, and as part of arrangements by Mr Olliver and Ms Sparks to restructure their affairs in light of Mr Olliver's financial difficulties, a matrimonial trust of theirs, the Glover Trust, was restructured.[4] At the same time a joint venture was established between the Glover Trust and another of the couple's matrimonial trusts, the Waimarie Trust.[5] The following steps were involved:

(a) A new trustee was appointed for the Glover Trust: Glover Trust Corporation Ltd (GT Corp Ltd). The shareholders and directors of GT Corp Ltd were Ms Sparks and the couple's solicitor, a Mr Thomas.

(b) The terms of the Glover and Waimarie Trusts were varied so that Mr Olliver was no longer a beneficiary, albeit that he retained the power of appointment of trustees to the Glover Trust.

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4 The Glover Trust had been settled by Mr Olliver in 1999. Ms Sparks was a trustee, but not a named beneficiary. The discretionary beneficiaries of the Glover Trust were Mr Olliver, Mr Olliver's spouse, children and wider family members. The final beneficiaries, entitled to the trust funds at vesting, were Mr Olliver's spouse at the time and any of his children or grandchildren alive at the time. As settlor, Mr Olliver retained the power to remove and appoint trustees. The trustees had wide powers to exclude and add beneficiaries.

5 The Waimarie Trust was settled by Ms Sparks in 2005. A corporate trustee, Waimarie Trust Ltd, was appointed. The discretionary beneficiaries of the trust were Ms Sparks, Mr Olliver and Ms Sparks' children, grandchildren and great grandchildren. The final beneficiaries, entitled to the trust funds at vesting, were Ms Sparks' children, and their children and grandchildren as survivors pro rata. The power to appoint a new trustee was held by Ms Sparks and an accountant, Mr Gimlet, jointly as "the appointor". The appointor could also exclude and add beneficiaries.

(c) Ownership of an entity involved in Mr Olliver's business affairs, the CIT Group (comprising CIT Holdings Ltd and its subsidiaries), was transferred to the Glover Trust. Ms Sparks and Mr Thomas became the directors of CIT Holdings.

(d) The Glover Trust then entered into the joint venture agreement (the JVA) with the Waimarie Trust.

[8] The recitals to the JVA record that the opportunity had arisen to acquire "the Property" by mortgagee sale and that the parties were forming the joint venture for the purpose of "preserving the residential portion of the Property for the benefit of Waimarie, and maximising the potential for the residue". As defined in the JVA, the Property was the Tranche One properties, together with 41 Glover Street, St Heliers. The property at 22–24 Waimarie Street was identified "as the residential portion". The following provisions from the JVA capture the JVA's essence:

> 2.2 The parties hereby establish a Joint Venture in accordance with the provisions of this agreement for the purpose of pursuing the business.
>
> 2.3 Upon the commencement date:
>
> (a) Waimarie shall contribute the initial capital of $2,000,000.00;
>
> (b) Glover shall contribute the Property. The Property to remain in the name of the Glover owned company, CIT Holdings Ltd ("CIT"), while part of the assets of the Joint Venture. The beneficial ownership of the Property and other assets of the Joint Venture shall be determined in accordance with the terms of this agreement and not by reference the title to any part of the Property or the shareholding of CIT.
>
> 2.4 The Joint Venture shall operate as from the commencement date and the parties shall conduct themselves in relation to the Joint Venture and this agreement for the maximum commercial advantage of the Joint Venture and the parties (as a group) consistent with prudent commercial practice and laws of New Zealand.
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> …

[9] The joint venture would terminate on the sale of the Tranche One properties and the transfer of the residential portion to the Waimarie Trust. The residential portion was not to be mortgaged if that was possible.

[10] At termination the Glover and Waimarie Trusts would share surplus monies 40:60 respectively. In determining the Waimarie Trust's 60 per cent share, the value of the residential portion was to be included.

[11] As signed in March, the JVA did not explicitly provide for the acquisition of Tranche Two properties. That acquisition was provided for in a supplementary JVA agreed in April 2009.

[12] CIT acquired the Tranche One and Tranche Two properties from Taurus Capital & Finance Ltd, a company said by Ms Sparks to be under the control of a long-time friend and business associate of Mr Olliver in March and April of 2009. CIT's purchase of the Tranche One properties was funded by the Waimarie Trust's initial $2 million capital contribution, together with the proceeds of a $6,750,000 debt facility provided by BNZ. Its purchase of the Tranche Two properties was funded by a further capital contribution of $1,675,000 from the Waimarie Trust pursuant to the supplementary JVA.

[13] It was a term of the 2009 BNZ debt facility that CIT provide security by way of a "perfected security interest in all present and after-acquired property of CIT" and "registered first mortgages" over the Tranche One properties. Pursuant to those covenants, CIT executed a general security agreement (the 2009 GSA) in BNZ's favour. It also executed mortgages over the Tranche One properties in registrable form: BNZ duly registered those mortgages. As we understand it, BNZ had not previously been involved in financing those properties.

[14] In the subsequent years, the joint venture development of the Waimarie St properties was no more successful than earlier development efforts, and Mr Olliver and Ms Sparks' marriage foundered.

[15] In March 2011, Ms Sparks took steps to protect her and her children's interests in the Tranche Two properties from Mr Olliver and other creditors, including BNZ. With Mr Thomas' assistance, Ms Sparks arranged for the Tranche Two properties to be transferred by CIT to a new trust Ms Sparks settled, the Glover No 2 Trust. The appellant, Glover No 2 Ltd, was established as the trustee of the

Glover No 2 Trust. The discretionary beneficiaries were Ms Sparks, any spouse of hers, and her children, grandchildren, remoter issue and wider family. The final beneficiaries were Ms Sparks and her living children or grandchildren. The transfer of the Tranche Two properties was expressed to be by way of a distribution by the Glover Trust to the beneficiaries of the Glover No 2 Trust. At the same time, however, Glover No 2 Ltd executed a declaration that it held the Tranche Two properties as bare trustee for CIT.

[16] The events that followed can be summarised thus:

(a) In October 2011 the Waimarie Trust transferred its interest in the joint venture to Glover No 2 Ltd as trustee of the Glover No 2 Trust: GT Corp Ltd, as trustee of the first Glover Trust, agreed to that transfer. In that way, Glover No 2 Ltd acquired, as trustee, beneficial interests in the Waimarie St properties.

(b) In May 2012 Mr Olliver completed the final payment under his creditors' proposal. That same month, BNZ refinanced CIT, providing an $8,755,000 business and farming overdraft in place of the earlier, 2009, loan. The registered mortgages over the Tranche One properties, and the security created by the 2009 GSA, were recorded as continuing to support CIT's obligations to BNZ.

(c) In July 2012 Mr Olliver and Ms Sparks separated.

(d) In September 2012 Mr Olliver removed GT Corp Ltd as trustee of the Glover Trust, and appointed new trustees. In November 2012 those trustees began proceedings in the High Court for the transfer by Glover No 2 Ltd of the Tranche Two properties back to CIT.

(e) On 20 December 2012 BNZ, having earlier that month made demand on CIT, issued notices under the Property Law Act 2007 and the Personal Property Securities Act 1999 (the PPSA) in exercise of its rights under its registered mortgages of the Tranche One properties

and under the 2009 GSA respectively. CIT was required to pay $9,022,264.45 by 4 February 2013.

(f) In early February 2013 Allan J heard the application of the trustees of the Glover Trust for the return by Glover No 2 Ltd to CIT of the Tranche One properties. The Judge granted that application in March 2013.[6] The Court of Appeal upheld that judgment in December 2013,[7] and in May 2014 the Supreme Court declined Glover No 2 Ltd's application for leave to appeal.[8]

[17] Between Allan J's hearing of the return proceedings in early February 2013 and the Supreme Court's May 2014 decision to decline leave:

(a) Glover No 2 Ltd mortgaged the Tranche Two properties to Southern Cross Finance Ltd (SCF) to secure a $500,000 facility (February 2013).

(b) Glover No 2 Ltd lodged caveats against both the Tranche One and Two properties to protect its interests under the JVA (July 2013 and February 2014 respectively).

(c) BNZ lodged caveats against the Tranche Two properties to protect its interests under the 2009 GSA (August 2013).

[18] Following the decision of the Supreme Court declining leave, matters heated up.

[19] CIT entered into agreements to sell the Tranche One properties (to BBG Holdings Ltd — an entity associated with Mr Olliver — for $5,813,500) and the Tranche Two properties (to Mr Olliver himself, for $4,756,500). At about the same time, CIT commenced proceedings to remove Glover No 2 Ltd's caveats, Ms Sparks commenced matrimonial property proceedings and CIT made a statutory demand

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6 *Glover Trust Ltd v Glover Trust Corp Ltd* [2013] NZHC 545.
7 *Glover No 2 Ltd v Glover Trust Ltd* [2013] NZCA 608.
8 *Glover No 2 Ltd v Glover Trust Ltd* [2014] NZSC 54.

against Glover No 2 Ltd for the court costs that had been ordered in the return proceedings.

[20] In November 2014, Associate Judge Matthews set aside CIT's statutory demand.[9] In December 2014 Associate Judge Osborne dismissed CIT's application to have Glover No 2 Ltd's caveats on the Tranche One and Two properties removed.[10]

[21] On 19 March 2015, SCF assigned its mortgages of the Tranche Two properties to BNZ. On 20 April 2015, BNZ issued notices under s 119 of the Property Law Act to CIT under its original mortgages over the Tranche One properties and under SCF's mortgages over the Tranche Two properties. In both notices, BNZ required payment of $10,956,462.86 from CIT. That amount included the sum of approximately $275,000 owing under the SCF loan by Glover No 2 Ltd. The scene was set for these proceedings.

The challenged decision

[22] The issues before Associate Judge Sargisson in the December 2015 hearing were narrow. They reflected Glover No 2 Ltd's acceptance that BNZ had a power of sale as mortgagee of the Tranche Two properties, but that — because BNZ's interest as mortgagee (by assignment) under the mortgage was limited to the SCF debt — further conditions should be imposed. In a pre-hearing memorandum, the Judge recorded those issues as follows:

> Whether the Court should, in the exercise of its residual discretion, impose conditions in addition to those of the kind set out in para [2] above, being
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> (i) Conditions designed to impose a form of marshalling; and
>
> (ii) A condition that would require the applicant to issue a new Property Law Act notice to replace the notice issued on 20 April 2015, such new notice to identify that the sum currently owing under the mortgage is $275,000 plus any interest accrued.

[23] Those issues reflect Glover No 2 Ltd's central argument that the Tranche Two mortgages do not secure the monies lent by BNZ to CIT in 2009 to purchase the

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9 *Glover No 2 Ltd v CIT Holdings Ltd* [2014] NZHC 2786.
10 *CIT Holdings Ltd v Glover No 2 Ltd* [2014] NZHC 3114.

Tranche One properties. Rather, all the Tranche Two mortgages secure is the outstanding balance of the 2014 debt assigned by SCF to BNZ in March 2015. On that basis, the additional conditions Glover No 2 Ltd sought would have limited BNZ to selling at mortgagee sale that number of the Tranche Two properties sufficient to realise what was owed to it on the (assigned) SCF debt.

[24] Associate Judge Sargisson accepted Glover No 2 Ltd's main argument, as to the extent of BNZ's security interests under the Tranche Two mortgages. She did not agree with BNZ that the "all obligations" Tranche Two mortgages, properly interpreted, secured anything other than the debt of Glover No 2 Ltd to SCF. The issue was, she said, one of interpretation. In reaching her conclusion, she relied on a number of decisions which addressed similar "mix and match" arguments.[11]

[25] BNZ does not now challenge that conclusion. Rather, it relies on the alternative argument it made, which the Associate Judge did accept, that CIT's obligations to it are secured over the Tranche Two properties under the terms of the original 2009 GSA.

[26] The Associate Judge summarised, and subsequently adopted, BNZ's argument to that effect in the following terms:

> [38] BNZ also says that even if its rights are subject to such limits, the GSA includes an agreement to mortgage, meaning that since 2009 it has had an equitable mortgage over all the land owned by CIT (including the second tranche properties). The GSA allows the BNZ to claim the full amount owing under either mortgage, though it does not impact on Glover's liability as borrower; the BNZ can only claim $275,000 against Glover. It says this was clearly set out in the letter accompanying the Property Law Act notice.

[27] Thus, she concluded, the April 2015 Property Law Act notice was valid and BNZ could "use the security under the GSA to recoup the whole of the debt under the first mortgage".[12] Nor did Glover No 2 Ltd have a right to impose a condition limiting the exercise of BNZ's power of sale, as s 182 of the Property Law Act made

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11 *McGaveston v NMFM Mortgages Ltd* CA 24/02, 11 December 2002 at [16]–[19]; *Re Clark's Refrigerated Transport Pty Ltd (in liq)* [1982] VR 989 (VSC) at 995 (treated positively in New Zealand in *Kerr v Ducey*, which also involved an all obligations mortgage); *Kerr v Ducey* [1994] 1 NZLR 577 (HC); *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404; *Official Assignee v Pavan* [2012] NZHC 1315; *Katsikalis v Deutsche Bank (Asia) AG* [1988] 2 Qd R 641 (QSC).

12 *Bank of New Zealand v Glover No 2 Ltd*, above n 3, at [43].

clear.[13] As her Honour put it, if BNZ was entitled to use the Tranche Two properties as security for the whole debt, it must logically be entitled to sell whichever property or properties it prefers.[14]

[28] As before, and to protect Glover No 2 Ltd's beneficial interests under the JVA, the Judge imposed the following conditions:

> [49] If the following persons themselves, or through an intermediary or agent, bid at auction, tender for sale, or otherwise seek to negotiate a purchase of the properties described in the abovementioned certificates of title, then any agreement entered into between the mortgagee and such person shall be subject to the condition that it is conditional upon the Court's approval:
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> (a) Gregory Martin Olliver;
>
> (b) Errol Wayne Bailey;
>
> (c) Donald Bruce Thomas;
>
> (d) Sarah Patricia Sparks; or
>
> (e) Any other person or entity associated with them.
>
> [50] Any surplus after full repayment of all amounts owing to the applicant by CIT Holdings Limited, following realisation of the first and second mortgages, either by mortgagee sale by the applicant or by a receiver appointed by the applicant under its GSA dated 10 March 2009 shall be held undisbursed, on interest-bearing deposit, on trust, for the benefit of CIT Holdings and its creditors, pending further order of the Court.

Appeal

[29] Glover No 2 Ltd challenges the Associate Judge's decision on five grounds. They are:

(a) That the Associate Judge did not have jurisdiction to determine the effects and implications of the GSA when exercising her discretion under s 143 of the LTA.

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13 At [45].
14 At [46].

(b) That, if the Associate Judge did have that discretion, Glover No 2 Ltd was not given adequate opportunity to be heard by her on those questions.

(c) That the Associate Judge was wrong to find that the GSA gave rise to an equitable mortgage.

(d) That the Associate Judge was wrong to conclude that BNZ's April 2015 Property Law Act notice was valid.

(e) Finally, that the Associate Judge wrongly exercised her discretion under s 143 of the LTA when she declined to impose further conditions on BNZ's mortgagee sale of the Tranche Two properties.

[30] We consider each of those issues, and the parties' arguments, in turn. Given the way the appeal was argued before us we do so in a different order to that set out above.

Analysis

Wrong exercise of discretion?

[31] Section 143(2) of the LTA gives the Court the power, when responding to an application to remove a caveat, to "make such order in the premises, either ex parte or otherwise, as to the Court seem meet". The discretionary nature of that power is clear. The exercise of such a discretion may only be successfully challenged where the Judge:

(a) was wrong in principle; or

(b) took account of irrelevant considerations, or failed to take account of relevant ones; or

(c) was plainly wrong.

[32] If the first four of those five issues (see [29]) are determined in BNZ's favour the Associate Judge's decision is not, in our view, otherwise open to challenge. First, the Associate Judge would not have made any error in principle. Secondly, and for Glover No 2 Ltd Mr Knight did not argue otherwise, we do not think it is possible to challenge that decision separately on the basis that it was plainly wrong or that it was one made either on the basis of a failure to take account of relevant considerations or of a failure to take account of irrelevant ones. We turn therefore to those four issues.

No jurisdiction/breaches of natural justice?

[33] The contest between Glover No 2 Ltd and BNZ before the Associate Judge squarely raised the issue of the extent of BNZ's security interests in the Tranche Two properties. It was by reference to that matter that the Associate Judge had to resolve the issue of additional conditions. Glover No 2 Ltd submitted that BNZ's only interest in the Tranche Two properties was under the SCF mortgage. It could not, therefore, rely on the security interests created by the GSA to have recourse to those properties to recover its re-financed loan to CIT.

[34] For its part, BNZ argued that the GSA created a security interest in all of CIT's present and after-acquired properties. It included an agreement to mortgage, meaning that BNZ had had an equitable mortgage under the GSA over the Tranche Two properties from the time they were acquired by CIT.

[35] In our view the question of the relevance of the GSA for the conditions Glover No 2 Ltd sought was, therefore, properly before the Associate Judge. Both parties addressed it formally in their written submissions and, we are satisfied, before the Associate Judge. No issues of jurisdiction or of natural justice arise.

Did the GSA create an equitable mortgage in favour of BNZ over the Tranche Two properties?

[36] General security agreements (GSAs) have, since the passage of the PPSA, replaced the previous fixed and floating charge debentures companies would execute in favour of major creditors over all their undertakings, including existing and future real and personal property. The PPSA does not apply to land: it provides a

conceptually new regime for the creation of security interests over personal property. But, as a matter of contract, a GSA may create security over land. To the extent it does, the terms of the PPSA do not apply.

[37] CIT's 2009 GSA, as relevant, provides:

(a) That CIT granted BNZ a "Security Interest in the Secured Property as security for payment of the Secured Amounts and the performance of our obligations to you from time to time".

(b) That the "Secured Property" was all of CIT's present and after-acquired property, and all personal property in which it had rights, whether now or in the future.

(c) That the "Secured Amounts" included all amounts for which it might become actually or contingently liable to BNZ for any reason.

(d) That the phrase "Security Interest" had the meaning given to it by s 17 of the PPSA except in respect of any property where the PPSA does not apply to such an interest in that property, or where such an interest is to be created in a Resource Consent, in which case "Security Interest" means a fixed charge.

[38] Applying those definitions, under its 2009 GSA CIT agreed to give BNZ a fixed charge over all its present and after-acquired real property, that is land. *Goode on Commercial Law* comments:[15]

> Equity, treating as done that which ought to be done, considered that an agreement to give a mortgage was itself a mortgage provided that certain conditions were satisfied, and on this basis saw no difficulty in treating a mortgage or charge of after-acquired property as constituting a present, albeit inchoate, security which fastened on the asset at the moment of its acquisition by the debtor, without the necessity for any separate *novus actus* [new act].

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[15] Roy Goode and Ewan McKendrick *Goode on Commercial Law* (4th ed, LexisNexis, London, 2009) at 668.

[39] That equitable rule, authoritatively restated in *Holyroyd v Marshall*,[16] went back, *Goode* observes, several centuries.

[40] The Associate Judge was, therefore, correct when she concluded that the 2009 GSA created an equitable mortgage over the Tranche Two properties. The fact that the 2009 GSA operates to create fixed charges, as opposed to mortgages, over after-acquired land does not affect that conclusion. Under s 79 of the Property Law Act a mortgage over land, whatever its form, takes effect as a charge and does not operate as a transfer of the estate or interest charged. There is, in our view, therefore, nothing in the difference in terminology in this context between a "mortgage" and a "fixed charge".

[41] Nor, as Mr Knight for Glover No 2 Ltd argued, did there need to be a request from BNZ to CIT at the time the Tranche Two properties were acquired to bring that mortgage into existence. Clause 11 of the GSA, which contained an agreement to execute additional or replacement security agreements, is to be understood in this context as an agreement to provide BNZ with registered mortgages should it so request. That BNZ did not make such a request does not mean that equitable mortgages did not come into existence when the Tranche Two properties were, in fact, acquired.

Was BNZ's April 2015 Property Law Act notice valid?

[42] It is clear that notice under the Property Law Act is required before BNZ can exercise the powers of sale given to it by the 2009 GSA as regards land owned by CIT.

[43] Glover No 2 Ltd's argument before the Associate Judge was that, because the SCF mortgage did not secure the monies advanced to purchase the Tranche One properties, then BNZ's April 2015 s 119 notice relating to that mortgage, which claimed that the full amount was owing, was defective. That argument does not directly address the Judge's reasoning, relying as that reasoning does on the alternative proposition based on the extent of the security provided by the GSA. The

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16 *Holyroyd v Marshall* (1862) 10 HL Cas 191.

question therefore becomes whether the Property Law Act notices BNZ gave in April 2015 put it in the position to exercise its right of sale under the 2009 GSA. Given the Associate Judge's unchallenged finding as to the monies secured by the SCF mortgages, it is the right of sale under the 2009 GSA that BNZ must rely on if it is to look to those properties for repayment of all or part of the monies originally advanced to acquire the Tranche One properties.

[44] BNZ's April 2015 notices were given with respect to:

(a) Mortgage No: 8093228.2: that is the mortgages created by CIT in 2009 over the Tranche One properties in favour of BNZ; and

(b) Mortgage No: 9304917.1: that is the mortgages created by Glover No 2 Ltd in 2013 over the Tranche Two properties in favour of SCF.

[45] BNZ did not, therefore, give notice exercising its power of sale under the 2009 GSA at all. In our view, therefore, to the extent that BNZ wishes to rely on that power of sale, it is not currently in a position do so.

[46] We have also considered whether the notice of sale BNZ did give under the Property Law Act as regards the GSA in 2012 might have given it that power. We have concluded that it did not. That notice was, as relevant, in the following terms:

> To: **CIT Holdings Limited**, 26 St Heliers Bay Road, St Heliers, Auckland ("**You**"/"**Mortgagor**")
>
> **Bank of New Zealand**, the mortgagee under the Security Agreement ("**the Mortgagee**"), gives notice:
>
> a. That the consequence specified below will follow if each default specified below has not been, or cannot be, remedied on or before **4 February 2013**; and
>
> b. That the Mortgagee intends to sell the Collateral, which is subject to the security interests that:
>
> i. were created or provided for in the Security Agreement; and
>
> ii. were perfected on 9 May 2009 at 3.53pm by registration of a financing statement on the Personal Property Securities Register.

> The security interest over the Collateral under the Security Agreement has been registered on the Personal Property Securities Register under financing statement number FT33343YH60FP930.
>
> **Default**
>
> As at the date of this notice, you are in default under the Security Agreement in that:
>
> 1. there was a demand made of you dated 10 December 2012 requiring you to pay the sum of $8,995,696.35 to the Mortgagee (the Demand); and
>
> 2. you have failed to pay the above sum referred to in the Demand.

[47] As can be seen, therefore, that 2012 notice given under s 128 of the Property Law Act was given in respect of the mortgage over goods, that is personal property, created by the 2009 GSA. It was not given as regards the equitable mortgage the GSA created over the Tranche Two properties.

[48] BNZ can, of course, remedy the problem it faces: to do so it would need to give a fresh notice pursuant to s 119 of the Property Law Act under the power of sale created by the GSA as regards the equitable mortgage over the Tranche Two properties. Alternatively, Glover No 2 Ltd could waive the defective notice to enable what would to us seem to be BNZ's inevitable mortgagee sales to proceed.

[49] The underlying issue as between Glover No 2 Ltd and BNZ would appear to be a concern that BNZ may collude in some way to enable Mr Olliver, at the expense of Ms Sparks, to regain control of the Waimarie Street properties. The conditions the High Court imposed, and which remain in place, appear to us sufficient to address that concern. Those issues are now, however, for the parties to resolve in terms of this judgment.

Conclusion

[50] The appeal is allowed. The Property Law Act notices issued by the Bank of New Zealand on 20 April 2015 do not entitle it to sell the Tranche Two properties pursuant to the equitable mortgage over those properties created by the 2009 general security agreement.

[51] The respondent must pay costs to the appellant for a standard appeal on a band A basis with usual disbursements.

Solicitors:
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