IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV-2009-442-000281

UNDER	sections 119 and 137(1)(c) Property Law Act 2007
IN THE MATTER OF	an Order for Possession under Parts 12 and 13 of the High Court Rules
BETWEEN	LDC FINANCE LIMITED (IN RECEIVERSHIP) Plaintiff
AND	RICHARD JENKINS AND IAN RODERICK SMITH AS TRUSTEES OF DB ONE FAMILY TRUST Defendants

Hearing: 2 December 2010
(Additional Submissions filed 18 and 31 August 2011)
(Heard at Nelson)

Appearances: P J Bellamy for Plaintiff
T Spear for C Gordon, a person served

Judgment: 15 September 2011

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on plaintiff's summary judgment application

Introduction

[1] The plaintiff, as mortgagee of a property at Spring Grove owned by the defendants, by summary judgment seeks orders granting the plaintiff possession of the property and cancelling any leases.

[2] The plaintiff's application is unopposed by the defendants. The defendants are the trustees of the DB One Family Trust, which is the family trust of one Colin Gordon. Mr Gordon is the primary beneficiary.

[3] The application was initially opposed by Mr Gordon and by Felbridge Auto (NZ) Limited, who were persons directed to be served. In the event, Felbridge after filing its opposition took no further part in the proceeding.

[4] Mr Gordon says that he has, at all material times, been a mortgagee in possession in priority to the plaintiffs.

[5] Felbridge (a company owned by Mr Gordon and another) said that it would be detrimentally affected by the orders sought by the plaintiff, Mr Gordon having leased the property to Felbridge in 2003.

[6] The plaintiff commenced the proceeding in July 2009 and promptly thereafter served Mr Gordon and Felbridge as persons directed to be served.

[7] Mr Gordon then purported to take possession of the property on 29 July 2009.

[8] A significant issue raised by this proceeding is as to the respective rights of the plaintiff and of Mr Gordon in relation to possession of the property.

[9] For a long period after the proceeding was issued, the proceeding was effectively parked while the plaintiff and Mr Gordon attempted to negotiate a settlement.

[10] The Court, in November 2010, in the absence of resolution, directed that the proceeding be brought on for hearing.

Chronology

[11] The sequence of events was:

- 28.11.1988-19.06.03 – title to the property held by Mr Gordon.

- April 03 – four written leases granted by Mr Gordon for lengthy periods and at minimal or no rent.

- 19.06.03 – title to the property transferred by Mr Gordon to defendants with mortgage back for $185,000.00.

- 27.08.04 – mortgage registered on the title in favour of Halifax Finance Limited.

- 09.11.04 – mortgage priority instrument registered on title (making Halifax first mortgagee).

- 12.09.05 – Halifax lends defendants $224,000.00.

- 20.09.05 – previous Halifax mortgage discharged from title and new mortgage to Halifax registered on title, but as a second mortgage.

- 31.07.06 – Halifax assigns its rights and obligations under the loan contract to S C Management Limited.

- 20.03.07 – S C Management Limited assigns its rights and obligations under the loan contract to the plaintiff.

- 07.03.08 – plaintiff serves Property Law Act notice on defendants.

- 09.07.08 – plaintiff obtains summary judgment against defendants (limited to the assets of the Trust) for $293,079.86 plus interest and costs.

- September 2008 – correspondence between plaintiff's solicitors and defendant Jenkins.

- Late 2008 – agent markets the property for the defendants but the property is unsold.

- 18.06.09 – plaintiff gives notice to defendants of intention to take possession.

- 24.06.09 – Property Law Act notice issued by Mr Gordon to defendants.

- 14.07.09 – plaintiff commences this proceeding and applies for directions as to service.

- 23.07.09 – advertisement of plaintiff's notice of intention to take possession of the property.

- 23.07.09 – Mr Gordon's Property Law Act notice expires.

- 27.07.09 – Mr Gordon purports to take possession of the property.

- 29.07.09 and 06.08.09 – advertisements of Mr Gordon's taking of possession of the property.

More general background

[12] The leases which Mr Gordon entered into before transferring title to the property named as lessees –

1. his son, Jonathan Gordon, a mechanic; and

2. Dale Conlon (Mr Gordon's business partner), a car restorer; and

3. Felbridge Auto (NZ) Limited, a company whose shares are owned by Messrs Gordon and Conlon; and

4. Murray Voice and the Members of the Lost Breed Motorcycle Club.

[13] Leaving aside his capacity as mortgagee, there are no contractual documents indicating that Mr Gordon had any personal right in relation to the occupation of the property.

Plaintiff's grounds for summary judgment

[14] The defendant mortgagor having not opposed summary judgment, no issue was taken as to the plaintiff's rights (in the absence of any established affirmative defence) to enforce its right of possession after obtaining summary judgment in relation to the secured debt itself.

Grounds of opposition

[15] The plaintiff, aware that the property was occupied, obtained directions that this proceeding be served on or for the attention of identified occupants. As I have said, a single notice of opposition was initially filed on behalf of both Mr Gordon and of Felbridge Auto (NZ) Ltd (being one of the occupants), a company of which Mr Gordon is a shareholder.

[16] The initial notice of opposition was egregiously lacking in detail as to grounds, Mr Gordon and Felbridge alleging simply that:

(a) Each of them would be detrimentally affected by such orders.

(b) The plaintiffs have no, or no sufficient, basis for the application.

(c) The affidavit(s) to be filed in support.

[17] On 19 August 2009, the Court directed Mr Gordon and Felbridge to file an amended notice of opposition which properly particularised the grounds of opposition so as to meaningfully inform the Court and the plaintiff of the precise points of opposition. If legal principles were to be relied upon at the hearing, Mr Gordon and Felbridge were directed to succinctly identify the notice of opposition those principles.

[18] In the event, Felbridge took no further part in opposition. Mr Gordon filed an amended notice of opposition, the grounds of which were –

- The said COLIN GORDON is and was at all material times the First Mortgagee in possession of the property.

- The said COLIN GORDON is and was at all material times a mortgagee in possession in priority to the Plaintiffs

- The said COLIN GORDON as a mortgagee in possession in priority to the Plaintiffs has entered into leases with the Lessees.

- The affidavits of COLIN GORDON previously filed, and the affidavit filed in support of this Amended Notice of Opposition.

[19] The amended notice of opposition recorded that Mr Gordon relied on ss 137, 138, 139, 143 and 144 of the Property Law Act 2007 and also upon the decision in *Advanced Securities Ltd v Lee* (2008) 6 NZConvC 194,658; (2008) 9 NZCPR 755.

[20] Even the amended notice of opposition as filed does not clearly reveal the precise thrust of the grounds of opposition which Mr Spear came to advance on behalf of Mr Gordon for the hearing (both in written submissions filed before the hearing and in oral submissions at the hearing).

[21] The grounds of opposition which Mr Spear sought to advance in submission may be summarised as four-fold, being:

- Because Mr Gordon had entered into possession of the property on 27 July 2009, he was a mortgagee in possession with priority – by virtue of the decision in *Advanced Securities Ltd v Lee* any order to be obtained by the plaintiff would not create a back-dating of the plaintiff's possession.

- The plaintiff is estopped from pursuing its summary judgment by reason of an accord and satisfaction reached between the parties after the proceeding was issued.

- The leases (above [12]) should not be cancelled by the Court because the plaintiff's predecessor-in-title was given notice of the leases.

- There are areas of disputed evidence which makes the case unsuitable for summary judgment.

[22] In the course of drafting this judgment, it became apparent that neither counsel was alert to the provisions of s 168 Property Law Act 2007 (the Act) which has the effect of defining (or deeming) the date at which a mortgagee withdraws from possession. The provision is directly relevant to possession as between first and subsequent mortgagee. I accordingly invited counsel to make further submissions as to the relevance of s 168. Because of the relevance of s 168 it became necessary for the Court to consider what might be treated as a fifth ground of opposition, namely that the operation of s 168 would be to render nugatory any order of the Court granted to the plaintiff, as Mr Gordon had entered into possession following the date of any backdated entry into possession on the part of the plaintiff.

Ordering of issues

[23] It is convenient in this case to deal with the issues in the following order –

- S 139 of the Act – the backdating issue;
- S 168 of the Act – the issue as to withdrawal from possession;
- The leases issue;
- The accord and satisfaction (estoppel) issue;
- The disputed evidence issue.

S 139 of the Act – the backdating issue

Statutory provisions

[24] Section 139 of the Act provides:

> **139 When mortgagee becomes mortgagee in possession**
>
> (1) A mortgagee who exercises a power to enter into possession of mortgaged land or goods in accordance with section 137 becomes a mortgagee in possession of the land or goods on the earlier of—

(a) the date on which the mortgagee enters into, or takes, physical possession of the land or goods; or

(b) the date on which the mortgagee first receives any income from the land or goods as mortgagee in possession; or

(c) the date of the mortgagee's application to the court for the order if—

(i) the mortgagee applies to the court for an order for possession of the land or goods; and

(ii) the court, in response to the mortgagee's application, makes the order.

(2) A reference to the date or time of entry into possession of land or goods by a mortgagee in possession has a corresponding meaning.

(3) Despite subsections (1) and (2), sections 156, 162, and 163 apply to a mortgagee who becomes a mortgagee in possession under subsection (1)(c) of this section—

(a) as if the references in sections 156(1) and 162(1) to the mortgagee's entering into possession were references to the making of the order for possession of the land or goods by the mortgagee; and

(b) as if the references in sections 156(1)(b) and (c) and 163(1)(a) to the date of entry into possession were references to the date of the making of that order.

[25] The ways in which a mortgagee may exercise its power to enter into possession, including by applying to a Court for an order for possession, are set out in s 137 of the Act which provides:

137 Exercise of power to enter into possession

(1) If a mortgagee becomes entitled under a mortgage, after compliance with subpart 5, to exercise a power to enter into possession of mortgaged land or goods, the mortgagee may exercise that power by—

(a) entering into or taking physical possession of the land or goods peaceably and without committing forcible entry under section 91 of the Crimes Act 1961; or

(b) asserting management or control over the land or goods by requiring a lessee or occupier of the land, or a lessee or bailee of the goods, as the case may be, to pay to the

mortgagee any rent or profits that would otherwise be payable to the current mortgagor; or

(c) applying to a court for an order for possession of the land or goods.

(2) A mortgagee may do all or any of the things referred to in subsection (1) before or after taking any steps to exercise any power to sell the mortgaged land or goods.

(3) Subsection (1)(a) is subject to section 138.

(4) Unless the context otherwise requires, a reference in this subpart to land or goods includes a reference to land and goods.

[26] In this case, the plaintiff has applied for an order for possession of the property pursuant to s 137(1)(c) of the Act.

[27] For the purposes of the application before me, it is also necessary to refer to the requirements of s 156 of the Act, which deals with the notice a mortgagee must immediately give when entering into possession of mortgaged land or goods. Section 156 provides:

156 Notice of entry into possession of mortgaged land or goods

(1) A mortgagee, on entering into possession of mortgaged land or goods,—

(a) must immediately give—

(i) written notice of that fact to the current mortgagor; and

(ii) public notice of that fact; and

(b) must, within 5 working days after the date of entry into possession, send a copy of the public notice to the following persons if the mortgagee has actual knowledge of the name and address of the person:

(i) every former mortgagor:

(ii) every covenantor:

(iii) every mortgagee under a subsequent mortgage, and every holder of any other subsequent encumbrance, over the mortgaged land or goods:

(iv) every person who has lodged a caveat under section 137 of the Land Transfer Act 1952, or a notice under

> section 42 of the Property (Relationships) Act 1976 having the effect of a caveat, against the title to the mortgaged land or any part of it; and
>
> (c) must, if the current mortgagor is a body corporate registered under an enactment, send a copy of the public notice to the Registrar within 5 working days after the date of entry into possession.
>
> (2) A notice given under subsection (1) must include—
>
> (a) the mortgagee's full name:
>
> (b) the date on which the mortgagee entered into possession of the mortgaged land or goods:
>
> (c) a brief description of the mortgaged land or goods:
>
> (d) the address of the registered office of the mortgagee if the mortgagee is a body corporate, or the address of the mortgagee's residence if the mortgagee is an individual, or an address specified by the mortgagee as an address to which communications relating to the mortgaged land or goods may be addressed.
>
> (3) If a mortgagee fails to comply with this section, the mortgagee, and, if the mortgagee is a body corporate, every director of the mortgagee, commits an offence and is liable on summary conviction to a fine not exceeding $10,000.

[28] As will be seen, it is the creation in s156(3) of an offence (the offence of failing to comply with s 156), that has led to what have been described as problems in the interpretation of s137(1)(c).

[29] The date on which a mortgagee applies to a Court for an order is self-evidently not in normal legal parlance the date on which the mortgagee obtains or takes possession. The actions referred to in s 139(1)(a) (entering into or taking physical possession) and s 139(1)(b) (receiving income as mortgagee in possession) are established categories of possession. What Parliament has done through s 139(1)(c) is to deem a mortgagee to have taken possession on the specified date, being the date of the application to the Court. I therefore adopt Associate Judge Doogue's description of s 139(1)(c) as a deeming provision: see *Advanced Securities Ltd v Lee* (2008) 6 NZ ConvC 194,658; (2008) 9 NZCPR 755.

[30] If s 139(1)(c) is applied literally to the facts of the present case, the plaintiff is deemed to have become a mortgagee in possession on 14 July 2009.

The difficulty with s 139 of the Act

[31] Section 139(1) of the Act had no equivalent in the predecessor provisions, namely s 106 Land Transfer Act 1952.

[32] The authors of the New Zealand Law Society (NZLS) seminar published as N McMahon & Ors, *The New Property Law Act* (New Zealand Law Society, 2007) (D McMorland contributing) detected an issue with s 139(1)(c) in this way, at page 25 –

> The timing of entry into possession is problematic in the case of a mortgagee who has obtained an order for possession, because it is "back dated" to the date of the application to the court. Under s 156 the mortgagee, on entering into possession of mortgaged lands or goods, must immediately give notice of that fact. Obviously this will be impossibility because the mortgagee will not know until the making of the Court order that it has actually become entitled to possession.

[33] At the subsequent NZLS/Council of Legal Education seminar published as M Hopkinson & J Toebes, *Mortgagee Sales* (New Zealand Law Society, 2010), the presenters slightly adapted the comments from the earlier seminar:

> The timing of this last entry into possession is problematic – because it is "backdated" to the date an application is made to the Court for an order for possession of the land by the mortgagee, but only if the Court subsequently makes the order to that effect.
>
> The position is unsatisfactory because the mortgagee's obligation as mortgagee in possession commence, on the face of it, at the time it makes a (later successful) application for vacant possession – and is this the date of filing an application in the Court or the date of service of same upon the defendants?

[34] The presenters of the second seminar did not refer to the intervening judgment of Associate Judge Doogue in the *Advanced Securities* case in 2008. In *Advanced Securities*, the very "problem" identified in the 2007 seminar had become a focus of submissions.

The facts and reasoning in Advanced Securities

[35] In *Advanced Securities* the effective date of entry into possession was of potential importance as between mortgagee and registered proprietors. This may be contrasted with the present case where the competition is between two mortgagees.

[36] Advanced Securities, as mortgagee, applied for an order for possession under the Act.

[37] The defendants took no steps in the proceeding.

[38] Counsel for the plaintiff drew the attention of the Court to the fact that there may be an issue as to the correct interpretation of s 139(1)(c) of the Act. The Court requested the Solicitor-General to appoint counsel to appear as counsel assisting the Court and Mr Oliver of Crown Law duly appeared and made submissions additional to those of counsel for the plaintiff.

[39] Mr Oliver made submissions as to the "problematic" nature of s 139(1)(c), referring to what had been said at the NZLS seminars. Both counsel made submissions that 139(1)(c) should not be read literally. They referred to authorities which permit departure from a literal reading of the text of a statute in order to avoid an absurdity.

[40] The common theme of their submissions was that an absurdity is produced if 139(1)(c) is read literally, because to do so would mean that the mortgagee, when the Court comes to make the order of possession, is invariably placed in a position that the mortgagee has committed an offence under s 156(3) of the Act.

[41] Counsel both suggested that it would be absurd if s 139(1)(c) means that the effective date of possession was the date of application to the Court. Mr Oliver noted, with reference to the presenters of the NZLE seminar, that it would be –

> ...an impossibility in most circumstances if the order is effectively backdated to the date of the application.

The intention of Parliament in s 139 of the Act

[42] I begin with s 5(1) Interpretation Act 1999 which requires that:

> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[43] I shall, in this judgment, focus first on the text and, secondly on purpose.

[44] The authorities referred to by counsel in *Advanced Securities* uniformly recognise that the departure from a literal reading in order to avoid an absurdity is a legitimate exercise of the Court's jurisdiction provided the Court can be confident that it has ascertained Parliament's intent. See, for instance, *Northland Milk Vendors' Association v Northern Milk Limited* [1988] 1 NZLR 530 per Cooke P at 537; and *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 per Thomas and Blanchard JJ at [40].

[45] There are at least two focuses of Parliamentary intent in relation to the provisions in the Act as to mortgagees in possession. First, there will be Parliamentary intent in relation to the requirement that a mortgagee in possession give notice. Secondly, there will be Parliamentary intent in relation to the effective date of possession.

[46] Turning to the first (the giving of notice), it is apparent from the judgment in *Advanced Securities* (at [25]) that both counsel made limited submissions on the policy behind the provisions requiring notice to be given. Associate Judge Doogue, upon the basis of those submissions, identified at [25] as significant aspects of Parliament's intention that –

- the affected parties are informed that the usual state of affairs which exists between mortgagor and mortgagee has changed; and
- interested parties are alerted to the fact that matters have now progressed beyond the point that the mortgagee is merely a charge-holder over the mortgagor's interest; and

- a subsequent mortgagee, contemplating its own options, needs to know that those have been affected by another mortgagee's entry into possession.

[47] His Honour then applied those conclusions as to Parliamentary intention to the deemed entry into possession under s 139(1)(c) in this discussion (commencing at [25]):

> [25] ... The fact that a mortgagee might not have advanced past the point of contemplating taking that step [of actual entry into possession] by one of the means specified in s 146 would not be something that the subsequent mortgagee would need to know.
>
> [26] But for any deeming provision in the Act, the fact of making an application to the Court would not alter the position as to whether the mortgagee was in possession. The critical issue would be whether the Court ultimately made an order on the application. That is why s 139(1)(c) includes the words:
>
> > "...if the court makes the order."
>
> [27] Of course, from the point when the Court makes its order the rights of the mortgagor and the mortgagee are significantly affected and it is understandable that the legislature should consider that other interested parties should be advised of the change.

[48] The second aspect of parliamentary intent relates to selection of the effective date of entry into possession. The dates under s s139(1)(a) and (b) are straight-forward as they are actual or physical events directly affecting a property on date of occurrence. In s 139(1)(c) Parliament has selected the date of the Court order for possession as the date on which the mortgagee becomes mortgagee in possession.

[49] It is not clear from the judgment in *Advanced Securities* whether the Court in that case was referred to any material relevant to the policy behind the selection of effective date.

The importance of Parliamentary intention/policy in the present case

[50] The *Advanced Securities* case did not involve competing security holders. It certainly did not involve the stark issues of this case as to which competing mortgagee first entered into possession.

[51] It seems clear that 139(1) of the Act exists precisely to enable parties interested in or affected by interests in land to know precisely when a mortgagee has taken possession.

[52] I turn to consider a report of the Law Commission.

[53] As to the appropriateness of resort to Committee and Commission reports for assistance in statutory interpretation, see *Worsdale v Polglase* [1981] 1 NZLR 722 per Davison CJ at 726:

> If I had been in any doubt as to the meaning to be given to that section, it would be dispelled by reference to the report ... where [the Contracts and Commercial Law Reform Committee] considered the various matters which led to the passing of the Contractual Remedies Act 1979. That report makes it plain that the interpretation contended for by Mr Boon was at least the one intended by the Reform Committee in its recommendations to Parliament.

[54] See, similarly, the Court of Appeal's reference to 1967 and to 1978 reports of the Committee in *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 at 176. These authorities are noted in J F Burrows, *Statute Law in New Zealand* (4th ed, 2009) at 263-264 as constituting the modern position and a "sensible" approach to the use of such materials.

[55] The Law Commission in the early 1990's undertook a review of the then 40 year old Property Law Act 1952, including its relationship to provisions in the Land Transfer Act 1952. The Law Commission reported to the Minister of Justice on 28 June 1994: see *Report no. 29, A New Property Law Act*. A new section 116 was proposed, in these terms (which will be seen to be materially similar to those in s 139(1) of the Act as it was enacted):

> **Section 116 When mortgagee becomes mortgagee in possession**
>
> A mortgagee who exercises a power to enter into possession of mortgaged land or goods in accordance with section 115 becomes a mortgagee in possession of the land or goods.
>
> (a) on the date on which the mortgagee enters into, or takes, physical possession of the land or goods, or
>
> (b) on the date on which the mortgagee first receives any income from the land or goods as mortgagee in possession, or

> (c) if a court, on the application of the mortgagee, makes an order for possession of the land or goods by the mortgagee, on the date of the application to the Court, then
>
> whichever first occurs; and any reference to the date or time of entry into possession by a mortgagee in possession has a corresponding meaning.

[56] In its commentary on the proposed Act, the Law Commission explained the various proposals. It said this in relation to the proposed section 116 (*Report No 29,* at p 325):

> 443 Uncertainty was expressed by many of the submissions to the Justice and Law Reform Committee of the House of Representatives, in its deliberations on the amendments to the 1952 Act, and to the Law Commission on NZLC PP16 concerning the circumstances in which a mortgagee may be regarded as being in possession of the property, particularly when physical possession has not been taken. In view of such uncertainty, it has been thought desirable to define those circumstances. The new s 116 confirms that a mortgagee is in possession when
>
> - that person takes physical possession, or
> - that person applies for and obtains a court order for possession of the property, or
> - when income is received *and* the mortgagee has management and control of the property: confirming *Noyes v Pollock* (1886) 32 Ch D 53, in which it was held that mere receipt of rent by a mortgagee, where the rent was collected on behalf of the mortgagor, did not mean that the mortgagee was in possession.
>
> 444 If the mortgagee proceeds by way of court application and obtains an order (which is almost automatic), the possession backdates to the date of the application: *Southpac Custodians Ltd v Bank of New Zealand* [1993] 1 NZLR 663.

[57] Thus, the Commission indicated areas in which it was clarifying or confirming case law. In relation to the receipt of income (now s 139(1)(b)), the principle in *Noyes v Pollock* (1886) 32 Ch D 53 was being confirmed. In relation to what became s 139(1)(c), the principle in *Southpac Custodians Ltd v Bank of New Zealand* [1993] 1 NZLR 663, as to back–dating possession, was being confirmed.

[58] There is no reference to the *Southpac Custodians* case in the judgment in *Advanced Securities*. It appears possible that Associate Judge Doogue was not referred directly to *Southpac Custodians* or to the back-dating approach which the Court of Appeal adopted in that case.

[59] In *Southpac Custodians*, Southpac as the first mortgagee was pitted against the Bank of New Zealand which was first debenture holder and second mortgagee. In issue was the entitlement to rents, being an important right arising from possession.

[60] Southpac purported to give notice that it had entered into possession. It subsequently commenced summary judgment proceedings in which it sought a declaration as to its possession or, alternatively, an order for possession.

[61] The Master refused the declaration as to possession but granted an order for possession, effective only from the date of the order.

[62] Southpac appealed on the basis that its right to the rent arose when the proceeding claiming an order for possession was served on the tenants. The receivers and the Bank cross-appealed on the basis that the Master ought not to have made an order for possession at all.

[63] The judgment of the Court of Appeal was delivered by Hardie Boys J.

[64] The Court referred, at 666, to English cases which held that a first mortgagee's entitlement to rent commenced when proceedings were filed and not when an order was eventually made. The rationale, as explained in cases such as *Preston v Tunbridge Wells Opera House Ltd* [1903] 2 Ch 323 (per Farwell J at p 325), was that the exigencies of the business of the Courts which prevent an application from being heard the moment it is made should not cause a mortgagee to suffer from the delay involved.

[65] The Court, then said this at page 668:

> If the mortgagee is entitled on default to enter into possession by receiving rents, or to enter peaceably into actual occupation, then there is no reason in logic or justice to postpone his entitlement to rents because it proves necessary, or indeed he chooses, to exercise his rights through the Court rather than directly. Thus, by refusing to allow peaceable entry, a mortgagor should not be in a better position than one who is co-operative with his mortgagee. Further, it is significant that s 106 [Land Transfer Act] uses the expression "may bring an action" rather than words such as "may obtain an order": the emphasis is on the commencement rather than the conclusion of

> the proceedings. We therefore adopt, for a situation such as the present, the English rule enunciated in the cases referred to above.

[66] *Southpac's* appeal was allowed. The Master's order for possession, which had been expressly effective from the date of delivery of the judgment, was amended so that it was effective from the respective dates of service of the application on the tenants.

[67] Southpac was subsequently applied as settled law: see for instance *Southern Cross Building Society v Gibson* HC Auckland M1004-IM01 19 December 2001. In that case, Williams J made an order for possession effective from the date on which the application had been served on the registered proprietors.

[68] In *Laws of New Zealand*, Mortgages, para 225, Geoffrey Fuller deals with s 139(1)(a) of the Act. At Footnote 1, in specifically acknowledging that he has adapted his comments from the Law Commission Report no. 29, paras 443-445 (above [55]), Mr Fuller refers to s 139(1)(a) as confirming the earlier case law both in relation to *Noyes v Pollock* and in relation to *Southpac Custodians.*

[69] For completeness, I note also the decision of the Court of Appeal in *Burke v Advanced Securities Ltd* [2008] NZCA 93. The Court in that case referred to some of the discussion in *Southpac Custodians* (at 668-669) before commenting (at [61]):

> Statutory provisions relating to mortgagee sales are now contained in the Property Law Act 2007. We mention that to alert the parties to the different provisions that may now apply. We have not considered whether there are any material differences between the old and new regimes and should not be taken as making any comment on that issue.

[70] *Burke v Advanced Securities Ltd* raised different issues to those in this case.

Purpose

[71] The interpretation arrived at through analysis of the text and legislative history above arises equally from the purposive approach required by s 5(1) Interpretation Act.

[72] The question to be asked under s 5(1) Interpretation Act is – what was the purpose of s 139(1)(c) within the structure of the whole of s 137? The answer to this question lies in the mischief recognised by the Court of Appeal in *Southpac Custodians*, and by the English Courts in the case law which the New Zealand Court of Appeal adopted. It is this. If a mortgagor, entitled to enter into possession, elects to apply to this Court for an order for possession (with the delay inherent in the Court process), it may be considered unfair to deprive the mortgagor of the rights and benefits of possession from the time of the application through to the grant of the order. The purpose of the principle expounded in *Southpac Custodians* and of including a Court application within s 137(1) as one of the triggering events constituting entry into possession is clear. It was to ensure that where a Court application is made, the mortgagor receives (backdated to the date of the application) the incidental rights and benefits of possession, including the right to receive the income produced by the property. In short, a purpose of s 137 is to backdate the effective date of possession. Any other interpretation of s137(1)(c) would be to deny s 137(1)(c) its purpose.

[73] Prior to the enactment of the Act, there was settled case law arising from earlier English authorities and from *Southpac Custodians* as to the requirement to back-date the effectiveness of an order for possession. If any uncertainty remained in New Zealand, it was as to whether the back-dating should be to the date of service (whether on registered proprietor or other affected parties) or to the date of application to the Court. The Law Commission in its 1994 report and in its proposed legislation opted for back-dating to the date of the application to court. The Law Commission's proposed s 116 became (without material amendment) s 139(1) of the Act. The certainty which the submitters to the Justice and Law Reform Committee of the House of Representatives had sought (see para 443 of the Law Commission report – quoted above at [56]) - as to when a mortgagee is to be regarded as being in possession of property was delivered.

[74] There is no evidence to suggest a Parliamentary intent to the contrary of the words used in s 139(1)(c). The legislative history indicates that s139(1)(c) was intended to have its literal meaning.

[75] This conclusion accords with the view taken by Associate Judge Gendall in *TEA Custodians (Bluestone) Ltd v Mouroukis* High Court Wellington CIV-2010-485-1585 28 October 2010. While there is no suggestion in the judgment that any detailed submissions were made as to the construction of s 139(1)(c), his Honour applied s 139(1)(c) according to its literal meaning, saying at [25] –

> "The date of possession is effectively "backdated" to the date of the application."

The implications of s 156 of the Act

[76] My conclusion has been that s 139(1)(c) of the Act is to be given its literal, ordinary meaning.

[77] As a product of this conclusion, I acknowledge that s 156 of the Act (above [27]) (which deals with the notice to be given in relation to entry into possession) may create for the plaintiff who successfully applies for an order for possession what may be an unworkable requirement. It will certainly be an unworkable requirement if the "five working days after the date of entry into possession" referred to in s 156(1)(b) encompasses the situation of deemed entry into possession under s 139(1)(c). If it does, s 156 then would add injustice to unworkability in constituting the successful plaintiff an offender liable to summary conviction.

[78] The impression I gain from the relationship between ss 156 and 139 of the Act is that the unsuitability of s 156 for the situation of deemed entry into possession is one of a drafting or legislative oversight. As counsel did not address submissions to the legislative history of s 156, and as that provision is not central to my conclusions, I refrain from expressing a concluded view in relation to this aspect. What may be noted, however, is that the direct predecessor of s 156 of the Act was s 104DD of the 1952 Act. Section 104DD had been introduced as one of a group of sections comprising a new Part 7A of the 1952 Act which was inserted by s 5 of the Property Law Amendment Act 1993. Those provisions were collectively inserted to introduce requirements of notification and reporting where mortgagees were in possession or receiving income from mortgaged property. A series of amendments to both the Property Law Act 1952 and the Land Transfer Act 1952 were taken through

Parliament in 1993 and enacted on 28 September 1993. I am not aware of any material to indicate that *Southpac Custodians* (decided in October 1992) and reported in 1993 was in any way in the mind of the draftsperson or Parliament when introducing and enacting the 1993 reforms to which I have referred.

[79] What is clear to me is that the deemed date of possession in s 139(1)(c) was as intended by Parliament. What is less than clear is how s 156 was intended to operate in relation to a plaintiff who successfully applies for an order for possession.

[80] The Court in this proceeding is not called upon directly to adjudicate upon any issue raised under s 156, whether with regard to the commission of an offence or otherwise.

[81] When s 156 of the Act comes before the Court for direct consideration in another case, it may be that approaches to statutory interpretation flowing from concepts of absurdity and the like may come into play. That is a matter for the interpretation of s 156 rather than a matter which should impact upon the interpretation of s 139. In this regard, I recognise that I am, with respect, not following the approach which recommended itself to this Court in *Advanced Securities Limited v Lee*.

S 139(1)(c) of the Act applied to this case

[82] The plaintiff made its application for an order for possession of the property on 14 July 2009.

[83] Given my conclusion that the plaintiff's entry into possession of the property will be deemed (by s 139(1)(c)) to be backdated to the date of the application, the making of an order for possession under s 137 of the Act will mean that the plaintiff's deemed date of entry into possession will be 14 July 2009.

S 168 of the Act – the issue as to withdrawal from possession

The statutory provision

[84] Counsel did not draw my attention to the provisions of s 168(1)(b) of the Act which provides :

> **168 Withdrawal of mortgagee from possession**
>
> (1) A mortgagee who has exercised a power to enter into possession of mortgaged land, goods, or accounts receivable must be taken to have withdrawn from possession of all or any part of the land, goods, or accounts receivable on the earlier of –
>
> (a) ...
>
> (b) the date on which a mortgagee under any mortgage having priority over the mortgagee's mortgage enters into possession of, or appoints a receiver for, all or that part of the land, goods, or accounts receivable; or ...

The relevance of the statutory provision

[85] In this case, Mr Gordon has an at least arguable case that he has a mortgage with priority over the plaintiff's mortgage.

[86] Mr Gordon purported as mortgagee to enter into possession of the property on 27 July 2009. If the plaintiff is granted an order of possession, it will be deemed to have entered into possession on 14 July 2009 (the date of the commencement of this proceeding). If Mr Gordon's mortgage has priority over the plaintiff's mortgage, the plaintiff's backdated possession would be deemed to have come to an end on 27 July 2009, some 13 days after its deemed backdated commencement, and more than two years before the date of the order by which the plaintiff would be granted possession.

[87] This is not a situation which the Court could simply ignore by reason of a counsel having overlooked it in their submissions. Section 168 operates as a matter of law and must be taken into account by the Court to the extent it affects the rights of the parties.

Submissions for Mr Gordon

[88] Upon invitation to make further submissions, Mr Spear submitted that the provisions of s 168(1)(b) would render nugatory any order of possession in favour of the plaintiff as Mr Gordon, as first mortgagee, entered into possession on 27 July 2009. Mr Spear referred to the decision of this Court in *TEA Custodians (Bluestone) Ltd v Mouroukis* HC Wellington CIV 2010-485-001585 28 October 2010 as an example of the operation of s 168(1)(b). In that case TEA as first mortgagee applied for an order for possession by summary judgment. TEA held a first mortgage. Aztec Securities Ltd, the second mortgagee, had already taken possession. The straightforward application of s 168(1)(b) is illustrated at para [27] of the judgment where Associate Judge Gendall said –

> ...once an order is made by this Court, TEA is entitled to possession of the property as against Aztec. There is no reason why Aztec should be able to retain possession of the property

Submissions for the plaintiff

[89] Mr Bellamy, in his supplementary submissions, apologised to the Court for overlooking the provisions of s 168(1)(b) but recorded that the plaintiff's summary judgment application for possession would have been pursued even had counsel been alert to those provisions.

[90] Mr Bellamy accepted that –

> Prima facie as first mortgagee [Mr Gordon's] mortgage has priority over the plaintiff's second mortgage.

[91] I regard this as a necessary concession not only because the ranking of the mortgages arises from the way in which they have been registered but also because the plaintiff's case was put and argued at the hearing in a manner which recorded the priorities according to registration and did not seek to suggest that some other priority should apply. In his original written submissions Mr Bellamy had said –

> The defendants gave Halifax Finance Ltd a security by way of a registered mortgage over a property on Main Road, Spring Grove. The mortgage was registered as a second mortgage ranking after a mortgage to Colin Norman Gordon.

[92] In his affidavit filed in support of the summary judgment application, Mr Reid had deposed that by the terms of the loan by Halifax (the plaintiff's predecessor) to the defendants the loan was to be secured by a first mortgage over the property, whereas the mortgage was registered as a second mortgage ranking behind that of Mr Gordon as first mortgagee. But after commenting as to what the terms of the loan agreement had been, Mr Reid thereafter in his affidavit recognised Mr Gordon as the first mortgagee – for instance, he referred to Mr Gordon as having a vested interest in delaying and undermining the mortgagee sale process as Mr Gordon –

> is the beneficiary of the Trust and also the first mortgagee.

[93] Notwithstanding this background, Mr Bellamy submitted that the Court should now explore the proposition that because of the loan agreement with the plaintiff's predecessor (whereby the defendant trustees in consideration of the advance provided by Halifax undertook to provide Halifax with first mortgage security over the property) there was an estoppel by representation. In particular Mr Bellamy submitted that Mr Gordon should be estopped from asserting that he holds a first mortgage or has a mortgage with priority over the plaintiff's mortgage.

[94] Mr Bellamy submitted that the factual issues could be properly explored because –

> ... the evidence that is referred to by the plaintiff is clear on the face of the documents...

[95] The exhibits to which Mr Bellamy referred include for instance a Fees Schedule attached to the loan agreement in which the (trustee) borrowers agree that the new advance shall be a first mortgage.

Discussion

[96] Notwithstanding the reference in the plaintiff's evidence and in exhibits to an agreement that the mortgage granted to Halifax would be a first mortgage, nothing in the plaintiff's documents or case signalled to the defendants or to the other parties served that they would have to meet a proposition that the plaintiff's registered

second mortgage should be treated as a first mortgage ranking ahead of Mr Gordon's registered first mortgage. To the contrary, the affidavit filed by Ms Sirisamphan on behalf of the plaintiff, in support of directions for service, made it clear that (notwithstanding issues as to what had been agreed) steps had been taken to serve the documents on Mr Gordon "in his capacity as the first mortgagee".

[97] In short, the plaintiff chose to make its application upon the basis that Mr Gordon was the registered first mortgagee and had that priority. Evidence relevant to the granting or denial of an estoppel, relating to priorities was not called for or explored.

[98] It should also be added (although it is not determinative of the decision I should make in relation to this issue) that Mr Bellamy's proposition that there should be an estoppel by representation may be difficult to sustain given that what is referred to is in the nature of a promise rather than a representation of existing fact. There may be other concepts to explore and it is unnecessary that I take that matter further.

[99] In the event, I do not consider it appropriate that Mr Gordon or his counsel should have to explore or seek to meet an estoppel argument at this late point of a summary judgment application. It would be inappropriate to reopen the evidence and to permit further evidence to be filed. It is also in the circumstances inappropriate to allow the plaintiff to add what would effectively be a further ground or line of reasoning to its application for summary judgment.

[100] Mr Gordon purported to enter into possession of the property on 27 July 2009 and his taking of possession is at least arguable. If his possession is established at trial, it would follow that the plaintiff's (deemed backdated) possession (by reason of any order made by this Court on this application) would have come to an end on 27 July 2009 by operation of s 168(1)(b) of the Act.

[101] Mr Spear submits that these circumstances render any order granting the plaintiff possession of the property nugatory. It is sufficient in the present context that such an order is rendered at least arguably nugatory. The Court does not have

sufficient evidence before it to determine whether there is any value to the plaintiff being deemed to have thirteen days of possession (from 14 July 2009 to 27 July 2009). If there was rental received during that period there may be an argument that the backdated order would not be nugatory. On the other hand, the de minimis principle may apply. The Court simply has not been provided with the necessary information to determine the matter one way or the other.

The leases issue

The leases to which Mr Gordon refers

[102] In relation to leases, Mr Gordon's (amended) ground of opposition was this:

> The said Colin Gordon as a mortgagee in possession in priority to the Plaintiffs has entered into leases with the Lessees.

[103] Mr Gordon, shortly after filing his amended notice of opposition, filed an affidavit in opposition.

[104] In it, he referred to four leases entered into between 1 April 2003 and 4 April 2003 (above [12]). He says that those leases were entered into in the period when he was still registered proprietor of the property, a few weeks before he transferred the property to the trustees. The leases were accordingly entered into by Mr Gordon as registered proprietor.

[105] Mr Spear, for Mr Gordon, did not explain at the hearing why Mr Gordon's notice of opposition identified the issue in relation to leases as being that he, Mr Gordon "**as a mortgagee in possession** in priority to the Plaintiffs has entered into leases with the Lessees" (my emphasis).

[106] The protection of the plaintiff's interests, after Mr Gordon purported to enter into possession in late July 2009, was dealt with formally through an undertaking provided to the Court by Mr Gordon through his then counsel, Mr Roose. The undertaking dated 19 August 2009 reads –

> Through me, he undertakes not to do or leave undone anything which might be prejudicial to the interests of the Plaintiff regarding the secured property,

> and in particular not to take any action pursuant to his rights as mortgagee (whether qua mortgagee in possession or otherwise) under the first mortgage until further order of the Court.

[107] Mr Gordon has not been released from that undertaking which still operates. Accordingly, even had Mr Gordon purported after 19 August 2009 to enter into any commitments in relation to the property, it would not lie in his mouth to suggest that those commitments should affect the plaintiff's entitlements in this proceeding.

The plaintiff's application for cancellation of leases

[108] In its statement of claim, the plaintiff particularised the occupants of the property as they were understood by the plaintiff to be.

[109] The plaintiff sought an order cancelling any leases existing on the property pursuant to s 251 of the Act.

[110] Section 251(1) of the Act provides:

> **Powers of court in making order for possession**
>
> (1) On an application to a court for an order for possession of the land comprised in a lease, the court may make the order and cancel the lease.

[111] Accordingly, for the purpose of the relief the plaintiff was seeking, the plaintiff was content to treat the four lease documents of April 2003 as constituting valid leases.

Mr Gordon's evidence in relation to the lease issue

[112] Notwithstanding the absence of any reference in his amended notice of opposition to any principle which, on the facts of this case, would render the four leases binding upon the plaintiff as mortgagee, Mr Gordon in his second affidavit in opposition gave evidence of the detail of the four mortgages. He made no reference to any knowledge on the part of the plaintiff as mortgagee (or of the plaintiff's predecessors as mortgagee).

[113] In a further affidavit (entitled "Second Affidavit" but in fact his third affidavit), Mr Gordon said that he had spoken to a director of Halifax (the original mortgagee) prior to entering into the loan. Mr Gordon said this –

> Prior to entering into the loan and/or the mortgages, I had a discussion with Paul Brownie who was the sole director of Halifax... I explained to Paul that there were tenants occupying the property who had valid leases. I explained that Ian Smith, my solicitor at the time, and also a trustee of the Trust, had advised me to put these leases in place when I was seriously ill. Annexed ... is a copy of the fax I sent to Paul Brownie after the conversation recording what we had discussed. From the outset of this legal claim I had been searching for documents through the numerous boxes I have in storage at the property. As soon as I discovered the fax, I brought it to the attention of my solicitor. [Mr Gordon then went on to deal with matters relating to the health of himself and his wife].

[114] The document attached as the fax sent to Paul Brownie is a single page hand-written document bearing Mr Brownie's street address and fax number at the top and reads:

> Dear Paul,
>
> This letter is too confirm, that, due too my concerns regarding various matters re the Proposed loan too us too Pay John Levenbach, I wish too confirm what I discussed with you on the Phone.
>
> 1. That there are tennants occupying the Property with valid leases. Ian smith advised me too Put these leases in Place when I was seriously ill.
>
> The leaseholders are myself, Dale Conlon, Johnathon Gordon and Murray Voice. There are quite a number of Buildings on the Property which according too "Dowans" may, lower the Value and may, make it harder too sell.
>
> However Richard Jenkins has assured us that C.D.R. tyres Ltd has enough income coming in too satisfy the loan. I will fax this copy and post the original. Thank you.
>
> Kind Regards Colin Gordon
>
> (The spelling is as it appears in the fax).

The plaintiff's position on the lease issue

[115] The plaintiff did not seek to file reply evidence. To the extent that the plaintiff had previously referred to the position of the purported lessees, the relevant information had been contained in the affidavit of Mr Reid, an accountant, and of Ms

Sirisamphan filed in support of the application for directions as to service. Those affidavits had identified the manner in which the plaintiff had come to understand there were occupiers of the property. Emails were attached which came from the defendant trustees. In the case of the first-named defendant he had written an email on 12 September 2008 setting out the "information I have received" in relation to the occupants of the buildings on the property. In the case of the second-named trustee his solicitors had sent an email to the plaintiff's solicitors. In that email, Mr Smith's solicitor had written:

> As to the property:
>
> - The workshop is "occupied" by Mr Gordon in the sense that it is used for that purpose.
>
> - However, and unknown to the trustees (and, the Council as we understand it) there is another structure on the property occupied by a person on a basis we are unsure of – at best an informal licence.
>
> - ...
>
> - We are making enquiries as to the status of the "informal licence" and the structure to ascertain whether either will be an impediment to orderly sale.

[116] Mr Bellamy, for the plaintiff, had filed brief submissions in support of the summary judgment application for its first hearing. This was before Mr Gordon's second and third affidavits were filed.

[117] Mr Bellamy identified succinctly the plaintiff's position with regard to the tenancies –

> A mortgagee is immune from adverse claims which are not registered prior to the mortgage except where the mortgagee has consented: section 119 Land Transfer Act 1952 and *Capital and Merchant Investments Ltd (in receivership) v Russell Management Ltd* [CIV 2008-404-8214 HC Auckland 3 March 2009 Asher J] particularly paragraph 12.

[118] The issue in the *Capital and Merchant Investments* case was whether Capital (which had a first mortgage) had consented to leases and as a consequence lost its priority to them.

[119] Under a heading "The relevant provisions of the Land Transfer Act 1952", Asher J said this:

> **The relevant provisions of the Land Transfer Act 1952**
>
> [12] Registration under the Land Transfer Act 1952 confers on mortgagees as registered proprietors an indefeasible title to the interest of the proprietor in the fee simple, which under ss 62 and 63 of the Land Transfer Act 1952 (subject to various exceptions) is immune from adverse claims: *Fraser v Walker* [1967] NZLR 1069 at 1075. The starting point is, therefore, that a mortgagee is immune from adverse claims not registered prior to the mortgage, such as claims from a later lessee. This position is specifically reflected in s 119, but with a qualification:
>
> > **119 Lease not binding on mortgagee without consent**
> >
> > No lease of mortgaged or encumbered land shall be binding upon the mortgagee *except so far as the mortgagee has consented thereto.*
> > (Emphasis added)
>
> Thus, a lease of mortgaged land can be binding against a registered mortgagee if the mortgagee has consented to the lease.
>
> [13] If a mortgagee has a power of sale, such a sale will vest the estate in the land in the purchaser from that mortgagee free from any other estates or interests except for those which have priority over the mortgage, or which by reason of the mortgagee's consent are binding. Section 105 provides:
>
> > **105 Transfer by mortgagee**
> >
> > Upon the registration of any transfer executed by a mortgagee for the purpose of [exercising a power of sale over any land], the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest *except an estate* or interest created by any instrument which has priority over the mortgage or *which by reason of the consent of the mortgagee is binding on him.*
> > [Emphasis added]
>
> Thus, any lease created after the registration of the mortgage cannot prevent a transfer of unencumbered title to a purchaser at mortgagee sale unless the lease has priority over the mortgage, or which by reason of the consent of the mortgagee is binding on the purchaser. It can be seen then how the critical issue in this case is whether it is arguable, as Russell Management asserts, that Capital consented to the seven leases.

[120] In his initial written submissions, Mr Bellamy referred also to *Bunt v Hallinan* [1985] 1 NZLR 450. Mr Bellamy relied on that decision as authority for the proposition that if the owner of land grants a lease of it, and subsequently

mortgages it, the rights of the mortgagee are subject to the prior rights of the lessee if the lease is registered or if it is unregistered and the mortgagee has notice of it. In *Bunt v Hallinan*, the Court of Appeal was considering a case in which it was asserted that a purchaser had acted fraudulently for the purposes of ss 62 and 182 Land Transfer Act when he became registered proprietor with knowledge of an unregistered lease. The Court of Appeal by a majority (per Richardson and McMullin JJ; Eichelbaum J dissenting), dismissed the appeal. The Court found that the allegation of Land Transfer Act fraud was not substantiated.

[121] Accordingly, Mr Bellamy's initial summary of *Bunt v Hallinan* understates the requirements recognised by the Court of Appeal before the Court will intervene on the grounds of fraud under ss 62 and 182 Land Transfer Act. Notice of an unregistered interest of itself is insufficient. Fraud must be established or, in a summary judgment context, the opposing party must have an at least arguable case that there has been Land Transfer Act fraud.

Initial submissions for Mr Gordon

[122] The initial submissions filed for Mr Gordon adopted the concept that what is required pursuant to *Bunt v Hallinan* is simply that the mortgagee has notice of the unregistered interest of a lessee. Mr Spear submitted that the original lender/mortgagee had notice of the leases through the fax which Mr Gordon deposes to having sent to Mr Brownie. The plaintiff would be equally fixed with the knowledge of the leases which the original lender held.

Submissions for plaintiff

[123] Mr Bellamy submitted that the starting point for analysis of any arguable rights on the part of the lessees must lie in the "consent" provision in s 119 Land Transfer Act (lease not binding on mortgagee without consent) and in the consent exception to s 105 Land Transfer Act (transfer by mortgagee).

[124] Mr Bellamy submitted that the Court should observe the distinction drawn in *Capital and Merchant Investments* by Asher J between the "consent" required by the

wording of ss 105 and 119 and mere knowledge of the existence of the lease or acquiescence. His Honour at [31] referred to *NZ Fisheries Limited v Napier City Council* (1990) 1 NZ ConvC 190,342 (CA), and observed:

> In that case Casey J observed that consent should not be too readily assumed or spelt out from the course of dealing between the parties, and said at 190,344 that:
>
> > … acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act such as written or oral acceptance or even an implied acceptance of conduct.

[125] And his Honour added, at [33] –

> It is clear then that mere knowledge by the mortgagee of the existence of the lease is not enough to constitute consent: *Registered Securities Ltd v Christensen Potato Co Ltd* (1991) ANZ ConvR 57.

[126] The Court looks for something more than mere knowledge – Asher J referred to "a certain point of co-operation and involvement".

[127] Finally, Mr Bellamy referred to Mr Gordon's final affidavit, 17 November 2010, filed on the same date as Mr Gordon's submissions were required for the summary judgment hearing. In that final affidavit, Mr Gordon explained why he had to send the fax (above [114]). Mr Gordon explained that after he sold the property to the trustees (in 2003) he made three gifts (in 2003, 2004 and 2005) in reduction of the debt back. At that point (late 2005) the possibility of selling the property arose. Mr Gordon received legal advice that he should stop gifting because the property was worth around $50,000.00 whereas he was still owed approximately $77,000.00. He says he was also advised to take possession of the property, as he had not been made a trustee of the Trust and he had no control over the Trust. Against this background, Mr Gordon deposed:

> Accordingly, I gave notice to the Trust and to Halifax Finance Ltd. A copy of the notice is **attached** and marked "A". [This document being the handwritten fax which Mr Gordon had attached to his previous affidavit]. I was unaware of any specific legal format and, in my mind, this gave me ownership and control of the property. When I consulted David Earle of Glasgow Harley Lawyers in 2009, he said that in order to cement it in he would issue a formal Property Law Notice and place the necessary advertisements. This was done on 24 June 2009.

[128] Against this background, and upon the express wording used by Mr Gordon, Mr Bellamy submitted that at most Mr Gordon was giving notice of the tenancies. There was no request for consent.

Submissions for Mr Gordon at the hearing

[129] Mr Spear submitted that the fax was evidence both that notice of the leases had been given to Halifax and that consent had been given by Halifax. Mr Spear noted that the content of the letter indicated that there had been a prior discussion by telephone between Mr Gordon and Mr Brownie, with the letter acting as a confirmation of what had been discussed.

[130] When pressed as to where Halifax's consent was articulated, Mr Spear submitted that Halifax's action in subsequently making the loan to the trustees constituted the consent. Mr Spear went further to suggest that the consent may not have been written down but may have been given orally. He suggested that the people involved were not necessarily in the habit of making notes.

[131] When I questioned Mr Spear as to the basis upon which he was speculating as to an oral expression of consent, Mr Spear indicated that he himself was not suggesting that consent had been given orally. He suggested however that these are matters that could be explored at a full hearing at which Mr Brownie of Halifax "might cast light".

Submissions for plaintiff in reply

[132] Mr Bellamy invited the Court to refrain from speculating as to matters which might have been discussed if there was no basis in the evidence for such speculation.

[133] To illustrate the danger of making assumptions as to the level of discussion between Mr Gordon and Mr Brownie, Mr Bellamy referred to a letter written by Mr Gordon's then solicitor to the plaintiff's solicitor on 17 August 2009. The plaintiff's solicitor, having received the notice of opposition and Mr Gordon's first affidavit, requested details of the leases which were alleged to have been executed and asked

whether Mr Gordon had provided copies or details of the leases to the trustees and when that had occurred. Mr Gordon's solicitor replied:

> Our client advises he did not provide details of the leases to the trustees. The leases were signed prior to the transfer of the property to the Trust. Our client advises he was recommended to put leases in place by Ian Smith to protect the interests of the lessees, some of whom had erected buildings on the property. Our client advises, however, that Mr Smith was not involved in the preparation of the leases.

[134] Mr Bellamy noted that it is Mr Gordon's evidence that his faxed letter was a form of notice which he gave to both Halifax and to the Trustees. Given that Mr Gordon accepts that he had not even provided details of the leases to the Trustees, there is no foundation upon which to speculate as to his provision of detail to Halifax.

Discussion

[135] Mr Gordon has laid no adequate evidential foundation for the proposition that the plaintiff's predecessor may have consented to the April 2003 leases so as to make those leases binding upon the mortgagee.

[136] In relation to a significant commercial loan being negotiated at arms' length, it is nonsensical to suggest that a lender would understand it was being asked to consent to leases which were referred to but about which no detail was provided. Matters of fundamental importance such as the term of the lease and the value of the rental stream would be of fundamental importance. The importance of those items is highlighted in this case by the entirely uncommercial nature of the leases which Mr Gordon says he entered into in April 2003.

[137] It is significant that Mr Gordon, who provided four affidavits to add to his opposition, does not at any point say that consent to the leases was requested or that any person at Halifax expressed consent. There is no evidence of written consent. There is no evidence of oral consent. The arguable case for Mr Gordon sits at its highest in the category of mere notice or acquiescence. Given the level of information provided by Mr Gordon (lacking the important, non-commercial details of the leases) there is also nothing to touch the conscience of the mortgagee. Rather

it may be that Mr Gordon's own conscience is tainted by his inadequate level of disclosure of the lease arrangements he had put in place.

[138] There is equally no merit in Mr Gordon's suggestion that Halifax by making the loan consented to the leases. Such a submission is tantamount to a submission that mere knowledge or acquiescence is sufficient. The legislation requires that a mortgagee must have consented to the leases if it is to be bound by the leases.

Conclusion

[139] The plaintiff has satisfied me (assuming for present purposes that the documents of April 2003 were genuine and arguably binding contracts of lease) that there is no arguable basis for Mr Gordon or other lessees to assert that the plaintiff is bound by the 2003 leases. Accordingly, had I been making an order of possession I would also have made an order under s 251(1) of the Act cancelling the leases. Given the conjunctive wording of the Court's powers under s 251(1), however, I do not have the jurisdiction to cancel the leases when possession is not ordered.

The accord and satisfaction (estoppel) issue

The raising of the issue

[140] An additional ground of opposition was advanced by Mr Spear in submissions but not in Mr Gordon's amended notice of opposition. The argument was that the parties during a period when this proceeding stood adjourned, had reached an accord and satisfaction.

[141] There is a fundamental procedural difficulty with this ground. The proceeding has been one in which those appearing had ample time to plead their cases. Mr Gordon did not signal, in his amended notice of opposition, this ground of opposition. The Court must be vigilant not to permit a defendant to pursue grounds which are not articulated as grounds of opposition. This is particularly so where the events said to constitute a ground of defence arise (as in the case of the alleged accord and satisfaction) after the proceeding itself has issued and where the ground

asserted would constitute a positive defence. There is a need for clear pleading by the defendant (or other party) and the opportunity for the plaintiff to directly address through fresh evidence, if necessary, the pleaded allegation. What Mr Gordon did in this case was to include in his evidence some material as to events after the issue of the proceeding but without attaching to those a ground of opposition such as "accord and satisfaction" which later emerged with Mr Spear's submissions filed for the hearing.

[142] I will examine briefly Mr Gordon's evidence which I find falls short of establishing an arguable case of accord and satisfaction. In the circumstances, I am able to determine this particular aspect of the case on the evidence. Had I considered that Mr Gordon's evidence on this point established an arguable case of accord and satisfaction, I would nevertheless have inclined to the view that the Mr Gordon should not be heard in opposition on that defence given the lack of any proper pleading or notice of it.

The facts relied on by Mr Gordon

[143] Mr Gordon said this in his affidavit (I summarise):

- A meeting took place on 16 November 2010 attended by Mr Gordon, the first named defendant, associated solicitors, and Mr Reid. The aim was to resolve the ongoing dispute between the parties.

- A binding agreement was reached during and immediately after this meeting whereby Mr Gordon would pay the plaintiffs $80,000 (funded by the sale of Mr Gordon's classic Aston Martin car) and the plaintiffs would (in return) discontinue all legal proceedings against Mr Gordon.

Accord and satisfaction – the legal principles

[144] An accord is an agreement by which a contractual (or other) obligation is discharged: the satisfaction is the consideration which makes the agreement operative. Both must be present: *Laws of New Zealand*, Torts, para 71.

[145] In this case, the accord and satisfaction suggested by Mr Spear fails to be arguable given the absence of any evidence of satisfaction. While Mr Gordon's evidence suggests that an agreement (or "accord") was negotiated, he does not suggest that he acted on the accord by making the payment identified by the alleged agreement or accord. No satisfaction is alleged.

Conclusion

[146] In these circumstances, I do not need to determine whether there was, in the first instance, an accord. Mr Gordon's evidence of the accord has the quality of last minute imprecision which lends itself to rejection through a robust approach on the part of the Court. It is inherently unlikely in relation to the commercial dealings between these parties that a financier, after issuing a proceeding of this nature, would commit itself to be bound for an indefinite period to accept a much lower sum than the contract of loan required to be paid. I incline to the conclusion that the suggested accord is itself, untenable, but find against Mr Gordon in this context upon the basis that there is no arguable satisfaction in any event.

[147] If estoppel were to have been presented as a ground of opposition distinct from accord and satisfaction, I would also have found nothing on the facts deposed by Mr Gordon to so affect the conscience of the plaintiff as to constitute a circumstance estopping the plaintiff from enforcing its contractual rights. Mr Spear appropriately did not seek to develop the proposition that estoppel might exist as an arguable ground of opposition independent of accord and satisfaction.

The disputed evidence issue

The raising of the issue

[148] Mr Gordon's amended notice of opposition was required precisely because the Court required specific grounds of opposition in accordance with the Rules. The amended notice of opposition filed (above [18]) raised a number of matters that were in the nature of affirmative defences. The notice did not suggest that this was a summary judgment application which should be refused on the ground that the Court will not attempt to resolve genuine conflicts of evidence.

Mr Spear's written submissions

[149] When Mr Spear filed his written submissions two weeks before the hearing, he devoted five paragraphs to portions of the affidavit of Mr Reid (in support of summary judgment) which he submitted were in dispute. He submitted in relation to each that Mr Reid should be made available for cross examination, making summary judgment inappropriate.

[150] The five areas of Mr Reid's evidence which Mr Spear suggested gave rise to dispute were –

- Evidence as to communications from the second-named defendant (Ian Smith) through his lawyer as to the occupation of the land.

- Evidence that no reply was received from the defendants in reply to the plaintiff's solicitor's letter dated 18 June 2009.

- Evidence that when the defendant trustees indicated they had listed the property for sale the enquiries made by the plaintiff of the real estate agent indicated that the agent only had very limited instructions.

- Evidence that when the plaintiff instructed its own land agent to look at the property Mr Gordon confronted the agent.

- Evidence that the interest of the investors in the plaintiff can only be properly protected if they are mortgagees in possession.

[151] Mr Spear's written submissions, which he did not further develop in oral submission, referred variously to evidence which might be given by the first-named defendant, Richard Jenkins, and to the possibility that Mr Reid's evidence might be eroded through cross-examination.

Discussion

[152] Given Mr Gordon's failure to raise this ground of opposition when required to explicitly state his grounds, this might have been an occasion for the Court's peremptory dismissal of the ground raised in submissions. However, given the close relationship between the plaintiff's obligation to establish its case beyond argument and the proposition that there are disputes of fact in certain areas, I have examined the five suggested areas of dispute.

[153] I do not find any of them to impact on the central issues in play. By way of example, in relation to the alleged first area of dispute, it matters not to the outcome of the issues the Court has had to examine whether Mr Smith's state of knowledge as to those in occupation was as deposed by Mr Reid or not. It is not enough for a defendant to suggest that on some matter or other dealt with in the evidence of the plaintiff there may be room for dispute. To be meaningful, the area of dispute must relate to what is in issue in the application before the Court. None of the five areas of alleged dispute raised by Mr Spear is in that category.

Conclusion

[154] This is not a case in which there is any arguable dispute of fact which should lead to a denial of the plaintiff's summary judgment application either in relation to the order for possession or order cancelling the leases. There remains therefore nothing to cut across the plaintiff's entitlement to the second order. The grounds for denying the plaintiff the first order (possession) is limited to that arising from s 168 of the Act.

Conclusion – bringing together the various grounds of application and opposition

[155] The plaintiff's application for summary judgment must fail. This arises by virtue of the provision of s 168 of the Act and its arguable application in this case. But for the effect of s 168 in bringing to an end any (back-dated) possession granted to the plaintiff, I would have been satisfied in the summary judgment context that the plaintiff was entitled to an order of possession and an order cancelling leases.

[156] Costs should be reserved in accordance with the approach of the Court of Appeal in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403.

Orders

[157] I order:

- the plaintiff's summary judgment application is dismissed;

- The costs of the application are reserved, both as between plaintiff and Mr Gordon and as between plaintiff and defendants.

Next case management conference

[158] I adjourn the proceeding to a case management conference at ***2.30pm 10 October 2011 (Associate Judge Osborne)*** by telephone. Counsel are to file three working days before preferably a joint memorandum containing a summary of what each party now intends to do in relation to this proceeding and containing any appropriate timetabling suggestions.

Solicitors:

Duncan Cotterill, PO Box 827, Nelson
Spear Law, PO Box 1290, Nelson