**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA522/2013**
**[2015] NZCA 337**

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| BETWEEN | ATHANASIOS KORONIADIS<br>Appellant |
| AND | BANK OF NEW ZEALAND<br>Respondent |

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| Hearing: | 18 June 2015 |
| Court: | Cooper, Venning and Williams JJ |
| Counsel: | Appellant in Person<br>G J Toebes for Respondent |
| Judgment: | 28 July 2015 at 2.30 pm |

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant is to pay the respondent's costs for a standard appeal on a Band A basis.**

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**REASONS OF THE COURT**

(Given by Venning J)

[1] Athanasios Koroniadis appeals a decision of Gendall J entering summary judgment against him in favour of the Bank of New Zealand (the Bank) under a

guarantee.[1] The principal debtor is Miramar Development Ltd (MDL), a company now in receivership and liquidation.

**Background**

[2] We take the relevant background summary largely from previous interlocutory decisions of this Court concerning this appeal.[2]

[3] The Bank provided financial accommodation to MDL by way of a term loan for $1.1 million and an overdraft facility of $25,000. As security the Bank took personal guarantees from Mr Koroniadis and his brother, who were directors of MDL, as well as a general security agreement from MDL (GSA) and a registered first mortgage over a commercial property in central Wellington owned by MDL (the property).

[4] MDL defaulted on the payments due under its borrowing from the Bank. On 24 August 2012 the Bank made demand on MDL requiring it to pay the debit balance of the overdraft account and the interest arrears on the loan facility. The demand was not complied with and the Bank appointed receivers under the GSA.

[5] On 5 October 2012 the Bank issued a notice under s 119 of the Property Law Act 2007 (the Act). The notice required the default to be remedied by 9 November 2012. MDL was served with the notice on 5 October 2012 but the Bank had trouble serving Mr Koroniadis with a copy of the notice as required by s 121 of the Act. The copy of the s 119 notice and a s 122 notice were finally served on him on 19 November 2012 by service on his lawyer, Mr Langford. By this time, the date by which the default had to be remedied had already passed.

[6] MDL did not remedy the defaults. The Bank made demand against Mr Koroniadis as guarantor for the balance of the loan owing as at 7 January 2013 ($1,070,795.32) together with the current account loan balance ($36,436.70). Mr Koroniadis did not pay. The Bank then sought summary judgment against

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1 *Bank of New Zealand v Koroniadis* [2013] NZHC 1700 [decision under appeal].

2 *Koroniadis v Bank of New Zealand* [2014] NZCA 197 [extension of time decision] and *Koroniadis v Bank of New Zealand* [2015] NZCA 244 [amended grounds of appeal decision].

Mr Koroniadis for those sums. The Bank also sought summary judgment against Mr Koroniadis' brother, who did not oppose the application. Judgment against the brother was given by default. Mr Koroniadis' brother has since settled with the Bank by paying $250,000, which the Bank accepted in discharge of his obligations.

**The judgment under appeal**

[7] The defences Mr Koroniadis raised to the summary judgment application included:[3]

(a) The Bank should prove he had received the notice of demand under the guarantee dated 7 January 2013 and the notice to the covenantor under s 121 of the Act.

(b) The notice to the covenantor was received after the remedy date specified in the notice.

(c) The Bank had not proved service on him of the demand under the guarantee of 7 January 2013.

(d) He had made arrangements to pay the outstanding overdraft amount but the Bank refused to enable him to do so, or alternatively wrongly added conditions improperly requiring payment of a debt owing by a related third party company.

[8] Gendall J granted summary judgment. He considered the defences raised by Mr Koroniadis related to process issues that could readily be answered.

[9] The Judge found the Bank had served Mr Koroniadis with the copy of the s 119 notice "as soon as possible" after service on the mortgagor as required by s 121 of the Act.[4] He was further satisfied that any delay in service on Mr Koroniadis could not, in the circumstances, have caused him any prejudice. He had not lost an opportunity to remedy the defaults.

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3 Decision under appeal, above n 1, at [26].
4 At [34].

[10] As regards the notice of demand under the guarantee the Judge found that the absence of proof of service of the 7 January 2013 notice had not in any way prejudiced Mr Koroniadis. In any event, on the balance of probabilities the Judge found that Mr Koroniadis had received the notice. Further he had clearly received a copy of the notice on 28 March 2013 when he was served with the proceedings.[5]

[11] In relation to the suggestion that Mr Koroniadis had made arrangements to pay the overdraft but these had been refused by the Bank, the Judge found the claims to be unsupported by the evidence and seemingly incorrect.

[12] The Judge concluded Mr Koroniadis was "quite unable to advance any arguable defence to the [Bank's] summary judgment application".[6] The Bank had satisfied the Court Mr Koroniadis had no defence to its claims against him as guarantor. Judgment was entered accordingly.

**Events subsequent to the judgment**

[13] Mr Koroniadis sought to appeal Gendall J's decision to this Court. He filed a notice of appeal on 5 August 2013 but failed to serve the notice on the Bank until the following day (one day out of time). In the meantime the Bank took bankruptcy proceedings against Mr Koroniadis. On 25 October 2013 Associate Judge Bell granted Mr Koroniadis a stay of the bankruptcy proceedings.[7] Associate Judge Bell did so to enable Mr Koroniadis to pursue his application to appeal out of time. In the course of that judgment the Associate Judge identified two points which he considered may be worthy of consideration by this Court:[8]

(a) the acceleration of the loan by the bank; and

(b) the service on Mr Koroniadis of the copy of the notice under s 119 of the Act after the time for compliance had expired.

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5 At [37]–[39].
6 At [57].
7 *Bank of New Zealand v Koroniadis* [2013] NZHC 2865 [stay decision].
8 At [14]–[15].

[14] Mr Koroniadis was granted leave to file the appeal out of time.[9] He then filed amended notices of appeal on 22 August 2014 and 14 February 2015. On 12 June 2015 this Court granted Mr Koroniadis leave to file the amended grounds of appeal. The Court also granted the bank's cross-application for leave to adduce further evidence.[10]

[15] The last procedural matter to note is that Mr Koroniadis had separately filed a counterclaim against the Bank in the summary judgment proceedings. Mr Koroniadis claimed that he was prejudiced in terms of s 122(5) of the Act by the Bank's actions and that his actual indebtedness to the Bank was unclear. On 21 October 2013 Associate Judge Bell granted summary judgment in favour of the Bank as counterclaim defendant to that claim.[11]

**The amended grounds of appeal**

[16] Mr Koroniadis raises the following grounds in his amended notice of appeal:

(a) The High Court was incorrect to find the receivers were correctly appointed when in fact they were not correctly registered with the Companies Office for MDL.

(b) The High Court incorrectly found, in relation to the whole outstanding balance of the fixed term loan ($1,070,795.32), that it was a debt due to the Bank and that the Bank had met its contractual obligations to accelerate the loan.

(c) The High Court incorrectly found in relation to the Bank's case that service of the s 119 notice was done "as soon as possible" in compliance with s 121 of the Act.

(d) The High Court incorrectly found Mr Koroniadis was not prejudiced by the late service of the s 119 notice.

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9 Extension of time decision, above n 2.
10 Amended grounds of appeal decision, above n 2.
11 *Bank of New Zealand v Koroniadis* [2013] NZHC 2775 [counterclaim decision].

(e) The High Court incorrectly found that Mr Koroniadis was liable for the full balance owing on the term loan when it had not been accelerated correctly.

(f) The High Court incorrectly found the amount the Bank was awarded under the GSA was higher than the limit contractually defined in the guarantee and indemnity agreement.

(g) The High Court incorrectly found the Bank had provided sufficient evidence to support its claim the Bank statements were being regularly forwarded to MDL and Mr Koroniadis.

(h) The High Court incorrectly determined that substituted service was ordered by the Court and was completed by affixing the documents to the front door of Mr Koroniadis' residence on 28 March 2013.

[17] There is a certain degree of overlap between the grounds of appeal but in a summary of submissions filed for the purposes of the appeal Mr Koroniadis helpfully refined and identified the points at issue before the Court as:

(a) He was denied legal representation.

(b) The consequences of the invalid appointment of the receivers.

(c) The acceleration of the loan.

(d) The demand notice dated 7 January 2013.

(e) Property Law Act notices served out of time.

(f) Breach of contract and mandate.

(g) The relief sought.

## Decision

*Representation*

[18] Mr Koroniadis submitted he was denied legal representation before the High Court, which led to an unfair hearing. He referred to the Supreme Court decision of *Condon v R* to support his submission.[12]

[19] This ground of appeal is misconceived. *Condon* of course concerned the need for representation of an accused in a criminal trial. Even in such a case the Court noted that whether representation was essential for a fair trial is a fact-driven question, determined by looking at the trial as a whole.[13]

[20] We note Mr Koroniadis personally filed a notice of opposition and defence to the summary judgment on 17 May 2013. He had from then until the hearing on 4 July 2013 to arrange representation. Mr Koroniadis may have been eligible for civil legal aid but the obligation was on him to arrange representation, either on a private basis or through legal aid.

[21] Litigants are often unrepresented in civil proceedings. There is no evidence to suggest that Mr Koroniadis was disadvantaged in this case by the fact he was representing himself. Mr Koroniadis has represented himself throughout several sets of proceedings and was able to do so perfectly adequately before this Court.

*The appointment of the receivers*

[22] Mr Koroniadis submitted that the Bank had breached cl 15.2.12 of the GSA by not appointing the receivers under a deed of appointment. He submitted there was no valid deed of appointment before the company was placed into receivership, so that the receivers were trespassers.

[23] The basis for Mr Koroniadis' submission is a conflict between the notice lodged with the Companies Office, which records the receivers as John Fisk and Richard Longman, and the evidence of Mr Willdig (the manager of Strategic

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12 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300.
13 At [79].

Business Services for the Bank) that the receivers were John Fisk and Colin McCloy (as noted on the s 119 notice). The matter was further confused when documents signed on behalf of the receivers were apparently signed by Mr Longman. Mr Toebes, for the Bank, submitted the issue of the appointment of the receivers was irrelevant to Mr Koroniadis' guarantee obligation. Strictly speaking Mr Toebes is correct but the matter could have been readily clarified and Mr Koroniadis' concerns addressed by production of the deed of appointment of receivers.

[24] However, we note that in *Koroniadis v Fisk*, a decision of Associate Judge Smith dated 13 November 2014, the Judge records the position:[14]

> [13] Mr Koroniadis says that Companies Office records show that Mr Fisk and Mr Longman were appointed by the bank as receivers, under a General Security Agreement. Mr Fisk and Mr Longman are both chartered accountants at Price Waterhouse Coopers.
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> [14] The Companies Office website was subsequently amended to show Mr Fisk and Mr McCloy as the receivers. In an affidavit filed in support of the receivers' application for security for costs, Mr Fisk says that Mr Longman's name was listed on the Companies Office website as one of the receivers in error. He says that the website listing appears to have stemmed from an administrative error when the receivership details were initially provided to the Companies Office.
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> [15] Mr Fisk provided a copy of the notice of appointment of receivers which was given to MDL. It is dated 18 September 2012, and it shows Mr Fisk and Mr McCloy as the receivers appointed by the bank. A notice published in The Dominion Post newspaper on 20 September 2012, and in The New Zealand Gazette on 27 September 2012, also showed Mr Fisk and Mr McCloy as the receivers, as did a notice delivered to Mr Koroniadis on 22 September 2012. In earlier proceedings which Mr Koroniadis commenced against Messrs Fisk, Longman, and McCloy, Mr Fisk produced a copy of the formal appointment document dated 18 September 2012, under which the bank appointed himself and Mr McCloy as receivers and managers of MDL.
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> [16] Mr Koroniadis complains that it was not until 4 July 2014 or thereabouts that the Companies Office amended its website, removing Mr Longman's name as a receiver.
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> [17] On the face of it, the appointment of Mr Fisk and Mr McCloy appears to have been properly made, but somehow Mr Longman's name was given to the Companies Office as joint receiver with Mr Fisk instead of Mr McCloy. There is nothing in the evidence to show that Mr Longman has in any way purported to deal with the assets or affairs of MDL as a receiver of the company.

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14 *Koroniadis v Fisk* [2014] NZHC 2823.

[25] The judgment records the evidence in that proceeding confirmed the appointment of Mr Fisk and Mr McCloy as receivers. Further, Mr Toebes as counsel confirmed to this Court that he had drafted the said deed of appointment of Mr Fisk and Mr McCloy as receivers.

[26] To the extent it is at all relevant to this appeal, we accept that Mr Fisk and Mr McCloy were appointed as the receivers of MDL. The incorrect record in the Companies Office does not invalidate their appointment. The receivers are those appointed by the deed in terms of the GSA, not the parties advised to the Companies Office.

[27] We are also satisfied that, as the demand of 24 August was not met, the Bank was entitled to appoint the receivers to MDL. Clause 13 of the GSA, "Events of Default", included:

> 13.1.1 If default is made in the payment of any Secured Amounts;

Secured amounts are defined in the GSA as:

> … all amounts that at any time are due and owing by [MDL] to [the Bank]
> …

[28] In the event of default cl 14 applied, particularly Rights on Enforcement cl 14.1 and 14.1.7:

> 14.1 At any time after an Event of Default occurs you may at your option, exercisable by notice in writing to us (irrespective of any agreement in writing or course of dealing to the contrary, or any concession or delay or previous waiver by you), treat the Secured Amounts as payable immediately and may immediately or at any later time (in addition to the exercise and enforcement of all or any of your other Rights) do all or any of the following things without giving us any or further notice or demand:
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> …
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> 14.1.7 whether in or out of possession appoint any person or persons to be a Receiver of all or any part of the Secured Property; …

[29] By operation of the second part of cl 14.1 the Bank was entitled to appoint receivers to MDL without giving further notice or making further demand.

*The acceleration/demand issue*

[30] Mr Koroniadis next submitted that the Bank failed to comply with the contractual terms of the loan facility master agreement. He submitted the demand was limited to the overdraft facility. He argued that the Bank had not taken proper steps to accelerate the principal of the term loan which was otherwise not payable until 17 January 2018.

[31] Section 119 of the Act is relevant. It reads:

> **119 Notice must be given to current mortgagor of mortgaged land of exercise of powers, etc**
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> (1) No amounts secured by a mortgage over land are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise a power specified in subsection (2), by reason of a default, unless—
>
> (a) a notice complying with section 120 has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor; and
>
> (b) on the expiry of the period specified in the notice, the default has not been remedied.
>
> (2) The powers are—
>
> (a) the mortgagee's power to enter into possession of mortgaged land:
>
> (b) the receiver's power to manage mortgaged land or demand and recover income from mortgaged land:
>
> (c) the mortgagee's or receiver's power to sell mortgaged land.
>
> (3) Subsection (1) is subject to sections 125 and 126.
>
> (4) A notice required by this section may be given in the same document as a notice under section 118.

[32] Mr Koroniadis relies on the following reasoning of Associate Judge Bell in his oral decision granting the stay of the bankruptcy proceedings:[15]

> [14] … The bank did serve notices under s 119 of the Property Law Act. Service of a notice under s 119 is necessary before any acceleration clause can operate. The definition of acceleration clause in s 4 of the Property Law

[15] Stay decision, above n 7.

> Act covers both clauses where acceleration happens automatically and clauses where acceleration is not automatic but gives the occasion for a balance payable under a loan to be called up. The table loan facility in this case seems to be subject to a provision under which the balance payable under the facility is not repayable automatically on default, but only on the bank making demand. The bank does not seem to have included any evidence on its summary judgment application that it had called up the balance after the time for complying with the notice under s 119 had expired.

[33] If the Associate Judge was suggesting, in the final sentence of the above paragraph, that a further notice was required to accelerate the loan after the expiry of the s 119 notice in this case he is, with respect, wrong for the following reasons.

[34] An "acceleration clause" is defined as an express or implied term that provides that, if there is a default, any amounts secured by a mortgage become payable (or may be called up as becoming payable) earlier than would be the case if not for the default.[16]

[35] Even where there is default, s 119 of the Act provides that no amounts secured by a mortgage are payable under an acceleration clause (and no mortgagee or receiver may exercise certain powers under the mortgage), unless a notice complying with s 120 has been served on the mortgagor and the default has not been remedied.

[36] The first issue is whether MDL committed an act of default. Mr Willdig's evidence was that the Bank gave a formal letter of demand on MDL on 24 August 2012. The demand was accompanied by a letter of the same date recording that the overdraft on the company account increased to $32,430.51 which was in excess of the facility limit of $25,000. As a result the term loan interest payment of $8,061.55 due for payment on 17 August 2012 was not met. The term loan fell into default and remained in default. In its demand the Bank demanded repayment of the debit balance of the current account ($24,773.70) together with the interest arrears due under the fixed term loan ($8,067.61), in total $32,841.31.

[37] The demand was not met. However, while the debit balance of the current account was repayable on demand, the principal of the term loan was only payable

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16 Property Law Act 2007, s 4.

earlier than the expiry of its term if it was accelerated. Both the first part of cl 14.1 of the GSA and cl 12.1 of the loan facility master agreement are acceleration clauses. The second issue, then, is whether the Bank effectively called up the amounts secured by the mortgage in terms of the acceleration clauses.

[38] There is no reason in principle why a notice issued under s 119 to comply with s 120 of the Act cannot also satisfy the requirement for a demand to call up the principal under the term loan, provided it has that effect. Section 120(1)(d) confirms that the notice can address various consequences.

[39] The s 119 notice gave notice that MDL was in default under the GSA and the mortgage in that it had failed to pay certain of the secured amounts as defined in the GSA and secured moneys as defined in the mortgage as had been demanded from it by letter dated 24 August 2012 amounting to $32,841.31.

[40] As noted above that sum of $32,841.31 was made up of the amount outstanding under the current account and also the arrears under the fixed rate term loan. The notice went on to specify the action required to remedy the default, namely payment of the full sum of $32,841.31 on or before 9 November 2012. Finally the notice gave advice of the consequences if the default was not remedied and, importantly, recorded one consequence as:

> If each default has not been, or cannot be, remedied on or before 9 November 2012:
>
> 1. all amounts secured by the [GSA] and the Mortgage will become immediately due and payable (to the extent they have not already);
>
> …

[41] Mr Willdig confirmed that the s 119 notice was served on MDL on 5 October 2012.

[42] The notice complied with s 120 of the Act. It was effective to accelerate the payment of the principal under the provisions of both the term loan and GSA. There was a default, and the Bank gave written notice that if the default was not remedied the secured amounts (which included the term loan principal) would be immediately

payable. The demand was not satisfied by MDL. The full principal due under the term loan was thereby accelerated in accordance with the provisions of the loan agreement and the GSA. No further demand was necessary.

[43] From the expiry of the time for compliance by MDL the principal sum under the term loan was payable in full and the Bank was entitled to exercise its rights under the GSA and mortgage in relation to MDL's property and/or to exercise its rights against the guarantors in accordance with the terms of the guarantee, subject only to compliance with ss 121 and 122 of the Act.

[44] There is a related point. We note that s 125(1)(b) of the Act provides that amounts secured under a mortgage debenture (the GSA in this case) may become payable without a s 119 notice whether or not there is a collateral mortgage over the land. However, we need not consider that matter further as it was not addressed in the submissions before us.

*The demand notice dated 7 January 2013*

[45] Mr Koroniadis next submitted that there was no proof the demand of 7 January 2013 on him as guarantor existed or that it was served on him. However, in Mr Willdig's first affidavit he deposed:

> 8. Following an unsuccessful tender campaign for the security property instigated by the Receivers of the Company, demand for payment of the Company's outstanding indebtedness to the Bank was made on each of the defendants under the Guarantee. The demands have not been remedied.

[46] Mr Willdig also gave evidence that formal letters of demand on each of the defendants (including Mr Koroniadis) were made dated 7 January 2013. Copies of the demand were exhibited to his affidavit. In his affidavit in reply Mr Willdig further addressed the matter and confirmed the demand under Mr Koroniadis' guarantee dated 7 January 2013:

> … was posted at that time to [Mr Koroniadis] at 17 Hobart Street, Miramar. … A further copy was sent to [Mr Koroniadis] with my email of 7 May 2013.

[47] In terms of the guarantee document itself Mr Koroniadis' address was given as 17 Hobart Street, Miramar, Wellington. The guarantee document recorded:

> 25.3 Notices, certificates and demands may be handed to you personally or left at, or posted by prepaid mail to, or sent by facsimile or email to, your address, fax number or email address shown in the Main Terms of this Guarantee …
>
> 25.4 If posted, notices, certificates and demands from us are considered to have been received at the time they would have been delivered in the ordinary course of the post and in any event at the end of five business days.

[48] Like the Judge, we are satisfied on the evidence available to the Court the notice of demand on Mr Koroniadis as guarantor was served on him.

[49] In any event, as Mr Toebes submitted, the proceedings themselves constituted a demand.

*Property Law Act notices delivered out of time*

[50] Mr Koroniadis then submitted, again in particular reliance on Associate Judge Bell's observations during the stay application, that the Bank had failed to comply with its obligations under s 121 of the Act. He submitted the Bank had deliberately held back delivering the notices until after the due date in order to prejudice him and his ability to address the default.

[51] In his decision Associate Judge Bell said:[17]

> [15] The other matter concerns the question of service of a notice under s 121 of the Property Law Act. The bank had difficulty serving Mr Koroniadis with a copy of the notice under s 119. The notice was issued on 5 October 2012 and required any defaults to be remedied by 9 November 2012. In fact Mr Koroniadis was not served until 19 November 2012, which was after the date for remedying the default. Associate Judge Gendall accepted the bank's case that it had complied with s 121 because it had served the notice on Mr Koroniadis as soon as possible.
>
> [16] There remains the point whether the service must still be made on a former mortgagor or covenantor or other person required to be served under s 121 before the time for remedying the default has expired. Notices under s 121 serve a different purpose from notices under s 122. The purpose of notices under s 122 of the Property Law Act seems to be to give guarantors

[17] Stay decision, above n 7.

> or former mortgagors the opportunity to exercise the power of redemption under s 97 of the Property Law Act. The purpose of serving a notice under s 119 on a former mortgagor or covenantor or other person under s 121 seems to be to give them an opportunity to remedy the mortgagor's default within the time provided under s 119. I understand from Mr Toebes that the requirements of s 121 may not have been the subject of any earlier considered decisions. The implications of serving a notice under s 121 outside the period for compliance [are] a matter that may be worthy of consideration by the Court of Appeal.

[52] Section 122 requires notice of intention to recover any deficit following a mortgagee sale to be given to a guarantor. In this case both the copy of the s 119 notice and the s 122 notice were served on Mr Koroniadis by service on his lawyer on 19 November 2012.

[53] Section 121 of the Property Law Act provides:

> **121 Copy of notice under section 119 must be served on former mortgagor, covenantor, subsequent mortgagee, and caveator**
>
> (1) A copy of the notice served under section 119 must, as soon as possible, be served (whether by the mortgagee or receiver) on the following persons if either the mortgagee or receiver has actual notice of the name and address of the person:
>
> (a) any former mortgagor:
>
> (b) any covenantor:
>
> (c) any mortgagee under a subsequent mortgage, and any holder of any other subsequent encumbrance, over the mortgaged land if—
>
> (i) the subsequent mortgage or other subsequent encumbrance is registered; or
>
> (ii) the subsequent mortgage or other subsequent encumbrance is unregistered, but either the mortgagee or receiver has actual notice of it; and
>
> (d) any 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.
>
> (2) A failure to comply with this section does not prevent—
>
> (a) any amounts secured by the mortgage from becoming payable; or

(b) the exercise of the mortgagee's power to enter into possession of the mortgaged land; or

(c) the exercise of the receiver's power to manage the mortgaged land or demand and recover income from it; or

(d) the exercise of the mortgagee's or receiver's power to sell the mortgaged land.

(3) However, if there is a failure to comply with this section, the mortgagee is liable in damages for any loss arising from that failure.

[54] Mr Koroniadis submitted that it was not fair to say that "as soon as possible" could mean anything other than that the notices would be served before the expiry date. Otherwise there would be no point in providing a date of remedy.

[55] Gendall J was prepared to accept that the notice was served as soon as possible after service on MDL given the circumstances prevailing in this case. The Judge considered that the reason for the delay in service was simply because the Bank had experienced difficulty in serving Mr Koroniadis and despite numerous unsuccessful attempts the earliest occasion on which service could be effected was when it was effected on Mr Koroniadis' solicitor on his behalf. The Judge took into account the plaintiff's process server's evidence of several attempts made to serve Mr Koroniadis.

[56] It is apparent that the Bank experienced difficulties in trying to personally serve Mr Koroniadis. Mr Willdig attached a report from a process server outlining difficulties encountered in attempting to serve the notice on Mr Koroniadis. However, ss 359 and 360 of the Act provide for service by delivery by registered post or by personal service. The Bank could have served the notice by registered post, shortly after service on MDL. It is not clear why it did not do so. While it is no doubt desirable to serve a guarantor personally, personal service was not required in this case. In the circumstances we therefore accept it could be said the s 119 notice was not served "as soon as possible".

[57] However, nothing turns on that as we agree with the Judge that in any event the delay in service of the notice on Mr Koroniadis as guarantor could not, in the circumstances, have caused him any prejudice. The purpose of service of the notice

was to enable Mr Koroniadis as guarantor to take steps to remedy the default and/or to avoid the consequences of the property being sold by introducing his own buyer to the property or by buying out or refinancing the mortgage. None of those options was, on the evidence, available to Mr Koroniadis. Further he had more than sufficient time after service of the notices on him on 19 November to take steps to address the demand before the property was sold. The property was not sold until after the application for summary judgment had been determined in July 2013.

[58] Next, as Mr Toebes submitted, even if there was a failure to comply with s 121 of the Act that could not prevent the amounts secured by the mortgage from becoming payable nor affect the right of the mortgagee to exercise its power of sale over the mortgaged land. At most the failure to comply with the section renders the mortgagee liable in damages for any loss arising from that failure. There is no evidence of any such damages.

[59] The provisions of s 121 can be contrasted with s 122, which confirms that failure to comply with s 122 leads to the covenantor being prejudiced then the covenantor is to the extent of the prejudice released from liability to the mortgagee for the deficiency.[18] Section 122 requires service of the notice at least 20 working days before the mortgagee sale. That requirement was complied with in this case.

*Breach of contract and mandate*

[60] Mr Koroniadis next submitted the Bank had breached its contract and mandate by failing to provide bank statements. He submitted the bank had breached its responsibility under cl 12.2 of the terms of letter of advice — business and farming overdraft by refusing to take reasonable care to provide bank statements as required. He also referred to cl 11.1.7.3 of the loan facility master agreement, which he said supported the obligation to provide bank statements.

[61] Clause 12.2 of the business and farming overdraft advice provided that bank statements would be sent at least monthly. However, cl 11.1.7.3 of the loan facility

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[18] Subsection (5).

master agreement does not advance the issue from Mr Koroniadis' point of view as that relates to an obligation of the borrower, not the Bank.

[62] Mr Koroniadis submitted there was no evidence to support the Bank's claim that, contrary to his assertion, he was receiving bank statements.

[63] Mr Willdig's evidence was that, according to the bank records, all bank statements had been provided as and when the company was entitled to receive them and additional duplicate statements had been provided from time to time at the request of the directors. Since the appointment of the receivers on 18 September 2012 bank statements had been forwarded to the receivers.

[64] Mr Toebes submitted that Mr Koroniadis had made numerous unsuccessful complaints about the Bank to the Banking Ombudsman on this issue and submitted that in any event, whether the Bank had failed to comply with its obligations was irrelevant to the issue of Mr Koroniadis' obligation as a guarantor. At most the issue of whether the Bank complied or not with its obligations to provide bank statements to the principal debtor is a matter for the principal debtor, MDL, not Mr Koroniadis as guarantor.

[65] We agree. The guarantee agreement excluded any defence to the demand that could possibly have arisen from this point. At para 15 the guarantee provides that Mr Koroniadis' obligation was:

> You must pay us without any set-off or counterclaim and without any deduction or withholding.

[66] At best any claim Mr Koroniadis has against the Bank on this point is a set-off or counterclaim, which he is precluded from raising as a defence to the claim under the guarantee.

*Damages*

[67] Mr Koroniadis submitted that he was entitled to claim the following heads of damage against the Bank:

(a) trespass;

(b) reinstatement of the property; and

(c) general damages.

[68] To the extent the trespass and reinstatement of property (to MDL not Mr Koroniadis) claim relies on the invalid appointment of the receivers it cannot succeed for the reasons given above. To the extent the damages claim relies on a breach of ss 119, 121 and 122 of the Act, these issues have already been the subject of a counterclaim by Mr Koroniadis which was dismissed by Associate Judge Bell.[19]

*Quantum*

[69] Mr Koroniadis also submitted the guarantee was limited and the judgment exceeded the permitted limit. The limit was stated to be $1.1 million plus any amounts determined under cl 5. Clause 5 provided for an amount equal to one year's interest and costs. The amount for which judgment was entered was, in total, (including interest) $1,179,298.25. One year's interest on the $1,070,795 being the principal owing on the term loan alone would have been $144,557. The total claimed and for which judgment was entered is within the terms of the guarantee.

**The further evidence**

[70] In a decision dated 12 June 2015, this Court granted leave to the Bank to adduce further evidence detailing payments received by the Bank in reduction of MDL's debt since the appeal was filed, and also deposing to the service of an updated demand for payment.[20] The Bank now seeks to recover a smaller sum to take account of the proceeds of realisation. Despite that, the judgment entered by Gendall J should stand. It was properly entered. The Bank of course can only execute it to the extent of the balance still due.

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19 Counterclaim decision, above n 11.

20 Amended grounds of appeal decision, above n 2, at [24].

[71] For the above reasons we are satisfied that none of the grounds of appeal is sustainable. The appeal is dismissed.

**Costs**

[72] The appellant is to pay the respondent's costs for a standard appeal on a Band A basis.

Solicitors:
JTLaw, Wellington for Respondent