IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-006913

UNDER	Part 12 of the High Court Rules
IN THE MATTER OF	an application for summary judgment
BETWEEN	ASB BANK LIMITED Plaintiff
AND	CRAIG ALEXANDER URQUHART First Defendant
AND	DAVID JOHN MILLER Second Defendant

Hearing: 18 May 2011

Appearances: E C Gellert and L M Lim for the Plaintiff
P R Cogswell for the Defendants

Judgment: 20 May 2011

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
20.05.11 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
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P Cogswell, Cogswell + Jaduram Lawyers, Auckland – paul@cogswelljaduram.co.nz

Background

[1] The defendants are trustees of the Thelma Trust (the Trust). As such they borrowed $1,350,000 from ASB on 6 October 2005.

[2] On 1 March 2007 the defendants borrowed a further $200,000 from ASB.

[3] On 15 September 2009, ASB granted a $50,000 overdraft facility to the defendants.

[4] These borrowings were all secured by:

(a) A mortgage over the property at 84 Vintage Lane, Te Whau Peninsula, Waiheke Island (the property); and

(b) The defendants' guarantees.

[5] The defendants defaulted on their loan obligations. On 3 December 2009 ASB served demand for payment of $77,235.92 being the balance owed on the overdraft facility granted about ten weeks earlier.

[6] On 23 December 2009 and on 14 December 2009, ASB served Property Law Act notices on the first and second defendants respectively. Those notices expired unremedied.

[7] Subsequently ASB exercised its rights as mortgagee and sold the property for the sum of $1.15M. After the sale proceeds were applied to the defendants' indebtedness a shortfall remained for which, on 18 August 2010, ASB sent written demand for payment of the sum of $588,958.99.

[8] The ASB applies for summary judgment for payment of the shortfall sum together with interest that continues to accumulate on that sum.

Opposition to summary judgment application

[9] As filed, it asserts ASB as mortgagee breached the duty imposed on it by s 176 of the Property Law Act 2007 (s 176) to obtain the best price reasonably obtainable, by:

(a) Selling the property for $1.15M when the reasonable forced sale valuation price was between $1.553M and $1.793M (inclusive of GST).

(b) Refusing to exercise the intervening events clause contained in the mortgagee sale agreement in the period between the formation of the mortgagee sale agreement and the settlement of that agreement in circumstances where:

(i) The defendants advised ASB it was negotiating a sale of the property with a new purchaser at a price exceeding $1.15M; and

(ii) The defendants presented ASB with an unconditional refinancing officer from a new financier offering to advance $1.15M to the defendants.

[10] By their opposition the defendants invite the Court to reopen the relevant loan and overdraft agreements under section 120 of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) on the grounds that ASB has exercised its rights or powers conferred under those agreements in an oppressive manner.

Mortgagee's duty when exercising a power of sale

[11] Section 176 provides that a mortgagee exercising a power of sale, owes a duty of reasonable care to a mortgagor to obtain the best price reasonably obtainable as at the time of sale.

Intervening events clause

[12] In the form of agreement drawn for the purposes of mortgagee sale an intervening events clause was contained. It provided:

> 16. INTERVENING EVENTS
>
> 16.1 If it is necessary for the vendor to obtain any consent or consents to the sale; or
>
> 16.2 should at any time before completion of the purchase there be any charging order or caveat notice of interest under the Property (Relationships) Act 1976 registered against the title to the property sold, or if an injunction proceeding is issued or any court order granted preventing registration of the memorandum of transfer in pursuance of this sale; or
>
> 16.3 for any reason whatsoever (not being limited in any way by reference to the foregoing);
>
> the vendor may, notwithstanding any attempt to obtain such consent or consents or remove such caveat or charging order or notice of interest under the Property (Relationships) Act 1976 or any negotiation or litigation in respect thereof, by notice in writing to the purchaser or its solicitor rescind the contract evidenced hereby and on doing so this agreement shall be void and the deposit and any other money paid by the purchaser shall be refunded to the purchaser in full (without interest or costs) and such money shall be accepted by the purchaser in full satisfaction of all claims hereunder or otherwise howsoever and neither party shall have any right or claim against the other.

The mortgagee sale agreement

[13] This was negotiated with the purchasers the day after the property was passed in at auction. It did not contain the clause 16 intervening events clause. Instead it contained a clause providing the mortgagee with a right of cancellation in the event title to the property could not be provided. It provided:

> 7. FAILURE TO PASS TITLE
>
> If:
>
> 7.1 any proper objection or requisition be insisted on which the vendor is unable or unwilling to satisfy or comply with; or
>
> 7.2 it is necessary for the vendor to obtain any consent or consents to the sale; or

> 7.3 at any time before completion of the purchase any charging order, lien, caveat, notice of claim of interest under the Property (Relationships) Act 1976 or statutory charge is registered against the title to the property sold, or if an injunction proceeding is issued or any court order granted preventing registration of a memorandum of transfer in pursuance of this sale; or
>
> 7.4 for any other reason whatsoever (not being limited in any way by reference to the foregoing);
>
> and the vendor is unable to pass title the vendor may, notwithstanding any attempt to remove or satisfy such objection or requisition or to obtain such consent or consents or remove such charging order or lien or caveat or notice of statutory charge or any negotiation or litigation in respect thereof, by notice in writing to the purchaser or purchaser's solicitors, cancel the contract evidenced hereby on repaying to the purchaser the deposit (without interest or costs) which shall be accepted in full satisfaction of all claims hereunder or otherwise howsoever and neither party shall have any right or claim against the other.

[14] Whilst both clauses preserve a right with the vendor to cancel a contract the failure to pass title clause makes it clear that a vendor may do this only if title is unable to be passed to the purchaser. By contrast it is arguable that the intervening events clause may permit cancellation for any reason at all [16.3].

[15] The defendants' notice of opposition to summary judgment was filed at a time when they did not have a copy of the agreement for sale and hence were not aware of the failure to pass title clause. The defendants assumed a sale agreement was completed in terms of the draft prepared for the mortgagee auction which contained an intervening events clause. The defendants' opposition case was filed upon the basis that because of the intervening events clause the mortgagee's sale agreement with the purchaser was only ever a conditional agreement until that time the sale was settled (i.e. on 9 July 2010).

[16] The claim of an arguable defence based upon a breach of a mortgagee's duty relied upon the defendants' belief that the intervening events clause applied and permitted the cancellation of the purchaser's contract for any reason at all prior to the settlement date.

[17] Plainly, the substituted Failure to Pass Title clause at best permits cancellation only if title is unable on settlement to be passed to the purchaser. In short, it provides no ability in the mortgagee to cancel the contract "for any reason whatsoever'.

[18] Hence, the thrust of the defendants' opposition has, upon presentation, changed. Instead of arguing that the mortgagee had the ability to cancel the contract prior to settlement and was under a duty to do so when a refinancing offer was made and when a sale at a higher price was being negotiated, (post agreement but prior to settlement), the defendants now submit that a breach has occurred because the mortgagee has failed to preserve to itself a right of cancellation in the event a refinancing offer or a higher price sale is negotiated prior to settlement of any sale.

[19] I will discuss this change in the defendants' breach of duty submission later in this judgment.

Evidence in opposition

[20] Mr P J Leary deposed he attended the mortgagee auction on 28 April 2010. He described the bidding process. He said when bidding reached $1,045,000 the auctioneer adjourned and sought further instructions from other persons present. He said eventually the top bid received was $1.1M. He said the auction then concluded without any announcement being made that the property had been sold.

[21] Mr Leary reports that during the auction he recalled the auctioneer encouraging bids from the floor saying;

> The property was going dirt cheap.

[22] Mr R D Lawton is a registered valuer and has been since 1975. He is very familiar with Waiheke Island properties. His work has encompassed all areas ranging from lower cost residential homes/baches to the superior residences "that are much in evidence today". Within his profession he considers his knowledge of, involvement with or background to Waiheke property is as good as any and much better than most.

[23] In April 2010 he was instructed to conduct a current market valuation of the property. Previously he had conducted a number of valuations of this property. He concluded the current market value was $2.39M inclusive of GST.

[24] After the property was sold by mortgagee sale he was asked by the defendants to opine on the appropriate discount to apply when the subject property has been sold by a mortgagee. He said such a presentation to the market usually results in the property selling at a figure well below its normal unfettered open market value. He said:

> This is a result of:
>
> - Public knowledge of vendor circumstance;
> - The method of sale at public auction or tender;
> - Sometimes difficulty with presenting the property to prospective purchasers;
> - Often a presentation of the property at less than its best;
> - Perceived problems with occupier removal;
> - The need for a cash sale on the day.

[25] He said it is common experience to see properties selling at around 20 to 30 per cent below the normal expected value. He noted with the current market that appeared to be in place, a forced sale may result in a figure at a higher discount. In his judgment a forced sale price range would have been $1.553M to $1.793M including GST.

[26] Mr Lawton said that recently he has become aware of the sale of the property at 88 Vintage Lane, next door to that sold by ASB. He noted that it was a smaller property and had a frontage to the same beach as the property. He said it was separated from an adjacent coastal reserve by a narrow strip owned by their neighbour. He mentioned the land had a water bore but was otherwise undeveloped.

[27] He noted the property at 88 Vintage Lane was once part of the land now sold by ASB. He is aware that 88 Vintage Lane was sold on 13 September 2010 for

$2.58M. He concludes that based on this comparable sale he believes his assessment of forced sale value of the property is correct.

[28] The first defendant, (Mr Urquhart) has sworn an affidavit in which he notes the property comprised two lots. Following a boundary realignment, the defendant sold the smaller lot of 1 hectare to D and M Robertson for $1.75M in November 2005 – the same lot which in September 2010 sold for $2.58M.

[29] The Trust retained the larger block of 3.23 hectares.

[30] When in 2008 the defendants became committed to repay principal as well as interest upon their ASB loans they in January 2009 decided to sell the property and engaged the services of Bayleys. Mr Urquhart recounts receiving an offer of $3.4M plus GST on 24 January 2009 which was conditional upon the Trust purchasing a property owned by the offeror. Eventually that offeror was unable to declare the contract unconditional and it came to an end.

[31] In July 2009 a further conditional agreement was entered into at a price of $2.54M plus GST. Again that purchaser was unable to declare the agreement unconditional and it came to an end in September 2009. At that time and in the face of the Trust's defaults under its loan obligations it was agreed with ASB that the Trust would conduct a tender process for the sale of the property. ASB agreed to provide the further overdraft facility to enable the marketing to take place. Bayleys was asked to run a tender process. The property was marketed internationally with tenders being scheduled to close on 4 November 2009. There were no offers in the outcome but discussions were continued with four interested parties. By December 2009 it appeared none of those parties was in a position to make an offer. Further marketing was carried out in local Waiheke Island publications, Bayleys' website, Trade me and the New Zealand Herald. The property was marketed at a price of $2.4M. ASB was kept up to date with the marketing campaign on a monthly basis.

[32] After ASB issued its Property Law Act notice in December 2009 Mr Urquhart met with Mr Kirschberg of ASB who agreed to allow the trust until 25

February 2010 to sell the property. The defendants were advised that after that date the property would be sold by a mortgagee sale.

[33] On 1 March 2010 ASB advised the Trust it would be instructing Kellands Real Estate to take the property to mortgagee sale.

[34] Mr Urquhart said Kellands marketed the property for four weeks. He was not aware of any marketing advertising other than insertions in the New Zealand Herald.

[35] On 20 April 2010 he obtained Mr Lawton's valuation report.

[36] Following the auction and receipt of a report from Mr Leary about what happened at the auction; Mr Urquhart had the Trust's lawyers write to ASB's lawyers expressing concern at the way the auction was conducted. He said those concerns were not addressed by ASB. He then had the lawyers write again to ASB's lawyers seeking a copy of the valuation ASB relied upon. He said such was not provided.

[37] Then he says, he was advised by the Trust's lawyers that the mortgagee sale agreement entered into by ASB contained an Intervening Events clause. Mr Urquhart claims this clause meant that he "still had the opportunity to attempt to either refinance or introduce a purchaser at a price better than that achieved (of $1.15M including GST) prior to settlement date (i.e. by 9 July 2010).

[38] Mr Urquhart then immediately contacted Bayleys again and asked them to revisit the database of interested parties in an attempt to achieve a sale at a better price than achieved at auction. In that outcome three parties visited the property with Mr Urquhart and the Bayleys' agent. One of those was a Mr S Casper who through a company called Olo Limited put in an initial offer of $1.1M plus GST. Mr Urquhart said he continued to negotiate with Mr Casper "over the next while until he raised his offer to $1.35M plus GST". Mr Urquhart notes the offer was conditional but the trust would have been able to meet those conditions. Importantly it was not conditional on finance.

[39] Mr Urquhart states that at the same time he was attempting to arrange a refinance of ASB's debt. He says on 11 June 2010 he was given an unconditional offer of finance of $1.2M. He had the Trust's lawyers write to ASB's lawyers referring to the intervening events clause and asking them to consider exercising that right as the trust was negotiating an offer with Mr Casper and also had a refinancing offer confirmed.

[40] He said ASB's lawyer's response was quick and unequivocal; that ASB would not rescind the contract formed after the auction.

[41] In summary it is Mr Urquhart's position that before the date of settlement of the mortgagee sale:

(a) The trust had an offer from Mr Casper of $1.35M plus GST.

(b) The trust had an unconditional refinancing offer of $1.15M.

(c) The plaintiff had not accepted the highest bid made at the auction of $1.1M but had then accepted and then settled an offer in the sum less than the refinancing offer obtained.

Summary of defendants' position of their claim of mortgagee breach

[42] It is that the Court cannot be satisfied that there is no defence to the summary judgment application. Also, they say there are disputed evidential matters and issues that require determination by trial and therefore summary judgment is inappropriate.

[43] The defendants assert there has been a breach of s 176 by ASB's refusal to exercise its rights to cancel the mortgagee sale prior to settlement date because it failed or refused to consider an alternative, but higher offer for the purchase of the property and/or failed to consider the refinance offer which exceeded the amount of the highest offer achieved at the auction. Alternatively it was in breach because it did not, by the sale agreement, preserve to itself the ability to cancel the agreement when a refinancing offer or a higher priced offer was made.

[44] Mr Cogswell submits that had the mortgagee sale agreement contained a clause that enabled ASB to rescind the contract for any reason at all (and if the agreement did not have such then it should have) then, ASB had an absolute right, subject only to the requirement to repay money received from the purchaser, to rescind the mortgagee sale agreement. In that event such a clause should have been invoked or at the very least, settlement delayed, to consider the proposals put forward, the defendants say, just prior to settlement. Mr Urquhart asserts that prior to settlement he provided advice of that refinancing offer of $1.15M, and was engaged in negotiations with a purchaser who was willing to pay more than the price achieved at auction.

[45] Mr Cogswell submits that arguably ASB breached its duty both under s 176 and also under section 120 of the CCCFA by refusing to even entertain the possibility that the defendants could bring offers (refinancing or an alternative purchaser) to it that would reduce its losses and hence, the shortfall of the defendants.

[46] Mr Cogswell submits ASB would have been better off by:

(a) $127,778 if it had accepted the refinance offer; or

(b) $327,778 if it had accepted the offer from Mr Casper's company.

[47] He submits even the failure to consider those alternatives is arguably a breach of duty similar to that held to be a breach in *Nathan Securities Limited v Stavefield Holdings No. 29 Limited* [1]. Mr Cogswell also refers the Court to the decision of O'Regan J in *Agio Trustees Company Limited & Anor v Harts Contributory Mortgages Nominee Company Limited & Anor* [2]. In that case it was held a mortgagee's failure to consider or even explore an alternative, but higher, offer was a breach of the duty of (now) s 176.

[48] Mr Cogswell submits that *Agio* held that the duty under (now) s 176 remained throughout the period that the mortgagee had the right to rescind a

[1] CA 6/93 1 July 1993.
[2] High Court, Auckland, CP 404/381 – SDOO, 11 October 2001.

mortgagee sale agreement (i.e. until date of settlement); and because the mortgagee failed to follow up an alternative purchaser in an attempt to negotiate a more favourable transaction.

[49] Mr Cogswell submits the plaintiff erroneously contends that an intervening events type clause can only be invoked if the defendants made an offer to redeem in full, and because they contend the clause is only for the mortgagee's benefit and it was under no obligation to exercise it. Mr Cogswell submits that *Agio* makes it clear that the existence of a right to rescind a mortgagee sale agreement preserves the imposition of a duty under s 176. He contends it is arguable that the duty is not to rescind the contract but rather to obtain the best price reasonably obtainable. He submits in this case ASB would not even entertain the possibility it could exercise a right to rescind, and refused to make even the most cursory enquiry about the situation, notwithstanding the clear advice from the defendants that there were better options.

Complaint concerning auction process

[50] The second arm of the defendants' opposition concerns the conduct of the auction. The defendants say it was flawed. Their criticisms are that there was:

(a) An inadequate marketing period and campaign;

(b) A failure to follow up with Bayleys' contacts;

(c) The conduct of the auction itself.

[51] Mr Cogswell submits there is a significant disparity between the sale price and Mr Lawton's estimate of a forced sale price that cannot adequately be excused or explained. Also he says:

(a) There was a clear difference in the view of the parties' respective valuers forced sale calculations.

(b) Although an auction may represent the true value "on the day" that should not prevent a Court from examining all aspects of the auction process.

(c) The price finally negotiated was less than that offered at auction. The highest auction bid of $1.1M plus GST was less, he says, than the final price of $1.15M inclusive of GST.

[52] Mr Cogswell contends the subsequent sale of the adjacent block must raise questions about the mortgagee sale process. He said a four week marketing program was arguably too short given the relatively specialised nature of the property – island location, vineyard operation. He compares that to the period of 14 months during which the property was marketed by Bayleys for Mr Urquhart. He says there is an arguable need for a lengthier period where a specialised property is being sold. Although there is no evidence to support, Mr Cogswell submits it may have been more appropriate to have marketed the property in Spring rather than, as it was, in Autumn.

[53] Mr Cogswell submits the breadth of the marketing campaign is questionable. He states there were "only adverts in the Herald were undertaken, plus some adverts in a local Waiheke paper of some sort". Mr Cogswell submits overseas adverts would have been appropriate. He says Kellands should have approached Bayleys for contacts regarding the sale process. He notes that when Mr Urquhart did contact Bayleys, two written conditional offers had been obtained and interest was being received at the rate of about one party per week. Mr Cogswell submits that Kellands should "have followed up with Bayleys to check their state of interest in the property or any leads, but the evidence is that this was not done".

[54] Finally Mr Cogswell submits there is an air of unreality regarding the attempts of Mr Sumich the auctioneer to deny and/or interpret what Mr Leary claims was said at the auction. If Mr Leary is correct in what he claims he heard then, Mr Cogswell submits, arguably that would have had an adverse affect on the sale process. It could even have been a breach of a mortgagee's duty of care.

Complaint of commercial oppression

[55] The actions of ASB in refusing to invoke an intervening events type clause, and by the manner in which the mortgagee sale was conducted, both provide cause for an oppression argument under the CCCFA. Mr Cogswell submits the approach of the High Court when assessing whether there has been a breach of reasonable standards of commercial practice, is to consider "the whole of the relevant circumstances". Such an assessment should not, Mr Cogswell submits, be made in a summary judgment context. By Mr Cogswell's assessment the same type of conduct highlighted for assessment in this case was disapproved of in *Agio* and *Nathans Securities* where it was held to be a breach of a mortgagee's duty and, arguably, to be a breach of reasonable standards of commercial practice.

[56] In this case, conduct which affected ASB's recovery, also affected the defendants' position. Therefore the focus must be on all parts of the transaction, including the refusal to invoke an intervening events type clause. Overall, in this case Mr Cogswell submits it is arguable ASB has not shown the defendants have no defence – that the plaintiff has not shown that their case is 'unanswerable'.

Considerations

[57] Summary judgment applications are about satisfying the Court of an absence of an arguable defence. They are not about proving an applicant's case is unanswerable.

[58] ASB's loan documents are not challenged. The defendants acknowledge a contractual liability to repay. The defence is based around claims of a breach of duties under s 176 and an alleged failure by ASB to cancel the sale agreement or to delay settlement of it.

[59] I have reviewed the defendants' evidence in opposition. I have not yet in this judgment reviewed ASB's evidence. I will do this only in respect of matters where the parties are apparently in conflict. Of course a summary judgment application is not an appropriate forum to resolve critical issues of evidence. Rather those issues

should be left for trial. However, a Court should not shy from making determinations where factual claims are plainly or are probably wrong. Claims of an arguable defence usually rely upon more than supposition or proposition.

[60] The defendants focus has mainly been upon the intervening events clause, or now as matters have developed, upon the absence of such a clause.

[61] Issues affecting the intervening events clause concern whether ASB had an obligation at all to the defendants concerning it. If it did then consideration needs to be given to the substance of claims that prior to settlement of the mortgagee sale negotiations were being carried out with a party prepared to purchase at a greater value than achieved by mortgagee sale.

[62] In the same context an analysis needs be made of the defendants' claim to have arranged refinancing in an amount greater than the mortgagee sale achieved.

[63] A review of the auction process will focus upon what was done to obtain the best price reasonably obtainable in the circumstances. Mr Cogswell's submissions have focussed upon claims that the property was of special significance and should perhaps have been auctioned in the spring and not in autumn. Of course there is no evidence to support those propositions and so this Court's focus will be to critically examine the marketing process undertaken and the sale process that occurred. I will deal with the auction process objections first.

Pre-auction events

[64] Property Law Act notices were served after the further two months allowed to the defendants to market and sell the property themselves. Before then the defendants have been marketing the property for sale for approximately 12 months.

[65] On 31 March 2010 ASB obtained a valuation from Mr J B Mitchell a registered valuer since 1967 who was familiar with Waiheke Island properties having valued over 2500 of these since the late 1970s. He had owned property on Waiheke

Island for 24 years. Mr Mitchell deposed that he disagreed with Mr Lawton's valuation figure because:

(a) The temporary buildings on the property and the rundown vineyard upon it added no value to it.

(b) No additional value should be attributed to the property's water supply because water was supplied from an external source.

(c) Too much value was placed on account of the property's proximity to the water for the property was not a water frontage block but merely enjoyed a right-of-way to the beach.

[66] Mr Mitchell reported that the market value of the property was $1.4M (inclusive of GST) and that a forced sale value of the property was between $1M and $1.1M (inclusive of GST).

[67] ASB's agents, Kellands undertook a five week marketing campaign (not four weeks as the defendants allege) which included:

(a) Advertising over five weeks in the New Zealand Herald.

(b) Advertising over four weeks in the *Waiheke Marketplace*.

(c) Advertising the property for a five week period on three different websites being www.kellands.co.nz, www.realestate.co.nz, and www.trademe.co.nz.

(d) Placing signage outside the property.

(e) Sending emails to each of 250 clients from a database of two of Kellands agents with extensive knowledge of the Waiheke Island property market and experience at conducting marketing campaigns for properties in the area.

(f) Distributing information sheets to all individuals who made enquiries, and taking prospective purchasers to view the properties.

[68] During the course of marketing Kellands informed ASB that a number of interested parties were concerned with the fact the sale price was exclusive of GST. Thereupon ASB agreed to amend the terms and conditions so that the sale price was inclusive of GST.

[69] On 27 April 2010 (the day before the auction), Kellands received correspondence from solicitors acting for the Robertson's, the owners of the neighbouring property at 88 Vintage Lane which had previously been purchased from the defendants. The correspondence advised that the Robertsons purported to terminate access to the property's water supply which was drawn from a bore located on the Robertson's property. It also recorded that the defendants were obliged to relocate the property's existing electricity and telephone services (also located on the Robertson's property) and had neglected to do so. It said the Robertsons were entitled to take steps to terminate the delivery of these utilities to the property.

[70] In the course of the five week campaign Kellands said they had sparse feedback from purchasers. Those who did provide feedback indicated an interest in purchasing at around the $1M mark. The auction was held on 28 April with a reserve set at $1.4M. The property was passed in because bidding did not reach the reserve. The highest bid was $1.1M inclusive of GST, not exclusive of GST as the defendants erroneously deposed in support of their argument that the property was sold the next day for a lesser sum than had been bid at auction.

[71] On 29 April ASB continued negotiating with the highest bidder (the Robertsons) and on that day entered into an unconditional mortgagee sale agreement. The sale price under the mortgagee sale agreement was $1.15M (inclusive of GST).

Post-auction events

[72] On 1 July 2010 (five working days before the unconditional sale was due to settle) the defendants' solicitors wrote to ASB's solicitors advising:

> As I mentioned yesterday the Thelma Trust (Trust) has told us:
>
> 1. It is able [to] refinance at $1.150m and pay to the bank the sum of $1.150m; and
>
> 2. It will continue negotiating with a prospective purchaser it has with the view to securing a higher purchase price which will in turn reduce the shortfall to the bank.

[73] No more information was by the letter provided at that time.

[74] Earlier on 19 April 2010 ASB's Mr Kirschberg emailed Mr Urquhart and advised him the bank would consider allowing a discharge of its mortgage if the defendants were able to obtain refinancing for the sum of "no less than" $1.5M. This he explained was because the Trust's total indebtedness to ASB at that time was $1.507M.

[75] Based upon the level of information given to ASB by the Trust's solicitor's letter dated 1 July 2010, ASB refused to exercise its right to cancel the mortgagee sale agreement.

[76] On 9 July 2010 the mortgagee sale agreement settled and ASB applied the net sale proceeds to the defendants' indebtedness to ASB.

[77] Mr Urquhart deposed that the offer from Mr Casper's company to purchase the property for $1.35M plus GST was put to the defendants on or about 28 June 2010. ASB say this offer was not brought to their attention before the mortgagee sale settlement date. Indeed the defendants' solicitor's letter of 1 July 2010 referred only to continuing negotiations with a prospective purchaser with a view to securing a higher purchase price.

[78] The first defendant deposed to having received a refinancing offer of $1.2M. His solicitor's letter of 1 July 2010 reports that the defendants "were able" to obtain a refinance for the sum of $1.15M. A copy of the refinancing offer has been provided in evidence. It is dated 11 June 2010. This Court observes:

(a) It was for a sum lower than the amount that Mr Kirschberg had previously indicated ASB was prepared to accept for full repayment of its debt.

(b) Although it is asserted by the defendants the refinancing offer was unconditional, it appeared to be conditional upon a number of events including a declaration from the defendants stating the property was not part of a GST registered activity. Also the offer stated it would automatically be withdrawn if it was not accepted within five working days (i.e. by 18 June 2010).

Principles

[79] If the Court is to grant summary judgment it should not be left with any real doubt or uncertainty about an applicant's claim. The applicant must show there is no defence and in a case where such a defence is not apparent from the papers which bind the defendants, the defendants will have to respond with evidence showing the basis of an arguable defence.

[80] As earlier noted the Court does not normally resolve material conflicts of evidence or assess credibility or deponents. But also as earlier noted the Court may reject evidence which lacks credibility or which is improbable.

[81] The strong point of the defendants' case is their claim of a failure by ASB to invoke an intervening events type clause. That they say amounted to a breach of s 176. Likewise it is claimed such a breach occurred by the marketing and auction process undertaken.

[82] A useful summary of the general principles applicable to a mortgagee's statutory duty of care can be found in *Public Trust v Ottow* [3]:

> (a) A mortgagee has no duty at any time to exercise the powers of sale or possession. In default of any provision to the contrary in the mortgage, the power of sale is for the benefit of the mortgagee, who can sell at any time in accordance with the mortgagee's convenience:

[3] 10 NZCPR 879 at para [17] (per Asher J).

Raja (Administratrix of the Estate of Raja (Dcd) v Austin Gray (A firm) [2002] EWCA Civ 1965 at [55], per Peter Gibson LJ; *Silven Properties v Royal Bank of Scotland* [2004] 1 WLR 1997 at [14].

(b) The mortgagee's duty of care is to take reasonable care to obtain the best price reasonably obtainable at the time of sale: Agio Trustee Co. Ltd v Harts Contributory Mortgages Nominee Co. Ltd (2001) 4 NZ ConvC 193, 480 (HC).

(c) It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 at 1355B; *Silven Properties v Royal Bank of Scotland* at [14].

(d) A mortgagee is under no obligation to improve the property or increase its value: *Silven Properties v Royal Bank of Scotland* at [16].

(e) A mortgagee sale for a price less then the current market value assessed by valuers does not, of itself, establish a breach of duty, although a large discrepancy may indicate a failure to take reasonable care: *Moritzson Properties Ltd v McLachlan* (2001) 9 NZCLC 262, 448 at [61].

(f) A mortgagee does not have any general duty to maintain properties prior to sale: Silven Properties v Royal bank of Scotland at [16].

(g) Following the service of property Law Act Notice there is no duty on a mortgagee to keep a guarantor informed of sales activities: *G Merel & Co. Ltd v Barclays Bank* (1963) 1 SJ 542.

(h) The mortgagee is not entitled to sell in a hasty way at a knock-down price sufficient to pay the debt, which because of the speed of sale leads to a lower price than could otherwise be obtained: see *Palk v Mortgage Services Funding Plc* [1993] 1 Ch 330 at 337-8.

(i) Proper care must be taken to expose the property to the market and to obtain the best price reasonably obtainable: *Harts Contributory Mortgages Nominee Co. Ltd v Bryers* HC AK CP403-IM00 19 December 2001 at [43](d) and (f).

[83] Later the Learned Judge set out the recommended steps that would indicate that a mortgagee had made reasonable efforts to obtain the best reasonably obtainable price. These were:

(a) The appointment of a reputable real estate agent to market the property.

(b) Obtaining a valuation report from an experienced valuer as a guide to what could reasonably be expected for the property.

(c) Marketing over a reasonably long period of time.

(d) An extensive advertising and promotional campaign.

(e) A properly conducted auction.

(f) A sale price that, given all circumstances, can be reconciled with expert opinion as to value.

[84] This case raises complaints of process in a manner the Court has dealt with on numerous occasions. Usually there are complaints of inadequate process and concerning the discrepancy between valuation and sale prices.

Conclusions about complaints of the auction process

[85] I think, as Ms Gellert submits, that the ultimate test about whether or not a mortgagee property was sold for the best price reasonably available, is determined by the auction process. In that outcome valuations may lose most of their significance provided the auction was properly advertised and the marketing process beforehand was competently managed. In this case there is no real evidence the contrary occurred. Also I do not accept Mr Cogswell's submissions to the contrary, unsupported by evidence, that the property was a speciality property and sale of it should have been deferred (until the Spring).

[86] I consider that in all respects ASB's mortgagee duties were met by the pre-auction marketing program conducted by Kellands. Submissions of an inadequate period of marketing and the like are wrong. There was no obligation to delay the auction to Spring or to any other time. It appears the property was in any event somewhat rundown. Mr Mitchell's valuation provided a proper basis to reflect on that provided by Mr Lawton. There is no evidence that this was a specialty property. The defendants were misconceived in their perception of value. This was demonstrated by the defendants own failed marketing program conducted over a period of 14 months prior. The property sold at auction for a price indicated by interested parties beforehand. It was also with slightly above the forced sale value range provided by Mr Mitchell.

[87] Objection has been taken to words allegedly spoken by Mr Sumich, the auctioneer, during the course of the auction. Mr Sumich does not accept these words he said. It matters not.

[88] Mr Sumich is an experienced auctioneer. He did not proclaim to interested purchasers at the beginning of the auction that they were going to get a property at undervalue. Rather the comment, if it was made, was made during the auction, an auction which went into recess on about three occasions at a stage when the highest bid was still well below the reserve price. If it was made it was a comment arguably meant to encourage bids. No objection could reasonably be taken to it.

Mortgagor's right of redemption and intervening events clause

[89] The defendants contention appears to be that the mortgagee must cancel or delay an unconditional contract for the purchase of the property if:

(a) The mortgagor is negotiating with a purchaser prepared to pay more for the land than was achieved at mortgagee sale; or

(b) If through another source the mortgagor can obtain separate funding for about the same sum which the land was sold for by mortgagee sale.

[90] In this case the defendants rely mainly upon the authority of *Agio*. In general terms it is submitted the existence of a right to rescind an unconditional mortgagee sale agreement preserves the imposition of a duty under s 176.

[91] That submission needs to be assessed in the context of the facts of the whole. Those include:

(a) The defendants had marketed the property themselves for 14 months during which time they engaged the services of reputable real estate agents. No sale was achieved.

(b) ASB indicated a preparedness to accept payment of the sum of $1.5M at a time when the debt then due was slightly more than that.

(c) A comprehensive marketing campaign was conducted by Kellands in advance of the auction taking place.

(d) A sale price was achieved in line with Mr Mitchell's estimate of forced sale value.

(e) Five workings days prior to settlement of the mortgagee sale the defendants' solicitors advised of the securing of refinance in an amount equal to the mortgagee sale price and indicated negotiations were continuing with the purchaser prepared to pay more than the mortgagee sale price.

[92] The ASB had incurred significant sale costs which it would have had to bear in the event it purported to revoke the intervening events clause. Likely also it would have had to deal with the concerns of purchasers of that property at auction.

[93] Advice given by the defendants' solicitors on 1 July 2010 provided the barest of details. They provided the sole basis upon which ASB could in the circumstances have acted.

[94] There is no reason to accept the property was not sold on 29 April 2010 at other than the best reasonably obtainable price available at that time. The defendants contend that notwithstanding the mortgagee either had the authority or should have reserved to itself the authority to rescind the sale in the interests of the mortgagor if proper reason arose for the mortgagee to do that.

[95] In this case I do not accept there was proper reason. I earlier noted that the refinance offer had apparently already expired even before its existence was notified on 1 July 2010 to ASB's solicitors. Also it was dependent upon the defendants providing a declaration stating the property was not part of a GST registered activity. The facts disclose that the property was operated as part of a GST registered activity. Moreover following sale ASB paid GST from the sale proceeds.

[96] The defendants claim ASB should have delayed settlement to allow negotiations to continue with Mr Casper. One could infer from Mr Urquhart's evidence that a price of $1.35M plus GST had already been negotiated prior to the Trust's solicitors writing as they did on 1 July 2010. That however is not what the

Trust's solicitors said. Indeed from that letter it is to be inferred negotiations were continuing. Also it is now clear that that offer was not just for the land but for the purchase of the land and the business assets including various items of plant and equipment, vehicles and intellectual property relating to the business that was operated on the land. It is not clear what value attached to those non-land items but it is clear that any payment in respect of those would not have been received by the mortgagee.

[97] In those circumstances the Court is satisfied ASB had no duty to rescind its unconditional contract for sale. Further it is clear in any event no duty was owed in this case from the time the contract was completed on 29 April 2010. I do not accept that the existence of an intervening events type clause did or would have transformed any contract which otherwise on its face was unconditional, into a conditional contract.

[98] In *Davison v Westpac Banking Corporation* [4], Randerson J found that the authorities established the following principles:

(a) Ordinarily, the mortgagor's right of redemption will be lost once the mortgagee enters into a binding contract of sale and exercise of the powers under the mortgage: *Waring (Lord) v London and Manchester Insurance Co Limited* [1935] 1CH 310.

(b) Where the contract is unconditional, there can be no question that a binding contract has been entered into. In such a case, both the mortgagee and the purchaser are bound to complete the contract (see p 12 of the judicial).

(c) Where there is a conditional contract, it will be a question of construction whether, in the circumstances of the case, the parties are bound to complete (see p 12 of judgment).

[4] HC Auckland CP 490/98 (5 November 1998).

(d) Where, as a matter of construction, the contract of sale expressly or implied preserves the right of redemption, the right is retained in accordance with the contractual term: *Pickersgill v Southland Building and Investments Society* (1994) 2 NZ Comv C191 799.

[99] Randerson J went on to say in *Davison* that the intervening events clause is primarily intended as a protection to the vendor in case it becomes difficult or impossible to achieve the sale due. In that case that is made quite clear by the Failure to Pass Title clause.

[100] Such a clause deals with events that occur which result in the vendor being unable to pass title. The existence of such does make the sale contract conditional. To the contrary the Courts have been satisfied that these clauses do not make sale agreements conditional. They simply create a right in certain circumstances to avoid the contract. They are insufficient to cause agreements to be conditional for the purposes of avoiding the contract. The authorities make it clear that these clauses provide a right but not an obligation to cancel if certain events occur.

[101] Mr Cogswell relied upon the case of *Agio* in support of his contention that these clauses act to provide that sale contracts are conditional until a sale has been settled. I consider that case can be distinguished. *Agio* was in fact a case about a failure by a vendor to get the best price obtainable. In that case the learned Judge held the duty (at time of sale) to get the best price continued and therefore a subsequent sale contract was held to be conditional upon that pre-existing obligation being performed. Also the Court had scepticism regarding the worth of the offer the mortgagee agreed to accept. The Court was concerned that a more worthy offer had at that time not been accepted.

Conclusions about whether an arguable case has been raised upon issues of right of redemption and the intervening events clause

[102] Mortgagees cannot cancel contracts at a whim. A mortgagor cannot redeem its mortgage once an unconditional contract has been entered into by the mortgagee for the sale of the land.

[103] In the context of redemption cases a mortgagee's duty to a mortgagor will probably always come to an end when an unconditional offer for purchase has been accepted.

[104] On the facts in this case even if a duty was owed there was no breach of that for the email of 1 July 2010 provided no proper basis for the mortgagee to rescind the sale contract. If a duty was owed then much more information was needed if the mortgagee was expected to act upon it.

[105] No duty was owed to the mortgagee post unconditional sale. Section 176 makes it clear that those duties are present to the time when the sale has been effected i.e. when the contract for sale has been entered into. When that contract is unconditional, the mortgagee's s 176 obligations come to an end.

CCCFA – Oppression

[106] Reasonably, I think, Mr Cogswell acknowledges that claims of oppressive commercial behaviour in this case merely support but do not add to the defendants' complaints of breach of mortgagee duty. Therefore as those breaches of duty complaints fail in this case, so too does a claim of CCCFA oppression.

[107] Section 120 of the CCCFA empowers a Court to reopen certain contracts if a party has exercised a right conferred by a contract in an oppressive manner. It is clear from section 118 of the CCCFA that the term "oppressive" is defined to mean oppressive, harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice.

[108] There is a high threshold to prove such commercial practice standards have been breached. It is clear in this case the defendants cannot succeed with an arguable case for oppressive conduct.

Judgment

[109] ASB is entitled to judgment in the amount claimed together with interest at the contractual rate until date of judgment.

[110] Any responsibility of the second defendant to meet payment of judgment is limited to any assets available from the Trust to meet payment of same.

[111] Costs are awarded to ASB on a 2B basis together with disbursements as fixed by the Registrar.

Associate Judge Christiansen