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

**CIV-2013-488-472**
**[2014] NZHC 3185**

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|---|---|
| BETWEEN | ANZ BANK NEW ZEALAND LIMITED<br>Plaintiff |
| AND | JESSE JAMES BOYCE<br>Defendant |

**CIV-2013-485-948**

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|---|---|
| BETWEEN | ANZ BANK NEW ZEALAND LIMITED<br>Plaintiff |
| AND | RAMAKRISHNAN RAMASAMY<br>First Defendant |
| | DHANALETCHUMI RAMAKRISHNAN<br>Second Defendant |

**CIV-2013-488-426**

| | |
|---|---|
| BETWEEN | ASB BANK LIMITED<br>Plaintiff |
| AND | JOHN CARNEY and<br>BERNADETTE ANNE CARNEY<br>Defendants |

Hearing: On the papers

Appearances: M G Colson/H A McCaffrey for Plaintiff for ANZ Bank
E Fox for ASB Bank
No appearance for Defendants

Judgment: 12 December 2014

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**JUDGMENT OF ASSOCIATE JUDGE BELL**

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*This judgment was delivered by me on **12 December 2014** at **3:00pm***
*pursuant to Rule 11.5 of the High Court Rules*

……
*Registrar/Deputy Registrar*

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[1] A loan contract may require the borrower to repay by instalments. Such a contract will often provide that if the borrower defaults in paying an instalment, the lender may give notice to the borrower requiring him or her to repay the balance of the loan, even though it would not otherwise have fallen due. That is a call-up acceleration clause. That is in contrast with automatic acceleration clauses, under which the balance of the loan becomes automatically repayable on default, without requiring the lender to give notice to the borrower. In loan contracts with call-up acceleration clauses, the lender must give notice to the borrower so as to make the balance of the loan due and payable. Failing notice, there is no acceleration and the lender must wait for each subsequent instalment to fall due before enforcing the debt for that instalment. So in *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of New Zealand Ltd*, Somers J said:[1]

> The mortgagee did not ever purport to call up the principal from the mortgagor. That did not invalidate the notice. But it did mean that the mortgagor was (at least until sale) not liable to repay before the contractual date.

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[1] *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324 (CA) at 342.

[2] In these three cases, the loan contracts have call-up acceleration clauses. Although the borrowers defaulted, the lenders did not give them call-up notices. The lenders contend that, even without calling up the loans, they are entitled to judgment for the principal payable under the loans. The lenders took security by way of mortgages over land owned by borrowers. In general, the lenders say that because they gave the mortgagors notices under s 119 of the Property Law Act 2007 and later sold the mortgagors' properties under their powers of sale, they are not required to take any further steps to call up the principal.

[3] The lenders applied for summary judgment. The borrowers did not oppose. Because I doubted whether the debts had been accelerated, I asked for further submissions. It has taken me longer than I would have wanted to give my decision. I apologise to the parties for the delay.

**Acceleration clauses and ss 119-120 of the Property Law Act 2007**

[4] Acceleration clauses are standard in loan contracts. They are to be contrasted with loan contracts under which lenders can call for repayment, regardless of default. A current account with a bank is a common example of the latter. The fact that a loan may be accelerated only upon default allows borrowers to plan their affairs with greater certainty than if the lender could call up the loan at any time. On the other hand, the possibility of the balance of the loan being called up upon default incentivises borrowers to repay on time. For lenders, acceleration clauses allow for efficiency in that they do not have to await each succeeding instalment to fall due and take separate enforcement action following each default.

[5] The Property Law Act defines acceleration clause:[2]

> In this Act, unless the context otherwise requires, –
>
> **acceleration clause** means an express or implied term in an instrument which 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 there had not been a default.
>
> [Emphasis added.]

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2 Property Law Act 2007, s 4.

[6] Under automatic acceleration clauses, the lender is not required to take any steps following default for the amount secured by the mortgage to become payable. If the lender does not want to insist on the automatic acceleration taking effect, that will require a waiver or some similar arrangement binding on the lender to operate. On the other hand, under a call-up acceleration clause, the requirement for a lender to call up entails a deliberate decision by the lender to accelerate the loan. "May" in the definition above shows the exercise of a discretion in calling up.

[7] It is for the parties to a loan contract to decide whether there should be acceleration provisions and to decide whether they should be automatic or call-up acceleration clauses. Invariably the lender sets the terms. A lender who specifies a call-up acceleration clause in a loan contract cannot complain of being held to it.

[8] When loans are secured by mortgages over land or goods, Parliament has introduced a control on the exercise of the power to accelerate: ss 119 and 120 of the Property Law Act for mortgages of land and ss 128 and 129 for mortgages of goods. An acceleration clause cannot take effect unless the mortgagee has first given the mortgagor a statutory notice as to defaults which must be remedied within at least 20 working days, and the defaults have not been remedied in time.[3] For mortgages of land, ss 119 and 120 say:

> **119 Notice must be given to current mortgagor of mortgaged land of exercise of powers, etc**
>
> (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—

[3] For completeness, I record that under s 125(1)(b) a notice under s 119 is not required in the case of a mortgage debenture, which creates a charge on all or substantially all of the assets of a body corporate.

(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.

**120 Form of notice under section 119**

(1) The notice required by section 119 must be in the prescribed form and must adequately inform the current mortgagor of—

(a) the nature and extent of the default; and

(b) the action required to remedy the default (if it can be remedied); and

(c) the period within which the current mortgagor must remedy the default or cause it to be remedied, being not shorter than 20 working days after the date of service of the notice, or any longer period for the remedying of the default specified by any term that is expressed or implied in any instrument; and

(d) the consequence that if, at the expiry of the period specified under paragraph (c), the default has not been, or cannot be, remedied,—

(i) the amounts secured by the mortgage and specified in the notice will become payable; or

(ii) the amounts secured by the mortgage and specified in the notice may be called up as becoming payable; or

(iii) the powers of the mortgagee or receiver specified in the notice will become exercisable; or

(iv) more than 1 of those things will occur.

(2) A notice required by section 119 may specify that the action required to remedy the default includes the payment (whether to the mortgagee or receiver) of a specified amount, being the reasonable costs and disbursements (whether of the mortgagee or receiver) in preparing and serving the notice.

[9] There were corresponding provisions, but not in the same terms, in s 92 of the Property Law Act 1952. In *Jaffe v Premier Motors Ltd*, Shorland J stated the purpose of requiring the statutory notice:[4]

> One of the objects of s 92 is to ameliorate the effects of a provision in the mortgage which makes the principal sum payable, if there is default in other matters. Its purpose in this respect is to require that a mortgagor will be notified in writing of any breaches of covenant which would, but for s 92, make the principal sum payable, and be given a period of time within which to remedy these breaches, and thus receive the opportunity of escaping the calling up of the principal sum.

[10] In *Commodore*, Cooke J said:[5]

> ... clauses accelerating a major liability in the event of a minor default can work oppressively. That is the very raison d'être of the statutory protection so far as it concerns acceleration clauses ... Over the years the New Zealand Parliament has shown continuing sensitivity to the interests of mortgagors and lessees by enacting various provisions for their relief or protection. Section 92(1) is a provision of this character in that, to adopt words used by Mr Barton, it provides for a short moratorium. ...

[11] While the purpose of the notice under s 119 is to give the mortgagor an opportunity to remedy defaults, it also allows time in which a mortgagor may make other proposals to the mortgagee. A mortgagee is not, of course, required to go along with the mortgagor's proposals. But the opportunity for proposals to be put and considered is still relevant. In the case of a call-up acceleration clause, the mortgagee has the opportunity to consider in all the circumstances, including matters put to it by the mortgagor, whether it should call up the balance secured by the mortgage, even if defaults under the loan contract have not been remedied within the time allowed under the notice.

[12] Sections 119 and 120 of the Property Law Act make only a limited disturbance to the parties' rights under the loan contract. The exercise of powers is deferred until the conditions in those sections are satisfied, but that aside, the terms of the loan contract are not varied - no new terms are added; none are taken away. So if the loan contract contains a call-up acceleration clause, that provision remains unchanged, both before and after a notice under s 119 has been served and after any

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4 *Jaffe v Premier Motors Ltd* [1960] NZLR 146 at 148. See also *United Peoples' Organisation (World Wide) Inc. v Rakino Farms Ltd (No 2)* [1964] NZLR 739 at 741.

5 *Commodore,* above n 1, at 333-334.

defaults have not been remedied. In those circumstances, the mortgagee may exercise the call-up power and all sums secured under the mortgage will become payable. But as Somers J pointed out in the *Commodore* case, if the lender does not give the notice calling up the sums secured under the mortgage, they will not become payable immediately but only on the contract date. The mortgagee will be able to only enforce the payment of instalments that had become due independently of the acceleration clause.

**The lenders' arguments**

[13] Against that, the lenders submit that these provisions do not stand in the way of their obtaining judgment, even though they did not write to the mortgagors calling up the loans after the mortgagors failed to remedy defaults set out in notices under s 119. Here are the arguments they put up.

*A notice under s 119 as a conditional call up?*

[14] The mortgagee may not call up under an acceleration clause ahead of the expiry of the time allowed for remedying defaults. The lenders contend however that it is possible to give a call-up notice with delayed effect. Their argument is that before the expiry of the time for remedying defaults given as required by s 120(1)(c), a mortgagee is entitled to give a notice to the effect that if defaults have not been remedied by a given date then the sums secured under the mortgage will become payable. The mortgagee can state that in a notice under s 119. They argue for a conditional notice, under which a call up is made in the s 119 notice, but is to take effect at the end of the moratorium.

[15] I disagree for two reasons. First, what is deferred under s 119 is the power to call up. Unlike an automatic acceleration clause, a call-up clause requires a decision by the mortgagee to accelerate. That decision can be made only after defaults have not been remedied within the time allowed. The decision is to be made in the circumstances at the end of the moratorium, not the circumstances when the notice under s 119 is issued. For example, during the moratorium the mortgagor may make part payments of the defaults and provide satisfactory assurances that the outstanding

balance will be paid very soon (although outside the period to remedy defaults). That may bear on the mortgagee's decision whether to call up. As s 119 defers the power to call up, including the decision whether to call up, the mortgagee is barred from pre-determining whether to call up ahead of the expiry of the moratorium.

[16] Second, the Property Law Act has limited provisions allowing the exercise of other powers before the expiry of the moratorium. Under s 124, a mortgagee or receiver may enter into an agreement to sell mortgaged land or grant an option to purchase ahead of the expiry of the moratorium, if the contract or option is conditional on the default not being remedied within time. Under s 126, a court may grant leave to a mortgagee or receiver to enter into possession or to begin management of mortgaged land ahead of time. These exceptions, allowing the mortgagee to take action only in defined circumstances before the end of the moratorium, prove the rule that otherwise steps may not be taken during that period.

*Specifying automatic acceleration under s 120(1)(d)(i)?*

[17] The lenders say that they can escape these restrictions by appropriate drafting of the s 119 notice. Section 120(1)(d) requires the mortgagee to state the consequences if defaults are not remedied in time. One of those consequences is that the amounts secured by the mortgage will become automatically payable; another is that secured amounts may be called up.[6] In their submission, that gives them options. That allows them to specify that amounts secured by the mortgage will become automatically payable under s 120(1)(d)(i), even if the loan contract has a call-up acceleration clause. On this argument, s 120(1)(d) allows them to assert powers that are not conferred in the loan contract. That cannot be right. The consequences that may be identified under s 120(1)(d) are those provided in the loan contract. To take an absurd example, if a mortgage does not allow the mortgagee to appoint a receiver on default by the mortgagor, a notice under ss 119 could not state as one of the consequences under s 120(1)(d) that the mortgagee will appoint a receiver to manage the property. If a loan contract provides a call-up acceleration clause, the consequence that the mortgagee may include in a s 119 notice is that the call-up *may* be exercised. Because ss 119 and 120 make only limited disturbance to

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6 Section 120(1)(d)(i) and (ii).

the loan contract, the mortgagee cannot assert automatic acceleration, unless the loan contract provides for it.

[18] In these cases, in each of the notices under s 119, the mortgagee specified that all amounts secured by the mortgage would become payable, a statement of effect (relying on s 120(1)(d)(i)), rather than saying that the loans may be called up, a statement of possible intention. The clear purpose of s 120(1)(d) is to preserve the distinction between the different forms of acceleration clause. The lenders cannot change their power to call up into an automatic acceleration by stating that there will be an automatic acceleration in their s 119 notice. If they wanted to accelerate, they were required to give notice to the mortgagors at the end of the moratorium. If they did not do so, there was no acceleration. Apart from the instalments that had already fallen due, they could not enforce payment of the other sums secured under the mortgages.

*Does the drafting of the notices defeat a later exercise of the call-up power?*

[19] This is a separate question. The issue is whether the fact that the notices stated the wrong consequence, automatic acceleration rather than call up, means that the lenders cannot later accelerate without first giving fresh notices under s 119. That arises only in the *ASB v Carney* case and I will deal with it there. It is a matter of interpreting the notice.

*The effect of recovery of sums secured under s 185 of the Property Law Act*

[20] The position reached so far is that the notices under s 119 were ineffective to make amounts secured by the mortgage payable earlier than would be the case if there had not been a default. When the loans were still in default at the end of the time for remedying them, the lenders did not give notice to the mortgagors calling up the principal under the loans, although they could have. In those circumstances the only debts the lenders could enforce were the unpaid instalments that had already become due. They were nevertheless entitled to exercise their powers under the loan contracts to sell the mortgaged properties, because they had stated that consequence

in their notices. They did sell. They say that even if they were not called up earlier, the loans were accelerated under s 185. That says:

> **185 Application of proceeds of sale of mortgaged property**
>
> (1) The proceeds arising from the sale by a mortgagee of mortgaged property must be applied—
>
> (a) first, to the payment of all amounts (if any) referred to in subsection (2), together with interest on those amounts at the agreed rate (if any) at which interest is payable on the principal amount secured by the mortgage:
>
> (b) secondly, to the payment of amounts secured by any other mortgage, encumbrance, or security interest over the property to the extent that it has priority over the mortgagee's mortgage:
>
> (c) thirdly, to the repayment of all amounts (if any) paid or advanced by the mortgagee for the purpose referred to in paragraph (b), together with interest on those amounts at the agreed rate (if any) at which interest is payable on the principal amount secured by the mortgage:
>
> (d) fourthly, to the payment of amounts secured by the mortgage (to the extent that those amounts have not been paid under paragraphs (a) to (c)):
>
> (e) fifthly, to the payment of amounts secured by any subsequent mortgage, subsequent encumbrance, or subsequent security interest over the property if—
>
> (i) the subsequent mortgage, subsequent encumbrance, or subsequent security interest is registered; or
>
> (ii) the subsequent mortgage, subsequent encumbrance, or subsequent security interest is unregistered, but the mortgagee has actual notice of it:
>
> (f) sixthly, to the payment of any surplus to the current mortgagor …

[21] The important part here is that the mortgagee may recover the amounts secured by the mortgage under s 185(1)(d). That includes amounts that would not otherwise have fallen due. That becomes clear when the predecessor to s 185 is considered - s 104 of the Land Transfer Act 1952:

**104 Application of purchase money**

(1) The purchase money to arise from the sale by the mortgagee of any mortgaged land, estate, or interest shall be applied—

(a) Firstly, in payment of the expenses occasioned by the sale:

(b) Secondly, in payment of the money then due or owing to the mortgagee:

(c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in the order of their priority:

(d) Fourthly, the surplus (if any) shall be paid to the mortgagor.

(2) Where the surplus cannot be paid to the mortgagor by reason of his not being found after reasonable inquiry by the mortgagee as to his whereabouts, the surplus may be paid to the Secretary to the Treasury in accordance with section 102A of the Property Law Act 1952, and the provisions of that section shall apply accordingly.

Under s 104(1)(b), the mortgagee could recover money "then due or owing", not money still to fall due. Section 185 allows greater recovery.

[22] The lenders' argument is sound insofar as s 185 allows recovery from the proceeds of sale of amounts secured. The policy behind s 185 is that once the security is realised, the mortgagee should be entitled to recover from the proceeds of sale all the sums secured, even if they have not become due and owing at the time of sale. The mortgagee should not be left unsecured for amounts that have still to fall due.

[23] In these proceedings, however, the amounts the mortgagees obtained on the sales were not enough to pay all the amounts secured by the mortgages. While the proceeds of sale of the mortgaged property may be applied against debt that had not otherwise fallen due, that does not mean that the loans have otherwise been accelerated. Section 185 only provides for recovery from the sale proceeds of amounts secured. It does not otherwise provide for a general acceleration of amounts that would otherwise be payable but for any defaults. The problem that the lenders have not called up the loans remains.

[24] From the proceeds of sale the lenders recovered sums that had already fallen due and also other sums secured, that is, sums that had not yet fallen due because there had been no acceleration. The lenders therefore recovered pre-payments of instalments to fall due later. For some time following the sale, the mortgagors were no longer in default because of these pre-payments. In the case of the ASB, it will be necessary to consider whether it could accelerate ahead of any fresh defaults by the mortgagor. I deal with that later.

*Additional argument by the ANZ*

[25] ANZ has a further argument for escaping from the problem. While it accepts that its standard loan contract has a call-up acceleration clause, its mortgages have an automatic acceleration clause:

> **7** ***Default***
> 7.1 If the customer does not:
> (a) pay any of the money then due … then the money will be immediately due and payable without the need for any demand.

[26] It also says that the inconsistency between the call-up acceleration clause in the loan contract and the automatic acceleration in the mortgage can be resolved. Its mortgage provides:

> 21.8 If any ambiguity or inconsistency arises between this mortgage and any other document or agreement, the Bank will decide which prevails.

[27] It submits that it is entitled to rely on the automatic acceleration clause in the mortgage and it cannot be held to the call-up acceleration clause in the loan contracts. I accept that submission. For its cases, it is entitled to rely on the automatic acceleration clause in its mortgages. That means that its notices under s 119 did properly state that one of the consequences of the failure to remedy defaults in time would be that the automatic acceleration provision would take effect. It was not required to give a further notice calling up the sums secured under the mortgage.

*ANZ's fallback position*

[28] ANZ's fallback position is that, even if it did not validly accelerate earlier, after it started these proceedings it did call up the sums secured by sending notices of demand to the customers. Given that I have found that ANZ can rely on the automatic acceleration provision of the mortgage, that point does not require a decision.

[29] If it did, however, it would be necessary to consider these matters:

(a) When construed in context, do the s 119 notices state that the acceleration power may be exercised?

(b) Can the bank accelerate ahead of any fresh defaults by the mortgagors?

Those questions do require consideration in the case of ASB.

[30] Now for each claim.

**ANZ Bank New Zealand Ltd v Boyce**

[31] The bank sues as successor to the National Bank. Mr Boyce had a current account with the National Bank from 2001. Under the bank's terms, the overdraft was repayable on demand.

[32] In 2006, Mr Boyce borrowed two sums from the National Bank: $293,523 and $5,000. They were table loans, repayable over 25 years. Each loan had an acceleration clause:

> The Bank may give written notice to the Customer to:
>
> (i) cancel any undrawn amount of the Loan (any amount cancelled will not be available to the Customer); and/or
>
> (ii) require immediate repayment of the Loan, and payment of all interest and other amounts owing under this agreement if:

(a) a default is made in payment of any amount due under this agreement or on any of the Customer's accounts with the Bank, or under any liability the Customer has to the Bank …

The Customer must immediately comply with any notice given under this clause.

[33] For security, Mr Boyce gave the bank mortgages over properties at 11A/11B Windsor Road and 26 Ormonde Place, Kaikohe. The bank's mortgage contains an automatic acceleration clause:

7. **In default**

If:

7.1 the Customer does not:
(a) pay any of the Money when due …

then the Money will be immediately due and payable without the need for any demand …

[34] Clause 21.8 of the mortgage provides:

21.8 If any ambiguity or inconsistency arises between this mortgage and any other document or agreement, the Bank will decide which prevails.

[35] In April 2011, Mr Boyce was in default under both term loans. The bank served a notice under s 119 of the Property Law Act on 6 April 2011, in which it required the defaults to be remedied on or before 18 May 2011. For consequences, the notice stated:

If each default has not been, or cannot be, remedied on or before 18 May 2011:

(a) All amounts secured by the mortgage will become payable, namely $290,072.90.

(b) The following powers of the bank as mortgagee will become exercisable:

(i) the mortgagee's power to enter into possession of the mortgaged land;

(ii) the mortgagee's power to sell the mortgaged land.

[36] On 18 May 2011, Mr Boyce had not remedied the defaults. The bank sold the mortgaged properties. The sale of the Ormonde Place property settled on

16 December 2011. After paying the costs of sale and arrears in district and regional council rates, the net proceeds paid to the bank were $20,846.24. The smaller loan was repaid in full and $18,530.00 was applied in reduction of the larger loan.

[37] The Windsor Road property was sold in January 2013. From the proceeds of sale, the bank applied $12,646.77 to the current account and $27,659.80 to the larger table loan. Following those payments, the total amount owing under the larger term loan and the current account was $293,310.73. Interest has continued to accrue on the table loan at 5.74 per cent per annum, and on the current account at 10.74 per cent per annum.[7] At 4 July 2013, the amount owing under the table loan was $276,163.18 and the amount owing under the current account was $26,232.36.

[38] As I have held that the bank was entitled to rely on the automatic acceleration clause in the mortgage rather than the call-up acceleration clause in the loan agreements, the bank is entitled to recover judgment against Mr Boyce in the sum of $302,395.54, plus interest on the sum of $276,163.18 at 5.74 per cent per annum from 4 July 2013 until the date of judgment, and interest on $26,232.36 at the rate of 10.74 per cent per annum from 4 July 2013 to date of judgment.

[39] The bank does not seek post-judgment interest at contractual rates. Interest on the judgment sum will run at five per cent per annum under r 11.27 of the High Court Rules.

[40] Under the bank's general terms and conditions for its accounts (incorporated into the loan contracts in this case), it is entitled to recover its solicitor-client costs. While it provided details of its costs for the first call of the summary judgment, it has been put to extra work since. It should file an affidavit and memorandum setting out the costs it claims. The affidavit should cover the matters required in *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd*.[8]

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7 The bank claimed interest on the current account at 28.15 per cent per annum in its original statement of claim, but reduced it to 10.74 per cent per annum in an amended statement of claim.

8 *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd* (2008) 19 PRNZ 591 (HC) at [14].

**ANZ Bank New Zealand Ltd v Ramasamy and Ramakrishnan**

[41] The bank made a loan of $695,150.00 to the defendants in January 2008. The loan was repayable by monthly instalments over 20 years. The defendants gave the bank a first mortgage over their property at 45 Jaunpur Crescent, Broadmeadows, Wellington. The loan was subject to the bank's standard loan terms and conditions. These included a call-up acceleration clause:

> ANZ may require you to repay immediately the whole of their loan and may cancel the loan or any undrawn portion of the loan, if any of the following situations occur:
>
> If you fail to pay, when due, any amount required to be paid to ANZ in connection with this loan. …
>
> ANZ may also have the right (amongst other things) to require you to repay immediately your loan in other circumstances, in terms of the security document(s) relating to your loan.

[42] The bank's mortgage is in the same terms as in the *Boyce* case. It contains the same automatic acceleration provision, and the same clause 21.8 allowing the bank to decide which prevails in the case of any ambiguity or inconsistency between the mortgage and any other document or agreement.

[43] The bank established two other accounts for the defendants. In November 2010 they were in default and the bank established an account called an "unarranged overdraft". This account was debited with costs incurred by the bank in enforcing the loan when the defendants had defaulted. I accept the bank's entitlement to charge costs incurred on defaults to the defendants, but it is not clear to me that the bank could charge the defendants a higher interest rate for those costs than for the principal sums owing under the term loan.

[44] In October 2012 the bank changed its technology system and established a loan servicing account for each customer with a loan. This was a current account into which loan funding payments were to be made. I accept that the bank might do that as a way of dealing with customers' payments, but again I do not accept that the bank was entitled to charge the defendants interest on that account at rates in excess of those applied under the loan contract.

[45] In May 2012, the bank sent a notice under s 119 of the Property Law Act to the defendants. As in the *Boyce* case, the notice described the consequences of not remedying the defaults as follows:

> If each default has not been, or cannot be, remedied on or before 25 June 2012:
>
> (a) All amounts secured by the mortgage will become payable, namely the $682,526.48.
>
> (b) The following powers of the bank as mortgagee will become exercisable:
>
> (i) The mortgagee's power to enter into possession of the mortgaged land;
>
> (ii) The mortgagee's power to sell the mortgaged land.

[46] The notice did not say that any call-up power may be exercised.

[47] The defendants made some payments to the bank but they were not enough to remedy the defaults in the notice. The bank sold the property at Jaunpur Crescent. The sale was settled on 29 November 2012. The net proceeds of sale the bank received were $360,512.75.

[48] The bank says that it applied those proceeds as follows:

(a) Unarranged overdraft: $2,180.73.

(b) Bank fees for early repayment: $1,462.62.

(c) $356,519.14 to reduce the balance of the loan.

(d) $316.63 to reduce the balance of the loan servicing account.

[49] It says that left the following sums owing to the bank:

(a) The balance under the loan: $320,388.73.

(b) Debit balance of the loan servicing account: $734.37.

[50] I am not satisfied that the bank is entitled to charge an early repayment fee upon a mortgagee's sale. The bank's term as to early repayment says:

> You may repay all or part of your loan at any time before its due date. But if you do, you may be liable to pay an early repayment fee plus the early repayment administration fee.

[51] That allows the bank to charge an early repayment fee if the customer chooses to make an early repayment. Customers who have defaulted under the loan, who cannot remedy defaults after receiving a notice under s 119 of the Property Law Act and who then suffer a sale by the bank as mortgagee, have not elected to make an early repayment and are therefore not chargeable under the term above.

[52] The amount of the unarranged overdraft was $2,180.73. The amount of the loan servicing account was $1051. The net proceeds the bank received from the sale of the property were $360,512.75. When the loan servicing account and the unarranged overdraft are repaid, the balance owing to the bank is $316,390.12. The bank is entitled to recover that sum plus interest on it at 5.99 per cent per annum from 29 November 2012 until the date of judgment.

[53] Under terms in the bank's loan terms and conditions booklet incorporated into the loan contract, the bank is also entitled to its solicitor-client costs in obtaining judgment. It should file an affidavit proving the costs it claims.

[54] My refusal to give the bank judgment for an early repayment fee is on a summary judgment basis: the bank has not satisfied me that the defendants do not have any defence to that part of the bank's claim. If the bank wishes to continue its claim for the early repayment fee, it should ask for a case management conference so that further directions can be given. It is not necessary for that aspect to come back to me.

**ASB Bank Ltd v Carney**

[55] By an agreement dated 14 June 2011, the bank lent the Carneys $528,000 under a table loan repayable over 25 years. For security, the bank took mortgages over properties at 494A Kerikeri Road, 12 and 18 Kingfisher Drive, Kerikeri.

[56] The loan agreement is subject to the bank's retail general terms and conditions. It contains a call-up acceleration clause:

> **10.1 Events of default:**
>
> If at any time and for any reason, whether or not within the control of any party:
>
> (a) Non-payment:
>
> You fail to pay on its due date any amount payable under any document …
>
> Then we may, at any time, *by notice to you*:
>
> …
>
> (ii) declare any or all of the outstanding money that is Owed on outstanding Money to be due and payable either immediately or at such later date as we may specify whereupon that indebtedness will become so due and payable: and …
>
> (iii) exercise all or any of our rights under any security documents.
>
> [Emphasis added.]

[57] The mortgage also contains this call-up acceleration clause:

> **7 Enforcement**
>
> 7.1 When enforceable:
>
> if, at any time and for any reason, whether or not within the control of a party:
>
> (a) non-payment;
>
> (b) The Mortgagor fails to pay on its due date any amount of the Secured Indebtedness; …
>
> … then the security constituted by this mortgage will become immediately enforceable (without notice to or the consent of the Mortgagor or any other person and without prejudice to any other right that the Bank may have) and the Bank may, at any time, *by notice to the Mortgagor, declare* all or any part of the secured indebtedness to be, and that debt will become due and payable (if not already so) either immediately or upon demand or at a later date as the Bank may specify.
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> [Emphasis added.]

[58] The Carneys defaulted under the loan agreement. The bank made demand for unpaid instalments on 30 April 2012. In May 2012 the bank prepared notices under s 119 of the Property Law Act but could serve only Mrs Carney. It obtained directions as to service under s 357 of the Property Law Act and served a fresh notice on Mr Carney in August 2012. For consequences, the May notice said:

> 1 If each default has not, or cannot be, remedied on or before 29 June 2012:
>
> (a) The full amount secured by the Mortgage will become payable; and
>
> (b) The following powers of the Mortgagee will become exercisable;
>
> (i) The mortagee's power to enter into possession of the mortgaged land; and
>
> (ii) The mortgagee's power to sell the mortgaged land…

The consequences stated in the August notice were the same as in the May notice (apart from a different date by which defaults had to be remedied). The Carneys did not remedy the defaults.

[59] The bank sold the mortgaged properties, receiving net sale proceeds of $226,050.09 from the Kerikeri Road property and $182,913.11 from the Kingfisher Drive properties.

[60] The bank's lawyers wrote to the defendants on 1 August 2013 demanding payment of $197,329.43 as the shortfall after the sale of the mortgaged properties. The bank claims that sum plus interest on it at 22.5 per cent per annum from 24 May 2013 (date of settlement of the sales) until judgment. The letter of 1 August 2013 did not expressly state that the acceleration power was being exercised, but the demand for payment is consistent with the bank giving notice to the Carneys that the remaining balance of secured monies was now due and payable.

[61] There is no evidence that the bank accelerated the debt between the expiry of the periods under the s 119 notices and the letter of 1 August 2013. The question is whether the bank can rely on the letter of 1 August as an effective acceleration of the loan.

[62] While the proceeds of sale of the mortgaged properties had been applied first to unpaid instalments that had already fallen due, and then towards the balance of the sums secured under the mortgage (being instalments that had not yet fallen due) as allowed under s 185, the bank's right to recover (outside s 185) for instalments that had not yet fallen due had not accrued when the bank received the sales proceeds, because the bank had not called up under the acceleration clauses of the loan contract and the mortgage. There are two matters to consider:

(a) Is the bank's exercise of the call-up power in the letter of 1 August 2013 precluded by the drafting of the s 119 notice?

(b) Was the bank entitled to exercise the call-up power, given that it had already recovered (under s 185) part of the sums secured by the mortgage?

*The drafting point*

[63] Section 120 of the Property Law Act requires a notice under s 119 to state the consequences if defaults are not remedied. In this case the bank's notices stated that the amounts secured by the mortgage and specified in the notice would become payable. Strictly, the notice ought to have stated that the amounts may be called up as becoming payable.

[64] On the face of it, there is an available objection that the notices under s 119 did not correctly identify the consequences of the defaults not being remedied in time. The argument would go that the notice refers to an automatic acceleration (which is not available in this case) and does not correctly identify a call-up acceleration power. As the s 119 notices did not state that consequence, the bank cannot now call up the amounts still to fall due, but for the defaults.

[65] While the notices could have been drafted better, is that fatal in this case?

[66] Against the objection that the notice under s 119 has misfired because it has targeted the wrong consequence, I am satisfied that, notwithstanding the poor drafting, there is a sound answer when the notice is read in context.

[67] Applying the modern approach to interpretation, when the notice under s 119 is read in context, the words "secured by the mortgage will become payable" mean that those amounts will become payable upon the bank exercising its acceleration power. A reasonable person in the position of the mortgagor receiving the notice would so understand it. The mortgage and the loan contract have call-up acceleration clauses, not automatic acceleration. Knowing those provisions, a reasonable mortgagor can be taken to read the notice as indicating that the bank had it in mind to call up the balance under the loan if the defaults were not remedied. While that reasonable mortgagor might be puzzled at first that the bank had used peremptory language unsuitable for stating that a power may be exercised, he would still pick that, despite the sloppiness, the bank had it in mind to accelerate if the mortgagor did not remedy the defaults in time.

[68] There is support for this approach in the decision of the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*.[9] That case concerned a notice given under a break clause in a lease. To give an effective notice under the break clause, the tenant had to give not less than six months' notice in writing to the landlord to expire on the third anniversary of the term commencement date. The relevant date was 13 January 1995. The tenant, however, gave notice purporting to exercise his option to terminate on 12 January 1995. The majority in the House of Lords held that, read in context, the notice meant 13 January 1995. It held against reading the notice literally, the approach of the minority. Lord Goff in dissent held that a notice would be correct only if it conformed to the specification in the lease. He said:[10]

> The simple fact is that the tenant has failed to use the right key which alone is capable of turning the lock.

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9 *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL).

10 At 754.

[69] Lord Hoffman, one of the majority, held that the same approach should be applied to contractual notices as to the construction of commercial contracts:[11]

> The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey. Why, therefore, should the rules for the construction of notices be different from those for the construction of contracts?

[70] The decision of our Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[12] is in line with this. While *Mannai* was directed at contractual notices rather than statutory notices, it is consistent with the balance which Cooke P was trying to strike in *BNZ Finance Ltd v Smith and Leuchars*.[13] While that was a decision on notices under s 92 of the Property Law Act 1952, it is also applicable to s 119 notices under the Property Law Act 2007:[14]

> Unfortunately this country is in an economic phase when issues as to the respective rights of creditors, debtors and guarantors are very much to the fore. As I see it, the cardinal points are, first, that the protective provisions of the Property Law Act should be applied reasonably generously and not whittled down, so as to make sure that persons having the misfortune to face major liabilities should have adequate notice of the claims against them. Secondly, that creditors who have complied with the spirit of the legislation regarding notice should not be defeated by technical defences when it is plain that liability has accrued.

*Was the bank entitled to accelerate, given its recoveries under s 185?*

[71] In August 2013 the bank had sold the mortgaged properties, with a net realisation of $408,963.20. That was more than enough to cover instalments that had fallen due up until the date of sale. The loan for $528,000 repayable over 25 years was a little over two years old. Under s 185 of the Property Law Act, the bank was entitled to apply the balance towards other sums secured under the mortgages - that is, instalments that had not yet fallen due - and it did so. While the bank has not provided calculations, it would clearly be some years before any further instalments would fall due.

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11 At 779.
12 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
13 *BNZ Finance Ltd v Smith and Leuchars* [1991] 3 NZLR 659 (CA).
14 At 669-670.

[72] The point that can be taken for the Carneys is that as at August 2013 they were no longer in default under the loan because future instalments had already been pre-paid out of the proceeds of sale received by the bank. In these circumstances the bank has lost the power to accelerate because the defaults in paying instalments under the loan have been remedied. The acceleration power is a remedy for defaults in paying money due under the loan. The acceleration clauses in the loan contract and the mortgage are to be read with that purpose in mind. If a borrower is no longer in default under a loan contract, the bank may not accelerate. To construe the call-up acceleration clauses in the loan contract and the mortgage otherwise would be commercially unreasonable.

[73] For the above reasons, ASB has not shown that the Carneys do not have an available defence to the allegations in its statement of claim. The arguable defence for the Carneys is that because the loan contract and the mortgage contain call-up acceleration clauses, and because ASB did not accelerate before it exercised its power of sale, the funds the bank recovered on the exercise of its power of sale were sufficient to repay not only unpaid instalments that have fallen due, but also to pre-pay instalments that are still to fall due. Because instalments have already been pre-paid, the Carneys are not in default and the bank cannot accelerate until there is a fresh default. The bank has not shown that there has been a fresh default. If there were, it would not need to serve a fresh notice under s 119, as there is no longer a mortgage securing the loan. But upon a fresh default it would be entitled to give notice to the Carneys calling up the loan.

*Result*

[74] Accordingly I dismiss ASB's summary judgment application. The bank may ask for a conference for further directions, if it wishes.

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**Associate Judge R M Bell**

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