IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA498/2022
[2023] NZCA 381

BETWEEN	WENYUE HE Appellant
AND	BANK OF NEW ZEALAND Respondent

Hearing:	24 July 2023
Court:	Collins, Lang and Woolford JJ
Counsel:	G J Thwaite and F F Teh for Appellant S A Armstrong and N J Robertson for Respondent
Judgment:	23 August 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

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

REASONS OF THE COURT

(Given by Woolford J)

[1] On 30 August 2022, Associate Judge Johnston entered summary judgment in favour of the Bank of New Zealand (BNZ) against Mr Wenyue He in the sum of $493,729.73 plus interest and costs.[1] Mr He now appeals against the Associate Judge's

[1] *Bank of New Zealand v He* [2022] NZHC 2128 [High Court judgment].

decision on the basis that he had counterclaims against the bank that should have gone to trial.

Background

[2] BNZ made a series of loans to Mr He totalling $3.21 million. The loans were secured over a property owned by Mr He at 8 Ngapipi Road, Orakei, Auckland (the property). On 13 December 2016, after all the loans had been advanced to Mr He, the property was transferred from Mr He personally to Mr He and a company, Bella Trustee 130701 Limited (Bella), as trustees of the Queen's Trust. The transfer occurred with BNZ's knowledge and consent. Just over a year later, on 23 January 2018, Bella was removed from the Companies Register.

[3] Two loans had been repaid in full or part on 15 September 2015. Mr He defaulted on borrowings from February 2018. Enforcement action was commenced, but the loan account was current again by September 2018. The enforcement file was closed. However, in November 2018, after further default, BNZ recommenced enforcement action. BNZ's solicitor issued a default notice dated 22 March 2019 under s 119 of the Property Law Act 2007 (the Act). The sale by BNZ as mortgagee relied on that notice.

[4] The tendering process for the property closed on 23 July 2019. The highest tender was $1.915 million, whereas the value of forced sale had been assessed at $2.1 million. Eventually, the property was sold by private treaty for $2.01 million (GST inclusive) on 7 August 2019. BNZ allocated the proceeds of sale to outstanding indebtedness. BNZ calculated the sum owing as at 12 September 2019 to be $493,729.73. The Associate Judge gave judgment against Mr He for that sum plus interest and costs.[2]

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2 At [57]–[58].

Grounds of appeal

[5] The grounds of appeal are two-fold:

(a) BNZ failed to serve the s 119 notice on each proprietor of a fee simple estate in the mortgaged property at 8 Ngapipi Road, being Mr He and Bella.

(b) BNZ failed to use the required efforts to sell the property. In particular, it did not obtain access to the property, nor did it obtain vacant possession for the purposes of sale. As a consequence, the property was sold at an undervalue.

Service of s 119 notice

[6] On 10 March 2014, Mr He entered into a loan agreement with BNZ to borrow $1.28 million to buy the property as an investment. Because Mr He lived in China, a clause allowing service on an agent in New Zealand was inserted into the loan documentation as follows:

> 9.2.4 Notwithstanding any other provision of the Facility Documents each notice, demand, document or other communication to be given, delivered or made to in connection with the Facility Documents may be served on you by delivering it during normal working hours to your address for service in New Zealand specified below for this purpose and for the attention of the person specified below for this purpose:
>
> LAWRENCE YUAN, 20 EDWARDS AVE, HENDERSON, AUCKLAND.

[7] On 31 July 2014, Mr He took out a further loan of $130,000. The same provision enabling service on Mr Yuan was included in the loan documentation.

[8] On 22 January 2015, Mr He borrowed $900,000 to buy an investment property in Massey. The same provision enabling service on Mr Yuan was included in the loan documentation.

[9] Mr He sold the Massey property for a profit and repaid $783,186 to BNZ on 15 September 2015. This was utilised to repay the first loan of $1.28 million in part and the second loan of $130,000 in full.

[10] On 7 October 2016, Mr He borrowed another $900,000 to buy an investment property in Pōkeno. At that time, Mr He advised BNZ that he had moved into the property as an owner/occupier, and accordingly he was not designated as an overseas person for this loan transaction. The provision enabling service on Mr Yuan was therefore not included in the loan documentation.

[11] Notwithstanding that Mr Yuan was not specifically designated as Mr He's agent in the October 2016 loan documentation, s 355(2) of the Act specifically provides that in cases where a person is out of New Zealand, a s 119 notice "may be given to, or served on, an agent in New Zealand of the person." Agent is defined in s 358 as "a person who has actual or ostensible authority to receive, on behalf of that person … a notice, cross-notice or other document required or authorised to be given or served by a provision of this Act".

[12] Mr He defaulted on his loan repayments in November 2018. In February 2019, BNZ instructed Verofi Limited (Verofi) to manage the default and recovery process.

[13] On 22 March 2019, Verofi instructed BNZ's solicitors to issue a default notice under the mortgage and pursuant to s 119 of the Act on behalf of BNZ, which specified that all amounts secured by the mortgage would become due and payable if the defaults were not remedied by 7 May 2019. When BNZ came to serve its s 119 notice on 26 March 2019, Mr He was not resident in New Zealand. BNZ's solicitors therefore instructed a process server to locate and serve Mr Yuan who had been appointed by Mr He as his agent for service and who had previously accepted service of an earlier s 119 notice on Mr He's behalf.

[14] A copy of the s 119 notice was also sent by BNZ's solicitors to the registered office of Bella by tracked courier post. There was no evidence that the s 119 notice was received at the registered office. BNZ later ascertained that Bella had been removed from the Companies Register 14 months earlier, on 23 January 2018.

[15] On 2 April 2019, Verofi advised Mr He by letter and email that a s 119 notice had been served on Mr Yuan as his agent. On 19 April 2019, Mr He emailed Verofi stating that he had funds coming in and would be able to pay $300,000 towards the

arrears if he could have a five-day extension. Verofi replied on behalf of BNZ extending the time for satisfaction of the s 119 notice for a week, to 14 May 2019. Mr He responded saying he would "make it happen".

[16] On 13 May 2019, Mr He emailed Verofi requesting more time for payment and advising that he had sold a gold mining project to a Chinese investor, and he would be paid 50 per cent of the price in June. Mr He also said in relation to market values "[you] may not get what [y]ou want, because [of] current house market".

[17] On 21 May 2019, Verofi advised Mr He that BNZ had declined to further extend the time for satisfaction of the s 119 notice. On 22 May 2019, Mr He called Mr Gilmore of Verofi who advised him that BNZ was proceeding with its enforcement action and gave him a general outline of the next steps in the mortgagee sale process. Mr Gilmore told Mr He that Verofi would now arrange for an agent's appraisal and let him know that he could repay all amounts outstanding anytime before a mortgagee sale occurred.

Associate Judge's decision

[18] After reviewing the statutory requirements under ss 353, 355(2), 358 and 359 of the Act, the Associate Judge could see no flaw in the process followed by BNZ and considered that the s 119 notice was effectively served on Mr Yuan as Mr He's nominated agent. The evidence established that Mr Yuan had ostensible and probably had actual authority to receive the s 119 notice.[3]

[19] The Associate Judge also rejected the submission that the s 119 notice should have been served on both Mr He and Bella.[4] By the time BNZ came to serve its s 119 notice, Mr He was the sole trustee of the Queens Trust and BNZ's obligation was only to serve Mr He in his capacity as trustee.

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3 At [42].
4 At [38]–[39].

Appellant's position

[20] Mr He submits that Mr Yuan was not his agent for service, ostensible or otherwise. The clause relied upon by BNZ in the loan documentation for the first three loans does not use the term "agent" for Mr Yuan, but merely identifies an address for serving documents required by the lending contract or credit legislation. BNZ consciously decided not to include the clause for the loan entered into on 7 October 2016, which is said to be the subject of the action.

[21] By letter dated 11 May 2018 in relation to an earlier default, BNZ's solicitors requested Mr He elect one of three ways he could be served with a s 119 notice. At that time, it does not appear that BNZ were relying on the clause in the loan documentation. No documentation provided by BNZ is said to contain a clause appointing an agent.

[22] Mr He further submits that Bella should have been served with the s 119 notice as one of the registered proprietors of the property. A process server should have been sent to the registered office to ensure service on the company, even though it had been removed from the Companies Register. Removal was a form of limbo, and the company could be restored to the Register by the Registrar of Companies or by order of the Court. Service was also required on the Secretary to the Treasury in terms of s 355(7), which provides:

> **355 Person to or on whom document to be given or served in special cases**
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> …
>
> (7) If the person is a company that has been removed from the New Zealand register or an overseas company that has been removed from the overseas register, or is a body corporate that has otherwise ceased to exist, the document must be given to, or served on, the person who is or is acting as, or a person who is an agent of, the Secretary to the Treasury.
>
> …

Respondent's position

[23] BNZ submits that the s 119 notice was properly served on Mr He as the sole trustee of the Queens Trust and as the borrower of the debt secured by the mortgage in favour of BNZ.

[24] Mr He was properly served by service on his agent Mr Yuan, who acknowledged receipt and accepted service on behalf of Mr He. Mr He was told in writing that this had occurred. The first time he took issue with Mr Yuan as his agent was in response to this proceeding. Quite apart from the clause in the loan documentation, pt 7 of the Act permits service of a s 119 notice on an agent in the special case of a person being outside New Zealand.[5]

[25] Service on Bella was not required as it had been removed from the Companies Register and was no longer in existence. It had previously held the property as a joint tenant with Mr He, but its interest had passed to Mr He in terms of s 72(2)(a) of the Act.

> **72 Body corporate may hold property as joint tenant**
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> …
>
> (2) If a body corporate is a joint tenant of property, its interest as joint tenant devolves on the surviving joint tenant in the following cases:
>
> (a) in the case of a company, if it is removed from the New Zealand register:
>
> …

[26] BNZ's obligation under s 119 was to serve the "current mortgagor". The "current mortgagor" was Mr He as the sole trustee of the Queens Trust.

Discussion

[27] We are of the opinion that Mr He was properly served with the s 119 notice and that service on Bella or the Secretary to the Treasury was not required. Like the Associate Judge, we can see no flaw in the process followed by BNZ.

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[5] Property Law Act 2007, s 355(2).

[28] We make five points.

[29] First, the service clause inserted in the loan documentation should not be interpreted as excluding service of documents relating to the mortgage or other security documents. A purposive interpretation of the words "facility documents" contained in the clause includes any relevant security documents.

[30] Second, s 355 of the Act allows for personal service on an agent if the person is out of New Zealand. An agent is defined in s 358 as a person who has actual or ostensible authority to receive on behalf of that person a document required to be served by a provision of the Act. Clearly Mr Yuan had at least ostensible authority from Mr He. Mr He had nominated Mr Yuan, a real estate agent with whom he had worked closely on various property transactions, as a person on whom documentation may be served in respect of all loans except the last loan advanced on 7 October 2016. That omission to include a service clause in the last loan was on the basis that he told BNZ he was now resident in New Zealand. Section 358 was, however, still applicable and allowed service on an agent if the person to be served was out of New Zealand, even if there was no service clause in the loan documentation.

[31] Third, Mr He (and Vosper Law on his behalf) remained in contact with the default management team at Verofi throughout the process and did not raise an issue or concern about Mr Yuan not being his agent for service of the s 119 notice. Even now, there is no direct evidence from Mr He disputing Mr Yuan's authority. His affidavit in opposition is silent on the matter. It was also not pleaded as part of his defence and counterclaim and was not relied on as a specific ground of opposition in his notice of opposition.

[32] Fourth, there was no obligation to serve the s 119 notice on Bella. It had been removed from the Companies Register and while application could be made for its restoration, it was not a registered company at the time of issue of the s 119 notice. It was therefore not a current mortgagor on whom a s 119 notice had to be served.

[33] In terms of s 72(2)(a) of the Act, its interest as joint tenant in the property devolved on to Mr He as surviving joint tenant the moment it was removed from the

Companies Register. There is no reason to depart from the ordinary meaning of devolve, which is the transfer of property from one owner to another.

[34] Fifth, service was not required on the Secretary for Treasury either. Section 355(7) of the Act which refers to service of documents on the Secretary to the Treasury does not apply because service of the s 119 notice on Bella was not required. It had no interest in the property.

Sale of the property

[35] Under s 176 of the Act, BNZ had "a duty of reasonable care … to obtain the best price reasonably obtainable as at the time of sale".

[36] BNZ engaged experts to assist it with the sale process—Verofi to manage the process, Barfoot and Thompson to market the property and Opteon New Zealand Limited (Opteon) to value the property.

[37] Barfoot and Thompson recommended a four-week marketing and tender sale process. Opteon assessed the value of the property on a forced sale basis as $2.1 million.

[38] The property was tenanted.

[39] On 21 May 2019, Verofi wrote to the tenants advising them of the sale process and requesting them to allow reasonable access to a valuer and a real estate agent. On 5 June 2019, Barfoot and Thompson provided a marketing proposal. It noted that the tenants were unwilling to allow access without the consent of the property manager. Barfoot and Thompson recorded that they had attempted to contact the property manager numerous times to organise a viewing but had been unsuccessful. On 20 June 2019, Verofi advised Mr He that the property would be marketed for sale by tender. It sought his and the tenant's co-operation to enable potential purchasers to fully view the property. On the same day it wrote to the tenants seeking their co-operation to obtain access for open homes and viewings.

[40] Between 25 June and 2 July 2019, Barfoot and Thompson attempted to contact the tenants without success. Between 3 and 10 July 2019, the property manager did not respond to Barfoot and Thompson's messages requesting access. Between 11 and 17 July 2019, Barfoot and Thompson was in contact with the tenants, who agreed to consider allowing them through the property later in the week (which did not happen). In the end, no access was available to potential purchasers over the four-week marketing period.

[41] On 23 July 2019, tenders for the property closed with Barfoot and Thompson receiving six offers. Verofi instructed Barfoot and Thompson to go back to the highest four tenderers to see if they would increase their offer, but this was unsuccessful.

[42] Barfoot and Thompson were then instructed to relist the property and continue marketing. On 7 August 2019, Barfoot and Thompson received an unconditional offer for the property. Following negotiations, the property was sold for $2.01 million.

Associate Judge's decision

[43] The Associate Judge considered that Mr He's contention that BNZ breached its statutory duty of taking reasonable care to obtain the best price reasonably obtainable at the time of the sale had no prospect of succeeding. While he accepted that BNZ did not obtain the fair market value of the property, that is not what s 176 of the Act required.[6]

[44] The Judge considered it reasonable for BNZ to follow the advice of an experienced real estate agent with respect to the length of time needed to market the property.[7] Further, after a properly concluded tender process and in light of the agent's subsequent advice that a sale of $2 million may need to be considered, the Judge considered that the final sale price could be reconciled with Opteon's initial valuation.[8]

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6 High Court judgment, above n 1, at [50].
7 At [52].
8 At [52].

Appellant's position

[45] Mr He submits that access to the property was essential to achieve the best price reasonably obtainable. Barfoot and Thompson knew that to be the case. It expressed concern in weekly marketing reports over the lack of access to the property and the effect this could have on offers.

[46] Mr He further submits that BNZ was able to solve the problem of access. It had wide powers to inspect or take possession of the property pursuant to its standard mortgage terms. Yet it did not exercise any of these powers. Mr He submits that the market value of the property was considerably more than the sum of $2.01 million actually achieved.

Respondent's position

[47] On the other hand, BNZ submits that with a total debt of more than $2.3 million it had every incentive to sell the property at full value. It engaged experts to assist it with the sale process. Barfoot and Thompson did everything within its power to obtain access to the property. Later in the process, Barfoot and Thompson updated its advice to estimate a sale range closer to $2 million was likely. BNZ submits that the tender process was sufficient to test the market and established the highest unconditional tender obtainable was $1.915 million. The subsequent sale for $2.01 million was better than the highest unconditional tender.

Discussion

[48] We do not accept that lack of access to the property in and of itself would be a breach of the duty of reasonable care in s 176 of the Act to obtain the best price reasonably obtainable. In the present case, we share the view of the Associate Judge that, at trial, Mr He would be unable to establish a breach of s 176.

[49] We make four points.

[50] First, while access to the property would have assisted Barfoot and Thompson to market the property, there were plans and photographs of the exterior and interior of the property available from the previous sale for $1.6 million in 2014 available on

different property websites. It can reasonably be assumed that all potential purchasers would have viewed the property on different property websites.

[51] Second, there was no obligation on BNZ to utilise its powers under the mortgage to gain possession of the property prior to any marketing and tender sale process. Counsel for Mr He was critical of the reasons advanced by BNZ for not exercising its powers to gain possession of the property, but we accept that there would have been some further delay and costs. Nor should BNZ be required to offer a financial inducement to the tenants which counsel for Mr He suggested could have been one way to secure access.

[52] Third, the primary finding of the Associate Judge that Mr He chose not to engage with the requests for Verofi on behalf of BNZ for access is not challenged. We agree with counsel for BNZ that Mr He cannot complain about the sufficiency of BNZ's steps in relation to access when he failed to engage with Verofi's requests for access.

[53] Fourth, the final sale price was not unreasonable. It can be reconciled with the initial valuation BNZ received from Opteon of the minimum recommended selling price at $2.1 million on a forced sale basis. Mr Davis, the Barfoot and Thompson agent engaged by BNZ, advised BNZ during the course of the marketing process that a sale closer to $2 million was likely.

Result

[54] The appeal is dismissed.

[55] The appellant must pay the respondent costs on a Band A basis for a standard appeal together with the usual disbursements.

Solicitors:
Millennium Law, Auckland for Appellant
Sanderson Weir, Auckland for Respondent