IN THE COURT OF APPEAL OF NEW ZEALAND

CA47/2014
[2015] NZCA 361

BETWEEN	GARY OWEN BURGESS Appellant
AND	TSB BANK LIMITED Respondent

Hearing: 13 May 2015

Court: Cooper, Mallon and Dobson JJ

Counsel: Appellant in person
D M Lester and G R Burgess for Respondent

Judgment: 10 August 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent is entitled to indemnity costs in the High Court, subject to the reservation that where costs have already been fixed in relation to interlocutory steps, the cost orders originally made are to stand.

C The respondent is also entitled to indemnity costs in this Court, together with the usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

[1] Mr Burgess mortgaged his farm land at Medbury Road, RD1, Hawarden (the property) to secure two loans he obtained from TSB Bank Ltd (the bank). When

he fell into arrears the bank served a notice under s 119 of the Property Law Act 2007 (the Act). Mr Burgess did not comply with the notice and the bank exercised its power of sale. The proceeds of sale were insufficient to meet his indebtedness to the bank, which commenced a proceeding in the District Court to recover the shortfall.

[2] That proceeding was transferred to the High Court after Mr Burgess filed a counterclaim well in excess of the District Court's jurisdiction.[1] The bank applied for security for costs on the counterclaim, and by consent both the counterclaim and the bank's applications for security were stayed pending determination of the bank's substantive claim.

[3] On 10 December 2013 Gendall J delivered a judgment in favour of the bank in respect of the shortfall sum of $22,911.70, and interest.[2] The Judge awarded costs on an indemnity basis together with disbursements.

[4] Mr Burgess appeals against that judgment.

Background

[5] In 2008 the bank advanced two loans to Mr Burgess, both of which were secured by a first mortgage over the property. The loans totalled $165,000, and comprised a table mortgage advance of $140,000 and a further revolving credit facility of $25,000.

[6] Mr Burgess fell into arrears of interest. On 26 February 2010 the bank served a default notice under s 119 of the Act. When the default was not remedied, the bank proceeded to a mortgagee sale and the property was sold at auction on 11 June 2010. The proceeding commenced by the bank in the District Court was to recover the residual indebtedness which remained after the property was sold.

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1 *TSB Bank Ltd v Burgess* DC Christchurch CIV-2010-009-2978, 28 July 2011.
2 *TSB Bank Ltd v Burgess* [2013] NZHC 3291.

[7] The debt claimed by the bank was ascertained in accordance with the following table, as set out by Gendall J in the judgment under appeal:[3]

(a)	Gross amount realised from the mortgagee sale			$210,000.00
(b)	Less the following payments:			
	(i)	GST paid on sale	$23,333.33	
	(ii)	Principal balance of Mr Burgess' two loan accounts which were consolidated	$166,148.59	
	(iii)	Unpaid and accrued interest	$10,324.68	
	(iv)	Default and other fees payable under the loan agreements	$2926.42	
	(v)	Hurunui District Council rates paid by the bank on settlement	$95.19	
	(vi)	Real estate commission on sale	$8795.00	
	(vii)	Advertising costs for the mortgagee sale	$3651.91	
	(viii)	Valuer's fee	$945.00	
	(ix)	Process Server's fee	$710.00	
	Legal fees and disbursements incurred on the mortgagee sale		$ 15,981.58	$232,911.70
		Total		$22,911.70

[8] The Judge recorded it was common ground that the loans were made, default occurred and a notice was issued under s 119 of the Act.[4] However, Mr Burgess denied liability to the bank claiming that the notice was invalid on a number of grounds. Each of the issues raised by Mr Burgess was rejected. Although he has not repeated all of the issues pursued in the High Court, Mr Burgess has maintained on appeal the principal arguments he made in the High Court challenging the validity of the notice. He claims that because the notice was defective, judgment should not have been entered against him. He further submits that in holding against him the Judge inappropriately relied on the approach previously taken in cases concerning notices issued by mortgagees under the Property Law Act 1952 (the 1952 Act) requiring that the mortgagor show material prejudice, and wrongly relied on s 26 of the Interpretation Act 1999 for that purpose. Mr Burgess complains that the Judge elevated the commercial convenience for the bank over its obligations to comply with the applicable statutory requirements.

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3 At [8].
4 At [17].

[9] It will be convenient to summarise the High Court's reasoning when addressing each of the issues pursued on appeal. Before doing so, we set out the relevant terms of the notice and the statutory provisions on which Mr Burgess's argument focused.

The notice

[10] The Judge recorded that the notice was dated 19 February 2010 and served on Mr Burgess on 26 February.[5]

[11] Paragraph A of the notice, headed "NATURE AND EXTENT OF DEFAULT" began by giving Mr Burgess notice that he was in default under the mortgage (described as "Mortgage number 7904873.4 (Canterbury Registry)").

[12] Paragraphs 1 and 2 of para A then stated as follows:

> **1.** You have failed to pay the following payments of interest which are secured by the Mortgage and due and owing under your TSB loan contract 76-0001164-40:
>
> | | |
> |---|---|
> | • Interest due 20.09.2009 | 117.14 |
> | • Interest due 20.10.2009 | 1,035.14 |
> | • Interest due 20.11.2009 | 1,064.49 |
> | • Interest due 20.12.2009 | 1,038.98 |
> | • Interest due 20.01.2010 | 1,082.58 |
> | | $4,338.33 |
>
> **2.** You have exceeded your Revolving Credit Limit of $25,000.00 set out in the Second Schedule of your TSB loan contract 76-0001164-47 by:
>
> | | |
> |---|---|
> | | $ 559.25 |
> | The total amount in arrears as at 1 February 2010 is: | $4,897.58 |

[13] The following paragraph of the notice alleged a failure to pay rates due on the property over which the mortgage was registered to the Hurunui District Council in the sum of $17.93.

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[5] At [19].

[14] Paragraph B of the notice was headed, "ACTION REQUIRED". It set out the action required to remedy the default as follows:

> **1.1** Payment of the sum of $4,338.33 being the arrears in interest due and owing as at 1 February 2010 together with payment of not less than the sum of $559.25 being the amount by which the Revolving Credit Limit has been exceeded as at 1 February 2010, plus interest and the Bank's weekly payment default fees to the date of repayment;
>
> **1.2** Payment to the Hurunui District Council of the rates arrears amounting to $17.93.
>
> **1.3** Payment of the costs and disbursements of preparing and serving this Notice which are made up as follows:
>
> > **1.3.1** Preparing the Notice – approximately $950.00 plus GST and disbursements; and
> >
> > **1.3.2** Service of Notice – approximately $350.00 plus GST and disbursements.

[15] Paragraph C required that the defaults be remedied by 8 April 2010. Then, para D of the notice provided that if the "above defaults" were not remedied before 8 April, the bank would have the right to sell the property, or to enter into possession of it.

[16] Paragraph E, "NOTES" provided as follows:

> **1.** Payment of the said sum of $4,897.58 plus interest and the Bank's payment default fee of $35.00 per week to the date of repayment may be made at any branch of TSB Bank Limited or alternatively may be made at the offices of Auld Brewer Mazengarb & McEwen, Solicitors, 9 Vivian Street, New Plymouth 4310.
>
> **2.** Interest at the normal rate of 8.84% on loan no. 76-0001164-40 amounts to $35.22 per day and will continue to accrue for which sum you are also liable.
>
> **3.** Interest at the normal rate of 6.39% on loan no. 76-0001164-47 amounts to $4.47 per day and will continue to accrue for which sum you are also liable.
>
> **4.** Payment of the arrears of rates owing to the Hurunui District Council amounting to $17.93 can be made to the offices of the Hurunui District Council, 66 Carters Road, Amberley, or by post to the Hurunui District Council, PO Box 13, Amberley 7741.
>
> **5.** Any payments made by you to the Bank after service of this Notice (other than the full amount detailed in this Notice including costs) by

> any means will be accepted without prejudice to this Notice and all rights and remedies available to the Bank.
>
> …

[17] The notice showed on its face that it was copied to Susan Natalie Beaven, Malley & Co (a firm of Christchurch solicitors) and the Hurunui District Council at Amberley. Ms Beaven was Mr Burgess's former wife. Gendall J recorded that Mr Burgess had been engaged in litigation against Ms Beaven in the Family Court since about 2005, including appeals to the High Court, Court of Appeal and Supreme Court.[6] At one stage, Mr Burgess issued a third party notice against her in the context of the present proceeding. However, that notice was set aside on the bank's application.[7] Malley & Co were solicitors who formerly acted for Mr Burgess and who were instructed by the bank to draw up the loan documents. Those instructions provided for a loan facility for borrowings by Mr Burgess and there is no suggestion that Ms Beaven had any contractual relationship with the bank in respect of the loan. Rather, Mr Burgess asserted that the loans were arranged by him for the purpose of paying her relationship property entitlements and to provide working capital for the farm.

[18] Ms Beaven was served with the notice because at the relevant time she had lodged a notice claiming an interest in the land (which was then registered solely in the name of Mr Burgess) under the Property (Relationships) Act 1976. Malley & Co also lodged a caveat, asserting an interest in respect of an agreement to mortgage dated 4 September 2008. It is evident that both Ms Beaven and Malley & Co were served with a copy of the notice pursuant to the bank's obligation under s 121(1)(d) of the Act to serve persons who have lodged a caveat under the Land Transfer Act 1952, or a notice under s 42 of the Property (Relationships) Act.

The Act

[19] Section 119(1) of the Act provides that no mortgagee may exercise powers specified in subs (2) by reason of a default, unless notice complying with s 120 of the Act has been served and, on expiry of the period specified in the notice, the

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6 At [14].
7 *TSB Bank Ltd v Burgess* [2013] NZHC 1228.

default has not been remedied. The powers in s 119(2) relevantly include the mortgagee's power to enter into possession of, and to sell, mortgaged land.

[20] Requirements relating to a notice under s 119 are set out in s 120. Section 120 provides:

> **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.

[21] As already mentioned, s 121 of the Act provides that a copy of a notice under s 119 must be served on various persons including those who have lodged a caveat under s 137 of the Land Transfer Act, or a notice under s 42 of the Property (Relationships) Act having the effect of a caveat, against the title to the mortgaged

land.[8] Under s 121(2) a failure to comply with s 121 does not prevent the exercise, amongst other things, of the mortgagee's power to sell the mortgaged land. However, under s 121(3), a failure to comply with the section makes the mortgagee liable in damages for any loss arising from that failure.

[22] The "prescribed form" referred to in s 120(1) is the form set out in the schedule to the Property Law (Mortgagees' Sales Forms) Regulations 2007 (the Regulations). Form 1 in the schedule has a structure and text appropriate for compliance with the requirements of s 120(1) of the Act. Where necessary to respond to the arguments of the parties we will refer to the specific wording of the form.

[23] For completeness we mention s 123 of the Act. That provides:

> **123 Instruments have no effect so far as they conflict with section 119, 120, 121, or 122**
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> A term has no effect if it—
>
> (a) is expressed or implied in an instrument; and
>
> (b) conflicts with section 119, 120, 121, or 122.

[24] Finally, because it is relevant to one of the issues on appeal we note that s 4 of the Act defines the terms "acceleration clause" and "default" as follows:

> … **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
>
> …
>
> **default** means—
>
> (a) a failure—
>
> (i) to pay on the due date any amounts secured by an instrument; or
>
> (ii) to perform or observe any other express or implied covenant in an instrument; or

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8 Section 121(1)(d).

(b) any other event (other than the arrival of the due date) on the occurrence of which any amounts secured by an instrument become payable, under any express or implied term in the instrument

The invalidity of the notice

[25] Mr Burgess acknowledged that his defence to the bank's claim was substantially based on the bank's alleged failure to issue a notice that complied with the requirements of ss 119 and 120 of the Act, in the form required by the Regulations, and containing the information required by the Regulations.

[26] His criticisms of the notice can be grouped into three broad categories. First, he claimed that the notice did not adequately inform him of the action required to remedy the defaults. Secondly, he submitted that the notice had improperly required payment of interest not yet due at the time the notice was issued, and that consequently it included an amount in respect of which he was not in default under the Act. Thirdly, he claimed the notice had failed properly to specify the consequences of not remedying the default. In particular he asserted that the bank had failed to record that failure to comply with the notice would result in the bank having the right to "accelerate" the repayment of the principal secured by the table mortgage. We deal with each of these propositions in turn.

Failure to adequately state the action required to remedy the default

The argument on appeal

[27] As has been seen, s 120(1)(b) requires that a notice issued under s 119 of the Act must adequately inform the mortgagor of the action required to remedy the default. Consistently with that, the form specified in the schedule to the Regulations contained the following paragraph:

Action required to remedy default

You are required to remedy the specified default(s), or to cause the default(s) to be remedied,—

(a) by payment of the sum of $[*amount*] (which includes [*amount*], being the reasonable costs and disbursements of the mortgagee/receiver in preparing and serving this notice):

(b) by [*specify action required to remedy each default*].

[28] Mr Burgess argued, both in the High Court and on appeal, that the notice was deficient because it failed to state the sum payable to the bank to discharge the notice, and it was not possible to identify or calculate, from the notice, the amount required to remedy the default. Mr Burgess notes that the notice referred in para 1.1 to the sum of $4,338.33 being arrears and interest due and owing as at 1 February 2010, together with payment of the sum of $559.25 which was the amount by which the revolving credit limit had been exceeded as at 1 February, as well as continuing to refer to interest and the bank's weekly payment default fees down to the date of repayment. Following that there was a reference to the Hurunui District Council rates arrears and a reference to costs and disbursements of preparing and serving the notice. The costs and disbursements were claimed in amounts preceded by the word "approximately". Mr Burgess noted the content of Note 5 (in para E of the notice) which referred back to the "full amount detailed in this notice including costs." He submitted that this linkage to the costs provision (cl 1.3) confirmed that a precise amount should have been stated in the notice.

[29] Mr Burgess referred to correspondence that took place between him and the bank following service of the notice. In a letter dated 14 March 2010 (that is, before the date by which the defaults were to be remedied) after acknowledging receipt of the notice, Mr Burgess said:

> I require a definite figure for the sums detailed in 1.3, I suspect a cheque made out for a sum "approximately" might not clear. I require a definite figure for the disbursements and costs of preparing and serving the notice.

[30] On 13 April 2010 (after the date for remedying the default), the bank's solicitors, without specifically acknowledging Mr Burgess's letter, advised that the amount of $2,646.06 was payable for the preparation and service of the notice. That comprised their fee of $1,595, GST of $199.38 and disbursements of $851.68. The disbursements included a process server's fee, and the letter noted that the total reflected additional attendances relating to the matter as a result of the process server being unable to locate Mr Burgess. Mr Burgess pointed out that the costs and disbursements advised in the letter of 13 April significantly exceeded the sums referred to in the notice.

[31] He also emphasised the importance of the notice providing a specific sum able to be paid to remedy the default, not only to inform the person to whom the notice was addressed, but also those served with a copy of the notice under s 121. He submitted that persons served under that provision might wish to satisfy the terms of the notice for various reasons in the event that the current mortgagor is unable to do so.

The High Court judgment

[32] The Judge held that neither s 119 nor s 120 referred to any particular sums or amounts that "must" be included in a s 119 notice, "except to the extent that s 120(1)(b) requires the payment of money to remedy the default."[9] While s 120(2) provides that a notice required by s 119 "may" specify that the action required to remedy the default includes the payment of a specified amount, that relates only to the reasonable costs and disbursements of preparing and serving the notice.[10] The Judge also thought it significant that s 120(1) states that the notice must "adequately inform" the current mortgagor of the matters that follow. The Judge thought that this introduced "an element of reasonableness and proportionality" and negated imposition of an absolute standard.[11]

[33] Having considered the terms of the Regulations, and noting that the form enabled deletion of the provision referring to payment of a specified amount, he concluded there was nothing in the Regulations which required more specificity than application of s 120 itself. After referring to s 26 of the Interpretation Act, he accepted the submissions of counsel for the bank that the notice met all of the mandatory requirements of s 120(1) because it stated the nature and extent of the default, the action required to remedy the default, the period for doing so and the consequences of failing to do so.

[34] With reference to use of the word "approximately" in para 1.3 of the notice the Judge said:

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9 *TSB Bank Ltd v Burgess*, above n 2, at [25].
10 At [26].
11 At [27].

> [32] It is true that ideally the notice at 1.3 giving "approximate" amounts for costs and disbursements for preparing and serving the notice could have stated exact amounts but certainly, so far as the claim for a service disbursement was concerned at least, this amount would not have been known at the time the notice was issued. Further, it is clear that exact amounts for these costs and disbursements were provided to Mr Burgess at a later time. And the evidence before me was clearly to the effect that Mr Burgess was able to either communicate to the bank to obtain an exact costs and disbursements figure if he had been in a position to remedy the default, or alternatively could have paid the $950.00 and $350.00 in each case (plus GST) specified in 1.3 which Mr Kendall for the bank indicates clearly would have been accepted.

[35] The Judge also found on the basis of the evidence, including that of Mr Burgess, that at no time did he have funds, nor was he in a position to remedy the degree of default which was specified in the notice. This meant that he could not show prejudice as a result of the approximation of costs and disbursements in the notice. He was satisfied it was proper to consider whether the mortgagor is materially prejudiced by an alleged defect in the notice, notwithstanding that the Act did not contain a provision equivalent to s 92(1A) of the 1952 Act which provided (among other things) that:[12]

> … no notice shall be void by reason of any variation from the prescribed form unless … the variation materially prejudices the interests of the mortgagor.

Our analysis

[36] We are unable to agree with some aspects of the Judge's reasoning. In particular, if the action required to remedy the default involves payment of a sum of money, we consider the Act and Regulations require the notice to state the sum that must be paid. We consider this to be the case due to the combination of s 120(1)(b), reg 4 (requiring that the notice be in accordance with form 1) and form 1 itself, in particular that part of it under the heading "action required to remedy default" which we have set out above.

[37] We do not accept that para (a) under the relevant heading in the form can be deleted if what is required is a payment to bring the payments required under the mortgage up to date. In this respect, a deletion from the form may only occur where

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12 The subsection is set out in full below, at [61].

the particular paragraph is "inapplicable". If what is required is payment of a sum of money, we do not consider para (a) can be said to be inapplicable.

[38] There will of course be cases where payments under the mortgage are up to date, but there is some other failure to comply with the terms of the mortgage which must be remedied. In such a case it would be permissible to delete para (a). In the present case, for example, there was the standard obligation (under cl 8(b)) to keep all buildings and other improvements on the land in good and substantial repair and condition. Another standard obligation, (in cl 8(e)(ii)) was to comply with all notices and demands relating to the land served on the mortgagor under any statute, regulation or bylaw. Another was to comply with the provisions of the Resource Management Act 1991, and the rules of any relevant regional or district plan (cl 8(g)(i)). With these kinds of obligations, it would generally not be relevant to refer to payment of a sum of money as an action required to remedy the default. Paragraph (a) could be deleted as inapplicable. Rather, the notice would have to "specify" the "action required" in accordance with para (b).

[39] It follows however that if the step necessary to remedy the default involves payment of a sum of money, then the sum to be paid must be specified in the notice. As Mr Burgess points out, that may often be important for the parties served with a copy of a notice under s 121(1) of the Act just as it will be important for the mortgagor in default. Those other persons need to know what steps they might need to take to protect their own position, even if only for the purpose of preventing the ongoing accrual of interest. For the same reason, there is merit in Mr Burgess's submission that inability of the current mortgagor to pay should not absolve the mortgagee from the need to comply with the requirement to state the amount required to remedy the default.

[40] However, these conclusions do not have the result that the notice was invalid on the basis asserted by Mr Burgess. In our view, the Judge was right to conclude that the notice was adequate notwithstanding the criticisms able to be made about the uncertainty of some of the terms. We accept, as the Judge effectively held, that the requirement that the notice "adequately inform" the mortgagor of the matters listed in s 120(1) connotes an assessment of fact and degree. Leaving aside for present

purposes the issue of requiring payment of interest not yet due (which we discuss in the next section) we have concluded that the notice sufficiently stated the amount Mr Burgess had to pay to comply with its terms, and therefore adequately informed Mr Burgess of what was required.

[41] An amount was stated for arrears of interest due and owing as at 1 February 2010. The extent to which the revolving credit limit had been exceeded at the same date was also stated. The reference to interest and the bank's weekly payment default fees were references to matters able to be ascertained under the terms of the loan documents. The amount stated as owing for rates was also specified.

[42] Use of the word "approximately" in paras 1.3.1 and 1.3.2 of the notice was inappropriate. However, we do not think that this deprived the notice of effect. In our view, the proper approach is to hold that payment of the two figures referred to, respectively $950 and $350 plus GST, would satisfy the terms of the notice as those were the specified amounts. The fact that in subsequent correspondence, the bank's solicitors referred to larger sums payable, could not alter the terms of the notice that had been served. We do not consider that a mortgagee sale could have taken place if the sums specified in paras 1.3.1 and 1.3.2 had been paid, and the additional amount subsequently sought by the bank was outstanding. By similar reasoning, we consider that payment of the sum of $559.25 in respect of the overdrawn revolving credit limit would have been sufficient compliance with the notice.

[43] As we have seen, para 1 in E of the notice stipulated the amount of the bank's weekly payment default fee and paras 2 and 3 gave daily rates for outstanding interest payments. We accept that the notice required calculation of the amount necessary to comply with its terms if interest and weekly default fees were to be paid down to the date of actual repayment, but the information necessary for the calculation was provided in the notice. In the result, paras B and E of the notice, read together, adequately informed Mr Burgess of what he needed to do to remedy the default which means that s 120(1)(b) of the Act was complied with.

[44] Strictly speaking, the fact that a degree of calculation was required by the terms of para 1.1 of the notice meant that there was a departure from the prescribed

form which on the face of para (a) (under the heading "Action required to remedy default") of the form requires the statement of one sum which is both specific and net of all the payments that must be made to comply with the notice.

[45] The question of statutory construction presented is whether the requirement of s 120(1) that a notice under s 119 be in the prescribed form means the notice must state the amount that is required to be paid and it is impermissible to include provision, as occurred here, requiring calculation of additional amounts depending on the date payment is actually made. This is precisely the sort of issue that s 26 of the Interpretation Act is designed to address. Mr Burgess's argument relying on the absence of a provision equivalent to s 92(1A) of the 1952 Act cannot have the consequence that s 26 does not apply.

[46] Applying that section, we would characterise the difference between the terms of the notice and the prescribed form as minor. Further, in our view, the notice had the "same effect" as the prescribed form because it stated what was required to remedy the default, and it was not misleading.

[47] For these reasons, we reject Mr Burgess's argument under this heading.

Requirement for payment of interest not yet due

The arguments on appeal

[48] Independently of the argument that the notice did not adequately inform him of the action required to remedy the default, Mr Burgess submitted both in the High Court and on appeal that the notice was invalid because it required the payment of interest on the arrears as at 1 February 2010 down to the date of repayment. Mr Burgess also complained about the requirement to pay the bank's weekly default fees to the date of payment.

[49] In essence, his proposition is that a notice under s 119 of the Act cannot relate to payments that are not due at the date the notice is served. Mr Burgess relied for this argument on the definition of "default" in s 4 of the Act, which we have set out above. He also relied on the decision of the High Court in *Propst v ANZ National*

Bank Ltd.[13] He argued that it cannot be right that a notice can include, as part of the default that must be remedied, events which have not yet occurred. As part of this argument he notes that under s 120(1)(c), the notice must allow a period of not less than 20 working days after the date of service of the notice (or longer if required by the relevant mortgage) by which the default must be remedied.

[50] For the bank, Mr Lester has submitted that Parliament cannot have intended s 119 to operate on the basis that the notice could not require payment of interest falling due after the date when the notice was issued where that is the consequence of the continuance of the original default. He argued that would potentially enable the mortgagor to defer making the required interest payments, forcing the mortgagee to issue a further notice to compel the payment of interest arrears. This could potentially occur on a repetitive basis. He submitted that there is nothing in the wording of the Act to suggest that a s 119 notice must artificially treat every default as if it were "frozen in time" at the date of the notice. In this respect he argued that when a default occurred and, in terms of the relevant instrument, it is a continuing default, nothing in ss 119 and 120 requires the default to be treated "artificially and misleadingly" as an isolated event. He also submitted that would lead to an "unnatural" interpretation being given to the expression "remedy the default" in s 120, since paying the amount stated in the notice would not actually "remedy the default".

[51] Mr Lester further submitted that, not only is it lawful to include a claim for interest and costs accrued to the date of payment, but it may actually be misleading of the bank not to do so. He submitted that a mortgagor in default may be confused to find that, having "remedied" a default by complying with the notice, the mortgagor actually remains in default because interest and costs accrued since the date of the notice have not been paid. Mr Lester submitted this may result in other legal issues being raised, such as waiver and estoppel.

[52] He submitted that *Propst* could properly be distinguished on its facts (as Gendall J did in the judgment under appeal) on the basis that there was insufficient detail in the notice to calculate the sum required to be paid. Finally, he submitted

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[13] *Propst v ANZ National Bank Ltd* [2012] NZHC 1012.

that the Judge had been correct to consider the issue of prejudice, and conclude that the alleged defect in the notice had not prejudiced Mr Burgess. In this respect, he noted the concession given by Mr Burgess in cross-examination that he would not have been in a position to pay anything under the notice even if it had been expressed in terms which, on Mr Burgess's argument, complied with the Act.

The High Court judgment

[53] The Judge did not accept Mr Burgess's argument. He expressed his preference for the approach in *Hart v ANZ National Bank Ltd* where Associate Judge Abbott had declined to follow *Propst*.[14] He expressed the view that a claim for payment of interest lawfully due after the date of the notice was not of itself capable of invalidating the notice. He said it was informative first of the default, and secondly of the fact that unless satisfied interest amounts would continue to accrue. He also considered it significant that the amount owing in respect of the interest payments was able to be calculated on the basis of the information set out in the notice, and distinguished *Propst* on that basis. He agreed with the approach taken in *Hart* that unless there was an ability to require payment of interest up to the date of payment, it would leave a gap that could not be filled, which could not have been the intended operation of s 119.

[54] Gendall J also thought it significant that industry practice supported the inclusion of a requirement for payment of interest up to the date of final payment so as to remedy a default. The Judge said in addition that he was satisfied no prejudice would arise from the claim for interest accruing after the date of the bank's notice. Mr Burgess was critical of these aspects of the Judge's reasoning, again relying on the absence from the Act of a provision equivalent to s 92(1A) of the 1952 Act.

Our analysis

[55] We start by considering the evident purpose of a notice under s 119 of the Act. The relevant purpose that may be inferred from its terms is to prevent the exercise of a power of sale "by reason of a default" unless a notice has been served that specifies the default and advises the current mortgagor that if the default remains

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[14] *Hart v ANZ National Bank Ltd* [2012] NZHC 2839.

unremedied after expiry of the period specified in the notice, power of sale will become exercisable. Until that occurs, the provisions in the mortgage authorising entry into possession and sale of the mortgaged land cannot be exercised "by reason of a default". Section 123 ensures that the requirements of ss 119 and 120 override anything to the contrary in the instrument under which the default has occurred.

[56] The words of ss 119 and 120, read together, indicate that the default to be specified is the default that was in existence at the time the notice was issued. We accept Mr Burgess's submission that the definition of "default" has reference to a failure to pay amounts secured by a mortgage on the date on which they fell due. Just as a notice could not be issued in respect of a threatened future default, so we consider that a notice issued in respect of an existing default could not specify as a default something that has not yet occurred.

[57] Paragraph A of the notice in the present case clearly stated the nature and extent of the default by reference to the defaults that had occurred as at 1 February 2010, a date prior to the issue of the notice. The approach taken was consistent with the requirement of s 120(1)(a) of the Act to inform the mortgagor of the nature and extent of the default, and with form 1 in the schedule to the Regulations, which relevantly contains the following:

> **Default**
>
> As at the date of this notice, you are in default under the mortgage in that—
>
> (a) you have failed to pay [*specify each default of payment claimed, stating the amount, due date, and nature (for example, principal, interest, insurance premiums, etc) of each missed payment, and any other particulars necessary to adequately inform the mortgagor of the nature and extent of the default*]:
>
> (b) you have failed to observe or perform the following express or implied covenant(s) in the mortgage: [*specify each default complained of with sufficient particularity to adequately inform the mortgagor of the nature and extent of the default, for example, failure to keep building(s) insured or in good repair*]:
>
> …

[58] As this wording indicates, the notice is about payments which the mortgagor has failed to make and obligations that have not been performed "as at the date of

this notice." In this case, contrary to Mr Burgess's submission, the notice did not require payment of sums not due at the time it was issued. However, para B, setting out the action required to remedy the default stated that the notice included reference to payments that would subsequently fall due. Those payments would be due under the loans secured by the mortgage, but were not part of the default specified in para A. The question is whether that meant the notice as a whole was rendered invalid.

[59] We do not consider that was the case, for the following reasons. We do not think that the approach taken was to any extent misleading. The default that formed the basis of the notice was accurately defined in para A in a manner that complied with the Act. The nature and extent of the default was clearly stated and must have been obvious to Mr Burgess.

[60] This approach is consistent with *Housing Corporation of New Zealand v Maori Trustee (No 2)*, a case on which Mr Lester relied.[15] In that case a notice issued under s 92 of the 1952 Act required payment of the amount in arrears and interest at a fluctuating daily call rate of interest as provided in the loan agreement "up to and including the date of actual payment of the amount in arrears".[16] Somers J (with whom Richardson J agreed) held that in order to comply with the relevant regulations the notice ought to have stated the amount due but unpaid on various dates and the interest accrued on them.[17] However, on the facts there had been no material prejudice and the notice was sustained: the mortgagor knew it was in default and had known at all times how interest was being calculated. Writing separately, Cooke P expressed his full agreement with Somers J on this point, and said "[t]he notice objections are mere technicalities and in my opinion without substance."[18]

[61] The judgment of Somers J dealt with the adequacy of the notice by reference to material prejudice, referred to in s 92(1A) of the 1952 Act, and there is no equivalent provision in the current legislation. However, we do not consider that

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15 *Housing Corporation of New Zealand v Maori Trustee (No 2)* [1988] 2 NZLR 708 (CA).
16 Reproduced at 727.
17 At 728.
18 At 712.

should have the significance for which Mr Burgess contends. In this respect it is worth setting out s 92(1A) in full:

> **92 Restriction on exercise by mortgagee of his rights**
>
> …
>
> (1A) Every notice shall be in the form prescribed by regulations made under this Act; but no notice shall be void by reason of any variation from the prescribed form unless the notice does not adequately inform the mortgagor of—
>
> (a) The nature and extent of the default complained of; and
>
> (b) The date (being a date that complies with the provisions of subsection (2) of this section) by which he is required to remedy the default (if it is capable of remedy); and
>
> (c) The rights that the mortgagee will be entitled to exercise if the default is not remedied within the specified period,—
>
> and the variation materially prejudices the interests of the mortgagor.

[62] Reading the provision as a whole it is most unlikely that the notice would have been upheld had the Court been of the view that the notice did not adequately inform the mortgagor of the nature and extent of the default and the other matters the notice was required to convey. Cooke P's reference to mere technicalities strongly suggests that is so. For present purposes it is significant that the notice in that case required payment of interest due on arrears down to the date of payment. There was no suggestion in the judgment that this made the notice invalid.

[63] It appears that *Housing Corporation of New Zealand v Maori Trustees (No 2)* was not referred to Gilbert J in *Propst*. We consider it can appropriately be applied in relation to the notice served in this case. We think it indicates that the notice should not be regarded as invalid, having regard especially to the clarity with which para A was expressed, and the fact that the sums said to be owing in that part of the notice were repeated in para B at 1.1 and 1.2. Mr Burgess knew the amount in arrears when the notice was issued but did not pay the amount necessary to remedy the default, or any amount. Consequently, we consider the bank was entitled to proceed on the notice.

[64] We do not have to decide the question of whether the bank could have proceeded to sell the property if all that remained outstanding when the notice period expired were debts that arose subsequent to the issue of the notice because that is not the situation that arose. However, if that situation did arise it is likely that a notice such as this would be treated as sufficient for that purpose. We say that because the information in the notice was sufficient to inform the mortgagor of the nature and extent of the default, and the action required to remedy it, considered at that later time.

[65] If this were regarded as a departure from the strict requirements of form 1 which refers to remedying the "the specified defaults" (and so relates back to the preceding definition of the defaults) any such departure would be immaterial, because any difference between the notice and the prescribed form is minor and not such as to be misleading. Section 26 of the Interpretation Act could accordingly be applied.

[66] For these reasons we reject this ground of appeal.

Failure to specify the consequences of remedying the default

[67] The third basis on which Mr Burgess challenged the validity of the notice was that it failed to state adequately the consequences of not remedying the default. As noted above para D of the notice simply stated that if the defaults were not remedied before 8 April 2010 the bank would have the right to sell the property or to enter into possession of it. This is what the bank proceeded to do, and it resulted in the shortfall that the bank then sought to recover in the present proceeding.

[68] What happened can be seen in the table set out in [7] above. Among the deductions made from the gross proceeds of the mortgagee sale , the item at (b)(ii) was the principal balance, consolidated, of the loans then outstanding, a sum of $166,148.59.

[69] Mr Burgess's complaint is that the consequence of the mortgagee sale was that the bank recovered not only the arrears due when the notice was issued, but also effectively accelerated repayment of the amount of the principal outstanding on the

table mortgage. While the bank was able to take that step under the terms of the loan agreement, the outcome had not been stated in the notice. He submitted that this was a consequence of the failure to remedy the default which should have been stated in the notice.

[70] It appears that in the High Court Mr Burgess argued that before the bank could deduct the principal balance outstanding it should have served a notice stating that if payment was not made of the outstanding arrears the bank intended to accelerate repayment of the loan. Section 119(1) provides that amounts cannot be claimed under an acceleration clause unless notice has been given as envisaged by the section. Acceleration would be the kind of consequence envisaged by s 120(1)(d)(ii). The notice in this case referred simply to the powers of entry and sale: the consequences were stated in accordance with s 120(1)(d)(iii).

[71] The Judge dealt with Mr Burgess's argument by pointing out that the bank had not purported to rely on an "acceleration clause" to demand immediate repayment of the full loans, because under the term of the loan agreement Mr Burgess was obliged to repay the loan "forthwith Upon Demand". Having pointed out that Mr Burgess appeared to have misunderstood the on-demand nature of the loans, the Judge said:

> [74] When the bank decided to exercise its power of sale, it gave notice under s 119, and demanded only the missed interest and a rates payment, not the full amount of the loans. Mr Burgess failed to remedy the missed payments or to take any steps at all. I am satisfied the bank was entitled to proceed to mortgagee sale and recover the full amount of the loans. These "acceleration notice" arguments that Mr Burgess has endeavoured to raise have no application in this case.

[72] We consider that reasoning is correct. The notice here applied only to the arrears due under the loans. It could have been satisfied, without any implication for repayment of the principal. However, once the land was sold, it was axiomatic that the principal would be repaid and the mortgage expressly provided for that to occur as a consequence of the sale.

[73] Although there was power under the mortgage to accelerate the payments due, the bank did not purport to exercise that power. Rather, it chose to exercise its

power of sale. Having done so it was obliged by cl 9(e) of the mortgage to apply the proceeds in accordance with a priority stated in the mortgage: first in payment of the expenses relating to the sale, secondly in payment of the moneys secured by the mortgage, thirdly in payment of subsequent registered mortgages and fourthly, in payment any surplus to Mr Burgess. This outcome was not the result of applying the acceleration clause.

[74] The provisions of the mortgage reflected those of the loan agreement. Clause 3(a) provided, in the case of both loans, that the loans were repayable on demand and cl 6 simply provided that in the event of a sale of the property, the borrower would repay all moneys due and owing to the bank pursuant to the contract.

[75] On appeal Mr Burgess has challenged the Judge's conclusion that cl 3(a) applied, claiming that the governing provision was rather cl 21, which defined "Events of Default", and provided that upon the occurrence of such an event the whole of the balance of the principal then outstanding and unpaid together with interest became due and payable immediately. While the contract did contain such a provision the bank did not purport to rely on it and did not need to do so. Rather it gave a notice that related only to the defaults listed in the notice and did not purport to call up the principal owing. As Mr Lester put it, whether the loans were repayable on demand or not was in fact irrelevant to the s 119 notice because the notice only demanded the missed payments. When the outstanding payments were not made the bank then exercised its power of sale, as it was entitled to do, and applied the proceeds in the manner required by cl 9(e).

[76] Mr Burgess also submitted that the Judge erred by failing to take into account the fact that the Second Schedule of the table loan contract provided for a Repayment Date "30 years from the Date of Advance". He contrasted this with the Second Schedule of the revolving credit facility which provided that repayment was "Upon Demand". The Second Schedules to which he was referring, however, were in each case a statement of the facility sought by him as the borrower. The actual contractual terms were as we have described them above, and cl 3(a) of the table

loan agreement applied notwithstanding anything to the contrary in any relevant document.

[77] We are satisfied this ground of appeal should not succeed.

[78] In the result we have rejected all of the grounds on which Mr Burgess claimed the notice was invalid.

Costs in the High Court

[79] The final aspect of the appeal that must be considered concerns the costs award made by the Judge against Mr Burgess. The Judge determined that Mr Burgess should pay indemnity costs.

[80] The bank had claimed such costs on the basis of cl 12 in both of the loan agreements. That clause stated:

> The Borrower shall pay to the Bank Upon Demand all costs, charges, losses and expenses relating to this Contract and/or the Securities and in respect of any exercise or attempted exercise by the Bank of any of its rights, powers, remedies, authorities, or directions under this Contract or any of the Securities, including in each case all legal expenses at the rate charged as between the solicitor and client and any GST or similar tax payable thereon.

[81] The Judge noted that two categories of costs and expenses had been claimed, those incurred in relation to the mortgagee sale itself and costs and expenses incurred in attempting to recover the outstanding indebtedness, the latter said to be ongoing. He recorded that Mr Burgess's amended statement of defence raised issues as to whether the costs and expenses claimed by the bank were reasonable or necessary.

[82] The Judge found that all of the costs in the first category had been properly claimed. As to the second, he held that the bank was contractually entitled to claim the costs as necessarily incurred by it in terms of the indemnity which Mr Burgess had agreed to at cl 12 of the loan agreement. He also referred to r 14.6(4)(e) of the High Court Rules, providing that the Court may order the payment of indemnity

costs where there is an entitlement to such costs under a contract. He said "there can be no question that reasonable indemnity costs are to be paid."[19]

[83] Notwithstanding the Judge's reliance on that provision, in the concluding part of the judgment, he referred to interlocutory applications made by Mr Burgess and said that the defence had been conducted in a manner that could be seen as designed to extend the duration and expense of the proceeding.[20] He also referred to formal cautions that had been given to Mr Burgess at an interlocutory stage about improper allegations against the bank and other parties including his former solicitors, a matter that Gendall J had canvassed earlier in the judgment.[21]

[84] Gendall J also described the present case as having been marked by the "sheer lack of merit in the technical approach taken by Mr Burgess." He said that these were all matters that "should properly sound in costs."[22] He concluded by stating that the bank was entitled to costs on an indemnity basis, together with disbursements, "such amounts to be approved by the registrar."[23]

[85] It is not immediately clear from the judgment why reference was made to Mr Burgess's conduct of the proceeding, since there was a contractual entitlement to indemnity costs. However, we infer that the Judge was referring to those matters because the Court's power under r 14.6(4) is discretionary and, of course, under r 14.1(1) insofar as the costs claim relates to costs of a proceeding, all matters are in the discretion of the Court.

[86] The issues raised by Mr Burgess on appeal focus first on an allegation that the Judge gave an indication during the hearing that the issue of costs would be the subject of separate submissions, following release of the substantive decision. He claims that the Judge then made his decision concerning costs without providing

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19 At [108].
20 At [121(d)].
21 At [10(f)], referring to a minute of Associate Judge Osborne dated 6 June 2013 cautioning Mr Burgess against making such allegations. We should also record, in fairness to Mr Burgess, that Associate Judge Osborne was able to record an apology for any offence caused, noting he had no reason to doubt its sincerity.
22 At [121(e)].
23 At [123].

the opportunity for submissions and consequently denied Mr Burgess the right to be heard.

[87] The same allegation had been made by Mr Burgess in the context of an application for the recall of the judgment. The bank filed a notice of opposition which accepted that Mr Burgess requested that costs be the subject of a separate hearing, but said the bank had not agreed to that course being followed and that in any event a separate hearing on costs would not have been justified. Mr Lester did not appear in the High Court. Junior counsel did, but while he was able to advise us that the bank had referred to its contractual right to indemnity costs he could not recall the Judge making any order as to how costs would be dealt with.

[88] Mr Burgess in fact made two applications for the recall of the judgment. Both were dismissed on the basis that there was an outstanding appeal in this Court. Consequently, we do not have the benefit of a direct response by the Judge to the submission Mr Burgess makes about a separate process for costs. We infer however that he must have agreed with the bank's notice of opposition because in declining the first application for recall he directed that the substantive judgment be sealed. He indicated he thought there would be a process in which costs were fixed, we infer with reference to the Registrar's approval.

[89] The substantive issues by Mr Burgess appear to be that the Judge failed to take into account actions of the bank that led to the prolongation of the proceedings, and made or caused (his submission was not specific) unnecessary interlocutory applications. He also claimed the Judge overlooked the fact that costs had already been determined on "many" of the earlier interlocutory proceedings.

[90] The first of those allegations lacked particularity. As to the second, if costs have already been fixed in respect of interlocutory steps, they obviously should not be taken into account again. Mr Lester confirmed that the bank would not seek further costs in respect of any such matter.

[91] Save for that issue, we are not persuaded that there is any basis for departing from the costs order made in the High Court. It seems that there may have been a

misunderstanding about the way in which costs were to be dealt with in the High Court. However, if there was conduct of the bank that was disentitling in respect of costs, the appeal to this Court was the proper opportunity for Mr Burgess to raise those matters. We have not found anything in his submissions in that category.

[92] We accept that the form of the notice in this case gave rise to issues in respect of which there was conflicting High Court authority and that Mr Burgess was entitled to pursue them. However, that is not a sufficient basis on which to conclude that the bank is not entitled to costs in accordance with the contract.

Result

[93] For the reasons we have given, the appeal is dismissed. The order made in the High Court in relation to costs is consequently confirmed, subject to the reservation that where costs had already been fixed in relation to interlocutory steps, the cost orders originally made are to stand.

[94] The bank is also entitled to indemnity costs in this Court, together with the usual disbursements.

Solicitors:
Clendons, Auckland for Respondent