IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2010-009-002978
[2013] NZHC 3291

BETWEEN	TSB BANK LIMITED Plaintiff
AND	GARY OWEN BURGESS Defendant

Hearing: 11 and 12 November 2013

Appearances: NRW Davidson QC and G R Burgess for Plaintiff
Defendant Appears in Person

Judgment: 10 December 2013

JUDGMENT OF D GENDALL J

Introduction

[1] This proceeding had its beginnings in the District Court at Christchurch as a 2010 debt collection following a mortgagee sale by the plaintiff (the bank) against its former customer, the defendant Gary Owen Burgess (Mr Burgess).

[2] In 2008 the bank advanced two loans to Mr Burgess to enable him to refinance debt and purchase his ex wife's interest in the property concerned. The loans totalled $165,000 and comprised a table mortgage advance of $140,000 and a further revolving credit facility of $25,000. They were secured by a first mortgage over the rural property at 563 Medbury Road, RD1, Hawarden (the property), previously owned by Mr Burgess and his former wife, Susan Natalie Beaven, (Ms Beaven), the ownership of which he was to take over.

[3] Not long after the loan was advanced, Mr Burgess fell into arrears of interest. On 26 February 2010 the bank served a default notice under s 119 Property Law Act 2007. The default was not remedied and so the bank proceeded with a mortgagee sale, selling the property at auction on 11 June 2010.

[4] Earlier, the bank had obtained a registered valuation of the property and engaged a real estate agent to commence preparations for the mortgagee sale. At the auction the property was sold for $210,000 (inclusive of GST) with settlement under the mortgagee sale occurring on 2 July 2010.

[5] Following the sale, there was said to be a residual indebtedness owing of about $23,000. On 27 October 2010 the bank brought proceedings against Mr Burgess in the District Court to recover this sum.

[6] Mr Burgess' response was to file a counter claim against the bank in the District Court alleging unlawful conduct on its part, and seeking unspecified amounts which exceeded $700,000 (alternatively claimed by Mr Burgess at a figure of over $1 million).

[7] Given the quantum of this counter claim, on 28 July 2011 Judge Neave in the District Court ordered that the proceeding be transferred to the High Court – *TSB Bank Limited v Burgess*.[1] That occurred.

[8] Leaving Mr Burgess' counterclaim on one side (a counter claim, which as will be seen below, has been stayed), the bank's present claim before this Court is for the sum said to represent the shortfall following the mortgagee sale. It amounts to $22,911.70 calculated as follows:

(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

[1] *TSB Bank Limited v Burgess* CIV-2010-009-2978, 28 July 2011.

	Legal fees and disbursements incurred on the mortgagee sale	$15,981.58	$232,911.70
	Total		$22,911.70

[9] The bank now seeks an order to recover this $22,911.70 debt (plus costs on this proceeding) from Mr Burgess.

Interlocutory matters

[10] During the course of this proceeding since it has been in the High Court, a number of interlocutory matters have arisen. It is useful to record these here. They are:

(a) Mr Burgess brought an application for judgment on his $700,000 (or $1 million) counter claim against the bank by formal proof, but this was withdrawn on the day of the hearing – recorded in a minute of Associate Judge Matthews on 17 May 2012.

(b) The bank applied for security for costs with respect to the counter claim against it. It followed that by consent, both Mr Burgess' counter claim and the bank's application for security for costs were stayed pending determination of the bank's claim. This was also set out in the minute of Associate Judge Matthews dated 17 May 2012.

(c) Mr Burgess then applied to strike out the bank's claim. That application was dismissed by Associate Judge Osborne on 13 May 2013.[2]

(d) Mr Burgess twice sought to join his former wife, Ms Beaven, as a third party to the bank's present claim, whilst at the same time attempting to have the claim struck out. Initially he did this by notice issued on 26 October 2011 and subsequently, after an extension of time was allowed by leave of the Court, granted by Associate Judge Osborne on 25 March 2013. The bank opposed the joinder and after a

[2] *TSB Bank Limited v Burgess* [2013] NZHC 1070.

hearing the third party notice was set aside by Associate Judge Osborne on 28 May 2013.[3]

(e) Mr Burgess applied for further and better discovery. This application as I understand it was dismissed on 28 May 2013, apart from a requirement that the bank provide a slightly fuller description of privileged documents.

(f) One final matter needs to be mentioned here. Following allegations, (considered by the bank to be scandalous) made by Mr Burgess against the bank and other parties (including allegations of criminal conduct, conspiracy, professional misconduct and the like) Associate Judge Osborne included in a minute dated 6 June 2013 a strong caution to Mr Burgess against making these or other false allegations.

[11] It followed therefore that the present hearing before me was to address only the bank's claim to recover from Mr Burgess the shortfall debt following the mortgagee sale. Although Mr Burgess' amended statement of defence is essentially a defence by way of counter claim, as noted above at [10](b), this counter claim was stayed pending the outcome of the bank's present claim before me.

Ms Beaven

[12] One further preliminary matter needs to be mentioned. In his statement of defence Mr Burgess refers on a number of occasions to his former wife, Ms Beaven but the bank submits here that this is entirely irrelevant. It is useful to deal with this aspect at the outset.

[13] As I understand the position, Mr Burgess and Ms Beaven married in 2002 and separated in 2003. This was approximately four years before Mr Burgess first approached the bank to borrow in his own name the loans in question.

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3 *TSB Bank Limited v Burgess* [2013] NZHC 1288.

[14] Since about 2005 up to the present time, Mr Burgess has been engaged in substantial litigation against Ms Beaven in the Family Court. This has included numerous hearings in the Family Court, High Court, Court of Appeal and the Supreme Court. As I understand the position, these proceedings continue.

[15] The bank says that Mr Burgess has continually attempted to draw Ms Beaven into this proceeding. The third party notice he issued on 26 October 2011, as noted at [10](d) above, was set aside by this Court on 28 May 2013. The residual debt which the bank seeks here relates to the mortgagee sale of Mr Burgess' own property in terms of the mortgage and loan agreements to which he was the sole borrower party. I am satisfied that it is quite inappropriate for Mr Burgess to continue any attempts he has made in the past to involve Ms Beaven in this proceeding.

[16] There is also nothing in the statement of defence filed by Mr Burgess, or in his evidence provided before this Court, which discloses any basis upon which his dealings with Ms Beaven might negate or influence in any way his liability to the bank. Any dealings he had with Ms Beaven, as I see it, are irrelevant to matters before me.

The bank's claim

[17] Turning now to the bank's formulated claim here, the facts of the borrowing Mr Burgess undertook from the bank, and his subsequent default, were not essentially challenged by Mr Burgess in his evidence. It seems to be clearly agreed that the loans were made, default occurred, and the s 119 notice was issued. The validity of this notice, however, is challenged by Mr Burgess, as are aspects of the mortgagee sale process.

[18] As a result, Mr Burgess denies any liability to the bank. In his amended statement of defence, he raises a significant number of issues which in considering the bank's present claim it is useful to address. These issues relate to:

(a) The costs claimed as an approximation in the s 119 notice;

(b) The claim in the s 119 notice for interest accruing after the date of the notice;

(c) The "acceleration" of the loan repayments;

(d) The alleged breach of the bank's duties as mortgagee by which the property was sold at mortgagee sale at an alleged undervalue;

(e) The alleged "loss of assets unable to be removed" from the property;

(f) The status of the Third Schedule of the loan agreements;

(g) The alleged "fraud" by Mr Burgess' former solicitors;

(h) An issue as to whether the loan agreements are contrary to the Property Law Act 2007;

(i) Whether the costs sought by the bank are excessive;

(j) An alleged breach by the bank of the Code of Banking Practice;

(k) Estoppel; and

(l) The alleged "invalidity" of the bank's present proceedings.

Costs claimed in the s 119 notice

[19] The s 119 notice in question was dated 19 February 2010 and served on Mr Burgess on 26 February 2010. It set out:

(a) First, a number of missed interest payments on the "40" table mortgage loan account (which had at an early stage of the loan become an interest only advance) and secondly, an excess borrowing amount on the "47" revolving credit loan account. As I understand it these figures are not disputed by Mr Burgess.

(b) Certain other amounts required to remedy the default under the mortgage (rates arrears on the property, interest accrued after the date of the notice and the costs of preparing and serving the notice).

(c) A timeframe for remedying the defaults.

(d) The consequences of failing to remedy those defaults.

[20] Mr Burgess here appears to challenge the technical validity of the s 119 notice on the basis that it did not contain "either of the specified sums required under [the] Property Law Act, nor did it [it] identify the amount to be paid to the bank to remedy the claimed default or defaults."

[21] A major part of this defence appears to relate specifically to paragraph 1.3 of the notice. This sets out as part of the bank's claim costs included in the notice which are said to be:

> 1.3 Payment of the costs and disbursements of preparing and serving this notice which are made up as follows:
>
> 1.3.1 Preparing this notice – approximately $950.00 plus GST and disbursements; and
>
> 1.3.2 Service of notice – approximately $350.00 plus GST and disbursements.

[22] It seems that Mr Burgess' principal complaint here is that the notice referred to only "approximate" amounts for preparing and service of the notice and not exact amounts.

[23] In considering the requirements for such default notices, s 119(1)(a) Property Law Act 2007 requires a mortgagee to give due notice to a mortgagor before exercising a power of sale under a mortgage. Section 120 prescribes the form of that notice in the following way:

> **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. (Emphasis added)

[24] It is clear from decisions such as *Re E-Merce Limited*[4] that the purpose of a s 119 notice is to ensure that a mortgagor is given adequate notice of the default complained of and the likely consequences if it is not remedied.

[25] Significantly, neither s 119 nor s 120 refer 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.

[26] On the contrary, the only reference in those sections to a "specified amount" is in s 120(2). This says that a notice "may specify" that the action required to remedy a default includes payment of a specified amount "being the reasonable costs

4 *Re E-Merce Limited* [2002] CSLB 92 (HC).

and disbursements...in preparing and serving the notice". It seems therefore that provision of a "specified amount" is optional.

[27] An important consideration here is the requirement in s 120 that the notice must "adequately inform" the mortgagor of the relevant matters. There seems little doubt that this introduces an element of reasonableness and proportionality when considering s 119 notice and would appear to negate an absolute standard.

[28] The prescribed form of notice is contained in form 1 of the Property Law (Mortgagee's Sales Forms and Fees) Regulations 2007. As with the Act, the form does not refer to any "specified sums" or "specified amounts" that must be stated in the notice. The form itself includes sections marked "+ delete if inapplicable". The "action required' section provides two optional additions:

> +(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].

[29] It would seem therefore that consistent with s 120(2) of the Property Law Act 2007, inclusion in the notice of an amount for costs is optional as the form itself provides that the reference to costs in option (a) may be deleted.

[30] And of relevance to any technical challenge to the prescribed s 119 notice is s 26 of the Interpretation Act 1999 which states:

> **26 Use of prescribed forms**
>
> A form is not invalid just because it contains minor differences from a prescribed form as long as the form still has the same effect and is not misleading.

[31] Before me Mr Davidson QC for the bank contended that the notice here met all of the mandatory requirements of s 120(1) in that it stated:

(a) The nature and extent of the default – s 120(1)(a);

(b) The action required to remedy the default – s 120(1)(b);

(c) The period for remedying the default – s 120(1)(c); and

(d) The consequences of failing to remedy the default – s 120(1)(d).

I agree.

[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.

[33] In any event, all the evidence here, including that of Mr Burgess himself, confirms that at no time did he have funds or was he in a position to remedy the degree of default which was specified in the s 119 notice.

[34] In addition, as I have noted above at [29], there is no mandatory requirement in the prescribed form or under the legislation to specify a precise amount claimed for preparing and serving the notice itself.

[35] In all these circumstances, it is difficult to see how any prejudice to Mr Burgess has arisen as a result of the approximation of costs and disbursements in the notice. Indeed to provide these approximate figures might be seen in one sense as assisting Mr Burgess to make a calculation of what was required to remedy the default, had he been in a position to do so (which he was clearly not).

[36] And in any event in a case such as the present, where there is a challenge to a s 119 notice, I am satisfied that it is proper to consider whether the mortgagor is

materially prejudiced by an alleged defect in the notice to such an extent so as to invalidate the notice.

[37] This was the position under s 92(1A) of the Property Law Act 1952 which was the predecessor of s 119 of the current Property Law Act 2007. That s 91(1A) of the 1952 Act provided in part:

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

[38] This express reference to material prejudice in the 1952 Act was not carried into s 119 of the Property Law Act 2007. There is a reasonable argument as I see it, however, that s 26 Interpretation Act 1999 (referred to at [30] above) effectively retains this requirement. I am satisfied too that recent authorities support the position that material prejudice remains a primary consideration for determining whether an alleged defect of the sort raised by Mr Burgess here would invalidate a notice under the 2007 Act.

[39] In *Hinde, McMorland & Sim, Land Law in New Zealand*[5] dealing with the contents of a s 119 notice, the learned authors state:

> The notice served under s 119 must comply with s 120, which provides that the notice must be in the prescribed form and must adequately inform the current mortgagor of:
>
> (1) the nature and extent of the default; and (2) the action required to remedy the default (if it can be remedied); and (3) the period within which the current mortgagor must remedy the default or cause it to be remedied; and (4) the consequence that if, at the expiry of the specified period, the default has not been, or cannot be, remedied, the mortgagee will become entitled to exercise certain specified powers...A question that arises in respect of all four matters is whether a minor or clerical error in a notice will render it non-compliant with s 120. As to the prescribed form, minor differences from that form will not invalidate a notice, as long as the notice still has the same effect and is not misleading: Interpretation Act 1999, s 26. As to the four matters that must be specified, it must be remembered that s 120 merely requires that the notice "adequately inform" the current mortgagor of them. In that respect the Court of Appeal has said that what matters is whether "a reasonable recipient would have understood, notwithstanding [the] error, what the notice-giver intended to specify." *Bryers v Harts Contributory Mortgage Nominee Co Ltd* [2002] 3 NZLR 343 (CA) at [15] per Blanchard J.

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5 *Hinde, McMorland & Sim, Land Law in New Zealand* Lexis Nexis at 15.095.

[40] And at 15.095(a) the learned authors acknowledge:

> (a) The nature and extent of the default
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> The notice must adequately specify the nature and extent of the default complained of. Some leeway is allowed by the Courts where the mortgagee does not correctly specify the extent of the default...

[41] In *Trustees Executors Ltd v Cary*[6] a mortgagor challenged the validity of a s 119 notice on various grounds including that the notice:

> [21] ...failed to properly advise the mortgagors, including the First Defendant, of the amount required to be paid to the Plaintiff to remedy the default specified in the Notice.

Associate Judge Faire rejected the mortgagor's arguments, implicitly on the basis that there was no prejudice.

> [23] The notices make it plain that they required the first defendant to remedy the default. He took no steps and the defaults were not remedied.

[42] Associate Judge Abbott in *Hart v ANZ Bank Limited*[7] expressly looked to whether there was prejudice arising from an alleged technical defect in a s 119 notice, and found there was none:

> [32] ...Prior case law indicates that the focus of the statutory provision [i.e. s 119 of the Property Law Act and its predecessor] is whether the mortgagor has been adequately informed of the amount required to clear the default, and whether the party required to respond to the notice can be said to be prejudiced in that respect. The lack of any such contention, or even a challenge to the notices generally prior to receipt of judgment in *Propst*, indicates that there is no prejudice in this case.

[43] And in *Bank of New Zealand v Koroniadis*[8] the bank served its s 119 notice on the second defendant (a guarantor, not a mortgagor) after it had nominally expired. In giving my decision in that case and finding there was no prejudice to the second defendant I stated:

> [27] ...even if the second defendant is able to establish proof of the matters he alleges (and in this regard his evidence here is confusing, often irrelevant and lacking in reliability) it does not in any way establish that he

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6 *Trustees Executors Ltd v Cary* (HC) 34 TCL 10/7, 18 February 2011.
7 *Hart v ANZ Bank Limited* [2012] NZHC 2839.
8 *Bank of New Zealand v Koroniadis* [2013] NZHC 1700.

> has been prejudiced by any alleged failures on the part of the plaintiff which may have occurred in serving him with documents in a prompt fashion.
>
> [34] ...I am satisfied that the delay in service of this Notice on the second defendant as guarantor here could not in all the circumstances have caused any prejudice or lost opportunity to the second defendant to remedy the defaults in question or otherwise.

[44] A similar finding was made in *Peters v Westpac New Zealand Ltd*[9] in which the defendant alleged (at [35]) that Westpac had "frustrated" his ability to remedy a default stated in a s 119 notice by failing to advise him that the amount required to remedy the default had increased from $13,108 to $20,000. The Court accepted that the defendant was "not told before the expiry of the Property Law Act notice on 30 March 2012 that his default had increased to $20,000". However, Venning J rejected the argument that this invalidated the notice:

> [42] ...There is a further and final point. Mr Peters was clearly not in a financial position to pay the $13,108 by 30 March 2012. He had paid nothing since mid to late 2011. He had no ability to pay the default and has provided no evidence he could do so.

[45] It is clear too that the Courts have upheld s 119 notices despite significant "positive" defects, such as overstating an amount payable or misstating the time for compliance. Findings have been made that such defects have not invalidated the notice, provided the recipient was adequately informed of the default and its possible consequences (in other words, provided there was no prejudice). For example, in *Commodore Pty Ltd v Perpetual Trustees,*[10] Cooke J said at 328:

> I agree with the Judge in his conclusion, following Richmond J in *Clyde Properties Ltd v Tasker* [1970] NZLR 754, that mere overstatement of the interest would not have invalidated the notice of intention to exercise the power of sale: the default complained of was sufficiently specified for the purposes of s 92(1)... No tender or payment of any kind was in fact made in response to the notice. It follows that after 16 March 1977 the power of sale given by the mortgage for default in payment of interest was lawfully exercisable.

[46] Likewise in *Bryers v Harts Contributory Mortgages Nominee Co Ltd*[11] the Court of Appeal said:

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9 *Peters v Westpac New Zealand Limited* [2013] NZHC 1366.
10 *Commodore Pty Ltd v Perpetual Trustees* [1984] 1 NZLR 324 (CA).
11 *Bryers v Harts Contributory Mortgages Nominee Co Limited* [2002] 3 NZLR 343.

> [14] We find ourselves in agreement with Fisher J that the notice given to ACAL on 28 January 2000 did comply with s 92 notwithstanding the clerical error. We reject the argument for the appellant that the section requires literal accuracy in the statement of a date...

[47] Finally, in a recent decision in *Southland Building Society v Austin*[12] in relation to an alleged failure to serve notices under s 122 of the Property Law Act 2007, Associate Judge Bell stated:

> [9] ...The defences and evidence of the defendants show that they were well aware that the properties were to be sold by auction. The evidence shows that they did not obstruct the sales but were aware of them and, if anything, were co-operative. Any failure to serve notices under s 122 cannot have prejudiced the defendants.

[48] The question that needs to be answered here is whether Mr Burgess was materially prejudiced or lost some other opportunity by the inclusion in the notice of an "approximate" amount for the reasonable costs of preparing and serving it.

[49] As noted in [26] above, under s 120(2) Property Law Act 2007, the inclusion of the costs amount is optional. As I see it therefore, Mr Burgess would have no basis for complaint if the notice had not stated an amount for costs. The same can be said if the bank had not taken the course of stating the costs figure known at that date as "approximate", but instead asserted an actual figure, even though it may have been inaccurate.

[50] Fundamentally, I am satisfied here that Mr Burgess was not materially prejudiced by the fact that the notice provided the optional costs and disbursements figures as "approximate" and not actual amounts. Mr Burgess did not plead prejudice, nor in my view has he provided any evidence of such.

[51] On the contrary, Mr Burgess formally conceded at the time the notice was issued in a letter to the bank's solicitors that the bank was "entitled to proceed with the mortgagee sale process". Indeed, he advised that he was "endeavouring to borrow some additional funds from CRT, to bring the mortgage up to date".

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[12] *Southland Building Society v Austin* [2012] NZHC 497 (upheld on appeal on other grounds: [2012] NZCA 337).

[52] Further, in cross-examination, before me Mr Burgess conceded that it did not matter what was in the notice because he could not have paid it anyway (page 54 line 8 of the Notes of Evidence):

> Q. ...But you were in no position to pay anything as I understand it, to meet these arrears?
>
> A. I was in a position where the funds that I required to repay the arrears were withheld from me unlawfully by other people.
>
> Q. Yes.
>
> A. Um, so I couldn't directly pay them. I should've been able to pay them.
>
> Q. Yes, so in that sense, and I accept there's an issue of which you've raised regarding the notice, but in that sense whether it said 850 or 950 or even the full amount that the bank in fact has sought from you subsequently for these charges, talking about the [preparing] of notice and service of notice, it wouldn't have made any difference, you couldn't have paid?
>
> A. Not at that stage.
>
> ...
>
> **Q. The bank had arrears owing to it and you couldn't pay them, that's the essence of it isn't it?**
>
> **A. It is, I see the bank and myself both as being the victim of other people's actions.** (Emphasis added)

[53] Thus, I find that Mr Burgess acknowledged that he was aware of his default, and that he needed to take prompt steps to remedy it, but because of lack of funds, he was not able to do so. Even after the bank provided the exact costs and disbursements amounts (after the nominal expiry of the notice but some eight weeks before the auction took place) Mr Burgess still took no steps to remedy the default. He said in his evidence that this was because funds were unlawfully withheld from him (by other parties), but this cannot be a defence to the bank's claim.

[54] Mr Burgess has produced no evidence, of any steps that he might or would have taken to remedy the default, but could not take, due to the "approximate" costs figure in the notice (which was in any event a relatively small part of the overall default). Besides not paying the costs, Mr Burgess did not pay the exactly specified

interest sums, which Mr Kendal for the bank in his evidence before me said would have been accepted as part-payment.

[55] As with the defendant in *Peters v Westpac New Zealand Ltd* Mr Burgess had no ability to clear the default and did not do so. He admits as much. There was no material prejudice or lost opportunity to him by the approximation.

[56] Accordingly, in my view there is no basis for finding that the s 119 notice is invalid here by reason of the bank's "approximation" of its costs on the issue and service of the notice specified at 1.3.

The claim for interest accruing after the date of the notice

[57] Mr Burgess's amended statement of defence claims next that the notice was invalid because "the notice unlawfully required the payment of interest and penalties not yet in default, as at the date of the notice" (paragraph 66). Mr Burgess appears to have added this pleading in response to a recent judgment in *Propst v ANZ National Bank Limited*.[13]

[58] In *Propst*, the mortgagor (Mrs Propst) submitted that two s 119 notices served on her by the bank in question, ANZ, were invalid because they "grossly overstated the amount required...to remedy the default [and] the interest claimed was 'overly difficult to calculate with accuracy" (at [47]). The Court agreed, and granted an interim injunction against ANZ.

[59] In his judgment, Gilbert J noted two problems on the claim for interest:

> [60] Further, the notice required payment of interest from 14 December 2011 until the date of payment. In my view, there are two problems with this part of the notice. First, the Bank did not supply sufficient information to enable the interest to be calculated. In relation to one of the facilities, the outstanding balance was not broken down between principal and interest. No information was supplied as to the changes to the outstanding balances since 14 December 2011. Mrs Propst would not know from the notice what changes to the variable interest rates might occur. Secondly, in requiring interest to be paid up to the date of payment, the Bank has purported to require payment of amounts not due at the date of the notice. In my view, this is not permissible.

[13] *Propst v ANZ National Bank Limited* [2012] NZHC 1012 Gilbert J.

[60] In the present case, it is clear the bank's s 119 notice also required payment of "interest and the Bank's weekly payment default fees to the date of payment".

[61] The present situation however as I see it is distinguishable from *Propst*, at least in part, in that Mr Burgess has not alleged here that the interest or default fees were "difficult to calculate" and could not reasonably do so. Section "E" of the s119 notice here clearly stated the daily amounts of interest accruing on the loans ($35.22 and $4.47 respectively) and the weekly default fee ($35.00).

[62] The question remains, therefore, whether the bank's notice was invalid because it required the payment of interest accruing after the date of the notice.

[63] *Propst* would appear to be the first (and to date, only) case in which a s 119 notice has been invalidated on the grounds (at least in part) that it claimed interest after the date of the notice.

[64] The only case in which *Propst* appears to have been considered to date is *Hart v ANZ National Bank Limited*[14] (a related case involving Mr Barry Hart, the brother of Mrs Propst). There, Associate Judge Abbott referred to *Propst* but declined to follow it on this aspect because he found no prejudice arose from the claim for interest after the date of the notice:

[65] It seems too that the question of material prejudice was not considered in *Propst.* In the absence of some prejudice to Mrs Propst arising from the claim for interest accruing after the date of the notice (or if she had experienced difficulty in calculating the interest), in my view must mean that *Propst* is inconsistent with previous other authorities of this Court, and I chose not to follow it here.

[66] In *Hart*, Abbott AJ (at [32]) took a similar approach and gave further reasons for declining to apply *Propst,* which I see as relevant here:

(a) Industry practice supports the inclusion of a requirement for payment of interest up to date of final payment in order to remedy a default.

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

(b) The notices showed the interest rates applicable to the amounts owing, thus allowing calculation. In the present case, the bank's notice expressly states the daily and weekly dollar amounts of the interest and default fees, allowing an even easier calculation.

(c) Mr Hart took no issue over the interest claim ahead of the judgment in *Propst*. Likewise, initially in the present case, no issue was taken by Mr Burgess over the interest or default fees claimed in the notice until it seems he became aware of the judgment in *Propst*. This defence was only added in his 28 August 2013 amended statement of defence, almost two years after his first statement of defence.

(d) Abbott AJ accepted the argument that an inability to require payment of interest (likely to be penalty interest) up to the date of payment so as to remedy a default, completely leaves a gap which cannot be filled. The recipient of the notice could meet a demand for interest only up to the date of demand but still be in default for failing to pay interest between the issue of the notice and the date of payment, hence requiring the issue of a further section 119 notice (with the potential for the same to happen again). This reasoning is directly applicable here. If Mr Burgess cleared the overdue interest payments set out in the notice "by the date it expired," he would remain in default for any interest accrued since the date of the notice, requiring issue of a further notice, and then another, etc. In my judgment, this cannot be the intended operation of s 119.

[67] As I see the position, the decision in *Hart* should be preferred to that in *Propst* and followed, to the end that a claim in a s 119 notice for payment of interest lawfully due after the date of the notice is not, of itself, capable of invalidating the notice. It is informative first, of the default and secondly, to note that unless satisfied, interest amounts would continue to accrue.

[68] But, in any event, I am satisfied for the reasons set out above, that no prejudice arose (or was even pleaded by Mr Burgess) from the claim for interest

accruing after the date of the bank's notice in the present case. The notice therefore is not invalid for this reason.

The "acceleration" of the loan repayments

[69] At paras 27, 31, 34, 56 and 67 of his amended statement of defence, Mr Burgess made a number of references to the bank having failed to issue an "acceleration notice" in respect of the loans. These allegations were not in his original defence. It seems they relate to a situation arising in a recent case *ANZ v Thompson*.[15]

[70] In *Thompson*, where the loan in question was not repayable on demand, the bank was found to have unlawfully accelerated repayment of a customer's loan without giving the notice required by s 119 of the Property Law Act 2007.

[71] The present case is clearly distinguishable for the simple reason that the loan in *Thompson* was <u>not</u> repayable on demand, unlike the present case. In *F M Custodians Ltd* v *Pavan*[16] in a not dissimilar situation to the present, I said on this subject:

> [19] There was also some suggestion before me that the plaintiff should have issued a s 119 notice pursuant to the Property Law Act 2007 before demanding payment of the loan. I agree with the plaintiff's submissions here that a **s 119 notice was not required, however, because the loan was repayable "on demand"**. Section 119, on the other hand, is limited to amounts that are payable under an acceleration clause. An acceleration clause is a term which provides that, "if there is a default, any amounts secured by a mortgage become payable...earlier than would be the case if there had not been a default": s 4. **Here the due date for repayment was the date of demand, and hence was not accelerated by a default**: cf *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of NZ Ltd* [1984] 1 NZLR 324 at 342. (Emphasis added)

[72] In the present case, the bank did not rely upon an "acceleration clause" as defined in s 4 of the Property Law Act 2007 to demand immediate repayment of the full loans. The loans were always repayable upon demand. Clause 3(a) of the loan agreement specifically provided that Mr Burgess as borrower was to repay the loan "forthwith upon demand".

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15 *ANZ v Thompson* [2013] NZHC 517.

16 *F M Custodians Ltd* v *Pavan* CIV-2010-485-835

[73] Mr Burgess appears earlier to have misunderstood the on demand nature of the loans here. In his evidence, he said that he did not realise this until late in these proceedings (at page 62 lines 23-27 of the notes of evidence):

> Q. All right. When, when did you come to realise that this is an on demand – these are on demand loans?
>
> A. I was only became aware of it, um, when the, when the issue was raised in, um, submissions or material put forward by the plaintiff I think by – in fact by you quite recently...

[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.

Alleged breaches of bank's duties on mortgagee sale

[74A] Mr Burgess alleges that "the property was sold at an undervalue" presumably as an allegation that the bank failed to obtain the best price reasonably obtainable at the time of sale, as required by s 176 of the Property Law Act.

[75] A mortgagee's duties under s 176 when selling a property are well established:[17]

(a) The mortgagee is not required to obtain the best price possible, only the best price reasonably obtainable in the circumstances;

(b) The mortgagee is not required to defer a mortgagee sale or decline a highest bid in the hope that the market may improve or a better price might be achieved at some future date;

(c) It is reasonable to expect that property sold in a forced sale will sell at a discount to what could be achieved in an unforced sale situation;

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[17] E.g. *Long v ANZ National Bank Limited* [2012] NZCA 132.

(d) Where the bank has undertaken a proper advertising and sales process, a property can often sell for less than a particular valuation price and the bank generally cannot be held responsible for this;

(e) The Courts have been reluctant to second guess the actions of a mortgagee acting on apparently sound advice, e.g. a sale conducted by a reputable real estate firm.

[76] The pleaded particulars of Mr Burgess's amended defence in this area appear to be:

(a) "...failing to correctly identify the nature and extent of the property and in failing to advertise the correct nature and extent of the property" (paragraph 50);

(b) "...failing to appreciate that the title is not one 'limited as to parcels' and has a floating river boundary on the South end" (paragraph 51);

(c) "There has been significant accretion to the south boundary since the original title was issued in 1873. The plaintiff...failed to recognise or take into account this extra land in valuing and marketing the property" (paragraphs 51-52).

These allegations it seems were raised for the first time in the amended statement of defence.

[77] But, on all this, the evidence before me shows:

(a) The bank engaged a registered valuer to value the property, and a valuation was obtained;

(b) A reputable local real estate agent was engaged and provided an indicative valuation, and advice on a proper sale process;

(c) The bank did not claim that the property was "limited as to parcels", and neither is the title limited as to parcels;

(d) Mr Burgess has failed to provide any evidence of the alleged "accretion" to his land, or whether such accreted land (assuming it existed and had not been taken into account in the valuation) would have affected the valuation;

(e) The property was marketed in terms of a recommended marketing plan by the real estate agent with reference to other rural properties in the locality; and

(f) Interested parties were able to physically view the property (as a number did) and were able to make their own assessments.

[78] In his evidence, Mr Burgess provided nothing to suggest in any way that there was a defect in the sale process followed by the bank. Mr Burgess did question the bank's use of an auction to sell the property. The unchallenged evidence before me however was that the real estate agent expressly recommended sale by auction and it was noted that mortgagee sales are carried out "almost universally by auction". Ultimately, Mr Burgess provided no evidence as to why a tender or any other sale process ought to have been used.

[79] Mr Burgess also seems to infer and allege that the bank breached its duties by accepting a bid lower than the reserve price. After the property failed to reach the reserve price the bank accepted the highest bid. However, as Asher J held in *Public Trust v Ottow*[18] (approved by the Court of Appeal in *Mitchell v Trustees Executors Limited*:[19]

> A failure to achieve an assessed valuation price at a mortgagee sale is not in itself any indication of a breach of the mortgagee's duty of care to obtain the best price reasonably obtainable: *Moritzson Properties Ltd v McLachlan* (2001) 9 NZCLC 262, 448 at [61]. A failure to achieve a price that a mortgagor believes the property should achieve, does not give rise to an inference that a mortgagee has breached its duty to take reasonable care:

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18 *Public Trust v Ottow* [2010] NZCPR 879 at [33].

19 *Mitchell v Trustees Executors Limited* [2011] 12 NZCPR 659 at [68](a).

> *Wallace v Bank of New Zealand* HC AK CIV-2009-404-3534 1 July 2009 Wylie J at [54]. Of course, a sale at a price which is much less than the assessed value, when there is no explanation for the discrepancy, can indicate a failure to take reasonable care.

[80] In the present case, the indicative forced sale valuation of the property was "between $230,000 and $245,000" and the real estate agent's assessment of value was "between $160,000 and $180,000". The property in fact sold for $210,000 which was within 10% of the registered valuer's indicative range, and significantly in excess of the real estate agent's range.

[81] It does seem from evidence before the Court that there was limited interest in the property. The valuation and the marketing report also suggested that the property had been poorly maintained. The marketing report noted that the "attitude and co-operation of the owner with regards to tidying and presenting the property for sale could significantly affect the sale price likely to be achieved at sale." Before me, Mr Burgess gave no evidence of actually assisting the sale process. He admitted he did not meet with or assist the real estate agent, despite being presented with options to do so.

[82] Mr Burgess also did not challenge the evidence presented for the bank that he showed up later while potential clients were viewing the property and stated that he would be taking matters to Court. Thus, as I see the position, it could be fairly argued here that Mr Burgess could potentially have assisted the bank to obtain a higher price if he had tidied up the property and assisted the sale process but he chose not to do so. And, as Asher J said in *Ottow*:

> [30] ...The [mortgagee] could not be expected to nursemaid the [mortgagor] or coerce them into taking more steps to achieve the best price possible...It had no obligation to take such a step...

[83] In this case Mr Burgess makes what I see as a quite unfounded suggestion that a higher price should have been obtained for the property, but he presents no evidence regarding this aspect. The only real question here is whether the price obtained was sufficiently less than the valuation so as to indicate a possible failure on the part of the bank to take care in selling the property. I am satisfied that in this case clearly it is not. I reach this conclusion given that, on the unchallenged

evidence before me, the price obtained was within 10% of the valuation completed by the registered valuer and significantly in excess of the value assessment made by the real estate agent. As noted in Asher J's decision in *Ottow*, in the absence of any evidence to the contrary, an unfounded suggestion that a mortgagee should have obtained a higher price for a property does not give rise to an inference that the mortgagee in question had breached its duty.

[84] For all these reasons I dismiss the claims advanced by Mr Burgess that the property was sold at an under value and therefore the bank has breached its duty here as mortgagee.

The alleged "loss of assets unable to be removed" from the property

[85] I find this claim advanced by Mr Burgess difficult to understand. At paragraph [45] of his amended statement of defence, Mr Burgess does allege that he suffered a "loss of assets unable to be removed from the farm in the three weeks allowed [by] the plaintiff".

[86] But before me Mr Burgess has not specified, nor provided any evidence, as to what assets were allegedly lost, why they were "unable to be removed" within the three week period, the alleged value of those assets or the basis upon which such "lost assets" would offset any or all of the bank's claims.

[87] This bald allegation on the part of Mr Burgess is entirely unsubstantiated. I find nothing in this claim put forward by him and I dismiss it.

The alleged "loss of business opportunity"

[88] Again this claim is difficult to follow. At paragraph [45] of his amended statement of defence, Mr Burgess does allege "loss of business opportunity" presumably as a result of the mortgagee sale.

[89] But, as with his pleading for loss of assets, Mr Burgess has provided no evidence of any kind as to any alleged loss of business here. Again I find this defence lacks any substance or credibility and is essentially at best part of

Mr Burgess' stayed counter claim. There is nothing before me to support this claim in any way and I dismiss it here.

The status of the Third Schedule of the loan agreements

[90] At paragraph 68 of his amended statement of defence, Mr Burgess "denies liability" on the basis that "the loan contracts are incomplete, lacking schedule 3".

[91] This defence was also one raised for the first time in the amended statement of defence. It appears to have been prompted by the bank providing supplementary discovery of the Third Schedule in June 2013. After original discovery was made, it seems that it came to the bank's attention that the loan agreements it had discovered (which were the loan agreements returned to it by Mr Burgess' solicitors) were missing their Third Schedule. The Third Schedule, as I understand it, is a single sheet, double sided glossy standard form that sets out the bank's standard lending charges. The evidence before me confirmed that this is the same document used in all of the bank's Liberty Loans such as the loans here. The bank then discovered a copy of its standard Third Schedule, applicable at the time of the loans, to Mr Burgess.

[92] The defence here appears to be a claim that the Third Schedule was not included in the loan documentation that Mr Burgess signed, and it follows therefore that he is not liable for the lending charges set out in the Third Schedule.

[93] The bank's evidence before me however is that the Third Schedule is likely to have been included with the loan documentation it provided to Mr Burgess' solicitor as standard practice. Mr Burgess's solicitor reviewed all documents and confirmed that they had been duly executed. Neither Mr Burgess nor his solicitor claimed that the Third Schedule was missing.

[94] It is impossible to prove conclusively that Mr Burgess did receive the Third Schedule here. However, the terms of the loan agreements and the acknowledgments made by Mr Burgess in my view preclude him from denying the Third Schedule. In this regard the following matters as I see it are relevant:

(a) In the loan agreements themselves, directly above his signature, Mr Burgess expressly "acknowledges receipt of a copy of this contract". "Contract" is defined in clause 2 as "this contract together with all Schedules attached". The First, Second and Third Schedules are expressly mentioned numerous times throughout the loan documents.

(b) In paragraph A of the "Acknowledgment as to Advice and Disclosure" in the First Schedule, Mr Burgess specifically acknowledges that prior to signing the loan contract the nature of the borrower's obligations and liabilities were explained to him by his solicitor and he fully understood and was aware of his obligations as borrower and his liabilities under the loan contract. As the loan agreements expressly referred to the Third Schedule in numerous places, in my view Mr Burgess is precluded from denying knowledge of the same.

(c) Mr Kendall gave evidence for the bank that in any event customers are able to see standard fees charged on their bank statements.

(d) And, before me, in any event Mr Burgess advanced no specific submissions addressed to this Schedule Three issue.

[95] As I see the position, even if Mr Burgess could establish that the Third Schedule had been omitted from the documents provided to his solicitor, the bank in my view is entitled to rely on the fact that the Third Schedule would still have been incorporated by reference – on this see *Burrows Finn & Todd "Law of Contract in New Zealand"*.[20]

[96] For all these reasons I find that there is nothing in this particular defence which Mr Burgess has endeavoured to advance in his pleading that might assist his position here. I dismiss it.

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[20] *Burrows Finn & Todd "Law of Contract in New Zealand"* 4th Ed, 7.2.2.

The alleged "fraud" by Mr Burgess' former solicitors

[97] At paragraph [71] of his statement of defence, Mr Burgess denies liability on the basis of what he says was "fraud or fraudulent conduct" perpetuated against both himself and the bank by his former solicitor, Mr Tait, of Malley & Co. The bank considers this allegation wrong, improper and irrelevant here.

[98] Mr Burgess has provided no particulars or evidence in support of what is a rather serious allegation. In any event, I am satisfied that it provides no basis for Mr Burgess to avoid his obligations to the bank here.

[99] And on this aspect, the bank wished to make quite clear that while it lacked knowledge of Mr Burgess' dealings with his former solicitors, the bank did not consider itself a victim of any "fraud" perpetrated by Mr Tait or Malley & Co as Mr Burgess has seen fit to allege.

[100] Throughout this proceeding, the bank notes that Mr Burgess has made serious unsubstantiated allegations of professional and criminal misconduct against other parties, despite his having been expressly warned against making such allegations by the Court. This is unacceptable.

[101] And, in my judgment there is nothing in this particular allegation or defence advanced by Mr Burgess. It is simply not relevant here and in addition it may well be a matter of considerable concern in that it involves what are said to be unfounded and improper allegations. In addition as I have noted above, it is clearly contrary to express warnings given by this Court to Mr Burgess to desist from such conduct.

Whether the loan agreements are contrary to the Property Law Act 2007

[102] It is rather puzzling that at paragraph [68] of his statement of defence, Mr Burgess claims that "portions or clauses (of the loan agreements) relied upon by the plaintiff are contrary to provisions of the Property Law Act and are severed by statute and the terms of the contract". And further, at paragraph [69] he claims that "the plaintiff's (implied) claim to have contracted out of the provisions of the (Property Law Act) is barred by the (Act)".

[103] In failing to refer to the relevant sections of the loan agreements and the Property Law Act, or to describe the "implied" claim by the plaintiff that he is referring to, Mr Burgess' pleading as I see it is entirely confusing.

[104] My understanding of the position is that the bank's stance here is that it complied with all relevant provisions of the Property Law Act. There is nothing before the Court that I have been able to see that might suggest otherwise. And in any event in my judgment Mr Burgess' claim here is irrelevant because the bank does not seek to assert or rely upon any provisions of the loan agreements as being "contrary" to the Property Law Act. Quite the contrary.

Whether the costs sought by the bank are excessive

[105] Paragraph [72] of Mr Burgess's amended statement of defence appears to go on to allege that costs and expenses claimed by the bank in this case may not be reasonable or have been necessary. In this regard, two categories of costs and expenses are claimed here:

(a) Those incurred by the bank in relation to the mortgagee sale itself ("mortgagee sale costs") totalling $33,105.10; and

(b) Costs and expenses incurred in attempting to recover the outstanding indebtedness from Mr Burgess ("debt collection costs") which are said to be ongoing.

[106] Mortgagee sale costs are set out at paragraph [8](b) above. Debt collection costs are sought on an indemnity solicitor and client basis following judgment, which the bank says is entirely in accordance with rule 14.6(4)(e) High Court Rules relating to the contractual indemnity at clause 12 of the loan agreement.

[107] So far as the mortgagee sale costs are concerned, Mr Burgess does not specify any particular costs he considers are excessive or unnecessary, nor has he provided any evidence in support. Rather, tellingly in my view, before me he managed to give only one "example" of this. At paragraph 49 of his submissions, Mr Burgess queried the cost of the process server making two attempts at service of

documents on him, whereas he considered that only one attempt at service should have been made. That claim as I see it however is nonsensical. The evidence before the Court indicates the process server was unable to locate Mr Burgess at his notified Hawarden address on the first attempt and therefore a further attempt was necessary, which resulted in him being served at his work place. I find that in all the circumstances it is neither excessive nor unreasonable for a second attempt at service to be made. Indeed clearly it was required. And, Mr Burgess has also provided no evidence as to why the total cost was unreasonable, given the remote rural locations involved. That process server's total fee covering both attempts to serve Mr Burgess was $710.10 of which $120.00 was for the unsuccessful service attempt at Hawarden. Those service costs in my judgment were necessary and reasonable. And, no other mortgagee sale costs here as I see it are unusual or properly questioned in any real way by Mr Burgess. This defence relating to the mortgagee sale costs is also dismissed.

[108] So far as the debt collection costs are concerned, as I note above, the bank is contractually entitled to claim these as necessarily incurred by it in terms of the indemnity agreed to by Mr Burgess at clause 12 of the loan agreement and rule 14.6(4)(e) High Court Rules. There can be no question that reasonable indemnity costs are to be paid.

Alleged breach of code of banking practice

[109] At paragraph [64] of his amended statement of defence Mr Burgess alleges that the bank breached the New Zealand Bankers' Association "Banking Code of Practice" ("code"). He says this code was incorporated into the loan agreements, that he was entitled to rely on this by virtue of the Fair Trading Act, the Contracts (Privity) Act and the doctrine of estoppel, and in some way the code makes a difference here. He seems also to allege by implication that unspecified provisions of the code conflict with provisions in the loan agreements such that the bank cannot enforce those (unspecified) provisions against him. In my view these allegations are quickly disposed of.

[110] The bank is a member of the New Zealand Bankers' Association and the evidence before me is that it says that it observes the code. The code however is not expressly incorporated or otherwise referenced into its loan agreements.

[111] On this question as to whether the code is to be implied into loan agreement contracts, the authorities establish that this is not to be the case – see *Westpac New Zealand Limited v Patel*[21] and the relevant authorities referred to there.

[112] I accept that this position is well established and the code is not to be implied into the bank's loan agreement contracts such as those that apply here. And, in any event, in this case Mr Burgess has placed nothing of any kind before the Court to suggest that the bank may have acted in breach of the code. I reject this defence.

Estoppel

[113] At paragraph [57] of his amended statement of defence, Mr Burgess alleges that the bank had "informed the defendant that the deficit on sale had been written off, and consequently is estopped from recovering this sum from the defendant".

[114] Again in my view this defence is quickly disposed of. It appears to be an attempt to construe the phrase "residual debt to be written off", in the bank's Mortgagee Sale Summary document provided to Mr Burgess following the mortgagee sale, as a basis for estopping the bank from exercising its contractual rights.

[115] The unchallenged evidence before me of Mr Kendall for the bank however was that the phrase simply refers to an internal bank write-off instruction that would occur if recovery was unsuccessful. The accompanying letter when this Mortgagee Sale Summary was provided to Mr Burgess expressly asked him to pay the sum, failing which it would be referred to a debt recovery agency. Accordingly, I find that there can be no plausible basis for Mr Burgess to think that the bank was advising him that it had written off the debt and therefore would not be pursuing recovery from him.

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[21] *Westpac New Zealand Limited v Patel* [2013] NZHC 1011

[116] On this aspect, I also leave on one side the fact that in any event in this case Mr Burgess has failed to plead the essential requirements of promissory estoppel as confirmed by the Court of Appeal in *Nixon v Walker*[22] (as outlined at paragraph [81].

[117] Nor in my view is there any reasonable basis for Mr Burgess here to plead the essential elements for promissory estoppel. This estoppel defence must also fail.

Alleged "invalidity" of the bank's proceeding

[118] Again this defence is quickly disposed of. Throughout this proceeding, Mr Burgess has maintained in varying ways that the bank's claim is a "nullity" which "cannot be remedied". This is despite the fact that he has taken numerous steps in the proceeding, including attempts to join his ex wife to the claim, seeking further and better particulars of the claim and applying for further and better discovery of documents relating to the claim.

[119] As I understand it, the grounds for Mr Burgess' assertion here appear to be that:

(a) The proceeding was originally filed in the District Court "by a firm of non-lawyers who are not permitted to file proceedings in the District Court for reward under the District Courts Act"; and

(b) The bank's solicitors who took over the proceeding following Mr Burgess' counter claim, Auld Brewer Mazengarb McEwan, "were ineligible to act under the Lawyers and Conveyancers Act, having been the lawyers who carried out the mortgagee sale, and thus lacking independence. As such they lacked the right of audience"

[120] In my view, these grounds are patently wrong and misconceived. In addition and in any event, I have considerable difficulty in understanding Mr Burgess' argument here. In short:

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[22] *Nixon v Walker* [2010] NZCA 273.

(a) The District Court proceedings were originally instituted by Maude & Miller who are a firm of solicitors in the Wellington region. They are clearly not "a firm of non-lawyers".

(b) Even if the proceeding had been filed by "a firm of non-lawyers" there is no such prohibition in the District Courts Act 1947. On this it is interesting to note that Mr Burgess has himself filed his own counter claim in the District Court.

(c) The proceedings were not filed "for reward" which appears to be a confused reference to s 57 District Courts Act 1947. But, even if true, this would be irrelevant and would not render the proceeding a "nullity".

(d) In any event, the transfer and re-filing of the proceeding in the High Court, which was carried out by the bank's current solicitors, would have remedied any technical invalidity in the proceeding; and

(e) Given that Mr Burgess has taken many steps in this proceeding as noted above, for him now to try to suggest that the proceeding is a nullity is simply untenable.

Conclusion

[121] For all the reasons outlined above, I conclude that:

(a) The bank's claim is for a straightforward loan contract debt recovery.

(b) Mr Burgess has raised numerous purported defences that I have outlined above but none of these have any merit.

(c) The quantum claimed by the bank here is not questioned in any real way and I find that the bank is entitled to judgment for that amount together with costs and interest under the loan agreement. Orders to this effect are to follow.

(d) Mr Burgess, as I note, has brought a number of interlocutory applications and has conducted his defence in a manner that in my view can only be seen as designed to extend the duration and expense of this proceeding. He has also been formally cautioned about improper allegations in this proceeding.

(e) This case in my judgment is marked by the sheer lack of merit in the technical approach taken by Mr Burgess. These are all matters that should properly sound in costs here.

Result

[122] The bank's claim for the amount representing the shortfall following the mortgagee sale succeeds. Judgment is now granted to the bank against Mr Burgess for:

(a) The shortfall sum of $22,911.70 outlined at paragraph [8] above; and

(b) Interest on the outstanding indebtedness as outlined in the schedule to the bank's amended statement of claim:

(i) Up to 10 March 2011 totalling $1557.27; and

(ii) From 11 March 2011 to the date of final payment at the rate of $5.51 per day.

[123] In addition, the bank is entitled to costs on an indemnity solicitor and client basis on this proceeding together with disbursements, such amounts to be approved by the registrar. An order to this effect is also now made.

.....
D Gendall J

Solicitors:
Nicholas Davidson QC, Christchurch
Copy to Defendant