IN THE HIGH COURT OF THE COOK ISLANDS **O.A. No. 3/2005**
HELD AT RAROTONGA
(CIVIL DIVISION)

BETWEEN **GARTH TINDALL YOUNG** of Arorangi, Rarotonga, entertainer and **MAURINE HINEWAI YOUNG** his wife (as Mortgagors)

Applicants

AND **HEDLEY RADFORD** of Titikaveka, Rarotonga (as Mortgagee)

Respondent

Appearances:

For Applicants: Mr J McFadzien
Respondent: In person

Hearing (by telephone):
Saturday, 10 September 2005 (New Zealand time) 9.00am
Friday, 9 September 2005 (Cook Islands time) 11.00am

Introduction

[1] The Respondent, Mr Radford, is the mortgagee under a Deed of Mortgage made in 1996 in respect of the leasehold interest of a property at Arorangi, Rarotonga upon which two houses are built. Leasehold estate exists by virtue of a Deed of Lease dated 9 October 1976.

[2] The Applicants on 8 June 2005 signed a conditional agreement to sell their leasehold interest to Magic Reef Limited for NZ$375,000. That agreement has since become unconditional and I was told at the hearing that it will be possible, upon this Court's decision as to the amount owing to the mortgagee, to settle that transaction next week.

[3] In anticipation of the sale proceeding the Applicants' solicitors wrote to Mr Radford on 14 June 2005 enquiring as to the amount required to settle the Deed of Mortgage as at 1 August 2005.

[4] Mr Radford claimed in a facsimile dated 17 June 2005 to have re-entered the leasehold property as a mortgagee in possession and to have taken steps to realise his security. In subsequent correspondence thereafter, all of this was said by Mr Radford to have occurred in 2002/2003. It was also said that Mr Radford's agent, Development Holdings Limited, had arranged a sale to another local company for $275,000.

[5] On 22 July 2005 the Applicants' solicitors again sent a facsimile to the Respondent asking for the amount required to repay the Respondent's Deed of Mortgage. On the same day, the Applicants' solicitors received from the Respondent an invoice purporting to be from Robati Real Estate.

[6] On 27 July 2005, the Respondent sent to the Applicant's solicitors a settlement statement along with a copy of the invoice from Development Holdings. The settlement statement claimed inter alia the following amounts:

3 months interest @ 15% pa (Property Law Act 81 (3))	$7,402.50
Plus Robati Real Estate Inv (faxed to you)	$2,682.50
Plus Development Holdings Ltd (faxed to you)	$915.47
Plus my indemnity costs (less 50% to the Youngs)	$500.00
Plus Dev. Holdings Ltd letters re interest default	$26.00
Plus Advertising costs C.I. News	$47.60

These amounts, which totalled $11,524.07, were said to be owing by the Applicants to the Respondent.

[7] On 1 August the Applicants' solicitors wrote to the Respondent denying liability for those six items claimed in the settlement statement.

[8] There were further discussions between the parties but there was no agreement. Accordingly, on 2 August 2005, the Applicants applied to this Court for declarations to determine whether or not they were liable to pay the disputed sums. An injunction was also sought to restrain any action on the part of the Respondent in

the meantime, including any action by the Respondent to sell the leasehold interest pursuant to his rights as mortgagee.

[9] The declaration sought orders that the following sums were not due and payable:

> "(a) the sum of $7,402.50 claimed by the Respondent pursuant to section 81(3) of the Property Law Act 1952, being 3 months interest; and
>
> (b) the sum of $2,632.50 claimed by the Respondent as being fees due to Robati Real Estate; and
>
> (c) the sum of $915.47 being fees due to Development Holdings Limited claimed by the Respondent as being payable by the Applicants; and
>
> (d) the sum of $500.00 claimed by the Respondent as indemnity costs;
>
> (e) the sums of $26.00 and $47.60 being respectively fees for letters and advertising costs."

The Hearing on 30 August 2005 and the Court's Directions

[10] The matter was referred to me during a callover in the High Court on 30 August 2005 because of its urgency. Mr McFadzien appeared for the Applicants. There was no appearance for the Respondent but I was satisfied that the application and supporting papers had been personally served on Mr Radford in the Cook Islands by a member of the staff of McFadzien PC on the same date that they were filed, namely 2 August 2005. I was made aware that, thereafter, Mr Tapaitau, Barrister and Solicitor, had represented Mr Radford and that there had been some discussions between the parties and a number of letters were written by the Respondent.

[11] I was further informed that on 22 August Mr Tapaitau had withdrawn from his representation for Mr Radford and had so advised both Mr McFadzien, Miss Harvey who was acting for the purchaser of the property and the Registrar. However, it was clear that Mr Tapaitau, before his representation terminated, advised the Respondent that the application was to come before the Court on 22 August. Additionally, Mr McFadzien's letter to Mr Tapaitau of 22 August, which amongst other things advised of the hearing, was also sent by Mr Tapaitau to Mr Radford. In short, Mr Radford had had full notice of the hearing and the Court felt able to consider the matter. In its judgment on that day at paragraph 7-9, the Court said:

> "(7) The major deduction claimed by the Respondent is the sum of $7,402.50 namely three months' interest claimed by the Respondent pursuant to s. 81(3) of the Property Law Act 1952. However, there has

been produced to me today a letter signed by Mr Radford. Ms Harvey, who was in Court today, has confirmed that the signature is that of Mr Radford. The letter states, inter alia, "I accepted Mr McFadzien's argument that three months' interest does not apply". This clearly amounts to an admission that the $7,402.50 deduction is unsustainable and I rule accordingly.

(8) The other claimed deductions are not so clear. Moreover, the mortgagors, Mr and Mrs Young, have not had a chance to file a supplementary affidavit to deal with the more recent claims for deductions.

(9) Accordingly, I make the following directions:

(1) The Respondent Mr Radford, shall, if he wishes to pursue the alleged amounts owing, file in the Court, with a copy to Mr McFadzien, a sworn affidavit setting the grounds upon which both items (b) – (e) and any other amounts are claimed. This affidavit must be filed no later than 4pm on Monday, 5 September.

(2) The Applicants will file affidavits in reply no later than 4 pm on Wednesday, 7 September and there will be, if necessary, a hearing by way of a telephone conference at 11 am Cook Islands' time on Friday, 9 September 2005.

(3) An interim injunction in the terms set out in the application is hereby granted to take effect until further order of the Court.

(4) Costs on the present application are reserved.

(5) Leave to either party to apply at any time by written notice to the opposing party."

[12] Mr Radford filed a comprehensive affidavit in accordance with these directions. The Court is indebted to him for his prompt compliance. The Applicants did not do so because Mr Young had since been obliged to travel to New Zealand for medical treatment and it was not possible for him to file a further affidavit. Instead lengthy submissions were filed by Mr McFadzien who advised that all the evidentiary material upon which he relied was already before the Court in the affidavit by Mr Young.

[13] Mr McFadzien also filed for the Applicants an amended application for declaratory orders dated 5 September 2005. The effect was to amend the disputed amounts, in respect of which the declaration was sought, to read as follows:

> "(a) the sum of $2,632.50 claimed by the Respondent as being fees due to Robati Real Estate; and
>
> (b) the sum of $1,000.00 (increased from the original claim of $500.00) claimed by the Respondent as his "costs prior to becoming Mortgagee in Possession";
>
> (c) the sum of $2,000.00 claimed by the Respondent as his "costs after becoming mortgagee in possession and attempting to recover the debt";
>
> (d) the sum of $2,000 claimed by the Respondent as "Tepure Tapaitau's fees for legal advice and acting as a communication centre to Magic Reef Limited's offer of $375,000.00".
>
> ...
>
> An earlier claim for 3 months' interest referred to in the application originally filed herein has been abandoned by the Respondent and is referred to in the Memorandum of the Court dated September 2005."

It will be noted that the Amended Application dropped reference to the amounts of $26.00 and $47.60 which had been included in the original Application. The Court therefore has no need to consider those items. The amended application took into account additional amounts claimed recently by Mr Radford. It also sought a continuation of the interim injunction.

The Substantive Hearing on 9 September 2005

[14] When the matter came before me by way of a telephone hearing on Friday, 9 September (Cook Islands time), Mr McFadzien appeared for the Applicants and Mr Radford appeared in person. At the outset Mr McFadzien sought leave to amend the application. In this respect, it was said on behalf of the Applicants in the written submissions of 7 September 2005 at paragraph 22:

> "The Applicants had earlier conceded that the sum of $915.47 being fees charged by Development Holdings Limited for matters in connection with enforcement of the security would be payable by them. Since by his statement of the 17th August referred to in paragraph 3 of these submissions the Respondent has increased the amount of his claim, the Applicants now seek to deny liability for this amount. Additionally, it was only on 6th September and after filing the Amended Application that the Applicant's solicitor sighted for the first time, the February 2002 section 92 notice. Leave is hereby sought to amend the Amended Application 5th September accordingly. These submissions will be served upon the Respondent today as advice of this. The Applicants accept that the Respondent has the right to respond to this proposed amendment to the Application. It is conceded by

> the Applicants that the Respondent intended to make a copy of the section 92 notice available to the Applicants' solicitor on 5th September but was unable to do so due to commercial photocopying delays."

[15] This application for amendment was discussed between the Court and Mr Radford. Since Mr Radford was going to be able to present his views on all of the amounts he claimed, there was no prejudice to him in allowing the amendment. I accordingly allowed the Applicants to add to the list of disputed items the $915.47 being fees billed to the Respondent by Development Holdings Limited and claimed by the Respondent from the Applicants.

[16] It was agreed between the parties at the hearing that there was no dispute about the principal sum owing $197,400.00 nor were any interest calculations in issue. Interest will be payable down to the date of settlement.

[17] In the course of the hearing there was produced to the Registrar a letter from Mr Tapaitau enclosing an account for his fees in acting for Mr Radford from 3 August to 22 August in the sum of $2,812.50. This account has since been faxed to me. Therefore in considering the amounts which are subject to the application I amend item (d) from $2,000 to $2,812.50.

[18] The Court asked Mr Radford whether there are any changes which he wished to make to the list of amounts which he contended the Applicants were responsible for as set out in his letter of 17 August 2005 (which amounts were largely replicated in the amended application). He said that in item (c), which referred to a sum of $2,000 claimed by the Respondent as his costs after becoming mortgagee in possession and attempting to cover the bad debt, should now be amended to a claim for $4,000. Mr Radford also offered the comment that he thought Mr Robati's bill was "a bit on the high side".

[19] Thus the final amounts in dispute became the following:

(a) the sum of $2,632.50 claimed by the Respondent as being fees due to Robati Real Estate; and

(b) the sum of $1,000.00 claimed by the Respondent as his "costs prior to becoming Mortgagee in Possession";

(c) the sum of $4,000.00 claimed by the Respondent as his "costs after becoming mortgagee in possession and attempting to recover the debt";

(d) the sum of $2,812.50 claimed by the Respondent as "Tepure Tapaitau's fees for legal advice and acting as a communication centre to Magic Reef Limited's offer of $375,000.00".

(e) the sum of $915.47 claimed by the Respondent in respect of fees charged by Development Holdings Ltd in relation to enforcement of the security in 2002

Submissions of the Parties - Applicants

[20] The written submissions for the Applicants contained the following:

"6. The Applicant's first submission is that the Respondent is not entitled to recover any of the costs claimed by him, of whatsoever kind. The reasons are as follows.

7. The Respondent yesterday produced for the first time, a copy of the Property Law Act section 92 notice said to have been served on 22nd February 2002, three and a half years ago. This is annexed as **RD#2**. The Applicant Garth Young in his affidavit denies receiving such a notice. Assuming however for the purpose of these submissions that it was sent by registered post as alleged by the Respondent, it is the submission of the Applicants that the said notice has, by the Respondent's own conduct, lapsed in June of 2002 and/or that the Respondent waived or is estopped by his conduct in June 2002 and by subsequent conduct throughout 2003 and 2004, from relying on that notice.

8. Assuming the notice was served in February 2002 as alleged, the Applicant's submission is that it lapsed in June 2002 when the loan from the Respondent to the Applicants was re-structured with the Respondent's consent and knowledge. In June 2002, the Respondent's agent Development Holdings Limited restructured the loan by adding to the principal sum, the arrears of interest then owing, thus saving the Applicants from having to pay interest at the penalty rate of 18%. Interest on the new principal sum then reverted to the lower rate of 15%.

9. Particulars of the re-structuring are set out in a statement form the Respondent's agent Development Holdings Limited dated 14th June 2002 to the Applicants and produced by the Respondent. This is annexed as **RD#3**.

10. The consent and knowledge of the Respondent to the restructuring is to be found in the lower right-hand corner of a handwritten note produced by the Respondent stating "agreed $197,400 from 31/5/2" and attached as **RD#4**.

11. Subsequently, the Respondent accepted throughout the years 2003 and 2004, sums in payment of interest from the Applicants. $11,600 was accepted during 2003. $9,700 was accepted during 2004. These sums are set out in a handwritten fax from the Respondent to McFadzien PC dated 6th September 2005 and attached as **RD#5**.

12. The Court's attention is drawn also, to section 90 of the Property Law Act 1952. The principal under the mortgage had become due in the year 2000. The mortgage is attached as **RD#6** (the schedule to the mortgage refers). It had not been repaid. The Applicants paid not

less than 3 months interest in 2003 and 2004 and so are entitled to the benefit of this section. 3 months notice as required by section 90 was never given by the Respondent.

13. The actions of the Respondent in re-structuring the loan in June 2002 and in accepting interest during 2003 and 2004 amount to the waiver and/or estoppel referred to above.

14. In a New Zealand Law Society Seminar held at Auckland in 1991 (Leaders Steven Dukeson & Bruce Stewart) it was stated:

> 'Typically, the question has arisen in the past where the mortgagee or his or her agent received part of the amount which is in arrears. Though the question of whether a mortgagee has waived a default or a default notice will depend very much on the facts of each case, it seems relatively clear that if moneys are received clearly on a "without prejudice" basis (i.e. without prejudice to the mortgagee's rights to proceed to sale) the mortgagee should be protected. If the mortgagee has expressly or impliedly waived the default notice, a fresh notice will have to be served before the power of sale can be validly exercised: Tommy v White (1850) 3 HLC 49; Barnes v Queensland National Bank Limited (1906) 3 CLR 925.'

...

16. In the present case, the Property Law Act section 92 notice was allegedly served in February 2002. The loan was re-structured in June 2002, interest in substantial amounts was accepted throughout 2003 and 2004. There is no evidence that the restructuring or the payments of interest in 2003 and 2004 were accepted on a without prejudice basis by the Respondent. It is submitted that, particularly given the period of time that had elapsed since the alleged service of the notice in February 2002, a fresh notice should have been served by the Respondent in 2005, before efforts were made by the Respondent to effect a sale. There was accordingly not valid section 92 notice in effect, at the time the costs claimed by the Respondent as (allegedly) mortgagee in possession, were incurred. Because of this, clause 8 of the Mortgage (**RD#6**) which contemplates a section 92 notice, cannot be called in aid by the Respondent for his expenditure and alleged costs in 2005.

...

18. In the event that the above submission is accepted by the Court, every sum other than principal and interest claimed by the Respondent cannot be claimed by the Respondent as a mortgagee. Accordingly the Applicants are not liable for any such amount."

[21] Mr McFadzien added the following comments to his written submissions. As to the 3 July 2003 letter he claimed that, to the extent it was being suggested that that might have been a valid section 92 notice, it was not such. It was a demand for rent, not a section 92 notice.

[22] Mr McFadzien emphasised that his principal argument was that contained in his written submissions, namely that there had been a waiver. He also said that his clients did not recall receiving service of the section 92 notice allegedly issued 3½ years ago.

[23] He said that document RD5, a letter from Mr Radford to McFadzien PC dated 6 September 2005 clearly established that Mr Radford had accepted interest during 2003 but also after July 2003. Payments of $10,000 or more had been made in 2004. In short, whatever may have happened in July 2003, it was subject to the same arguments about waiver and estoppel contained in the written submissions.

[24] In general submissions Mr Radford added the following comments to the extensive material contained in his affidavit of 5 September. First, he said referred to and relied upon a letter dated 3 July 2003 which Development Holdings Limited had drafted for the purpose of sending to the Applicants. Mr Radford said this supported his claim that in July 2003 he had become mortgagee in possession.

[25] Mr Radford produced to the Registrar a copy of that letter which also showed some handwritten amendments written by Mr Radford wherein he sought to increase the amount which was going to be claimed by Development Holdings from the Youngs. The Court asked Mr Radford whether this amended letter had ever been sent to the Youngs. He answered that he could not be sure because the amended letter could not be found, although Mr Tansley of Development Holdings apparently said that it had been sent.

[26] Mr Radford in claiming the disputed amounts relied primarily on sections 8, 10, and 11 of the mortgage document. These provide as follows:

> "MORTGAGOR'S LIABILITY FOR COSTS
>
> 8. The Mortgagors will pay all costs charges and expenses of and incidental to this mortgage and any variation or discharge hereof or any transfer in lieu of discharge and further if and as often as the Mortgagors shall have become in default hereunder will pay the costs of the Mortgagee (as between solicitor and client) of and incidental to the enforcement or attempted enforcement by the Mortgagee of his rights remedies and powers under this mortgage including the giving or attempted giving of any notice pursuant to the provisions of the Property Law Act 1952 and this clause shall apply notwithstanding that the Mortgagee may be a solicitor or a solicitor's nominee company."
>
> "POWERS OF SALE

10. If the Mortgagors makes default in payment of the principal sum and interest or any part of it for one month, or if the Mortgagors fails to observe or perform any other obligation hereunder, or becomes bankrupt, or enters into any assignment or composition for the benefit of creditors, or if any execution or charging order is issued against the mortgaged property or if an order is made or effective resolution is passed for dissolution or winding up, or if a receiver is appointed the Mortgagee may exercise the poser of sale and incidental powers vested in mortgagee by the Property Law Act 19523, as if the default and notice thereby required had been made given and continued and the terms of two months and one month mentioned in the Property Law Act 1952, Fourth Schedule, Paragraph 8, had elapsed, subject to section 92 of the Property Law Act 1952."

"COST OF MORTGAGEE'S SALE

11. Upon any Mortgagee's sale the Mortgagee may deduct and pay from the proceeds all proper and reasonable charges and expenses whether or not of a usual nature and also the commission of any agent employed in the sale calculated upon the sale price of the equity only and where the mortgaged property is sold in lots the mortgagee need not make any apportionment of the price between the lots AND the Mortgagors shall pay the costs charges and expenses of an incidental to the exercise of or attempted exercise of any power contained or implied in these presents."

As noted earlier, Mr Radford has said that the Robati Real Estate agents was a bit high but he had paid half of it, whether or not he recovered it from the Applicants.

Decision

[27] The Court has carefully considered the extensive materials Mr Radford placed before it as well as his oral submissions. The Court has re-read the Applicants' written submissions. The Court upholds the submissions of the Applicants as set out in paragraph [20] above, for two reasons. First, on the evidence it has not been established that at any stage Mr Radford became the mortgagee in possession. This is because service of a Section 92 Notice in 2002 (or for that matter in 2003) on the Applicants has not been established on the evidence before the Court. Secondly, assuming for the purpose of discussion such a notice had been served, the Court finds on the evidence that there has been a clear waiver by the restructuring of the loan to the Applicants in June 2002 and the subsequent acceptance of interest by Mr Radford on the new basis in 2002 – 2004; see Applicant's Submissions at paragraph 7-11 referred to paragraph 20 above.

[28] It follows from this that the sums claimed by Mr Radford and listed under (b) and (c) in paragraph 19 above as his costs prior to and following becoming mortgagee in possession are not recoverable. Nor is the amount claimed under (e) for the

Development Holdings fees. That amount should have been brought into the restructuring of the loan in June 2002. It is too late to claim it now.

[29] As to the Robati account, I have examined this account. It purports to relate to attempts to sell the property on behalf of Mr Radford and lists the people shown the property from 4 April 2005 until 22 August 2005. However, it follows from the Court's findings in paragraph [27] above that Mr Radford never became mortgagee in possession and therefore had no right to be trying to sell the property during this period. It equally follows that there is no basis for recovery of the costs of such selling endeavours.

[30] There are other reasons for this conclusion. First, in terms of the Robati fee so far as it relates to periods in August 2005, Mr Radford conceded that at least since 2 August 2005, he had known that the sale to Magic Reef had been concluded. It was not prudent to be spending money trying to sell the property at least until it was known whether that agreement would become unconditional. Secondly, even if there had been a right to sell, clause 11 of the mortgage provides only that the mortgagors are liable for **commission** if there is a mortgagee sale. What has been claimed here is not a commission for an actual sale but the costs of showing possible purchasers the property. It is not a commission and is therefore not recoverable. In this respect I refer to an affidavit which was filed by the Applicants which was sworn by Mr J F McElhinney, a registered valuer and real estate agent in Rarotonga who has been practising in Rarotonga for 7 years. His practice includes the letting and sale of leasehold property. He deposes that he is unaware of any real estate firm in the Cook Islands that charges fees on an hourly basis. He confirmed that the standard practice in the Cook Islands was to charge on a commission basis only if and when a sale resulted. He further deposed that he had so advised Mr Radford about 6 months ago. For all of the foregoing reasons, the Court finds that the Applicants are not responsible for any part of any fees, which may be owing to Robati Real Estate, and which were listed in paragraph (a) in paragraph [19] above.

[31] This leaves for consideration the claim for Mr Tapaitau's fees referred to in paragraph (d) of paragraph [19] above. In this respect, clause 8 is relied upon. (Clause 8 has already been set out above at paragraph [26].) It is noted that the mortgagors are liable to pay "all costs, charges and expenses of and incidental to ... any discharge of the mortgage". The latter part of the clause which provides for solicitor and client indemnity costs only applies where the mortgagors are in default

and steps are taken of and incidental to the enforcement or attempted enforcement by the mortgagee of his rights, remedies and powers. In view of my rulings in paragraphs [27] – [29] above, the default provision cannot be relied upon at this later stage. It should have been invoked in 2002 as part of the restructuring.

[32] There can be no doubt that Mr Radford is entitled to recover all reasonable costs, charges and expenses involved in preparing the discharge of mortgage which will be produced on settlement of the sale to Magic Reef and to legal advice in respect thereof. I have examined Mr Tapaitau's account. It does not refer directly to matters relating to the preparation of discharge of mortgage but is rather concerned with advice on the question of whether Mr Radford should pursue his claims for the disputed items and whether he should settle. Doubtless, the Applicants would contend that but for Mr Radford's pursuit of amounts not recoverable there would not have been any need for Mr Tapaitau's advice. I would accept such a submission up to a point. However, I think it is reasonable to allow part of Mr Tapaitau's account and also to provide that a modest additional amount which may be incurred in relation to the settlement itself. The Court considers that a fair and reasonable sum for which the Applicants should bear responsibility in relation to Mr Tapaitau's account would be $500. In making this finding, the Court passes no judgment on the reasonableness or otherwise of Mr Tapaitau's account. That is a matter which will have to be settled directly between Mr Radford and Mr Tapaitau. I allow a further $250 for any costs which may be incurred of and incidental to the actual settlement including the release of the mortgage.

DECISION

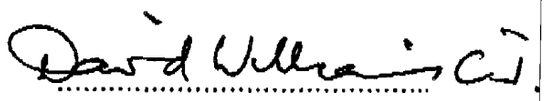
[33] For the foregoing reasons the Court finds and declares that none of the items claimed by the Respondent and listed in (a) – (c) and (e) of paragraph [19] above are recoverable. In respect of item (d), Mr Tapaitau's fees, the Court finds that the sum of $500.00 is recoverable by Mr Radford. In addition, the Applicants must pay the Respondent $250.00 as his costs on settlement in respect of the discharge of the mortgage.

[34] As long as the total sum of $750.00 is paid to Mr Radford on settlement of the Magic Reef sale plus all principal and interest owing, Mr Radford cannot legally refuse to discharge the mortgage.

[35] To put the matter another way, the Court finds that Mr Radford as mortgagor is obliged to provide a discharge of mortgage in the appropriate form and hand it over at settlement on payment of the principal and interest owing plus the sum of $750.00.

[36] The Court requires that settlement be completed as a matter of urgency on the foregoing basis because it is in the interests of all concerned that this matter be concluded and the parties move on. Until the Court is advised that settlement has occurred, the interim injunction will remain in force. However, it is to be taken to be discharged automatically once the settlement has been completed.

[37] Costs are reserved.



David Williams CJ
Signed on 13 September 2005
at 4.00pm NZ time