IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2014-470-000185
[2015] NZHC 2484

BETWEEN	DEBT BUYERS LIMITED Plaintiff
AND	LYNLEY JAYNE HANCOX Defendant

Hearing: 23 September 2015

Counsel: A Cherkashina for Plaintiff
No appearance and no steps taken by Defendant

Judgment: 9 October 2015

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 9 October 2015 at 4 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand

Solicitors:
Debt Buyers Ltd, Auckland.

Introduction

[1] In this proceeding the plaintiff Debt Buyers Ltd seeks judgment by way of formal proof for the outstanding amount of $552,537.14 owed by the defendant Lynley Hancox under a loan agreement and mortgage, together with interest of $928,518.15 and costs and disbursements. The total not including costs and disbursements is $1,481,055.29.

[2] At no stage in this proceeding has Ms Hancox filed any statement of defence or taken any steps.

[3] The claim initially proceeded by way of a summary judgment application. It came before Associate Judge Bell on an undefended basis. Having raised some concerns, and further affidavits having been filed, Associate Judge Bell declined to enter summary judgment in a judgment delivered on 7 April 2015 and dismissed the application.[1] He did so because he determined that Ms Hancox had an arguable defence based on a failure to give notice calling up the loan.

[4] Debt Buyers Ltd now seeks this formal proof judgment.

Facts

[5] Debt Buyers Ltd is suing as assignee of a debt Ms Hancox is said to owe Propertyfinance Securities Ltd (PFSL).

[6] On 12 April 2006 Ms Hancox borrowed $871,125 from PFSL. Ms Hancox provided a mortgage over her property in Mt Maunganui as security for the loan. On or around 13 April 2006 PFSL assigned all of its rights, title and interest in regard to the loan and its associated mortgage to the New Zealand Guardian Trust Co Ltd as trustee of the Propertyfinance Securities RM 2005-1 Trust. Consequently, New Zealand Guardian Trust transferred the mortgage to its nominee company Propertyfinance Funding Nominees Ltd, who acted as a trustee of New Zealand Guardian Trust in respect of the mortgage. On 11 October 2006, at Ms Hancox's request, PFSL agreed to increase the loan from $871,125 to $960,750.

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1 *Debt Buyers Ltd v Hancox* [2015] NZHC 668.

[7] By May 2008 Ms Hancox was in default under the loan agreement. On 12 May 2008 Propertyfinance Funding Nominees Ltd served on her a notice (the PLA notice) under s 119 of the Property Law Act 2007 (the PLA), requiring her to remedy the defaults by 23 June 2008. The amount required to remedy the defaults was $24,680.48 being arrears as at 8 May 2008.

[8] Ms Hancox did not remedy the defaults in time. Propertyfinance Funding Nominees Ltd sold the property under its mortgage for $556,000. It received net proceeds of sale of $525,450.94 in November 2008. After the costs and disbursements were deducted, the proceeds from the sale of the property were used to part pay the loan. After the part payment, there remained a shortfall owing on the loan to New Zealand Guardian Trust of $552,537.14.

[9] On 30 August 2013 New Zealand Guardian Trust assigned all of its rights, title and interest in regard to the loan to PFSL. On 29 August 2014 PFSL assigned all of its rights, title and interest in regard to the loan to Debt Buyers Ltd.

[10] On 31 October 2014 Debt Buyers Ltd commenced proceedings against Ms Hancox for recovery of the debt. At the same time Debt Buyers Ltd commenced the application for summary judgment. The application was dismissed by Associate Judge Bell on 7 April 2015 because in his opinion Ms Hancox had an arguable defence to Debt Buyers Ltd's claim.

[11] As of 18 September 2015 Debt Buyers Ltd claims that Ms Hancox's indebtedness to it totaled $1,518,202.75, being the outstanding amount, interest and default interest under the loan.

The acceleration issue

[12] It is Debt Buyers Ltd's submission that a notice of acceleration had been given by the lender when it served its notice under s 119 of the PLA on 12 May 2008. That PLA notice stated:

CONSEQUENCES IF DEFAULT NOT REMEDIED

If each default has not been, or cannot be, remedied on or before the 23rd day of June 2008:

(a) all amounts secured by the mortgage will become payable; and

(b) the following powers of the mortgagee will become exercisable;

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

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

(emphasis added)

[13] The issue that arises in this claim by way of formal proof is whether the PLA notice had effectively accelerated and called up the principal in terms of cl 5.2. Associate Judge Bell held in dismissing the summary judgment application that it did not.

[14] He applied his earlier decision in *ANZ Bank New Zealand Ltd v Boyce*[2] where he had held that the s 119 notice was not in itself a notice of acceleration. Having referred to cl 5.2 of the loan agreement he observed:[3]

> A call-up acceleration clause is to be distinguished from an automatic acceleration clause, where, upon default by the borrower, the balance under a loan becomes immediately repayable without any action on the lender's part. Under a call-up acceleration clause, the lender has a discretion whether to call up the loan. If the loan is secured by a mortgage over land, the lender may not accelerate without first giving the borrower a notice under ss 119 and 120 of the Property Law Act 2007 and the borrower fails to remedy the defaults in time. A notice under s 119 is not a notice calling up the balance of the loan under the loan agreement. Where there is a call-up acceleration clause, the balance under the loan does not automatically fall due upon failure to remedy the defaults within the time given in the s 119 notice. Accordingly, where there is a call-up acceleration clause, in the absence of any call-up, the lender will be able to sue only for payments that have already fallen due.

[15] Before me Debt Buyers Ltd accepts that cl 5.2 of the loan agreement is a call up acceleration clause and not an automatic acceleration clause. It accepts that it gave no specific notice accelerating the loan, but argues that the s 119 notice was effective to accelerate the loan.

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2 *ANZ Bank New Zealand Ltd v Boyce* [2014] NZHC 3185.

3 *Debt Buyers Ltd v Hancox*, above n 1, at [21].

[16] The issue that has to be determined in this hearing is whether there was acceleration as relied on by Debt Buyers Ltd. Ms Cherkashina for Debt Buyers Ltd submitted that Associate Judge Bell had erred in his conclusion that the repayment of the loan was not accelerated. She relied on a recent decision of the Court of Appeal *Koroniadis v Bank of New Zealand* where it held:[4]

> There is no reason in principle why a notice issued under s 119 to comply with s 120 of the Act cannot also satisfy the requirement for a demand to call up the principal under the term loan, provided it has that effect. Section 120(1)(d) confirms that the notice can address various consequences.

[17] The Court of Appeal in that case quoted a section of Associate Judge Bell's decision in a different stay decision where he had stated:[5]

> [14] ... The bank did serve notices under s 119 of the Property Law Act. Service of a notice under s 119 is necessary before any acceleration clause can operate. The definition of acceleration clause in s 4 of the Property Law Act cover both clauses where acceleration happens automatically and clauses where acceleration is not automatic but gives the occasion for a balance payable under a loan to be called up. The table loan facility in this case seems to be subject to a provision under which the balance payable under the facility is not repayable automatically on default, but only on the bank making demand. The bank does not seem to have included any evidence on its summary judgment application that it had called up the balance after the time for complying with the notice under s 119 had expired.

[18] The Court of Appeal observed:[6]

> If the Associate Judge was suggesting, in the final sentence of the above paragraph, that a further notice was required to accelerate the loan after the expiry of the s 1119 notice in this case he is, with respect, wrong for the following reasons.

Analysis

[19] Section 119 provides that before any amounts are payable under an acceleration clause a complying notice must be sent. Section 120 sets out the form of notice and requires the form to adequately inform the current mortgagor of the acceleration.[7] Sections 119 and 120 provide:

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4 *Koroniadis v Bank of New Zealand* [2015] NZCA 337 at [38].
5 *Bank of New Zealand v Koroniadis* [2013] NZHC 2865.
6 *Koroniadis v Bank of New Zealand*, above n 4, at [33].
7 Property Law Act 2007, s 120(1)(d).

119 Notice must be given to current mortgagor of mortgaged land of exercise of powers, etc

(1) No amounts secured by a mortgage over land are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise a power specified in subsection (2), by reason of a default, unless—

(a) a notice complying with section 120 has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor; and

(b) on the expiry of the period specified in the notice, the default has not been remedied.

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.

[20] Therefore, before the principal can become payable by the borrower and any principal can be claimed by the lender, a notice under s 119 complying with s 120, and in particular giving the borrower 20 working days notice to remedy the default, has to be served.

[21] In addition, ss 119 and 120 override anything in the terms of the loan agreement.[8] The lender cannot as a matter of law require immediate payment on default. It must issue a s 119(1) notice and that notice must expire before the lender can require immediate payment of the principal.

[22] Whether or not there has been an effective contractual acceleration of the loan turns on the provisions of the loan agreement and mortgage that provide for acceleration and what Debt Buyers Ltd did. Clause 5.2 of the original loan agreement between PFSL and Ms Hancox provided:

> If the Borrower is in default under this agreement, then, without prejudice to its other rights and remedies, the Lender may do any one or more of the following (but without being required to do so):
>
> (a) Cancel any undrawn amount of the Loan; and
>
> (b) Cancel any of the Lender's other obligations to the Borrower under this agreement or any other loan agreement between the Lender and the Borrower; and
>
> (c) Require the Borrower to immediately repay the Loan, pay all accrued interest on the Loan, and pay all other amounts payable under this agreement or any one or more of the Securities or any other loan agreement between the Lender and the Borrower; and
>
> (d) Enforce any one or more of the Securities.

[23] As can be seen, cl 5.2 of the loan agreement provides for a three-stage process. First, the borrower must be in default. Second, the lender then has an option to do any one or more of the matters set out in cl 5.2(a)–(d), and may choose one of those four options. The third stage if the lender chooses the third option, is that it may "require the borrower to immediately repay the loan …".

[24] Clause 5.2 of the loan agreement would seem to have been drafted without reference to the PLA. It is part of a general loan agreement that presumably is used for all loans, only some of which will involve mortgages. Clause 5.2 in stating that the lender can on default "require the borrower to immediately repay the loan" is providing for the lender to do something that ss 119 and 123 do not allow.

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8 Property Law Act, s 123. See also *Burgess v TSB Bank Ltd* [2015] NZCA 361 at [55].

[25] Therefore, in the context of a demand under a mortgage, cl 5.2 gives the lender an unusable power. The clause could not be used to make the loan immediately repayable until after the expiry of a s 119 notice.

[26] Clause 5.2 was not relied on by the lender when it sent out the notice. The notice that it sent out calling up the principal was a notice under s 119, and was "in the matter" of the mortgage. There were relevant clauses in the mortgage. Clause 20(a)(i) provides:

> 20. RIGHTS AND POWERS OF SECURITY HOLDER ON DEFAULT
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> (a) Rights and powers generally: If default occurs, the security holder may at any time or times thereafter, in addition to any rights, remedies or powers otherwise conferred upon the security holder by law, exercise all or any of the following rights and powers separately or any two (2) or more of them concurrently.
>
> (i) call up the balance of the secured moneys in accordance with clause 21; or
>
> ...

[27] Clause 21 provides:

> 21. ACCELERATING PAYMENT OF SECURED MONEYS ON DEFAULT
>
> If default occurs, the secured moneys will become due and payable by the party granting the security in accordance with the provisions in any agreement relating to their payment and, to the extent that there is no agreement then:
>
> (a) In respect of any land, immediately upon expiry of a notice served under section 92 of the Property Law Act 1952 without the need for any further notice or demand; and
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> (b) In respect of personal property, immediately without the need for any notice or demand;
>
> And in either case together with interest calculated at the prescribed interest rate for a period of one month in addition to interest to the date of repayment of the secured moneys.

[28] Clause 1 of the loan agreement provides that if there is any conflict between any provision in the loan agreement or any security, the lender may determine which provision prevails. Given that cl 5.2 could not be used, PFSL when it issued the s 119 notice referring to "all amounts payable under the mortgage", can be seen as choosing cl 20 of the mortgage rather than cl 5.2.

[29] The general effect of these clauses in the mortgage is, as might be expected, that the lender may on default call up the principal sum by issuing a s 119 notice which complies with s 120.

[30] That is what the lender did when it issued the s 119 notice relying on the mortgage. It stated in the s 119 notice that if the default was not remedied by 23 June 2008 all amounts secured by the mortgage would become payable. There was no need for an additional notice calling up the loan. Accordingly I respectfully do not agree with Associate Judge Bell's statement:[9]

> A notice under s 119 is not a notice calling up the balance of the loan under the loan agreement.

[31] As the Court of Appeal has observed, the fact that there is a notice issued to comply with requirements under ss 119 and 120 of the PLA does not mean that the notice cannot also be a demand to call up the principal under the contractual provisions of the mortgage and the term loan.[10] This PLA notice had that effect. The fact that it met the requirement of s 119 did not mean that it could not also have the contractual function of calling up the principal. Such a notice can wear two hats. It can give a period of time within which the default can be remedied and it can also call up the principal sum contingent on that default not being remedied.

[32] Associate Judge Bell in *ANZ New Zealand Ltd v Boyce* stated that his first reason for rejecting the s 119 notice as a valid acceleration, was that the effect of s 119 was to defer the power of a mortgagee to call up the principal. In his view that decision could only be made after defaults had not been remedied within the time allowed. He considered that the decision was to be made in the circumstances at the end of the moratorium, not in the circumstances when the notice under s 119 was issued.[11]

[33] I respectfully disagree with this assessment. While s 119(1) states that no mortgagee or receiver may "exercise" a power in subs (2) by reason of a default, those powers are limited to the power to enter into possession, the power to manage

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9 *Debt Buyers Ltd v Hancox,* above n 1, at [21].
10 *Koroniadis v Bank of New Zealand*, above n 4, at [33].
11 *ANZ Bank New Zealand Ltd v Boyce*, above n 2, at [15].

or recover income and the power to sell. In relation to repayment of the principal, s 119(1) goes no further than saying that "no amount secured by a mortgage over land [is] payable ... under an acceleration clause" unless a notice complying with s 120 has been served. The ability to call up the principal is not deferred. The call up can take place before the notice is issued and served. All that is deferred in relation to the payment of the principal is the borrower's obligation to pay.

[34] There was a second reason Associate Judge Bell set out in *Boyce* before concluding that the PLA required the expiry of the s 120 period before exercising a power to call up. He noted that in ss 124 and 126 there were exceptions to the deferral of the exercise of other powers, and a mortgagee might enter into agreements if the contract or option was additional on default being remedied within time, or enter into possession or being management of the land ahead of time. He thought that these exceptions proved the rule.[12]

[35] I agree that these two clauses support a view that the exercise of the powers of possession, management and sale cannot take place until after the expiry of the s 120 period for remedying the default. However, as I have observed, it is not one of those powers that is in question in this case. What is in question is the power to call up the principal sum, and there is nothing in the words of s 119(1) that indicates that this is deferred and cannot be exercised until after expiry of the s 120 period.

[36] Therefore, the principal sum can be called up in the s 119 notice on the basis that it will not be payable until the expiry of the s 120 period. If the default is remedied in the course of that s 120 period then by virtue of s 119(1) the obligation to repay the principal sum is extinguished.

[37] Accordingly, I respectfully differ from the approach taken by Associate Judge Bell and conclude that the principal was validly called up and may be claimed in this proceeding.

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12 At [16].

The limitation period

[38] Ms Cherkashina also helpfully made submissions in relation to the limitation period. Debt Buyers Ltd commenced proceedings against Ms Hancox on 31 October 2014, approximately six years and five months after Ms Hancox fell into breach.

[39] Section 20(1) of the Limitation Act 1950 provides:

> No action shall be brought to recover any principal sum of money secured by a mortgage … after the expiration of 12 years from the date when the right to receive the money accrued.

[40] The monies that were lent to Ms Hancox are no longer secured by the mortgage, as there has been a mortgagee sale. I am satisfied that this is irrelevant. The issue arose in the English Court of Appeal in *Bristol & West Plc v Barlett; Paragon Finance Plc v Banks; Halifax Plc v Grant*.[13] The Court of Appeal was considering s 20(1) of the Limitation Act 1980 (UK) which was worded the same way as s 20(1) of the New Zealand Limitation Act 1950. Longmore LJ held in relation to that equivalent provision:

> … The question is whether the phrasing of section 20(1) of the statute "any principal sum of money secured by a mortgage" refers only to principal sum secured by a mortgage at the time when action is brought or whether it is sufficient that the principal sum of money be secured by a mortgage at the start of the 12 year limitation period, whatever may have happened thereafter. Since the sub-section refers to "the date on which the right to receive the money accrued" it is much more natural to read the sub-section as applying to mortgages existing on the date on which such right accrued.
> …

[41] The monies originally lent to Ms Hancox were secured by a mortgage over the property and remained secured until the mortgagee sale. In my view s 20(1) of the Act applies, which means that the limitation period relevant to recovering the principal under the loan was 12 years.

[42] The claim for interest is governed by s 20(4) of the Limitation Act, which provides:

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13 *Bristol & West Plc v Barlett; Paragon Finance Plc v Banks; Halifax Plc v Grant* [2002] EWCA CIV 1181; [2003] 1 WLR 284 at [30].

> No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge ... shall be brought after the expiration of 6 years from the date on which the interest became due: ...

[43] It is clear therefore that the lender is entitled to recover the interest falling due in the six year period prior to the issue of proceedings. This was the view of the English Court of Appeal again in relation to the provision of the same wording in the English Act in *Scottish Equitable Plc v Thomson.*[14] The plaintiff's claim is calculated on that basis.

[44] I am satisfied therefore that the claim is in time.

Result

[45] The application for formal proof is successful. It has been proven that the loan has been accelerated and the debt is owing. I enter judgment as follows:

(a) Ms Hancox is to pay the outstanding amount totalling $552,537.14;

(b) Ms Hancox is to pay interest pursuant to the loan agreement dated 12 April 2006 amounting to $928,518.15; and

(c) Ms Hancox is to pay disbursements incidental to this proceeding.

[46] I assume these sums include provision for costs.

[47] I reserve leave to file further memoranda in relation to costs should the plaintiff's consider that to be necessary.

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Asher J

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14 *Scottish Equitable Plc v Thomson* [2003] EWCA 225 at [35].