

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CIV-2018-009-002990
[2019] NZDC 25898**

BETWEEN	DAG INVESTMENT HOLDINGS LIMITED Plaintiff
AND	MARC NICHOLAS PRICE First Defendant
AND	SAMANTHA EVELYN CRAIG Second Defendant

Hearing: 11 October 2019

Appearances: T J Brown and S Devavoll for the Plaintiff
T A Hair for the First Defendant
No appearance for or by the Second Defendant

Judgment: 23 December 2019

**RESERVED JUDGMENT OF JUDGE P R KELLAR
In relation to Application for Summary Judgment**

Introduction

[1] ASB Bank Limited (“ASB”) advanced funds to the first defendant, Mr Price, and the second defendant, Ms Craig, to build their home (the “property”).

[2] The plaintiff, DAG Investment Holdings Limited (“DAG”) purchased the loans from ASB and took an assignment of the loans and associated security. The security included a first ranking mortgage over the property.

[3] DAG exercised its power of sale and sold the property to ANZEN Property Limited (“ANZEN”) for a final price of \$230,000. After the sale, \$43,067.69 remained owing. Additional costs of \$6,219.89 were also incurred.

[4] DAG seeks summary judgment against Mr Price for that debt, plus the additional costs together with interest and costs. DAG has already obtained judgment by default against Ms Craig.

[5] Mr Price opposes the application for summary judgment. He maintains:

- (a) The Property Law Act Notice did not comply with ss 119 and 120 of the Property Law Act 2007;
- (b) DAG failed to discharge its duty to take reasonable care to obtain the best price reasonably obtainable for the property;
- (c) DAG owed an equitable duty to act in good faith and to act for a proper purpose. It breached that duty by not acting in good faith and acting for an improper purpose;
- (d) DAG entered into possession of the property and in so doing breached its duties and obligations under ss 156-167 of the Property Law Act; and
- (e) Mr Price suffered loss or damage as a result.

Applications for summary judgment – General principles

[6] Rule 12.2(1) of the District Court Rules 2014 provides that:

The Court may award judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[7] Rule 12.2(2) provides that:

The Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.

The onus is on DAG to show, on the balance of probabilities, that Mr Price does not have a defence.

[8] The Court of Appeal in *Krukziener v Hanover Finance Ltd* summarised the applicable legal principles:¹

- (a) The question is whether the defendant has no defence to the claim; that is, there is no real question to be tried;
- (b) The onus is on the plaintiff, but where the plaintiff's evidence is enough to show that there is no defence, the defendant will have to respond if the application is to be defeated.
- (c) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. However, the Court need not accept uncritically evidence that is inherently lacking in credibility; for example where the evidence is consistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable;
- (d) The Court's assessment of the evidence is a matter of judgment. The Court may take a robust approach where the facts warrant it.

Issues for determination

[9] It is common ground that Mr Price and Ms Craig entered the loans; there were subsequent defaults; that ASB assigned the loans to DAG; and that DAG had the right, as mortgagee, to sell the property.

¹ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187.

[10] It is also common ground that the sale price was insufficient to repay the amounts outstanding under the loans. There was a shortfall of \$43,067.69. Costs of sale of \$6,219.89 were also incurred.

[11] The issues, in general, are whether DAG has established that Mr Price is liable for the amount outstanding under the loans and, if so, whether the issues he has raised amount to an arguable defence. The key issue, however, is whether DAG properly discharged its obligations in respect of the sale of the property both in law and in equity.

The power of sale – a mortgagee’s duty of care

[12] Section 176 Property Law Act provides that a mortgagee who exercises a power to sell mortgaged property owes the mortgagor “*a duty of reasonable care ... to obtain the best price reasonably obtainable at the time of sale*”. It is not a duty to obtain the best possible price or even to obtain the best price reasonably obtainable. It is a duty to take reasonable care to obtain the best price reasonably obtainable.²

[13] In *Public Trust v Ottow*³ Asher J provided a summary of the principles applicable to a mortgagee’s duty of care under s 176 Property Law Act, including:

- (a) A mortgagee has no duty at any time to exercise the powers of sale or possession. In default of any provision to the contrary in the mortgage, the power of sale is for the benefit of the mortgagee who can sell at any time in accordance with the mortgagee’s convenience;
- (b) The mortgagee’s duty of care is to take reasonable care to obtain the best price reasonably obtainable at the time of sale;
- (c) It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained; the mortgagee is under no obligation to improve the property or increase its value. Nor does a mortgagee

² *Agio Trustees Co Ltd v Harts Contributory Mortgages Nominee Co Ltd* [2001] 4 NZ ConvC 193, 480 (HC).

³ *Public Trust v Ottow* (2009) 10 NZCPR 879 at [17].

have any general duty to maintain the secured property prior to sale;
and

- (d) Proper care must be taken to expose the property to the market and to obtain the best price reasonably obtainable.

[14] Asher J set out recommended steps indicative of whether there have been reasonable efforts to obtain the best reasonably obtainable price:⁴

- (a) The appointment of a reputable real estate agent to market the property;
- (b) Obtaining a valuation report from an experienced valuer as a guide to what could reasonably be expected for the property;
- (c) Marketing over a reasonably long period of time;
- (d) An extensive advertising and promotional campaign;
- (e) A properly conducted auction;
- (f) A sale price that, given all the circumstances, can be reconciled with expert opinion as to value.

[15] Fisher J in *Harts Contributory Mortgages Nominee Co Ltd v Bryers*⁵ wrote:

Those are simply detailed examples [a similar list of principles to that of Asher J in *Public Trust v Ottow*] of the way in which the duty to take reasonable care to obtain the best price reasonably obtainable might be discharged in particular cases. In the end, the mortgagee's performance can only be assessed by reference to each particular case.

[16] In *Apple Fields Ltd v Damesh Holdings Ltd* the Court of Appeal confirmed that the duty of care owed by a mortgagee co-exists with the equitable duty of good faith.⁶ O'Regan J in *Agio Trustees Company Ltd v Harts Contributory Mortgages Nominee*

⁴ *Public Trust v Ottow* at [31].

⁵ *Harts Contributory Mortgages Nominee Co Ltd v Bryers*, HC, Auckland, CP 403-IM00, 19 December 2001 at [43].

⁶ *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA).

*Company Ltd*⁷ confirmed that among the principles that can be derived from the Court of Appeal's judgment in *Applefields* were the following:

- [a] Section [176 of the Property Law Act] is a legislative affirmation of the scope of the duty of care in negligence owed by a mortgagee who has decided to sell, as recognised in earlier New Zealand case law;
- [b] That duty of care co-exists with the equitable duty of good faith but, in most cases, the duty of care will be the more onerous obligation.

[17] The key argument for Mr Price is that there is a need for greater scrutiny of the conduct of the mortgagee to establish that it took enough steps to obtain the best price reasonably obtainable because the mortgagee was conflicted and had obtained the mortgage for a collateral purpose.

The factual background

[18] Mr Price and Ms Craig were in a personal relationship between December 2011 and September 2016.

[19] In January 2015 they purchased a bare block of land upon which they intended to build their family home. Plans and specifications were prepared. A valuation report was obtained from Jones Lang Lasalle Registered Valuers. Based on the plans and specifications those valuers indicated that the completed value of the land and buildings would be \$430,000.

[20] Mr Price and Ms Craig obtained a loan facility from the ASB Bank, secured by way of first mortgage over the property. The loan facility provided for funds to be draw-down as the construction progressed.

[21] Mr Price then worked with M A Easter Limited, a building company in Christchurch. M A Easter Limited was engaged as the builder upon the basis that Mr Price would carry out the work.

⁷ *Agio Trustees Co Ltd v Harts Contributory Mortgages Nominee Co Ltd* [2001] 4 NZ ConvC 193,480 (HC).

[22] The completed dwelling was to consist of 130 square metres containing three bedrooms, two bathrooms, contemporary kitchen, servery, open plan living/dining area and expansive deck.

[23] The dwelling was partly constructed by 5 October 2016. Jones Lang Lasalle Registered Valuers provided a valuation report as at that date indicating the value of the completed dwelling and land would increase slightly from the previous figure of \$430,000. However, a conservative assessment adopted the same figure of \$430,000. The existing land and partly constructed dwelling were valued at \$293,000.

[24] Ms Craig's parents are Gordon Craig and Deanna Craig. Mr Craig holds a Power of Attorney for Ms Craig because of her personal issues. Mr Toby Giles, lawyer of Saunders and Co, acts for Ms Craig, Mr Gordon Craig and DAG. He had also acted for Mr Price and Ms Craig when they purchased the land.

[25] After Mr Price and Ms Craig separated there were various communications, both directly and through lawyers, regarding relationship property issues and other matters. Communications on behalf of Ms Craig were undertaken by, or upon instructions from, Mr Gordon Craig. Things went reasonably well at first but, as time went by, they deteriorated. By mid-2017 Ms Craig had not made any payments towards her share of the mortgage, rates, insurances since the separation in September 2016. Mr Price continued to meet his share of the loan instalments and outgoings. He also met Ms Craig's share of mortgage loan arrears of \$4450.92 in March 2017.

[26] As at November 2017, Mr Price was still trying to reach a settlement with Ms Craig through Mr Gordon Craig in relation to relationship property issues. At this time, Ms Craig had still not made any contribution to the mortgage loan instalments since separation. This amounted to approximately \$9018. The primary cause of the ASB loan being in default was Ms Craig's unwillingness to pay her share of the mortgage loan instalments. I do not know why Ms Craig did not continue paying her share of the outgoings.

[27] In November 2017 Mr Giles sent a letter to Mr Price's lawyers with a settlement offer regarding relationship property. Mr Price did not accept the offer. His

lawyers, Malley & Co, sent a letter to Mr Giles dated 30 November 2017 containing an offer for settlement of relationship property matters. The letter also stated:

If agreement cannot be reached our client's proposal is that property is immediately placed on the market on an "as is" basis with Janette Wilson from Glass Miles engaged as the listing agent. Our client is open to whatever method the agent proposes to sell the property to achieve the highest sum reasonably obtainable.

[28] The letter also noted the understanding that the market value of the unfinished property was then around \$293,000. Malley & Co sent a further email to Saunders & Co on 11 December 2017 seeking a response to the letter of 30 November. Mr Giles responded to the email on 11 December 2017 indicating that his clients had not been well for a good part of the last week. He asked if he could have until Thursday of that week to consider his clients' response and draft an appropriate reply.

[29] Malley & Co did not receive a response from Saunders & Co. They sent further emails to Mr Giles on 15 and 19 December 2017 without response.

[30] Mr Price was unaware that Mr Gordon Craig had, in fact, instructed Saunders & Co to incorporate a company to acquire the ASB loans and mortgage. DAG was incorporated on 6 December 2017 for that purpose. Hence, DAG was formed about five days before Mr Giles informed Malley & Co that his "client" (presumably being a reference to Ms Craig through her attorney Gordon Craig) had not been well and asking for further time to respond.

[31] The directors and shareholders of DAG were Mr Giles and Mr Lang, both principals of Saunders & Co. DAG took an assignment of the ASB Bank loan and a transfer of the mortgage on 20 December 2017. Quite how DAG took an assignment of the loan facility and security and for what consideration is information that is not before the Court. And, it appears that Mr Price is also unaware of those matters.

[32] On 9 January 2018 Mr Price received a courier containing a Notice pursuant to s 119 Property Law Act and a letter from Saunders & Co dated 22 December 2017 (just two days after the mortgage was transferred to DAG). Mr Price had been completely unaware that DAG had taken an assignment of the ASB loan and transfer

of the mortgage. He had not received any notice from the ASB Bank or DAG to that effect. He had not received notice of assignment to the debtor.

[33] The default sum stated in the Property Law Act Notice is \$6,127.72. Counsel for Mr Price submits that the mortgage would not have been in default, or the default could have been remedied by Ms Craig or her father making her contribution to the loan instalments.

[34] On 25 January 2018 Malley & Co wrote to Saunders & Co requesting documentation justifying the Property Law Act Notice; disputing the validity of that Notice; and suggesting that matters would be best progressed by way of an orderly sale process with the engagement of a real estate agent, Glass Miles.

[35] On 25 January 2018 Saunders & Co provided a copy of the Notices of Assignment and Loan Facility but did not provide a copy of the Deed of Assignment or any other documentation. Due to an error in the Property Law Act Notice, the timeframe for default to be remedied was extended until 9 February 2018.

[36] By letter dated 19 February 2018 Mr Price again suggested that the property be sold by private sale with the engagement of Glass Miles as the agent to effect a sale at the best available price. On 23 February 2018 Malley & Co again wrote to Saunders & Co providing information that had been requested regarding the proposed real estate agent, including her experience. It seems that DAG had raised some issues about the suitability of Glass Miles acting as the real estate agent to list and sell the property. They also asked for copies of the insurance as this had been requested by the proposed real estate agent.

[37] DAG did not accept the proposal for an orderly private sale with the engagement of a real estate agent. On 4 May 2018 Saunders & Co sent an email to Malley & Co attaching a copy of the loan balance and advising that the mortgagee had unconditionally sold the property by way of mortgagee sale with settlement scheduled for 7 May 2018.

[38] Saunders & Co provided Malley & Co with a copy of a valuation from Colliers and statements as to the amount owing. However, they refused to provide a copy of the agreement for sale and purchase and the Deed of Assignment or settlement documents between DAG and the ASB.

[39] Mr Price now knows that DAG sold the property to ANZEN Property Limited for \$230,000 with settlement occurring on 7 May 2018. The agreement for sale and purchase between DAG and ANZEN Property Limited is dated 18 April 2018 for a purchase price of \$260,000. DAG accepted a reduction in the price by \$30,000 because of matters raised by the purchaser, including concerns that:

- (a) The property is a HAIL site;
- (b) The cladding was non-compliant and needed to be replaced to comply with the Building Code;
- (c) The lateral and drainage works needed to be completed.

[40] Counsel for Mr Price submits the fact that the property was a HAIL site would have been well known as most of the suburb is a potential HAIL site. However, there was no actual contamination on the property and the Council had determined that the land was appropriate and safe for residential development and the foundations had been professionally designed. Furthermore, Mr Price says the cladding for the property was compliant and in accordance with the approved variation to the Building Consent. The cladding had only been partly completed at that time. He also states that the lateral and drainage works needed to be completed. However, Mr Gordon Craig well knew this, and it would have been known to the purchaser prior to entering into the agreement for sale and purchase.

[41] Counsel for Mr Price submits there is no evidence of DAG making any independent enquiries before accepting the reduction of \$30,000 to the purchase price. Moreover, ANZEN was negotiating an immediate on-sale of the property. The property was on-sold for the sum of \$395,000. The transfer of ownership occurred on 16 August 2018. At the time DAG sold the property to ANZEN the estimated cost to

complete the dwelling, using an independent contractor, was \$92,000. ANZEN is in the building industry and counsel for Mr Price submits that it could complete some of the work itself and obtain more competitive prices from contractors or suppliers.

Section 119 Notice

[42] On 9 January 2018 DAG served on Mr Price a notice pursuant to s 119 of the Property Law Act. The notice recorded that the loans were in default and that if the default was not remedied on or before 26 January 2018 then all amounts secured by the mortgage would become payable and that DAG, as mortgagee, would have the power to enter into possession of the property or sell the property.

[43] A notice issued under s 119 of the Property Law Act must comply with s 120 of that Act. A requirement of s 120 is that the mortgagor must be given at least 20 working days after the date of service of the notice for remedying the default. The notice gave Mr Price only 13 working days to remedy the default. The minimum 20 working day period expired on 7 February 2018, allowing for Waitangi Day.

[44] DAG extended the date for remedying the default to 9 February 2018, being more than 20 working days from the date of service of the notice. DAG's solicitor wrote to Mr Price and his solicitor on 16 February 2018 recording that although the default had not been remedied, DAG would not be taking any action to enforce its rights pursuant to the mortgage until after 23 February 2018.

[45] The error in giving Mr Price insufficient notice has not prejudiced his position. DAG did not enter into an agreement to sell the property until 23 April 2018. Mr Price had not taken any steps to remedy the default by that date. Therefore, the defective notice under s 119 of the Property Law Act does not provide Mr Price with an arguable defence.

Entry into Possession

[46] Section 139 of the Property Law Act provides that a mortgagee will become a mortgagee in possession of land or goods in three circumstances:

- (1) When the mortgagee enters into, or takes, physical possession of the land or goods;
- (2) When the mortgagee first receives any income from the land or goods as mortgagee in possession;
- (3) Where the Court makes an order for possession of the land or goods.

[47] Mr Price asserts that DAG entered into possession of the property and failed to comply with its obligations under ss 156 – 167 of the Property Law Act. He relies largely on DAG’s Statement of Claim in which DAG pleaded that “the plaintiff as mortgagee subsequently entered into possession of the property”. Apparently, this was the result of an error in communication between DAG and its solicitor. It was corrected by way of the first amended Statement of Claim dated 8 February 2019. Hence, there is nothing in this point.

[48] Mr Price noted an email where DAG’s solicitor suggests that ANZEN’s solicitor should advise his client to change the locks and secure the property. That email was sent after the sale had gone unconditional. By that point, ANZEN had an equitable interest in the property. DAG does not enter into or take physical possession of the property by suggesting that ANZEN change the locks. This ground of opposition must therefore fail.

Sale of the Property

[49] Mr Price alleges that DAG failed to discharge its duty of reasonable care to obtain the best price reasonably obtainable for the property. He also asserts that DAG had an equitable duty to act in good faith and to act for a proper purpose in respect to the sale of the property.

[50] The equitable duty embraces a wider ambit than the duty in s 176 of the Property Law Act. The Court of Appeal in *Coltart v Lepionka and Co Investments Limited* made it clear that a mortgagee’s powers and duties are not exclusively codified

by s 176.⁸ The Court set out at least three aspects of the mortgagee's equitable duty: to act in good faith, to act for a proper purpose, and to exercise reasonable care to obtain the best price reasonably obtainable for the property. Only the last of those is captured by s 176 of the Property Law Act.

[51] The Court of Appeal in *Coltart*, referring to a mortgagee exercising its power of sale where the appellant did not qualify under s 176 of the Property Law Act because he had an option to purchase, observed:⁹

However, the duty to take reasonable precautions to obtain a proper price is a component of the overall duty to act in good faith, extending to all those interested in the equity of redemption such as the purchaser. A mortgagee must use its powers for that predominant purpose, and not act in a manner which unfairly prejudices or wilfully and recklessly sacrifices the interests of the mortgagor or a party claiming through it.

[52] The case for Mr Price is that DAG has breached its duty of reasonable care to obtain the best price reasonably obtainable and, that DAG has also breached its equitable duty to act in good faith and to act for a proper purpose by reason of the following:

- (1) At the time it acquired the loans and mortgage DAG was conflicted. The company was incorporated on the instructions of Mr Gordon Craig to acquire the loans and mortgage. As noted earlier, Mr Gordon Craig is the father of Ms Craig and holds a Power of Attorney for her. The directors and shareholders of DAG are Messrs Giles and Lang who are both lawyers of Saunders and Co who act for both Ms Craig (who of course is one of the mortgagors) and Mr Gordon Craig. As noted above, Mr Giles also acted for both Mr Price and Ms Craig when they purchased the property;
- (2) At the time of acquisition of the loans, Saunders and Co was engaged in correspondence with Mr Price's lawyers regarding settlement of relationship property as between Mr Price and Ms Craig. The property was their main asset. The loans were in default due to Ms Craig's

⁸ [2016] NZCA 102; [2016] 3 NZLR 36 at [35].

⁹ At [54]

failure to contribute to instalment payments amounting to approximately \$9,018. However, the ASB Bank had not issued a Property Law Act notice. The Property Law Act notice on which DAG relies records that the loans were in default by \$6,127.72. Therefore, had Ms Craig contributed to payment of the loan instalments, the loans would not have been in default. She has brought about the default. Her father, Mr Gordon Craig, is her attorney;

- (3) When DAG acquired the loans and mortgage security it was (through Mr Gordon Craig and presumably also Ms Craig) fully aware of the characteristics of the property, level of borrowing and the default;
- (4) Following the acquiring of the loans and mortgage, DAG moved immediately to the issue of a Property Law Act notice and refused to engage in an orderly sale process;
- (5) It is apparent from the correspondence between solicitors that DAG (in effect Mr Gordon Craig) acquired the mortgage for the predominant purpose of taking control of the sale of the property. It is an obvious inference that he did so to protect the interests of his daughter, Ms Craig. Although judgement has been obtained against Ms Craig in respect of the shortfall, it is a reasonable inference that DAG will not take steps to recover the debt from her. The position would have been otherwise if the ASB had sold the property as mortgagee leaving a shortfall.
- (6) It is apparent from the exchange of correspondence that Mr Price was lulled into a sense of false security. As noted above, Malley and Co (Mr Price's lawyers) sent an email to Saunders and Co on 11 December 2017 seeking a response to their letter of 30 November 2017. Mr Giles responded to the email on 11 December 2017 indicating that his clients had not been well and asking for more time. In fact, DAG was incorporated on 6 December 2017 for the purpose of acquiring the loans and security;

- (7) As far as the sale process itself is concerned, counsel for Mr Price submits that DAG failed to appoint a real estate agent; failed to carry out any marketing or reasonable marketing of the property over a reasonable period of time; failed to engage in any advertising or promotional campaign; failed to conduct an auction or reasonable sale process; and as noted above, accepted a reduction of \$30,000 to the purchase price.

[53] DAG submits that it has discharged its duty of reasonable care to obtain the best price reasonably obtainable for the property for the following reasons:

- (1) DAG obtained a registered valuation from a reputable valuer in January 2018 which specified the following values:
 - (i) Market Value as if complete = \$390,000 including GST if any;
 - (ii) Market Value as is = \$228,000 including GST if any;
 - (iii) Estimate realisable price range as is reflective of a shortened/sub optimal marketing campaign by the mortgagee = \$190,000 to \$200,000 including GST if any.
- (2) DAG sold the property ANZEN on an “as is” where is basis for a final sum of \$230,000 including GST if any which exceeded the above valuation;
- (3) As the sale was a private sale, no agency commission was incurred;
- (4) DAG or individuals on its behalf made approaches to various real estate agents and building companies to see whether they would be interested in selling or buying the property;

- (5) While no extensive marketing campaign was undertaken, the property had a limited market given its incomplete state. An extensive marketing campaign would have prolonged the sale process thereby delaying the reduction of the debt owing and increasing the amount of default interest that accrued. There were also legitimate concerns about the ability to renew the contract works policy for the property;
- (6) DAG adopted an approach consistent with the advice Mr Price received from the real estate agent.

[54] Mr Price proposed, through the Malley and Co letter to Mr Giles of 30 November 2017, that “if agreement [in respect of relationship property issues] cannot be reached...property is immediately placed on the market on an “as is” basis...”.

[55] Counsel for DAG submits that the only valuation evidence Mr Price supplied to challenge the sale price and valuation is a valuation from Jones Lang Lasalle Registered Valuers dated 5 October 2016. Counsel for DAG submits that the valuation is irrelevant because it is dated 18 months prior to the agreement with ANZEN and it specifically records it was obtained for “mortgage security purposes only”. Further, counsel for DAG submits that Mr Price’s estimated values of the property in a completed state are irrelevant because the property was sold as is where is and not completed.

Overall Assessment

[56] Mr Price has an arguable case that DAG acted in breach of its equitable duty both to act in good faith and to act for a proper purpose. It is also arguable that DAG breached its duty to exercise reasonable care to obtain the best price reasonably obtainable for the property at time of sale by having failed to appoint a real estate agent; failing to carry out reasonable marketing over a reasonable period of time; failing to engage in any advertising or promotional campaign; failing to conduct an auction or reasonable sale process.

[57] Mr Price, through his solicitors and Ms Craig (or her father, Mr Gordon Craig as her attorney) were in negotiations towards settlement of relationship property issues when Mr Gordon Craig formed DAG to acquire the ASB loans and mortgage for the apparent purpose of insulating Ms Craig from the consequences of a possible sale of the property through the ASB Bank as mortgagee.

[58] Saunders and Co were acting both for Ms Craig as a mortgagor and for Mr Gordon Craig in establishing DAG to acquire the loan and mortgage. As noted earlier, Saunders and Co had also acted for Mr Price and Ms Craig when the land was acquired.

[59] When DAG acquired the loans and mortgage security it was, through Saunders and Co and Ms Craig, fully aware of the characteristics of the property, level of borrowing and the default. After acquiring the loans and mortgage DAG moved immediately to the issuing of a Property Law Act notice despite relationship property negotiations being ongoing.

[60] As noted above, Mr Price was essentially lulled into a false sense of security. He was endeavouring to resolve relationship property issues and was awaiting a response to his proposal that the property be sold through a real estate agent on an “as is” basis. He indicated through his solicitor’s letter of 30 November 2017 that he was open to whatever method the agent proposed to sell the property to achieve the highest sum reasonably obtainable. Yet Saunders and Co, no doubt on the instructions of Mr Gordon Craig, endeavoured to buy time with their email of 11 December 2017 indicating that their clients had not been well when in fact DAG had been incorporated 5 days earlier, on 6 December 2017, for the purpose of acquiring the loan and mortgage.

[61] This is not an appropriate case for summary judgment. There needs to be closer examination (and discovery of documents) of the circumstances in which DAG took an assignment of the loan facility and mortgage. For example, how the assignment came about and what sum was paid as consideration. There are also arguable issues that DAG did not do enough to obtain the best price reasonably obtainable for the property at the time of the sale. There is the appearance at least that DAG was formed

to avoid negotiations for the settlement of relationship property and to protect Ms Craig from the possibility that a mortgagee sale by the ASB would expose her to a liability for any shortfall. Hence, it is arguable that the mortgagee sale was done for an improper purpose.

[62] Accordingly, the application for summary judgment is declined. The proceeding will be scheduled for a Case Management Conference.

[63] Costs are reserved.

P R Kellar
District Court Judge