

IN THE SUPREME COURT OF NEW ZEALAND

SC 133/2014
[2015] NZSC 20

BETWEEN DENNIS JOSEPH GARDINER AND
HUTIA MONICA GARDINER
Applicants

AND WESTPAC NEW ZEALAND LIMITED
Respondent

Court: McGrath, William Young and Arnold JJ

Counsel: G N Cruden and L W Goodman for Applicant
B J Upton for Respondent

Judgment: 9 March 2015

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay the respondent costs of \$2,500 together with disbursements (to be fixed if necessary by the Registrar).**
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REASONS

[1] The applicants, their son and his partner were equal shareholders in a company which acquired a rural property in 2007. The purchase price was \$490,000. The respondent, Westpac, advanced \$404,000 to finance the purchase, taking a mortgage security over the land and over separate property owned by Mrs Gardiner. All shareholders gave personal guarantees.

[2] Following default by the company, and demand by Westpac on the guarantors, Westpac served notices under ss 119 and 122 of the Property Law Act 2007 on the guarantors in 2010 and proceeded to exercise its power of mortgagee

sale over the rural property at auction. Around the same time, Mrs Gardiner went into default on separate obligations to Westpac. As a result, Westpac also sold her residential property, over which it also held a mortgage.

[3] At the auction for the rural property, no bids were received and the property was passed in. Westpac subsequently sold it for \$181,000 to Mr Read, an employee of the real estate agents who had been responsible for the marketing of the property in the period leading to the auction. Westpac obtained summary judgment against the applicants for the shortfall of \$238,397.34 and then applied for their adjudication in bankruptcy. The applicants applied to set aside the default judgments and default notices.

[4] These applications, which were all contested, were heard by Judge Abbott who upheld the summary judgment obtained by Westpac against the applicants holding that they had no arguable defence.¹ The applications to set aside that judgment and subsequent bankruptcy notices were dismissed. The Judge proceeded to make orders adjudicating both applicants bankrupt on the release of his judgment.

[5] The applicants' appeal to the Court of Appeal was dismissed.²

[6] Leave to appeal to this Court is sought on three grounds. The first is that the mortgagee sale of the rural property was substantially below the statutory and common law criteria of best price. The second is that the sale to the real estate agents' salesperson who had been responsible for selling the property was arguably unlawful. The third is that the proceeds of the two mortgagee sales arguably fully repaid the loan of \$404,000 but the summary judgment was inadequate to determine quantum issues. Nor could they be determined properly on appeal.

[7] In support of the first ground for the proposed appeal the applicants wish to argue that Westpac failed to discharge its duty of reasonable care under s 176 of the Property Law Act to obtain "the best price reasonably obtainable as at the time of sale". Section 176 affirms the scope of the duty of care owed by a mortgagee that is

¹ *Westpac New Zealand Ltd v Gardiner* [2013] NZHC 683, [2013] NZCPR 456 (High Court judgment).

² *Gardiner v Westpac New Zealand Ltd* [2014] NZCA 537 (Court of Appeal judgment).

recognised at common law. The applicants seek to challenge the Court of Appeal's finding that the offer accepted was close enough to the market value of the property in a forced sale situation to satisfy this requirement.³ On an appeal the Court would address questions of the approach to valuations in forced sale situations. This would involve the Court revisiting common factual findings by both Courts below. We do not regard this ground as raising a matter of general or public importance or general commercial significance that makes it necessary in the interests of justice for this Court to hear and determine the proposed appeal. The question of "discounting" values in forced sale situations in particular is a factual one. Nor does anything else in the applicants' submissions persuade us that the Court's conclusion in the summary judgment context, that viewed in commercial terms, Westpac was entitled to take the decision to sell the property at that price in the situation it was faced with, may have resulted in a miscarriage of justice.

[8] The second ground for the proposed appeal raises the questions of whether the sale was in breach of ss 134 and 135 of the Real Estate Agents Act 2008. The former section provides that a contract for the sale of land may be cancelled if a licensed real estate agent acquires a property from a client without the client's consent. This ground arises from the applicants' claim that Mr Read had a conflict of interest which put him in breach of the Real Estate Agents Act. The applicants' point is that at the time of marketing the property for his employer, he intended to purchase it.

[9] The Court of Appeal held that Mr Read's conduct involved no actionable breach because at the time Mr Read submitted his offer to Westpac, his involvement in the sale process had been brought to an end.⁴ Furthermore, Westpac was informed of Mr Read's role in marketing the property and gave its informed consent to the sale proceeding. That consent had also been given to the transaction after Westpac had received a valuation of the property at a figure above the purchase price. In these circumstances no issues arose under s 135 of the Real Estate Agents Act.

³ Court of Appeal judgment at [89].

⁴ At [95].

[10] The applicants submit that justice requires the applicants to be able to investigate Mr Read's conduct at trial including by cross-examination. The relevant facts were, however, established to the Court of Appeal's satisfaction in the summary judgment context. It is plain that Westpac did accede to a sale taking place at a price that the valuation exceeded by only a small amount. Westpac was also aware of the extent of prior involvement. We are also satisfied that nothing in the circumstances indicates the likelihood of a miscarriage of justice on this ground. In those circumstances the prospect of the applicants succeeding on this ground on an appeal are not sufficiently high to warrant us granting leave to appeal.

[11] The third ground of appeal raises issues concerning whether the realisation of other securities had extinguished the liability of the applicants under the guarantee. The applicants also contend there has been a miscarriage of justice. It is the applicants' contention that they did not appreciate what liability they were taking on in signing the guarantees and that the High Court had been unable to determine the amount of the sum guaranteed. These matters were addressed in the High Court judgment at paras [67], [78] and [102]. We see nothing to indicate that the way that they were dealt with might raise a substantial miscarriage of justice.

[12] The Associate Judge made a finding that the applicants' liability as guarantors was for the residual sum of \$238,397.34.⁵ We are not satisfied that there is any indication of error on the part of the High Court or Court of Appeal in adopting that figure as to the amount of the applicants' liability in a summary judgment context. The Associate Judge only indicated there would be uncertainty over the sum guaranteed if there was an arguable claim based on undue influence.⁶ He concluded that there was no such claim, and this finding is no longer disputed in the application. In those circumstances we do not accept that there is an arguable case on this issue that the matter should go to trial.

⁵ High Court judgment at [24] and [102].

⁶ At [66].

[13] In these circumstances the application for leave to appeal is dismissed with costs against the applicants of \$2,500. Disbursements are to be fixed by the Registrar if necessary.

Solicitors:
Goodmans Solicitors, Palmerston North for Applicant
Simpson Grierson, Auckland for Respondent