

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 78/2019  
[2019] NZSC 123**

BETWEEN GP96 LIMITED  
Applicant

AND PVG SECURITIES TRUSTEE LIMITED  
First Respondent

F M CUSTODIANS LIMITED  
Second Respondent

**SC 79/2019**

BETWEEN GP96 LIMITED  
Applicant

AND F M CUSTODIANS LIMITED  
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A R B Barker QC and J Moss for Applicant  
K C Francis and W N Fotherby for First Respondent in  
SC 78/2019  
J E Bayley for Second Respondent in SC 78/2019 and Respondent  
in SC 79/2019

Judgment: 7 November 2019

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**JUDGMENT OF THE COURT**

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- A An extension of time to apply for leave to appeal is granted in respect of both applications.**
- B The applications for leave to appeal are dismissed.**
- C GP96 Ltd must pay costs of \$2,500 to each of the respondents.**
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## REASONS

[1] These two applications for leave relate to the same decision of the Court of Appeal.<sup>1</sup> The applications were filed one day late and an extension of time is therefore required. The respondents do not oppose the extension and it has been adequately explained. We therefore grant the extension.

### **Factual background**

[2] The factual background is complex. It is set out in some detail in the Court of Appeal decision.<sup>2</sup> It is not necessary to repeat it here. The underlying dispute relates to a property in Christchurch, which was badly damaged in the earthquakes of 2010 and 2011 (the property). The property was owned by Lichfield Ventures Ltd (LVL), a subsidiary of Property Ventures Ltd (PVL). Both were placed in liquidation in 2010.

[3] The applicant (GP96) claims it was the lessee of the property, having, it says, taken an assignment of a lease held by the original tenant, LivingSpace Properties Ltd (LivingSpace). F M Custodians Ltd (FMC) was first mortgagee of the property and PVG Securities Trustee Ltd (PVG) was the second mortgagee as a result of successive assignments of the second mortgage. FMC consented to the lease of the property to LivingSpace but it appears that PVG's predecessor as second mortgagee did not.

[4] LVL, PVL, LivingSpace and GP96 were all associated with David Henderson. The document under which LivingSpace purported to assign its lease of the property to GP96 was signed by Mr Henderson on behalf of LivingSpace, LVL and GP96 and on his own behalf as guarantor. It was entered into in July 2010, just before PVL was placed in liquidation. The initial liquidator of LVL purported to disclaim LVL's interest in the property (including the lessor's interest in the lease) which, if successful, meant the property became *bona vacantia*<sup>3</sup> and passes to the Crown.

[5] FMC entered into possession of the property in 2011. Also in 2011, GP96 obtained an injunction to prevent FMC from demolishing, selling, or leasing the

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<sup>1</sup> *GP96 Ltd v PVG Securities Trustee Ltd* [2019] NZCA 325 (Gilbert, Wylie and Thomas JJ) [CA judgment].

<sup>2</sup> At [4]–[28].

<sup>3</sup> Property to which no one has a claim.

property until a dispute between GP96 and FMC about the existence of the lease and whether it had been terminated was resolved.<sup>4</sup> GP96 purported to renew the lease in 2015. FMC purported to decline consent to the renewal and denied the lease still existed. The property has not been occupied since the earthquakes and no rent has been paid since at least then either.

[6] After a prolonged dispute, FMC settled with the insurer of the property for the damage caused by the earthquakes and received a pay-out of over \$12 million. It applied this in reduction of the debt secured by its mortgage. GP96 objected: it claimed the property was not untenable and that FMC as mortgagee in possession was required to apply the insurance pay-out to repair and reinstate the property.

[7] PVG as second mortgagee contracted to sell the property to a third party in 2018. FMC was content for PVG as second mortgagee to conduct the mortgagee sale. This appears to have been because, unlike FMC, neither PVG nor its predecessors had consented to the lease of the property. GP96 lodged a caveat on the basis of its claimed leasehold interest. PVG commenced proceedings to have the caveat removed as it was required to do under the contract for sale and purchase of the property. GP96 commenced proceedings seeking an enlargement of the injunction it had obtained in 2011.<sup>5</sup>

### **The present proceedings**

[8] The competing claims were heard together. Gendall J held that the leasehold interest claimed by GP96 had to yield to PVG's interest as mortgagee and ordered the removal of the caveat.<sup>6</sup> He made a further order restraining GP96 from lodging further caveats.<sup>7</sup> He also discharged the injunction.<sup>8</sup>

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<sup>4</sup> *GP 96 Ltd v FM Custodians Ltd* (2011) 12 NZCPR 489 (HC).

<sup>5</sup> See above at [4].

<sup>6</sup> *GP96 Ltd v F M Custodians Ltd* [2019] NZHC 1183 [HC judgment] at [59]–[60].

<sup>7</sup> At [78].

<sup>8</sup> At [97].

[9] The Court of Appeal dismissed GP96's appeals against the decision of Gendall J in relation to the caveat and the injunction.<sup>9</sup> GP96 seeks leave to appeal to this Court in relation to both aspects of the Court of Appeal decision.

### **Settlement**

[10] After the Court of Appeal's judgment was delivered, PVG gave notice to GP96 of its intention to settle the mortgagee sale of the property. GP96 did not seek a stay and settlement occurred. The buyer is now the registered proprietor and the lease, to the extent it existed, is at an end. An obvious issue of mootness therefore arises in relation to the proposed appeal to this Court.

### **GP96's case**

[11] GP96 argues a matter of public importance arises and that the points at issue need to be resolved by this Court despite the fact the property has been sold.<sup>10</sup> It says there are two reasons for this. First, GP96 wishes to make a damages claim against FMC and/or PVG and the Court of Appeal decision will create an issue estoppel that will impede its ability to do so. Secondly, the points are likely to arise in other cases as the documents in question are standard forms in common use.

[12] The principal point GP96 wishes to raise involves a contest between a clause in FMC's mortgage and a clause in GP96's lease. The mortgage provision says when an insurance pay-out is made under a policy covering destruction of or damage to the property, the mortgagee may "at the mortgagee's sole option" apply the pay-out towards repair and reinstatement or in reduction of the amount secured by the mortgage. FMC chose the latter. The lease provision says, if the property is damaged but not untenable, the lessor must apply the pay-out towards reinstatement or repair, subject to some exceptions which are not relevant for present purposes. The Court of Appeal found that FMC was not bound to comply with the lease provision even though it had consented to the lease; this was because the lease provision was a personal covenant of the lessor, not a covenant affecting the land.<sup>11</sup>

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<sup>9</sup> CA judgment, above n 1, at [93]–[94].

<sup>10</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>11</sup> CA judgment, above n 1, at [76]–[84].

[13] The Court also rejected GP96's argument that FMC, as mortgagee in possession, had a statutory obligation to reinstate under s 150 of the Property Law Act 2007. That duty arises only if the cost can be met from "income". The Court of Appeal considered that insurance proceeds were not "income" as defined, a conclusion that GP96 wishes to challenge.<sup>12</sup>

[14] GP96 says the Court of Appeal was wrong in its conclusions. It argues the points involve a matter of public importance because the same conflict between the provisions described above and the same issue arising under s 150 will arise in future cases.

### **Our analysis**

[15] We accept the issues arising from competing interests of mortgagees and lessees may arise in a future case. Having said that, the present case involves some complex and unusual facts and if the points were likely to arise in other cases, it is perhaps surprising that this has not occurred in the numerous cases arising from the Christchurch earthquakes.

[16] Even if the points may arise in future cases, we are not persuaded that this is an appropriate case for them to be addressed. The sale of the property and consequent termination of the lease means the point is moot. GP96 took no steps to obtain a stay to prevent this from occurring. The damages claim foreshadowed by GP96 is a vague prospect only. If it were to proceed, numerous factual and legal issues would arise. Many of these were not resolved in the present proceedings because of the interlocutory nature of the proceedings and the nature of the evidence before the Court. They would not be resolved in an appeal to this Court either. Unresolved issues include the following:

- (a) whether the property was, in fact, tenantable when FMC received the insurance pay-out;

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<sup>12</sup> At [81].

- (b) whether the purported assignment of lease from Livingspace to GP96 was valid and, if so, whether GP96 validly renewed the lease;
- (c) the impact of the purported disclaimer of the property by LVL's liquidator;
- (d) whether the insurance pay-out was "income" for the purposes of s 150 of the Property Law Act;
- (e) whether PVG or its predecessor consented to the lease (the argument GP96 wishes to raise in this regard appears to be speculative at best); and
- (f) whether GP96's failure to act when notified by FMC of FMC's intention to apply the insurance pay-out towards the reduction of the amount secured by the mortgage would affect any damages claim.

[17] Given these unresolved issues, the mootness of the appeal and our doubt as to whether a matter of public importance truly arises, we conclude that it is not in the interests of justice to grant leave to appeal in this case. So, while we grant an extension of time to file the applications for leave, the applications themselves are dismissed.

[18] GP96 must pay costs of \$2,500 to each of the respondents.

Solicitors:

Canterbury Legal, Christchurch for Applicant

Meredith Connell, Auckland for First Respondent in SC 78/2019

Rhodes & Co, Christchurch for Second Respondent in SC 78/2019 and Respondent in SC 79/2019