IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 103/2023
[2023] NZSC 162

BETWEEN	WENYUE HE Applicant
AND	BANK OF NEW ZEALAND Respondent

Court:	Ellen France and Kós JJ
Counsel:	G J Thwaite and F F Teh for Applicant S A Armstrong for Respondent
Judgment:	6 December 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

Introduction

[1] The applicant, Wenyue He, has filed an application for leave to appeal from a judgment of the Court of Appeal.[1] The Court of Appeal dismissed the applicant's appeal from a decision of the High Court entering summary judgment in favour of the respondent, Bank of New Zealand (BNZ), in the sum of $493,729.73 plus interest.[2] The judgment sum reflected the sum owing by the applicant to BNZ following a mortgagee sale of an Auckland property owned by the applicant.

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1 *He v Bank of New Zealand* [2023] NZCA 381 (Collins, Lang and Woolford JJ).
2 *Bank of New Zealand v He* [2022] NZHC 2128 (Associate Judge Johnston).

Background

[2] Loans totalling $3.21 million advanced to the applicant by BNZ were secured over the Auckland property. In late December 2016, the property was transferred from the applicant personally to the joint ownership of the applicant and a company, Bella Trustee 130701 Ltd (Bella), as trustees of the Queen's Trust. About a year later, in January 2018, Bella was removed from the Companies Register.

[3] After a default in payments, BNZ took enforcement action under the mortgage in November 2018. A default notice dated 22 March 2019 under s 119 of the Property Law Act 2007 was issued. The mortgagee sale which followed relied on that notice. BNZ engaged expert assistance in respect of the management of the mortgagee sale process, the marketing of the property, and valuation. While the sales process proceeded, the property was tenanted and, despite attempts by BNZ's agents to facilitate potential purchasers having access to the property, no access was available throughout the tender process.[3]

[4] Six offers were received for the Auckland property in the course of the tendering process. The highest of these was for $1.915 million. A valuer had assessed the value of the property in a forced sale, such as a mortgagee sale, at $2.1 million. Ultimately, after relisting the property and further negotiations, it was sold for $2.01 million on 7 August 2019. BNZ sought summary judgment for the balance outstanding under the loans.

[5] In resisting summary judgment, the applicant relied on a pleaded counterclaim. He said that under the counterclaim he was entitled to an amount exceeding the sum sought by BNZ. Relevantly, the applicant contended, first, that BNZ had not properly served its notice under s 119; and second that, in the mortgagee sale process, BNZ did not discharge its obligation pursuant to s 176 of the Property Law Act to take reasonable care to obtain the best reasonably available price for the property, thereby causing him loss. The Courts below rejected the applicant's claims.

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[3] The Court of Appeal noted that there was no challenge to the finding in the High Court that the evidence suggested the applicant chose not to engage with requests that he assist in this process.

[6] The argument about service had two main aspects. The first of these related to the fact that, because the applicant was overseas at the time, BNZ had served the default notice on a Mr Yuan. Mr Yuan had been appointed by the applicant earlier as an agent for service and he had been referred to as the applicant's agent in the bulk of the loan documentation. Section 355 of the Property Law Act allows for personal service on an agent where the person otherwise to be served is out of New Zealand. An agent is defined in the Act as a person having actual or ostensible authority to receive the relevant document.[4] In rejecting the applicant's argument, the Courts below found that Mr Yuan at least had ostensible authority to accept service.

[7] The second aspect of the applicant's case about service relied on the fact Bella was not served. BNZ did attempt to serve Bella's registered office but then discovered that Bella had been removed from the register. The Court of Appeal did not accept the argument there was an obligation to serve the s 119 notice on Bella. That was because Bella had by then been removed from the Companies register and was not therefore a current mortgagor on whom service was required. Nor was there any obligation to serve the Secretary for the Treasury under s 355(7) of the Property Law Act as contended.[5] That was because service on Bella was not required given it had no interest in the property.

[8] As to compliance with the requirement to take reasonable care, both Courts found that the applicant would be unable at trial to establish a breach of that duty. The Court of Appeal noted, amongst other matters, the availability of information about the property on various websites and that the final sale price was not unreasonable. It could be reconciled with the original valuation BNZ received from the valuer.

The proposed appeal

[9] The applicant says that the question of whether service was effective raises questions of general or public importance or general commercial significance and that a hearing of the appeal is necessary to prevent a miscarriage of justice.[6] Amongst

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4 Property Law Act 2007, s 358.

5 The applicant states that, "for [him] this is only a side issue to the principal issue of service on Bella".

6 Senior Courts Act 2016, s 74(2)(a)–(c).

other matters, he wishes to argue that the approach of the Court of Appeal to the adequacy of the service on Mr Yuan is inconsistent with the purpose of the service provisions and results in a loosening of the service requirements. In terms of the failure to serve Bella, the applicant's arguments would focus on various matters including the width of the concept of ownership in the Property Law Act.

[10] The key point the applicant wishes to raise in terms of the mortgagee sale process is that BNZ erred in not obtaining access to the property for viewing. Again, this issue is said to give rise to questions of general or public importance or general commercial significance and that an appeal is necessary to prevent a miscarriage of justice.

[11] The proposed appeal would reprise the arguments considered by the Court of Appeal. The resolution of those matters would turn on the particular combination of facts raised in this case. There is no challenge to the principles applicable to the obligations of a mortgagee under s 176. No questions of general or public importance nor of general commercial significance arise.

[12] Nor do we see any appearance of a miscarriage of justice as that term is used in the civil context in the Court of Appeal's assessment of the facts.[7] We add that in determining that Mr Yuan had at least ostensible authority, the Court of Appeal also made the point that, in the applicant's dealings with the BNZ after service on Mr Yuan, no objection was raised then by the applicant about service. Further, as the respondent notes, it is not disputed that at the time of the issue of the s 119 notice, Bella was not a registered company. Finally, as the respondent submits, the Courts below had the benefit of evidence about the reasonableness of the final sale price.

Result

[13] The application for leave to appeal is dismissed.

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7 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

[14] The applicant must pay the respondent costs of $2,500.

Solicitors:
Millennium Lawyers, Auckland for Applicant
Sanderson Weir Ltd, Auckland for Respondent