

IN THE SUPREME COURT OF NEW ZEALAND

**SC 121/2009
[2010] NZSC 39**

BETWEEN JANICE MARY MERERE
 Applicant

AND JACKSON MEWS MANAGEMENT
 LIMITED
 Respondent

Court: Elias CJ, McGrath and Wilson JJ

Counsel: I R Millard QC for Applicant
 P S J Withnall for Respondent

Judgment: 16 April 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant purchased a unit in a retirement village which was subject to an encumbrance whereby, in consideration of a payment of 10 cents a year (if demanded), the encumbrancer covenanted to enter into a management services agreement with the respondent. The applicant tendered to the respondent \$9.90, as the total rental payable for the remaining 99 years of the encumbrance, and sought the discharge of the encumbrance. The respondent refused to discharge it.

[2] The applicant issued proceedings in the High Court seeking an order that the respondent provide a discharge. Ronald Young J so ordered, on the ground that the encumbrance was a “mortgage” for the purposes of the Property Law Act 1952.

Section 81(2) of that Act therefore entitled the applicant to a discharge on payment of the amount secured.¹

[3] The respondent appealed. As in the High Court, it was in the Court of Appeal common ground between the parties that the applicable legislation was the Property Law Act 1952. The Court concluded however following the hearing that the Property Law Act 2007 applied, without seeking further submissions on this point.² After comprehensively reviewing the history and the nature of rent charges and the provenance of the provision which became s 97(2) of the 2007 Act, the Court concluded that that sub-section made explicit what was implicit in s 81(2), namely that a mortgagee or encumbrancee is not required to provide a discharge until all the obligations which are secured have been performed. The appeal therefore succeeded.

[4] We accept that the issue sought to be raised on appeal is of general importance, because the technique of using encumbrances to secure obligations other than a monetary sum appears to be widely used. We also accept that it is regrettable that the applicant was not afforded the opportunity to make submissions to the Court of Appeal as to which Property Law Act applied, or whether the Interpretation Act 1999 may have some application. The applicant has however now had the opportunity, in its submissions in support of the present application, to attempt to establish that it is at least possible that the 1952 Act or the Interpretation Act are of relevance.

[5] Having read and considered all the submissions for the parties, we have concluded that it is not even seriously arguable that legislation other than the Property Law Act 2007 applies. Indeed, the applicant did not contend to the contrary. Nor is it seriously arguable that s 97(2) of that Act does not apply so as to defeat the applicant's claim. The words of the subsection could not be more clear in requiring a discharge only upon payment of all amounts "and the performance of all

¹ *Menere v Jackson Mews Management Ltd* HC Wellington CIV-2008-485-562, 6 October 2008.

² *Jackson Mews Management Ltd v Menere* [2009] NZCA 563 per Hammond, Chambers and Baragwanath JJ.

other obligations” which are secured. To conclude that the applicant is entitled to a discharge would also defy commonsense; the obvious purpose of the obligation to pay a nominal amount (if demanded) is to secure performance of the management services agreement, which could not be brought to an end unilaterally if there were no breach by the respondent. The proposed appeal is therefore hopeless. Leave to appeal is refused.

[6] As the Court of Appeal noted,³ the applicant retains her other remedies for what, she alleges, were breaches by the respondent of the agreement.

[7] The applicant was granted legal aid for the purpose of making the application for leave to appeal. There is therefore no order for costs.

Solicitors:
Guy and Toby Manktelow, Lower Hutt for Applicant
Duncan Cotterill, Wellington for Respondent

³ At [56].