IN THE COURT OF APPEAL OF NEW ZEALAND

CA666/2015
[2016] NZCA 102

BETWEEN	WILLIAM ANDREW CLYDE COLTART Appellant
AND	LEPIONKA & COMPANY INVESTMENTS LIMITED Respondent

Hearing:	25 February 2016
Court:	Ellen France P, Harrison and Kós JJ
Counsel:	L J Taylor QC and D A Chan for Appellant M G Colson and K J Dobbs for Respondent
Judgment:	7 April 2016 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order made in the High Court is set aside and substituted by the order set out in [92] of this judgment.

C Leave is reserved for either party to apply to the High Court for further orders.

D The respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Contents

Introduction

[1] This appeal from a decision of Associate Judge Smith ordering the removal of two caveats from the title to a property raises issues about the nature and extent of the duties imposed on a party which has acquired a mortgage consequent upon the mortgagor's default.[1]

[2] In 2009 a company called GLW Group Ltd (GLW) purchased a 24-hectare rural property on the banks of the Tukituki River in Hawke's Bay for subdivision into a number of separate lots. Westpac Banking Corporation (Westpac) agreed to fund GLW's expenditure in return for a first mortgage over the property.

[3] GLW granted an option to the appellant, Andrew Coltart, to purchase one undivided lot on which a homestead was situated (the homestead lot) for $650,000. Despite not having the security of title Mr Coltart says he has expended over $1.5 million on improvements. He has, however, lodged caveats to protect his interests under the option and easements in favour of the homestead lot. GLW later agreed to sell four other undivided lots to Lepionka & Company Ltd (LCL) and a separate lot to Stefan Lepionka and another as trustees of a family trust (collectively, including LCL, the Lepionka purchasers). The total purchase price was

[1] *Lepionka & Company Investments Ltd v Coltart* [2015] NZHC 2849 [HC decision].

$4.63 million. The subdivision remains incomplete; GLW has been unable to give title or settle with any of the purchasers.

[4] In 2015 GLW defaulted on the Westpac mortgage. Another Lepionka entity, the respondent Lepionka & Company Investments Ltd (the Lepionka mortgagee), was formed to buy Westpac's mortgage. Within days of acquiring the security, the Lepionka mortgagee adopted GLW's contracts with the Lepionka purchasers, agreed to pay them substantial compensation if the subdivision did not proceed and cancelled Mr Coltart's option. The Lepionka mortgagee later declined offers by Mr Coltart and a relative to purchase the property at market value.

[5] The Lepionka mortgagee claims that Mr Coltart's caveats are frustrating its attempts to complete the subdivision, give title and sell. Associate Judge Smith upheld its application for removal of Mr Coltart's caveats. He was satisfied that its prior legal charge prevails or will ultimately prevail over Mr Coltart's equitable interest in the property.

Background

[6] The relevant facts leading to the Lepionka mortgagee's acquisition of Westpac's mortgage are as follows:

(1) In 2009 Mr Coltart and GLW's managing director, Garth Paterson, agreed that Mr Paterson would buy the property for the purpose of subdivision; that Mr Coltart, who is an architectural designer, would project manage the resource consent application and build a home for Mr Paterson on what was known as lot 4; and that Mr Coltart would pay $800,000 to buy the homestead lot, also known as lot 2.

(2) Mr Paterson formed GLW which bought the property. Mr Coltart contributed $150,000 towards the purchase price, to be credited in part payment of the homestead lot.

(3) On 9 October 2009 Westpac agreed to fund GLW's purchase and development of the property, with the loan to be secured by a first mortgage.

(4) Also in October 2009, Mr Coltart took possession of the homestead lot. He subsequently renovated the homestead itself at a cost of $1.573 million including GST. Mr Coltart and his wife have since moved in to live in the homestead.

(5) Mr Coltart designed and built a house for Mr Paterson on lot 4. Construction was completed in December 2011. Mr Paterson disputed Mr Coltart's claim for payment of the building costs of $1.656 million. In August 2012, as a term of settlement of their dispute, GLW undertook to complete the subdivision. The parties cancelled the 2009 agreement for sale and purchase of the homestead lot and, in substitution, GLW granted Mr Coltart an option to purchase the homestead lot for $650,000 (the original purchase price of $800,000 less the $150,000 paid later). In exchange Mr Coltart agreed to forego his claim for payment of the lot 4 costs and gave permission for GLW to create two additional lots within the subdivision of the property.

(6) On 15 February 2013 Mr Coltart lodged his first caveat to protect his interests under the option. On 22 May 2013 he lodged his second caveat to protect his right to roam over common land within the property and easements in favour of the homestead lot.

(7) Early in 2011 Mr Coltart introduced Mr Lepionka to the property. He was then designing a house for Mr Lepionka in Auckland. Mr Lepionka did not have any interest in buying any part of the property. However, a third party later reintroduced Mr Lepionka to the property. The circumstances of this litigation suggest that Messrs Coltart and Lepionka have not remained on good terms.

(8) In January 2013 GLW entered into agreements to sell three other lots — lots 3, 5 and 8 — to LCL, and lot 4, together with another lot to be created for a fishing hut, to Mr Lepionka's family trust. These agreements were the result of a six week tender process conducted by GLW. The Lepionka purchasers paid GLW deposits totalling $463,000 or 10 per cent of the total purchase price. But GLW has failed to complete the subdivision and, contrary to its contractual obligations, has used the deposit payments for its own purposes.

[7] On 14 May 2014 GLW granted a second mortgage over the property to an Australian entity, AFI Management Pty Ltd. This charge is secured by a caveat lodged against the title on 3 March 2015. The amount said to be secured is contested. AFI apparently asserts that GLW's indebtedness exceeds $7 million. Mr Lepionka, on the other hand, calculates the debt is more likely about $60,000.

[8] GLW fell into arrears under the Westpac mortgage. On 29 January 2015 the bank served a notice of demand on the company to pay $235,716.05 by 5 March 2015.[2] GLW failed to comply. Westpac also served a copy of the notice on Mr Coltart. In early March 2015 the bank rejected Mr Coltart's request to adopt his option to purchase the homestead lot and complete the sale.

[9] On 25 March 2015 Mr Lepionka incorporated the Lepionka mortgagee. On 31 March 2015 the company took an assignment of all Westpac's rights under the first mortgage. The amount then owing was $2,665,000. The purpose of these steps, according to Mr Lepionka, was "to create a solution to the problem". As the Associate Judge explained:

> [15] The Lepionka purchasers were then faced with a significant problem. If the bank elected to sell the land as an un-subdivided block to some third party, or to proceed with the proposed subdivision but sell lots 3, 4, 5 and 8 to other parties, the effect of the mortgagee sale or sales would be to extinguish the interests of the Lepionka purchasers under their agreements to buy those lots. In that eventuality they would lose their deposits, just as Mr Coltart would lose the money he had spent for his interests in the land if the land (or the homestead lot) were sold to another party or parties.

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2 Property Law Act 2007, s 119.

[10] On 1 April 2015 the Lepionka mortgagee adopted GLW's contracts with the Lepionka purchasers. According to Mr Lepionka, this step was taken "so we could complete our contracts and own the land and, if we can, we still want to do that". In his view there were sound commercial reasons for the Lepionka mortgagee adopting the contracts. Among them were avoiding the usual mortgagee's discount for the absence of vendor warranties and another set of agents' commissions, as well as the uncertainty resulting from a mortgagee's sale.

[11] On the same day the Lepionka mortgagee entered into a subdivision and compensation agreement with the Lepionka purchasers which agreed to advance $50,000 towards the costs of completing the subdivision. In the event that the subdivision was not completed within six months and all the agreements were cancelled, the Lepionka mortgagee agreed to pay the Lepionka purchasers (1) the subdivision advance of $50,000 plus interest at the rate of 12 per cent compounding; (2) $463,000 representing the deposits earlier paid to GLW plus interest at 12 per cent per annum; and (3) $750,000 as compensation. The Lepionka mortgagee has never explained the commercial rationale for accepting what appears to be a gratuitous contingent liability for the last two items, exceeding $1.213 million plus compounding interest.

[12] On 9 April 2015 the Lepionka mortgagee gave Mr Coltart notice of cancellation of his option to buy the homestead lot. Mr Lepionka later explained that the company wished to free the homestead lot for sale to a third party and realise sufficient funds to complete the subdivision. He referred to the fact that the agreed option price of $650,000 fell well below independent valuations of the lot on a forced sale of between $1.84 million and $2 million. These assessments did not quantify the discrete value of Mr Coltart's improvements to the property.

[13] In April and May 2015 Mr Coltart and latterly his nephew, Mr McHardy, made the Lepionka mortgagee a series of offers to buy the property. In response to Mr Coltart's second offer of $6.65 million plus GST if any, the Lepionka mortgagee acknowledged that the offer may net more for the mortgagor and the second mortgagee than completing the Lepionka contracts.

[14] The last offer, from Mr McHardy on 1 May 2015, was for $6.93 million plus GST if any. GLW and AFI apparently consented. On 29 May 2015 the Lepionka mortgagee advised Mr McHardy that it rejected his offer because the Lepionka purchasers wished to complete their contracts.

[15] In an affidavit sworn in the High Court Mr Coltart calculated the net amount likely to be realised if the Lepionka mortgagee completed the sales to the Lepionka purchasers (plus $1.3 million which Mr Lepionka estimated as necessary development costs) and sold off the property the rest in exercise of its powers (using the maximum values which the Lepionka mortgagee ascribed to individual lots) as follows:

(1)	five lots to Lepionka purchasers		$4,630,435
(2)	Homestead lot		$1,739,132
(3)	Lot 6		$347,826
(4)	Less:		
	(a)	Development costs to complete	$1,300,000
	(b)	GLW's deposits	$463,000
	(c)	GST refund	$440,433
	Net realisation		**$4,823,958**

[16] By comparison, Mr Coltart's offer for the whole property was $6.93 million (zero rated for GST), yielding some $2,106,042 more than the amount available according to the Lepionka mortgagee's subdivisional sale approach.

[17] Notably, also, when the application was heard in the High Court in August 2015 Mr Lepionka estimated the outstanding costs of subdivision at $1.3 million. Mr Coltart pointed out that approximately $1 million of that estimate was for building a new fishing lodge on one of the lots sold to the Lepionka purchasers. By his uncontradicted estimate, the true costs of completion were about $300,000. Allowing for that adjustment, the differential between Mr McHardy's last offer and

the net recovery available to the Lepionka mortgagee on the subdivisional sale approach would increase by a further $1 million, to over $3.1 million.

[18] Three relevant events have occurred since the High Court hearing. First, without explanation in October 2015 the Lepionka mortgagee and the Lepionka purchasers cancelled the subdivision and compensation agreement. Second, in November 2015 the Lepionka mortgagee agreed to sell the homestead lot to a third party for $2.5 million GST inclusive, conditional on a number of events including vacant possession. That contract was recently cancelled.

[19] Third, the Lepionka mortgagee has carried out almost all the physical works along with the surveying work necessary to complete the entire subdivision of the property. The new subdivision has created a total of 11 new lots, plus a residual common lot, as opposed to the four originally planned by GLW. Mr Lepionka forecasts new titles will be available shortly.

High Court

[20] Associate Judge Smith delivered a comprehensive judgment. His rejection of most of the grounds raised to support Mr Coltart's caveats is not challenged on appeal. He identified and answered eight issues for determination which were, as argument developed before us, further refined.

[21] The Associate Judge was uncertain about the availability of a cause of action to Mr Coltart against the Lepionka mortgagee if the caveats were sustained and he was required to issue a proceeding to enforce his rights.[3] He was disadvantaged by the absence of a draft of Mr Coltart's statement of claim, identifying and particularising the legal foundation for a case against the Lepionka mortgagee. At our request Mr Taylor QC tendered during the hearing of the appeal an abbreviated statement of claim. A clearer picture has now emerged than was available to the Associate Judge of the nature of Mr Coltart's claim and the relief sought against the Lepionka mortgagee.

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3 HC decision, above n 1, at [128].

[22] The Associate Judge concisely identified the ultimate issue for his determination as:

> [34] … whether there is a reasonably arguable case that Mr Coltart had, and continues to have, a caveatable interest in the land. If he does, but it appears that his caveats could not survive a sale of the homestead lot (or of the land) by the Lepionka mortgagee to a third party, the question will be whether my discretion under s 143 should be exercised in favour of removal notwithstanding Mr Coltart's interest.

[23] The Associate Judge was satisfied that Mr Coltart's option to purchase the homestead lot and the unregistered easements gave him equitable interests in the property.[4] However, the Lepionka mortgagee's application to remove the caveats was made on the ground that Mr Coltart's interests would inevitably be extinguished, either by the cancellation notice or, if the notice was ineffective for any reason, on sale by the Lepionka mortgagee.[5] In the event, the Associate Judge found against Mr Coltart on both premises and exercised his discretion to remove accordingly.

[24] In particular the Associate Judge found that:

(1) Mr Coltart's equitable interest was extinguished in April 2015 by the Lepionka mortgagee's valid cancellation of his option to buy the homestead lot.[6]

(2) The Lepionka mortgagee owed equitable or statutory duties to GLW and the second mortgagee to act in good faith when selling the land but not to Mr Coltart.[7]

(3) The Lepionka mortgagee's duties included an obligation not to improperly prefer the interests of the Lepionka purchasers over GLW and AFI. It was not arguable that the Lepionka mortgagee had acted fraudulently in the sense of dishonestly adopting GLW's agreements with the Lepionka purchasers.[8] It was, however, arguable that by adopting the agreements, cancelling Mr Coltart's agreement and

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4 At [38].
5 At [39].
6 At [70]–[79].
7 At [96]–[101].
8 At [116]–[120].

rejecting offers by Mr Coltart and third parties to purchase the property, the Lepionka mortgagee had exercised its powers in bad faith or for the collateral purpose of protecting the Lepionka purchasers.[9]

(4) There was an insufficient connection between any lack of good faith by the Lepionka mortgagee and Mr Coltart's rights because any wrongful adoption of GLW agreements with the Lepionka purchasers did not directly affect Mr Coltart's interest in the homestead lot.[10]

(5) The Lepionka mortgagee's rights derived from the first mortgage and must prevail over Mr Coltart's unregistered equitable interests irrespective of whether the Lepionka mortgagee acted in bad faith.[11]

(6) Mr Coltart's interests were always liable to be defeated by a valid exercise of the mortgagee's power of sale and any lack of good faith could not improve Mr Coltart's position, with the inevitable result that he will lose his interest in the homestead lot when the property as a whole is sold.[12]

[25] The Associate Judge exercised his discretion to order removal of the caveats on these terms:

> [138] I am satisfied that this is also a case where, although there has been no memorandum of transfer yet presented, such an outcome is inevitable, and that I should not exercise my discretion to decline the removal application. However I do not think it is sufficiently clear that the caveats should be removed immediately, on the basis of the purported cancellation of the Coltart agreement under s 178(2). If the April 2015 cancellation was sufficiently linked to the adoption of the Lepionka purchasers' agreements a few days earlier, Mr Coltart may have an argument that the cancellation was invalid. In the circumstances, the appropriate course is to direct Land Information New Zealand (LINZ) to remove the caveats as and when the Lepionka mortgagee presents for registration a transfer of the land, or the homestead lot, to a party other than Mr Coltart.

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9 At [121].
10 At [122]–[123].
11 At [124].
12 At [128]–[129].

[26] The Associate Judge has since ordered a stay of execution of his judgment pending our determination of Mr Coltart's appeal with the result that LINZ is unable to remove the caveats in the interim.[13]

[27] The Associate Judge's disputed findings are that the Lepionka mortgagee did not owe an actionable duty to Mr Coltart after acquiring the Westpac mortgage and that, even if the Lepionka mortgagee had acted in bad faith or for collateral purpose, its valid cancellation of Mr Coltart's option or prospective sale of the homestead lot would inevitably extinguish Mr Coltart's interests.

Principles

[28] It is well settled that a caveat is a notice to others that the person lodging it claims to protect an interest in and a right to the subject land. The estate or interest protected by the caveat may not be charged or transferred.[14] Another party cannot defeat the caveator's right of claim by lodging an instrument for registration against the title.

[29] However, as the Associate Judge noted, this prohibition is subject to important qualifications. One is where the underlying interest protected by the caveat ceases to exist, and so the caveat cannot logically be sustained. The other is where the property is the subject of a mortgage, the purchaser's rights are always subject to those of the mortgagee: its title is paramount and the purchaser's equitable interest is extinguished by the mortgagee exercising its power of sale.[15]

[30] Similarly, the principles governing removal of caveats are settled. The registered proprietor or any other person having a registered estate or interest in the property may apply for an order for removal.[16] The caveator has the onus of showing that he or she has a reasonably arguable case for the interest claimed.[17] But the caveat will not be removed unless it is patently clear that it cannot be maintained,

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13 *Lepionka & Company Investments Ltd v Coltart* [2016] NZHC 5 at [66](2).
14 Land Transfer Act 1952, s 141(1).
15 HC decision, above n 1, at [32] applying *Vegar-Fitzgerald v Aorangi Forests Ltd* [2014] NZCA 200 at [12]; Land Transfer Act, s 105.
16 Land Transfer Act 1952, s 143.
17 *National Bank of New Zealand v Radisich* HC Hamilton CIV-2003-419-928, 25 August 2003 at [6].

either because there was no valid ground for lodging the caveat or, if there was, that ground no longer exists.[18] Within these parameters, the Court has a measure of discretion.

Issues

[31] As argument developed before us, the appeal came down to whether four issues were arguable: namely, whether (1) Mr Coltart has an interest in GLW's equity of redemption of the Lepionka mortgage; (2) if so, the Lepionka mortgagee owed Mr Coltart a duty relating to the exercise of its powers of sale; (3) if so, the Lepionka mortgagee was in breach of that duty; and (4) if so, Mr Coltart's caveats should be removed.

[32] We refer briefly to the background to the emergence of these issues. The Privy Council's decision in *Downsview Nominees Ltd v First City Corporation Ltd* is the most recent in a long line of authority on the nature and extent of a mortgagee's duties when exercising its powers of sale.[19] Courts of equity have gradually developed rules designed to strike a fair balance between the competing rights and interests of various parties in a security. The mortgagee must (1) exercise its powers of enforcement on the borrower's default for the purpose of preserving and realising the charged assets to discharge its debt; and (2) while it is entitled to give priority to its own interests, act fairly and equitably towards the mortgagor, subsequent mortgagees and others with an interest in the equity of redemption.

[33] Those powers and duties are now largely but not exclusively codified by s 176 of the Property Law Act 2007; in short, a mortgagee exercising a power to sell mortgaged property owes "a duty of reasonable care … to obtain the best price reasonably obtainable as at the time of sale". The duty is owed specifically to the current and former mortgagors, any covenantor, a subsequent mortgagee and the holder of any subsequent encumbrance.

[34] In the High Court Mr Taylor attempted to establish that Mr Coltart fell within the statutory category of an encumbrancer to whom the Lepionka mortgagee owed a

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18 *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 659–660.

19 *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513 (PC).

duty when exercising its powers. The Associate Judge was correct to reject this proposition.[20]

[35] Before us, Mr Taylor's emphasis shifted. He argued that the Lepionka mortgagee also owed Mr Coltart an equitable duty to act in good faith and use its powers for proper purposes; and to exercise reasonable care to obtain the best price reasonably obtainable for the property.[21] That is because Mr Coltart has an interest in GLW's equity of redemption of the Lepionka mortgage which gave him the same right to redeem. Mr Coltart's draft statement of claim alleges that in breach of its duty to him the Lepionka mortgagee acquired the mortgage and obtained registration for the improper and collateral purpose of protecting the interests of the Lepionka purchasers and with the intention of defeating his interest in the property. Mr Coltart's particulars of the Lepionka mortgagee's breaches will be addressed within our analysis of the third issue.

[36] Mr Colson accepts that a mortgagee owes a mortgagor and subsequent mortgagees coexisting duties of good faith in equity and of care by statute when exercising its power of sale.[22] But he says that as a purchaser under an executory agreement for sale of part of the mortgaged property Mr Coltart does not have a sufficient interest in GLW's equity of redemption to justify the existence of a duty owed by the Lepionka mortgagee.

Decision

(1) Equity of redemption

[37] The first issue is whether Mr Coltart arguably has an interest in GLW's equity of redemption of the Lepionka mortgage.

[38] The equity of redemption is the mortgagor's right to redeem or pay off the debt secured by a mortgage, representing "the sum total of the mortgagor's rights in

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20 HC decision, above n 1, at [96]–[101] and [127].
21 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (CA).
22 *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA) at [40].

the property" beyond the mortgagee's secured debt.[23] Its value is measured by the difference between the amount owing under the mortgage and the value of the mortgaged land. The right exists because the mortgaged interest is not a contract for sale but a security for repayment of principal and interest.[24]

[39] The nature and extent of the equitable right to redeem is now recognised by s 97 of the Property Law Act which materially provides:

> **97 Equity of redemption**
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> (1) The current mortgagor *or any other person entitled to redeem* mortgaged property may redeem it in accordance with this subpart at any time before it has been sold, under a power of sale, by the mortgagee or a receiver.
>
> (2) The mortgagee must, on payment to the mortgagee of all amounts and the performance of all other obligations secured by the mortgage, at the expense of the current mortgagor or other person seeking to redeem the mortgaged property, discharge the property from the mortgage in accordance with section 83.
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> …
>
> (Emphasis added.)

[40] Section 4 defines a person entitled to redeem as follows:

> **person entitled to redeem**, in relation to mortgage property,—
>
> (a) means a person with an interest in a mortgage property and entitled to redeem it; and
>
> (b) includes the current mortgagor, any former mortgagor, and any covenantor

[41] It also defines redeem:

> **redeem**, in relation to mortgaged property, includes the right to have the property discharged from a mortgage over the property

[42] In its report to Parliament the Law Commission said this:[25]

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[23] Charles Harpum, Stuart Bridge and Martin Dixon *Megarry & Wade: The Law of Real Property* (8th ed, Sweet and Maxwell, London, 2012) at [24-017].

[24] *Tarn v Turner* (1888) 39 Ch D 456 (Ch) at 459–460 per Kekewich J, affirmed in *Tarn v Turner* (1888) 39 Ch D 463 (CA) at 464 per Cotton LJ. Compare Property Law Act, s 79.

[25] Law Commission *A New Property Law Act* (NZLC R29, 1994) at 311–312.

> [Section 97] declares that an owner (or other person entitled to redeem), can redeem mortgage property … at any time before sale by the mortgagee under a power of sale. Those also entitled to redeem are other persons with an interest in the property; for example, other mortgagees, *purchasers* and lessees …
>
> (Emphasis added.)

[43] The Law Commission's statement and Mr Taylor's submission that Mr Coltart's option entitles him to redeem the Lepionka mortgage are supported by authority, starting with the Privy Council's statement of settled principle in *Downsview Nominees Ltd* that "all persons having *any interest* in the property subject to the mortgage or liable to pay the mortgage debt can redeem".[26]

[44] In *Pearce v Morris* Lord Hatherley LC stated to the same effect that any person with an interest in a property subject to a mortgage is entitled to redeem and have the property conveyed to him.[27] The right of a purchaser of part of the property under an executory contract for sale to redeem was accepted without challenge. The purchaser was not required first to perfect his equitable right by settlement of the contract and acquisition of legal title. However, the Court upheld the mortgagee's consequential refusal to deliver legal title until the purchaser owned the property.[28]

[45] In *Tarn v Turner* the Court of Appeal, affirming Kekewich J, held that a tenant of a property under an agreement to lease for a fixed term was entitled to redeem the lessor's mortgage.[29] The tenant had expended a significant amount on improving the property before the lessor fell into default. The Court rejected the mortgagee's argument that the right of redemption granted to persons having a partial interest in the equity of redemption had never been extended to a tenant for years.[30] The relatively limited nature of the interest was irrelevant. It was sufficient that the tenant may be prejudiced by the mortgagee's actions and should not be

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26 *Downsview Nominees Ltd*, above n 19, at 526 (emphasis added).

27 *Pearce v Morris* (1869) LR 5 Ch App 227 at 229. See also *Halsbury's Laws of England* (4th ed, reissue, 1998, online ed) vol 77 Mortgage at [306].

28 At 231–232. See also *Van Den Bosch v Australian Provincial Assurance Associate Ltd* [1968] 2 NSWR (NSWSC) 550 at 554.

29 *Tarn v Turner*, above n 24.

30 At 458.

denied the only available remedy for relief from the effect of the mortgage. The tenant's position was analogous to that of assignee of the equity of redemption.[31]

[46] Mr Taylor acknowledged that *Tasker v Small* appears to be to the contrary.[32] In that case, Lord Cottenham LC stated that, while a purchaser under an executory agreement for sale and purchase can be said to have contracted to buy the equity of redemption, he cannot redeem the mortgage until the purchase is completed.[33] As the mortgagee was not a party to the agreement, and no suit for specific performance lay against him, the purchaser's rights could not affect the security or interfere with the mortgagee's remedies.

[47] The premise for the Lord Chancellor's statement — that only one party can ever exercise a right to redeem — appears to run directly counter to *Tarn* and *Pearce.* Nevertheless, Mr Colson says that *Tasker* remains good authority for the proposition that a purchaser of part of a property under an executory contract is not entitled to redeem a mortgage. He relies on *Forthwith Shelf Co No 95 Ltd v Johnston Lawrence Elder Solicitors Nominee Co Ltd*, where Doogue J cited *Tasker* for the proposition that until an executory contract is carried into effect the purchaser cannot enforce against a mortgagee equities attaching to the property including the mortgagor's right of redemption.[34] The purchaser's rights arising out of its equitable interest are limited to enforcement of the contract — it was not entitled to act as if the contract had been specifically performed.

[48] In *Forthwith* Doogue J observed that, in *Firth Concrete Industries Ltd v Duncan*, McMullin J had accepted *Tasker* as good law.[35] However, McMullin J accepted *Tasker* as authority for the limited conclusion that only a party to a contract of sale could enforce it or seek damages for breach.[36] This was in the context of finding that the vendor under a conditional agreement for sale and purchase surrendered its interest in the subject land on the date the contract was entered into.

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31 At 464–465.
32 *Tasker v Small* (1837) 40 ER 848.
33 At 851.
34 *Forthwith Shelf Co No 95 Ltd v Johnston Lawrence Elder Solicitors Nominee Co Ltd* (1995) 3 NZ ConvC 192,178 (HC) at 8–9.
35 *Firth Concrete Industries Ltd v Duncan* [1973] 1 NZLR 188 (SC) cited in *Forthwith Shelf*, above n 34, at 8.
36 At 192.

The vendor's only interest from that point was in the payment of the balance of purchase money. McMullin J did not rely on *Tasker* for any wider proposition.

[49] We doubt whether *Forthwith* was correctly decided. Doogue J referred to *Pearce* and *Tarn*, apparently to support his finding that until the contract for sale had been specifically performed the purchaser was not entitled to argue that it had an interest in the equity of redemption.[37] But those two decisions have stood the test of time as authority to the contrary.

[50] We add what is possibly obvious. Mr Coltart's exercise of GLW's right to redeem the Lepionka mortgage would not without more materially improve or protect his position. The subdivision of the property would remain incomplete. He would have no title despite parting with $2.681 million plus accumulated interest and other costs. He would remain exposed to AFI and, to a lesser extent, GLW (which is now apparently in liquidation). And GLW would arguably remain bound to settle its agreements with the Lepionka purchasers.

[51] So the only viable option available to Mr Coltart was to purchase the property as a whole, redeeming the Lepionka mortgage in the process. While, as the Associate Judge noted, that event may arguably defeat the Lepionka purchasers equitable interests, the same option was available to those parties providing the Lepionka mortgagee accepted that the price offered was the best price reasonably available.

[52] In our judgment Mr Taylor is correct that Mr Coltart's option to purchase the homestead lot arguably gave him an interest in GLW's equity of redemption and thus a right to redeem the Lepionka mortgage.

(2) Equitable duty

[53] The second issue, once it is settled that Mr Coltart has an interest in GLW's equity of redemption, is whether the Lepionka mortgagee arguably owed him a duty of good faith in that capacity when exercising its power of sale for the purpose of

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[37] *Forthwith Shelf*, above n 34, at 9.

realising its secured debt by selling the property for the best price reasonably obtainable.

[54] We can answer this issue shortly. Mr Colson is correct that the duty to act in good faith and for the purpose of obtaining repayment of the debt is a composite one.[38] However, the duty to take reasonable precautions to obtain a proper price is a component of the overall duty to act in good faith,[39] extending to all those interested in the equity of redemption such as a purchaser.[40] 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.[41]

[55] It must follow that from the moment of acquiring Westpac's charge the Lepionka mortgagee owed Mr Coltart and all others with an interest in the equity of redemption of the mortgage a duty to act in good faith when exercising its powers of sale. In this respect all the relevant steps taken by the mortgagee — including adoption of GLW's agreements with the Lepionka purchasers, entry into the compensation agreements with the Lepionka purchasers, cancellation of Mr Coltart's option and refusal of his offers to purchase the property — were incidental to its powers of sale.

(3) Breach of duty

[56] The third issue is whether, assuming the Lepionka mortgagee owed Mr Coltart a duty of good faith, it was arguably in breach by acquiring the mortgage, adopting the Lepionka purchaser's contracts, cancelling Mr Coltart's option and rejecting his offers to buy.

[57] The Lepionka mortgagee's challenge to the Associate Judge's affirmative finding on this issue must be assessed against its decision to acquire the Westpac

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38 *Downsview Nominees Ltd*, above n 19, at 521–522.

39 *Forsyth v Blundell* (1973) 129 CLR 477; 1 ALR 68 per Menzies J at 69–70, dissenting in the result but not on the principles, approved in *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 139 CLR 195 at 541–542.

40 *Raja v Austin Gray* [2003] 1 EGLR 91 (CA) at [57]; Wayne Clark (ed) *Fisher and Lightwood's Law of Mortgage* (12th ed, Lexis Nexis Butterworths, London, 2006) at [30.22].

41 *Kennedy v De Trafford* [1897] AC 180 (HL) at 185.

mortgage when GLW was in substantial default, and when there was no realistic prospect of remedying that default or of the Lepionka mortgagee enjoying a return on its investment. Acquisition of a distressed security, with a right of recovery limited to the amount of the debt and contingent upon a forced sale of the charged property, was not a commercially rational decision. The Associate Judge was correct that the Lepionka mortgagee's apparent intention to protect the equitable interests of the Lepionka purchasers could not affect the validity of its status as owner of the mortgage with the associated rights of priority.[42] Nevertheless, this close connection, to the point of an apparent identity of interests, placed a burden on the Lepionka mortgagee to prove its bona fides, inevitably exposing it to challenge in these circumstances unless it could show independence and freedom from conflict.[43]

[58] It is necessary only to refer to two leading authorities which reflect the risk of an adverse finding of bad faith against the purchaser of a distressed security. In *Downsview Nominees Ltd* the Privy Council upheld findings in New Zealand courts that the purchaser of a first ranking debenture with knowledge of the mortgagor's default breached its duty of good faith in refusing the second debenture holder's offer to purchase the debenture.[44] The company was not acting for the proper purpose of realising its security but, by appointing its beneficial owner to act as receiver of the mortgagor's business, for the improper purpose of allowing the mortgagor to continue in trade.[45]

[59] In *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* the purchasers of a property, who had part performed the contract of sale by paying about 40 per cent of the price, formed a company to buy the first mortgage following the vendor's default.[46] The new mortgagee sold the property at auction to a related company. All three entities were controlled by the one individual. The High Court of Australia set aside the sale on the ground that the evidence did not support the existence of an independent bargain, given the relationship of all three participants. The particular breach was the first mortgagee's failure to pursue the

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42 See HC decision, above n 1, at [81]–[82].
43 *Bangadilly*, above n 39, at 541–542.
44 *Downsview Nominees Ltd*, above n 19.
45 Compare Property Law Act 2007, ss 102–103, obliging a mortgagee to transfer a mortgage after receiving a request from a subsequent mortgagee.
46 *Bangadilly*, above n 39.

prospect of obtaining a higher price when it was aware that another party was prepared to pay more for the property than was yielded at auction. Among other things, there was no local advertising of the proposed auction sale, interested parties were not informed of the date of the auction sale and the purchaser made all the decisions about the sale price without consulting the interested parties.[47]

[60] In Mr Colson's submission the Associate Judge's finding that bad faith is arguable is unavailable where the Lepionka mortgagee acted with mixed motives or purposes, one of which was the genuine purpose of recovering its debt in whole or in part. He relies on the decision of Lewison J in *Meretz Investments NV v ACP Ltd & Ors.*[48]

[61] The facts in *Meretz* are very complex, giving rise to a large number of issues for determination. But, in minimal summary, a construction company granted a charge to its parent over a rooftop lease securing finance for the construction of penthouse flats. The development encountered financial difficulties. The mortgagee exercised its powers following a breach by its subsidiary and sold to a third party. The owners of two other interests in the property sought to set the sale aside, alleging that by saving its mortgagor subsidiary from suffering further financial loss on the development the mortgagee acquired a benefit consequent upon the sale which was unrelated to recovery of its debt.

[62] We note that in the passages from *Meretz* upon which Mr Colson relies Lewison J was addressing an argument that the power of sale would only be exercised properly where the mortgagee had "purity of purpose";[49] that is, its only motive was to recover the debt secured by the mortgage. This argument was rejected. Lewison J accepted that a mortgagee validly exercises its power of sale where its motives or purposes are mixed, providing one was the genuine purpose of recovering its debt.[50] A mortgagee is entitled to protect and give priority to his own

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47 At 523.

48 *Meretz Investments NV v ACP Ltd & Ors* [2007] Ch 197 (HC) at [296]–[314]. See also Clark, above n 40, at [30.22].

49 At [300].

50 At [314].

interests:[51] "the fact that the mortgagee will acquire benefits consequent upon the sale does not necessarily involve a breach of the mortgagee's duty of good faith".[52]

[63] However, it is important to emphasise that Lewison J's analysis is confined to the interests of the mortgagee *as a mortgagee*. In our judgment a mortgagee may lawfully have other purposes coinciding with its core interest in discharging the debt and obtaining the best price reasonably obtainable and thereby properly anticipate the enjoyment of benefits collateral to exercising its power of sale. But an exogenous purpose — that is, a purpose flowing from interests outside the function of a mortgagee — cannot be allowed to prevail.

[64] In any event, we doubt that an inquiry into a mortgagee's motives will be productive. As Lewison J noted in *Meretz*, "dissection of a mortgagee's motives is likely to be difficult in practice".[53] And to strive for a purity of purpose would be to posit a fiction that ignores the complexities of decision-making.

[65] The leading authorities confirm that a mortgagee will come under the scrutiny of equity when the effect of its actions invites the inference that it was acting in breach of its duties. The ultimate question is whether a mortgagee has acted primarily for the purpose of recovering its debt. That question is to be answered objectively, not by examining a mortgagee's subjective motives, but by examining whether its *actions* are taken in good faith,[54] bearing in mind its entitlement to prefer its own interests wherever they conflict with other interested parties.

[66] So, in determining whether the Lepionka mortgagee has arguably acted in bad faith towards Mr Coltart, its conduct must be examined objectively against the touchstone of an obligation to establish that its primary purpose has been to realise its secured debt by selling the property for the best price reasonably obtainable. The Lepionka mortgagee has not sought to disguise that it acquired Westpac's mortgage with the predominant, possibly sole, intention of preserving the security and

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51 At [299].
52 At [313].
53 At [314].
54 Compare *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359 at [38].

exercising its power of sale to protect related parties. While that intention does not of itself prove bad faith, we agree with the Associate Judge that the Lepionka mortgagee's subsequent actions arguably give rise to an inference that its predominant purpose was not to sell for the best price reasonably obtainable or to protect its security. Instead, the Lepionka mortgagee's actions invite the inference that its predominant purpose was to secure collateral advantages for the Lepionka purchasers, driven by factors extraneous to the relationship of mortgagee and mortgagor.[55] The strict legal separation between the two Lepionka entities is not enough to shield the Lepionka mortgagee's actions from challenge. Mr Lepionka's overt control of and identification with each makes it difficult to maintain the appearance of independence.

[67] We refer in particular to these factors:

(1) The Lepionka mortgagee's adoption of the Lepionka purchasers agreements with GLW and undertaking to complete the subdivision. Mr Lepionka may be correct that the agreed prices would not be bettered by embarking on a new tender process. But there is no evidence that the Lepionka mortgagee paused to consider this option, or the alternative of selling the property as is, without incurring further subdivisional costs. The die was then cast. The Lepionka mortgagee effectively foreclosed the realistic prospect of selling the property as is at a considerably higher price.

(2) The Lepionka mortgagee's agreement to pay compensation of $750,000 and a fee of $50,000 and return the deposits of $463,000, all attracting interest at the rate of 12 per cent per annum compounding, if the subdivision did not proceed. As we have noted, the Lepionka mortgagee made no attempt to justify what appears to be the gratuitous assumption of a contingent liability to pay the Lepionka purchasers a total of $1.213 million plus compounding interest.

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[55] *Bangadilly*, above n 39, at 520–521.

(3) The Lepionka mortgagee's cancellation of Mr Coltart's option. Mr Coltart's uncontradicted evidence about the actual costs of completing the subdivision and Mr Lepionka's confirmation that this objective has now been achieved without selling the homestead lot throw into question the Lepionka mortgagee's rationale for cancellation. The inferences arguably available are that the Lepionka mortgagee was always able to finance the subdivisional costs without having to resort to the proceeds of sale of the homestead lot; and that its intention was to use those proceeds instead to construct a fishing hut on one of the lots which the Lepionka purchasers had agreed to buy. Arguably the Lepionka mortgagee's cancellation of Mr Coltart's option unnecessarily sacrificed his interests, not for the purpose of obtaining the best price reasonably obtainable for the property but for the purpose of benefiting the Lepionka purchasers.

(4) If the Lepionka mortgagee's primary objective was repayment of its debt and securing the best price reasonably available for the property, it would have accepted at least the last of the offers made by Messrs Coltart and McHardy to purchase. The result would have been sale of the property for market value, redemption of the Lepionka mortgage and the Lepionka mortgagee's discharge of its duties to all parties to whom they were owed. Instead the Lepionka mortgage rationalised its refusal of Mr McHardy's last offer on the ground that result did not suit related parties, the Lepionka purchasers. The Lepionka mortgagee's reliance on its contractual liabilities to those parties, assumed on adoption of the GLW agreements, is no answer to a claim that its course of conduct arguably showed bad faith towards Mr Coltart and others.

[68] Mr Colson argued that Mr Coltart was attempting to leapfrog the ordered chain of priority between those with legal and equitable interests in the property. He submitted that the untenability of Mr Coltart's position was established by a counterfactual analysis. In that event the Lepionka mortgagee should have conducted a full inquiry about whether to continue with subdivision or sell as is: if it

elected to continue with the subdivision then inevitably the homestead lot would have been resold given the low purchase price and Mr Coltart's rights would be at an end; and the same result would have occurred if the Lepionka mortgagee had sold the property as is.

[69] The flaw in this analysis is its premise that the Lepionka mortgagee was acting in good faith in rejecting Mr Coltart's offers to purchase the property at market value. For the reasons briefly given, we are satisfied that the Lepionka mortgagee was arguably acting in bad faith at the relevant times.

(4) Discretion

[70] In view of our answers favourable to Mr Coltart on the previous three issues, the question remains whether an order should be made removing his caveats. As noted, the Associate Judge exercised his discretion adversely to Mr Coltart because his interests either had been extinguished by the Lepionka mortgagee's valid cancellation of his option or would inevitably be extinguished by the mortgagee's sale of the homestead lot. We shall address his alternative findings in the same order.

(a) Cancellation

[71] First, the Associate Judge was satisfied that the Lepionka mortgagee's cancellation of Mr Coltart's option was effective in terms of s 178(2) of the Property Law Act.[56] Section 178 materially provides:

> **178 Powers incidental to power of sale**
>
> (1) If, under a mortgage and subpart 5, a mortgagee or receiver becomes entitled to exercise a power to sell mortgaged property, the sale—
>
> (a) may relate to the whole or any part of the property:
>
> (b) may be subject to, or free of, any mortgage or other encumbrance having priority over the mortgagee's mortgage:
>
> (c) may be in 1 lot or in separate lots:
>
> (d) in the case of mortgaged land, may be by way of subdivision or otherwise:

[56] HC decision, above n 1, at [79].

…

(2) The mortgagee or receiver may cancel a contract for the sale of the mortgaged property and resell the property without being liable for any loss on resale.

(3) Subsection (2) is subject to section 19 of the Receiverships Act 1993 or section 176(1), as the case requires.

[72] The Associate Judge was not satisfied that the power of cancellation given by s 178(2) was restricted to contracts of sale entered into by the mortgagee. In his judgment:

> [73] First, s 178(2) itself contains no such limitation. I accept that s 178(1), which refers to "the sale", is concerned with sale contracts entered into by a mortgagee or receiver under a mortgage and the statutory provisions of subpart 5 of the PLA. But s 178(2) does not refer to "*the* contract for sale" – it refers to "*a* contract for sale…". The wording in s 178(2) is wider, and I think it is wide enough to include any contract for sale of the mortgaged property which may have been made by the mortgagor.

[73] In the Associate Judge's view an anomaly would arise if the mortgagee were given statutory powers to cancel a sale contract which it had entered into with a bona fide third party, without any apparent responsibility to that party, but with no corresponding entitlement to cancel if the sale contract had been made by the mortgagor.[57] This construction was also consistent with s 179, authorising the mortgagee to elect to adopt for sale and purchase agreement previously entered into by the mortgagor.

[74] In our view the Associate Judge's construction of s 178 does not appear to comply with its sequential structure. Section 178(1) refers to exercising the "power to sell mortgaged property" and the permissible terms and conditions of "the sale". Section 178(2) refers to the power to cancel a contract "for the sale of the mortgaged property". This second power appears consequent upon and related to the mortgagee's exercise of the first power to enter into a contract for sale in accordance with its powers under s 178(1).

[75] The purpose of s 178(2) is limited to relieving the mortgagee of a liability to those to whom it owes duties under s 178(1) for loss on the resale of a property

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[57] At [74].

following cancellation of a contract which it has entered into. The Law Commission's report confirms that the powers incidental to the primary power of sale listed in s 178 are an adaptation of s 101(c)(i) of the Property Law Act 1925 (UK), allowing a mortgagee to "rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby".[58] The Privy Council's decision in *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd*, an appeal from a decision of this Court, illustrates its application.[59] The mortgagee in exercise of its powers of sale agreed to sell a mortgaged property to a vendor who defaulted. It then resold the property at a considerably lower sum to another purchaser. The mortgagor claimed he was entitled to be credited with the higher price payable under the first agreement. By reference to cl 7 of sch 4 of the Land Transfer Act 1915 which included the mortgagee's power "to rescind any contract for the sale [of a mortgaged property] and to resell the same without being answerable for any loss or diminution in price" the Privy Council held that a mortgagee cannot be held accountable for purchase money which it has never received as a result of a legitimate rescission.

[76] There is nothing in the English legislation or in the *Wright* decision to suggest that s 178(2) was enacted to empower the mortgagee to cancel a contract for sale of the mortgaged property to which it was not a party. Also, the Associate Judge's attention was not apparently drawn to pt 1 of sch 2 to the Property Law Act. Among the powers implied by cl 13(4) are those arising "if a contract for the sale of mortgaged land *entered into by the mortgagee* or a receiver is cancelled …" (emphasis added). This provision, within a power implied by statute into the mortgage, suggests that it relates to the power of cancellation vested by s 178(2).

[77] In our judgment a mortgagee's entitlement to cancel a contract for sale and resell without being liable for loss must relate solely to contracts to which the mortgagee is a party. The Lepionka mortgagee was not a party to the option agreement entered into between GLW and Mr Coltart. The careful regime for cancellation provided by the Contractual Remedies Act 1979 would be nullified if a

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58 Law Commission, above n 25, at 335.

59 *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] NZLR 388 (PC).

stranger enjoyed an absolute right to cancel the contract without cause. Section 7 strictly limits the power of cancellation in certain circumstances to "a party to the contract". If, however, the cancellation power under s 178(2) extends to a contract entered into by the mortgagor, the mortgagee would still be required to exercise its discretionary power of cancellation in accordance with the provisions of the Contractual Remedies Act.[60]

[78] In disagreeing with the Associate Judge, we consider our construction is consistent with the succeeding power under s 179 of the Property Law Ac to adopt an existing agreement for sale and purchase between the mortgagor and a third party. Section 179 provides:

> **179 Mortgagee may adopt agreement for sale and purchase**
>
> (1) If, at any time during which the mortgagee is entitled to exercise a power to sell mortgaged property, the whole or any part of the property is subject to an agreement for sale and purchase entered into by the current mortgagor or any former mortgagor, the mortgagee may elect, by notice served on the purchaser, to adopt the agreement for sale and purchase.
>
> (2) On making an election under subsection (1),—
>
> (a) the mortgagee has all the rights and powers in relation to the purchaser that the current mortgagor would have had as vendor of the property; and
>
> (b) the mortgagee may execute all assurances and do all other things necessary to effect the transfer or assignment of the property; and
>
> (c) the mortgagee must account for the proceeds of the sale as though the property had been sold by the mortgagee.
>
> ...

[79] By the means of formal adoption the mortgagee can elect to become a party to the agreement, acquiring the rights and assuming the liabilities as agreed by the contracting parties. Without adopting an agreement, the mortgagee is under no liability to the purchaser if it agrees to sell at a higher price to a third party which

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[60] The law on cancellation of contracts in New Zealand was codified by s 7 of the Contractual Remedies Act: *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [21].

will take free of the existing purchaser's interests.[61] By contrast, the consequence of the mortgagee's inability to cancel the same contract is that the purchaser's interest in the equity of redemption is not extinguished. Consistently with our earlier analysis, that party will be entitled to a share in the residue of the mortgagee's sale unless in exercising its overriding power the mortgagee sells for a higher price.

[80] Also, s 179(1) refers in detail to existing agreements for sale and purchase entered into by the mortgagor. If Parliament intended that the power of cancellation of such contracts was to vest in the mortgagee, it would presumably have provided a similarly extensive explanation of the mortgagee's powers and duties consequent upon cancellation.

[81] Moreover, we cannot see the purpose in providing the mortgagee with a power to cancel a contract to which it is not a party. The reference in s 178(2) must be to an executory contract — that is, one which has yet to be settled. The purchaser in that position cannot obtain clear title unless and until it discharges all mortgages, thereby securing repayment of the charged indebtedness. Once that happens, the mortgagee would have no interest in cancellation. However, in the event that the purchaser failed or was unable to settle, the mortgagee would be entitled to resort to its powers of sale to a third party, extinguishing the purchaser's equitable interest under the existing agreement without exposure to liability to other interested parties for any loss suffered on sale at a lesser amount. The addition of a discrete and absolute power of cancellation, especially where the mortgagee is not required to exercise it for the purpose of selling or preserving the security, seems unnecessary.

(b) Extinguishment by sale

[82] Second, the Associate Judge's conclusion is based on the premise that the Lepionka mortgagee will, irrespective of the validity of the Lepionka mortgagee's cancellation of Mr Coltart's option, extinguish his interest when the power of sale of the homestead lot is validly exercised. For the reasons given, we agree with the Associate Judge that the actions taken by the Lepionka mortgagee were arguably in breach of its duty of good faith. Where we differ from him is in our satisfaction that

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61 Land Transfer Act 1952, s 105.

the duty extended to Mr Coltart, and that his interest remained extant when he offered to buy the property and subsequently.

[83] Mr Coltart's draft statement of claim was unavailable to the Associate Judge. Among other things it seeks an injunction restraining the Lepionka mortgagee from selling or otherwise dealing with the land except in accordance with orders (1) directing sale of the property to Mr Coltart or a nominee; or alternatively (2) sale of the whole of the property by the Registrar of the High Court pursuant to ss 107 and 108 of the Property Law Act. Significantly, that remedy is available on application among others by, any "person entitled to redeem the mortgaged property".[62]

[84] We do not purport to forecast the result of Mr Coltart's application to the High Court, which should be made promptly. However, we are satisfied that Mr Coltart has an arguable case for such relief. All the four arguable issues which we have identified will require determination by the High Court on evidence given at trial.

[85] It is true, as Mr Colson emphasised, that s 105 of the Land Transfer Act 1952 stipulates that upon registration of a transfer from a mortgagee exercising its power of sale the mortgagor's estate or interest passes to the purchaser free of all interests unless they have priority over the mortgage. It is arguable, however, that equity will treat the Lepionka mortgagee's conduct as ceding priority to Mr Coltart's equitable and limited interests in the property.[63] Equity may also tailor a remedy which requires the Lepionka mortgagee to settle the agreements with the Lepionka purchasers before taking any further steps in exercise of its powers, such as sale of the homestead lot. We should record our agreement with the Associate Judge's rejection of Mr Taylor's alternative argument that the Lepionka mortgagee has consented to his option.[64]

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62 Property Law Act, s 107(2)(d).

63 *National Mutual Finance (1998) Ltd v Berryman* HC Wellington M 451/91, 2 October 1991 at [4], applied in *Instant Funding Ltd v Greenwich Property Holdings Ltd* HC Auckland CIV-2007-404-6806, 20 December 2007 at [22]; *Centillion Investments Ltd v Hillpine Investments Ltd* HC Auckland, CIV-2006-404-00695, 5 December 2006 at [34]–[35].

64 HC decision, above n 1, at [59].

[86] It follows that for these reasons we are satisfied that the Associate Judge erred in exercising his discretion to remove Mr Coltart's caveats.

[87] Mr Colson submitted that, if the appeal was allowed, we should nevertheless order removal of Mr Coltart's caveats on condition that LINZ accepts contemporaneously new caveats to be lodged by Mr Coltart against lots 2 and 7 of the current proposed subdivision contained in COA 4/424. Mr Taylor submits that Mr Coltart's caveats should remain against the existing title or all new titles, thereby enabling Mr Coltart or Mr McHardy to reinstate his offer to purchase the entire property.

[88] We agree with Mr Colson that Mr Coltart's caveats cannot be sustained against the title to the whole property once the subdivision has taken effect. The offers by Messrs Coltart and McHardy to purchase the property provided evidence that the Lepionka mortgagee was acting in bad faith. However, he has no right to a decree of specific performance of an offer. He cannot use his equitable interest to enforce a sale of the property to himself. Adoption of Mr Colson's proposal is all that is necessary to ensure that Mr Coltart's equitable interests are protected pending his application to the High Court for interim or permanent relief against the Lepionka mortgagee.

Summary

[89] In summary, we are satisfied that arguably:

(1) Mr Coltart had an interest in GLW's equity of redemption of the Lepionka mortgage;

(2) the Lepionka mortgagee owed Mr Coltart a duty to act in good faith when exercising its powers of sale;

(3) the Lepionka mortgagee was in breach of that duty; and

(4) the Lepionka mortgagee was not entitled to cancel Mr Coltart's option to purchase the homestead lot.

[90] In these circumstances, in exercising our statutory discretion, we are satisfied that Mr Coltart's caveats should not be removed except to the limited extent set out in [92].

Result

[91] The appeal is allowed.

[92] We order that Mr Coltart's caveats be removed on condition that LINZ accepts contemporaneously new caveats to be lodged by Mr Coltart against lots 2 and 7 of the current proposed subdivision contained in COA 4/424.

[93] Leave is also reserved for either party to apply to the High Court for any further orders necessary to implement this judgment.

[94] The respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

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