

IN THE COURT OF APPEAL OF NEW ZEALAND

CA553/2010
[2011] NZCA 368

BETWEEN ASB BANK LIMITED
Appellant

AND SOUTH CANTERBURY FINANCE
LIMITED
Respondent

Hearing: 22 June 2011

Court: Randerson, Winkelmann and Keane JJ

Counsel: M J Tingey and N F D Moffat for Appellant
T J G Allan for Respondent

Judgment: 3 August 2011 at 12:30 PM

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The judgment in favour of the respondent is set aside.**
- C Judgment is entered in favour of the appellant on the summary judgment application.**
- D The appellant is entitled to costs on the respondent's application for summary judgment on a Category 2B basis.**
- E The respondent must pay to the appellant costs as for a standard appeal on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Winkelmann J)

Introduction

[1] The issue on this appeal is the time at which the provisions of a deed of priority become operative. The provisions in question regulate the respective entitlements of two mortgagees to the proceeds of sale of a mortgaged property. The appellant, ASB Bank Ltd (ASB), was the first mortgagee in respect of a farm property, the respondent, South Canterbury Finance Ltd (SCF) the second mortgagee. The two had entered into a Deed of Priority (the Deed) in which they agreed the priority in which they were to share in the proceeds of a sale of the property, with ASB having first priority.

[2] The property was sold voluntarily by the mortgagor. A substantial deposit which the mortgagor received under the agreement for sale and purchase was paid to ASB in reduction of the principal debt. On settlement of the sale, ASB received the full priority amount stipulated in the Deed, without any reduction for the deposit it had already received.

[3] SCF argues that because the deposit represented part of the sale price for the property, ASB should only have received the first mortgagee priority amount less the deposit. It says that the Deed was intended to regulate the amount ASB and SCF were to receive from the sale of the land, whether the sale was a voluntary sale initiated by the mortgagor, or was a sale pursuant to the exercise of the power of sale by one of the mortgagees. ASB argues that the Deed is intended to regulate priorities as between itself and SCF only where the sale has occurred in exercise of a contractual or statutory power of sale. In any other circumstances, the mortgagees are entitled to rely upon their security documentation and relevant provisions of the Property Law Act 1952 and the Land Transfer Act 1952.

[4] Associate Judge Abbott granted summary judgment in favour of SCF for the amount of the deposit on the basis that ASB's entitlement under the Deed was to be reduced by the deposit that it had received.¹ ASB now appeals that decision.

The competing mortgage securities

[5] ASB provided a number of loan facilities to Mr Kevin Baker and to Ms Ruve Baker as trustees for the Oakdale Property Trust (Oakdale). These facilities included term loan accounts and two rural overdraft facilities. The overdraft facilities provided a revolving line of credit with the balance fluctuating over time as payments were made into and out of the account. The facilities were secured by way of a first registered mortgage granted by Oakdale to ASB in 2007 over a property in Puketirau Road, Tirau.

[6] SCF held a second registered mortgage over the same property. This mortgage was provided by Mr and Mrs Baker as security for a guarantee by Oakdale provided in respect of a loan by SCF to Serenity Cove Development Ltd.

[7] In January 2008, ASB and SCF entered into the Deed to regulate the priorities between the respective mortgages. The Deed contained the standard New Zealand Banking Association (NZBA) terms, and was executed after the Property Law Act 2007 came into effect.

Agreement for sale and purchase

[8] On or about 27 June 2008, Oakdale entered into an agreement to sell the farm for \$6 million plus GST with settlement deferred until 1 June 2009. The agreement was made unconditional on 11 June 2008 at which point, after deducting commission from the sale of \$135,000, the balance of the deposit, \$540,000, was paid to ASB in reduction of the rural overdraft facilities on 22 July 2008. It seems from the affidavit evidence to date that ASB was not told that the property had been sold, or what the \$540,000 related to. This sum was paid into an account then overdrawn to the extent of some \$63,000. On 23 July 2008, the Bakers transferred \$480,000 from the account into which the deposit was paid into another ASB account operated by

¹ *South Canterbury Finance Ltd v Nielsen* HC Hamilton CIV-2009-419-758, 4 August 2010.

Oakdale under the ASB loan facilities. This account was overdrawn to a much greater extent than the first. Over the next 11 months a further \$2.2 million was advanced on that account, and \$1.3 million repaid.

[9] As at the date that the deposit was paid, Oakdale had not sought a discharge of the ASB mortgage, nor had ASB sought to enforce its mortgage.

[10] In October 2008, when SCF was offering to roll over its loan to Serenity Cove, it discovered that the Oakdale Property Trust had received the deposit under the agreement for sale and purchase. SCF sought to have the deposit held for its benefit pending settlement of the sale, but SCF's solicitors were advised that the deposit had already been paid to ASB. SCF did not pursue this request.

[11] Settlement of the agreement for sale and purchase was to occur in June 2009. In the period immediately preceding settlement date, SCF sought details of how the proceeds of sale were to be paid on settlement. It received settlement statements which showed that the solicitors for Oakdale were proposing to pay the full priority amount to ASB, without any deduction to reflect the deposit already received by ASB. The sale proceeded on that basis.

[12] At some point there was an issue between SCF and the solicitor who acted for the Bakers, as to whether he had authority to release SCF's mortgage on receipt of that amount of money. The solicitor was initially the first defendant to the High Court proceeding. However, those issues are not relevant to the issues between SCF and ASB, and we understand they have been resolved between those parties.

Deed of Priority

The priority amounts

[13] The Deed defines the first mortgage as being the mortgage granted to ASB and the first mortgagee amount as follows:

\$3,500,000.00

Provided that:

- (a) if that amount is greater than any maximum amount specified in the First Mortgage for the purposes of section 80A(2) of the Property Law Act 1952 and, at the relevant time, a person (other than the Second Mortgagee) ranking subsequent to the First Mortgagee in respect of any land is entitled, at law, to be paid in priority to the Mortgagor, the First Mortgagee Amount will be that lesser amount; or
- (b) if the First Mortgage does not specify any maximum amount for the purposes of section 80A(2) of the Property Law Act 1952, and that amount is greater than the lowest balance secured by, and outstanding under, the first mortgage at any time after the First Mortgagee has notice of a person (other than the Second Mortgagee) ranking subsequent to the First Mortgagee in respect of any land, who or which, at the relevant time, is entitled, at law, to be paid in priority to the mortgagor, the First Mortgagee Amount will be that lowest balance outstanding.

[14] The provisos address a situation which might occur where there is a subsequent charge holder, other than SCF. That subsequent charge holder is not a party to the Deed. Therefore, priorities between it and ASB, and SCF will be determined in accordance with the general law, and in particular the provisions of the Property Law Act 1952.

[15] Whilst the Property Law Act 1952 has since been repealed by the Property Law Act 2007, some conditions continue to apply to mortgages that came into operation before 1 January 2008. Section 94 of the 2007 Act provides:

94 Transitional provisions for further advances

- (1) Section 92 does not affect the priority of a mortgage over property that comes into operation before 1 January 2008, so far as it extends to further advances expressly secured by—
 - (a) the mortgage; or
 - (b) any variation of the mortgage that comes into operation before that date.
- (2) Subsection (1) applies whether the further advances are made before, on, or after 1 January 2008.
- (3) The priority of the security for further advances made on or after 1 January 2008 under a mortgage or variation of mortgage referred to in

subsection (1) must be determined as if section 80A of the Property Law Act 1952 had not been repealed by this Act.

[16] Proviso (b) of the Deed addresses the situation where no statutory priority amount is stipulated so that a subsequent charge holder, again, other than SCF, can insist upon the application of the common law rules.

[17] The Deed also defines the “second mortgagee amount” as \$3 million. There are matching provisos, designed to deal with the situation where the interest of a subsequent charge holder affects SCF’s priority.

The operative provisions

[18] As to the Deed’s operative provisions, clause 1 provides:

The First Mortgagee and the Second Mortgagee agree to arrange priorities in respect of the First Mortgage and the Second Mortgage.

[19] In clause 2, the mortgagor’s acknowledgement of the priority arrangements are recorded and in clause 3 the parties agree to the incorporation of the standard NZBA schedule for deeds of priority.

The terms of the Schedule

[20] Turning to the terms of the Schedule of the Deed, clause 1 provides:

The First Mortgage, and all moneys secured from time to time under it, will have first priority over the Second Mortgage for the amount not exceeding the First Mortgagee Priority Amount.

[21] Clause 2 provides:

The Second Mortgage, and all money secured from time to time under it, will have second priority for an amount not exceeding the Second Mortgagee Priority Amount.

[22] Clause 3 provides that the first mortgage will have priority over the second mortgage for the balance secured by and outstanding under the first mortgage, but subject to the provisions of clauses 1 and 2.

[23] Clauses 5 and 6 are the “paramountcy” provisions. They exclude the effect of anything, including legal principles, which might alter the priorities provided by the Deed. Clause 5 expressly includes any application of the rule in *Clayton’s Case* or the rule in *Hopkinson v Rolt* which we discuss later in this judgment.

[24] Clause 7 provides that if the second mortgagee disposes of the property in exercise of a power of sale, the first mortgagee will:

provide the Second Mortgagee with a registrable discharge of the First Mortgage upon payment by the Second Mortgagee of the lesser of:

- (a) the amounts outstanding under the First Mortgage at the date on which that payment is made; and
- (b) the First Mortgagee Priority Amount.

[25] Clause 8 addresses the situation where some party other than the mortgagor or the first or second mortgagee sells the property. It provides:

Each Mortgagee irrevocably and unconditionally authorises and directs a liquidator, official assignee, administrator, receiver, or similar person appointed or acting in respect of the mortgagor to pay, as between the Mortgagees, the proceeds of the realisation of any land in accordance with the provisions of the Document.

[26] Clause 11 contains a number of definitions which are relevant to the issue in this proceeding. “Enforcement date” is defined as:

The earlier to occur of:

- (a) the expiry date of a notice issued in respect of a Mortgage under ss 90 or 92 of the Property Law Act 1952, pursuant to which a Mortgagee enters into possession, or exercises that Mortgagee’s power of sale, of any Land; and
- (b) the date on which a Mortgagee appoints a receiver of income in respect of any Land.

[27] “First mortgagee priority amount” is defined as:

The aggregate of –

- (a) the First Mortgagee Amount;
- (b) interest, for the Interest Period commencing on the Enforcement Date, calculated on a daily basis at the highest rate payable by the

Mortgagor to the First Mortgagee immediately before the Enforcement Date, on the lesser from time to time of –

- (i) The First Mortgagee Amount; and
 - (ii) The balance secured by and outstanding under the First Mortgage.
- (c) the amount of all fees, bank charges, taxes and reasonable expenses (including legal expenses, and goods and services and similar taxes on that amount) incurred by the First Mortgagee in protecting its security under the First Mortgage or exercising any powers or rights under the First Mortgage, but in each case only to the extent they relate to land; and
- (d) interest calculated on a daily basis at the greater of a rate equivalent to the cost of funds of the First Mortgagee and the highest rate payable by the mortgagor to the First Mortgagee, on the amounts in (c) (above) from the date of payment of the relevant amounts until the date of reimbursement of those amounts to the First Mortgagee.

Decision of the Associate Judge

[28] The Associate Judge noted the competing arguments. Counsel for SCF argued that the Deed regulated priorities in relation to the proceeds of sale, regardless of the particular eventuality which led to the sale of the land. ASB must therefore give credit in reduction of the priority amount for any part of the realisation of the security through the sale, including the deposit.

[29] Counsel for ASB argued that the Deed clearly contemplated regulation of “revolving credit” mortgages. The proper construction of the Deed was that it gave priority in relation to secured debt which fluctuated and was determined only at the point where the security was released or enforced.

[30] The Associate Judge referred to the clauses in the Deed as are set out above. He noted, in particular, that the definition of “first mortgage priority amount” included provision for further interest and costs to be added to the priority amount only after enforcement action was commenced. He commented that this indicated the parties intended that, after that point, recovery of advances and accrued interest would be limited to the priority sum.

[31] The Judge then referred to a decision of this Court in *Bank of New Zealand v Development Finance Corporation of New Zealand*.² In that case, this Court considered the purpose of a Deed of Priority between mortgagees to be:

- (a) To protect the first mortgagee against the loss of its priority in respect of further advances after notice of the second mortgage;
- (b) To limit the first mortgagee to priority over the second mortgage both in respect of the original advance, and further advances of the sum stated; and
- (c) To protect the second mortgagee's agreed priority over the first mortgage even though the second mortgagee itself might have made further advances.

[32] The Judge commented that the Deed in this case clearly has the same purpose. He said that although it seemed self-evident that the parties recognised that the amount of ASB's debt to have priority would not have been known until the security was crystallised, the amount of the debt to have priority is a different matter to the source of the fund from which it is paid. He said:³

The language of the deed, when read in context (two parties taking collateral security over the same land for advances), and in light of the purpose of a deed of priority, indicates that the parties intended that the priority amount was to be in respect of all money received from the sale of the security. I find support for this construction in the comments of the Court of Appeal in *Development Finance Corporation of New Zealand*:

The deed regulated the priorities between the bank and DFC in respect of the property charged and, in effect, the proceeds of its sale. As between the bank and DFC it must have been intended to allow each the same protection whatever the event which required resort to it.

[33] The Judge said that this construction of the Deed made better commercial sense than the interpretation argued for by ASB. It recognised both the fluctuating nature of the indebtedness under a revolving credit account and also that the parties

² *Bank of New Zealand v Development Finance Corporation of New Zealand* [1988] 1 NZLR 495 at 501.

³ At [46].

contemplated specific entitlements from the value of the security. The Judge also considered that this interpretation was necessary to address the argument that counsel for SCF advanced, that a second mortgagee would not wish to lend money on a security if it was subject to a deed of priority which allowed the second mortgage priority to be whittled away by staged payments of a purchase price.

Discussion

Approach to interpretation

[34] The relevant principles of contractual interpretation are not at issue in this proceeding. The principles to be applied were recently considered by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.⁴

[35] In this case there is no express provision as to how a deposit received by a vendor/mortgagor pursuant to a voluntary sale of the property is to be applied when calculating the first mortgagee priority amount. Although clauses 1, 2 and 3 of the Schedule to the Deed provide for the priority between the ASB and SCF mortgages, the Deed does not contain a comprehensive set of provisions describing when payment in accordance with those agreed priorities is required.

[36] In our view the Deed cannot sensibly be construed as a stand alone document regulating all aspects of the mortgagees' rights. It must be read with the mortgage documents which provide ASB and SCF with rights against the mortgagor. It must also be read within the context of the various statutory provisions and common law principles that regulate the rights of mortgagors and mortgagees. To substantiate this proposition it is necessary to outline the interplay between the common law, the provisions of the Deed, the mortgage documents, and relevant statutory provisions.

The position at common law

[37] Under the common law, a subsequent charge holder might be entitled to insist upon ASB receiving less from the proceeds of sale than its priority amount of

⁴ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

\$3,500,000 by means of the application of the rules in *Hopkinson v Rolt*⁵ and *Clayton's Case*.⁶ The effect of the rule in *Hopkinson v Rolt* is that a mortgagee whose mortgage is intended to secure further advances cannot claim the benefit of its security in priority to a subsequent mortgage of which it had notice before the further advances were made. This, combined with the rule in *Clayton's Case*, can have the effect that when a bank has lent money under a charge securing further advances, payment by the debtor credited to the secured account will reduce the debt, and subsequent advances, although extending no further than the original loan will not take priority over a subsequent charge holder of which the bank has notice when the further advances are made.⁷

[38] The Deed specifically excludes the operation of these common law rules so that ASB does not lose priority to SCF in respect of advances made subsequent to the grant of its mortgage even though ASB had notice of the grant of SCF's mortgage.

The effect of s 80A of the Property Law Act 1952

[39] Section 80A of the Property Law Act 1952 allows mortgagees to advance the principal sum in periodic payments, and to offer, as here, revolving credit without losing priority through the application of the rules. It enables priority to be maintained up to a sum stipulated on the face of the mortgage, notwithstanding periodic payments and revolving credit arrangements. The amount initially stipulated under the mortgage was \$3.3 million (later increased to \$7.025 million). ASB can rely upon that statutory amount against any secured interest other than SCF (in respect of which the priorities are governed by the Deed).

The terms of the mortgages

[40] Both ASB and SCF have entered into contractual arrangements with their mortgagor as to what the mortgaged land secures. In the case of ASB, its mortgage document provides that it is security for all of the mortgagor's indebtedness and obligations owed to the bank including future advances. The mortgage provides that

⁵ *Hopkinson v Rolt* (1861) 9 HL Cas 514, 11 ER 829.

⁶ *Devaynes v Noble (Clayton's Case)* (1816) 1 Mer 572, 35 ER 781 (Ch).

⁷ See the discussion of these issues in *Bank of New Zealand v Development Finance Corporation of New Zealand* at 500.

ASB is only obliged to release the mortgage on payment in full of the indebtedness and performance of all obligations.

[41] SCF's mortgage is not in evidence before us. However, we assume that since the mortgage was provided as security for a guarantee, the document would be in similar form, providing that SCF is only obliged to release the security over the land on performance of all obligations for which the mortgage is security.

[42] A mortgagor seeking a discharge of either ASB's or SCF's mortgage to enable the mortgagor to perform its contractual obligations under an agreement for sale and purchase with a third party must first fully perform its obligations under the mortgage. If the mortgagee is offered a lesser amount than the amount secured under the mortgage, the mortgagee is contractually entitled to refuse to discharge its mortgage. This is so notwithstanding the Deed. The mortgagor does not, by the Deed, acquire a right to obtain a discharge of either mortgage on payment of the agreed priority amounts. It is plain from the Deed that the priority arrangements are for the benefit of the two mortgagees. The purchaser also has no right to insist upon a discharge of the mortgages in the absence of full repayment, as the purchaser will have purchased the property with notice of and subject to the mortgages.

[43] To apply this to the present situation, when the mortgagor requested a discharge of mortgage to enable it to transfer clear title to the purchaser, SCF was entitled to refuse to release it unless it had received full repayment of the amount secured by the mortgage, or such lesser amount as it decided to accept. It had no need to resort to any Deed to protect the value of its security interest in the mortgaged property. It could rely upon the terms of its mortgage granted by the mortgagor. In such a circumstance, ASB also could rely upon its mortgage security documents to obtain full repayment before consenting to a release.

[44] If this is accepted, it is fatal to SCF's argument advanced in support of its application for summary judgment. The parties' ability to rely upon their security documents in a voluntary sale is inconsistent with an intention that the Deed apply in such a situation.

The text of the Deed

[45] Is the text of the Deed consistent with this interpretation? We consider there are clear indications within the Deed that it is intended to operate in the circumstance of a forced sale, forced in the sense that the property is sold by a mortgagee through exercise of a contractual power of sale, or sale by some person such as a “liquidator, official assignee, administrator, receiver, or similar person appointed to or acting in respect of the Mortgagor”. We say this because the provisions that expressly regulate the conduct of the parties, or how the proceeds of sale are to be paid, all deal with the division of proceeds following such a sale.

[46] Clause 7 of the Schedule obliges ASB to provide a registrable discharge of mortgage should SCF sell the property pursuant to a power of sale, on payment to ASB of the lesser of the amount outstanding under ASB’s mortgage on the date payment is made, or the first mortgagee priority amount. When a mortgagee comes to realise its security, it must be able to complete the sale, and to do that it must be able to obtain a release of the other mortgagee’s security.

[47] The omission of a mirror provision obliging SCF to provide ASB with a registrable discharge of mortgage, should it exercise its power of sale, is explicable by reference to the statutory context for this Deed. As first mortgagee ASB can rely on s 105 of the Land Transfer Act 1952 which provides:

105 Transfer by mortgagee

Upon the registration of any transfer executed by a mortgagee for the purpose of exercising a power of sale over any land, the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him.

[48] As second mortgagee, SCF’s ability to rely upon this provision is problematic, since ASB’s security ranks prior to SCF for at least part of the amount secured.⁸ Clause 7 of the Deed is required to protect the ability of a second ranking

⁸ *Bank of New Zealand v Development Finance Corporation of New Zealand* at 501 and 503.

mortgagee to effectively exercise a power of sale, in circumstances where the first ranking mortgagee has agreed to limit the extent of its priority.

[49] The only provision as to payment in the Deed deals with payment in a forced sale situation. Clause 8 contains an irrevocable direction to a “liquidator, official assignee, administrator, receiver, or similar person appointed to or acting in respect of the Mortgagor” to pay in accordance with the terms of the Deed. The defining characteristic of the members of this list is that they have control of the mortgagor’s assets, most likely in an insolvency situation, so that any sale by them of the property would be a forced sale.

[50] Finally, in terms of the text of the Deed, we also attach significance to the fact that the definition of first mortgagee priority amount is an amount calculated with reference to an “Enforcement Date”. An “Enforcement Date” is defined as the earlier to occur of either the issue of a Property Law Act notice, or the date on which a mortgagee appoints a receiver of income in respect of the land. Although the sale of the land by the mortgagor without the mortgagee’s consent is a breach of the terms of the ASB’s mortgage entitling ASB to undertake enforcement action, it was not obliged to take such action.

[51] The Deed must be read within its commercial and legal context. That is the context within which the parties understood and intended it should operate. Viewed in this context, we are satisfied that the Deed is to be construed as regulating payment of the proceeds of sale flowing from a forced sale. In respect of a voluntary sale, such as the one with which these proceedings are concerned, the Deed has no application. In a voluntary sale the parties may rely upon their own contractual arrangements with the vendor/mortgagor. This means that ASB could, notionally, have demanded full repayment before agreeing to release its security. Although ASB limited its claim to the first mortgagee priority amount, it need not have. Similarly, SCF was entitled to refuse to release its mortgage until the mortgagor met its terms irrespective of its agreement as to the second mortgagee priority amount.

[52] In agreeing to limit its priority to \$3.5 million in the present case, ASB was no doubt making a commercial judgement weighing up the merits of the various

situations that might arise if it insisted upon full repayment before agreeing to discharge its security, including the possibility that SCF would exercise its power of sale. In that case, ASB would, by clause 7, be obliged to limit its priority in accordance with the Deed.

[53] One of SCF's principal arguments in support of its application for summary judgment was that ASB's interpretation would allow an unjust situation to arise. Were the mortgagor to agree to sell its property with a purchase price paid in instalments, which it then in turn paid to ASB, the value of SCF's priority would be eroded. This argument is based upon a misunderstanding of the nature of SCF's rights as mortgagee. As noted, its remedy in that situation would be to refuse to release its security until its requirements for repayment were met. If they were not met, the mortgagor could not convey title, and the agreement for sale and purchase could not proceed to completion. The purchaser would be entitled to cancel and the vendor could be exposed to a damages claim but that would not affect the position as between the mortgagees.

[54] It was submitted for SCF that ASB could have had systems in place to identify unusual payments so it would become aware when the secured property was being sold and could ensure it did not lose priority by making further advances. In view of our conclusions as to the interpretation of the Deed and the relevant statutory provisions, we do not consider the priority issue is affected by knowledge (or lack of it) on the part of ASB that the funds received were a deposit under an agreement for sale and purchase.

The decision in Bank of New Zealand v Development Finance Corporation

[55] It is necessary to address the authority that the Associate Judge cited as supporting SCF's construction of the Deed, *Bank of New Zealand v Development Finance Corporation of New Zealand*. In that case, this Court said that the particular deed of priority was intended to protect the mortgagees' agreed priorities to the proceeds of sale, "whatever the event which required resort to it".⁹ We do not accept

⁹ At 501.

that this case, or the quoted passage, provides support for SCF's interpretation of the Deed in the present circumstances.

[56] *Bank of New Zealand* was concerned with a sale under the power of sale by the second mortgagee Development Finance Corporation of New Zealand (DFC). DFC and the bank had entered into a deed of priority pursuant to which the bank had agreed to limit the extent of its priority over DFC.

[57] DFC bought the property at a mortgagee sale, as it was entitled to do. It then requested a discharge of the bank's mortgage in return for payment to it of the priority amount. The bank refused and requested payment of the full amount it was owed. On appeal, this Court held that the bank was entitled to refuse to release its mortgage, because the bank's mortgage secured, as against the mortgagor and the purchaser, the whole sum advanced by the bank. As purchaser, DFC had no ability to take advantage of the deed of priority. As second mortgagee, DFC could not transfer the land free of the bank's mortgage, relying on s 105 of the Land Transfer Act, as the bank's mortgage had priority over it.

[58] The case was concerned with a forced sale situation, which is a situation distinguishable from the present. The comment "whatever the event which required resort to it" is to be read within that context. As the court found, as against the mortgagor and purchaser, the mortgage continued to secure the whole of the mortgagor's indebtedness to the bank, notwithstanding the deed of priority. For that reason, even in a forced sale situation, the mortgagor and purchaser could not have resort to the deed. The decision in that case is consistent with the interpretation we have set out in this case.

Conclusion

[59] We are therefore satisfied that as a matter of construction, the Deed did not apply to regulate the entitlements of ASB and SCF to the proceeds of sale, in circumstances where that sale was voluntary and entered into by the mortgagor. It follows that we must allow the appeal.

[60] Counsel for ASB also submitted that the Court may consider the parties' post-contractual conduct in construing the Deed. In particular, ASB contended that its interpretation of the Deed is more consistent with SCF's conduct. Having already determined that the Deed should be construed as the appellant contends, it is unnecessary for us to consider this point. In any event, given that the Deed of Priority was a standard form agreement we are satisfied that the parties' post-contractual conduct is not helpful in interpreting it.

Disposition

[61] In formal terms:

- (a) The appeal is allowed.
- (b) The judgment in favour of the respondent is set aside.
- (c) Judgment is entered in favour of the appellant on the summary judgment application.
- (d) The appellant is entitled to costs on the respondent's application for summary judgment on a Category 2B basis.
- (e) The respondent must pay to the appellant costs as for a standard appeal on a band A basis together with usual disbursements.

[62] We do not consider it is appropriate to certify for second counsel.

Solicitors:
Bell Gully, Auckland for Appellant
Grove Darlow & Partners, Auckland for Respondent