

Bank correct in refusing to discharge a mortgage where a damages claim is threatened against it

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The recent Supreme Court of New South Wales decision in *Australia and New Zealand Banking Group Ltd v Mishra* [2012] NSWSC 1333 examines a borrower's application to the Court for reimbursement of a portion of enforcement expenses paid to the Bank in circumstances where the Bank refused to discharge its mortgage because the borrowers wished to file a cross-claim against it.

Facts

ANZ provided the defendants certain facilities secured, firstly, over a property in Giraween ("Girraween Facility") and after, by two properties in Northbridge ("Northbridge Facilities").

The borrowers defaulted in the obligations to ANZ under the Northbridge Facilities.

Consequent upon the default, the borrowers:

- paid out the Giraween Facility and one of the Northbridge Facilities;
- reduced what was owing under the other two Northbridge Facilities;
- through their solicitors, informed ANZ's solicitors that they had obtained refinance in respect of the other two Northbridge Facilities; and
- informed ANZ that they asserted ANZ:
 - > acted improperly in its dealings with them;
 - > improperly withheld certain monies from them;
 - > engaged in misleading and deceptive conduct; and
 - > was estopped from taking possession of the Northbridge properties.

In response to the allegations made against ANZ, ANZ's lawyers informed the borrowers' solicitor that ANZ would not discharge its mortgages until the borrowers' claim against ANZ was heard and determined on the basis that it was entitled to retain its security to cover the costs expected to be incurred in dealing with the borrowers' claims.

Submissions

The Bank

ANZ submitted that:

- if a deed of release was not provided by the defendants, the Bank was entitled to require payment of an amount that might cover their costs of defending any fresh claim or cross-claim brought by the defendants. It argued its entitlement to do so was pursuant to:
 - > established principles in *Overton Investments Pty Ltd v Cuzeno RVM Pty Ltd* [2003] NSWCA 27;
 - > the terms of the mortgage relating to the reimbursement of the Bank's enforcement and legal expenses for money that is 'contingently' owed to the Bank;
 - > the terms of the mortgage that set out the defendants are only entitled to a release of the mortgage if they have paid all the secured money to the Bank.
- the relevant terms of the mortgage in the case of *Liberty Funding Pty Ltd v Steele-Smith* [2004] NSWSC 1100 were substantially similar to the mortgage provisions relied upon by the Bank in this case.

The Defendants

The defendants submitted that the facts in *Liberty Funding* differed as in that case the customers had already filed a cross-claim for unconscionable conduct.

Decision

The Court found for ANZ. In delivering judgment Davis J:

- found ANZ was entitled to treat the borrowers' threats of legal action against it as serious and this justified the bank's approach;
- observed ANZ had sought, but was refused, a deed of release from the borrowers concerning their claims;

- accepted that what ANZ required to be paid before the security was released were the probable costs of dealing with the borrowers' claim;
- adopted a line of reason from a series of earlier decisions and held that the clauses contained in the mortgage were wide enough in scope to cover as secured monies, the charging of contemplated costs in the event the borrowers were to commence the cross-claim against ANZ; and
- concluded that if ANZ did not require security for the probable costs of any future contest to be paid before discharging the mortgages, it would lose its right to raise the issue at a later point in time.

Further, Davies J held that ANZ did not act unreasonably in incurring the increased costs of \$17,844.05 and were payable pursuant to the terms of the mortgage.

Implications for lenders

Most mortgages will contain provisions with the same effect to that demonstrated in this case.

In circumstances where a borrower wishes a lender to discharge a mortgage at a time it is aware that the borrowers assert a claim against it, the recommended approach in determining whether or not to comply with the request to discharge the mortgage is to:

- (a) confirm the terms of the mortgage allow the lender to include payment of anticipated future legal costs as mortgage enforcement expenses;
- (b) if so, determine whether a future dispute against the lender can reasonably be anticipated;
- (c) if so, estimate what future legal costs will reasonably be incurred; and
- (d) seek payment of such legal costs from the borrower at that time as if it fails to do so it may lose its right to raise the issue later.

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