

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

CIV 2009-419-1404

UNDER the Property Law Act 2007

BETWEEN ANZ NATIONAL BANK LIMITED
Applicant

AND SNJ DAIRY LIMITED
First Respondent

AND DNT DAIRY LIMITED
Second Respondent

AND MARINO TE MOANA SHERWIN AND
DOUGLAS HILTON SHERTON
Third Respondents

AND STUART GAVIN CALLENDER AND
ROBERT VICTOR EADES
Fourth Respondents

Hearing: 23 October 2009

Appearances: J Douglas for the applicant
No appearance for first, second and third respondents
R G Ewen for the fourth respondents

Judgment: 23 October 2009

ORAL JUDGMENT OF WOODHOUSE J

Solicitors:
Mr J Douglas, Minter Ellis Rudd Watts, Solicitors, Wellington
Mr R G Ewen, Wynyard Wood, Solicitors, Auckland

[1] The applicant (the Bank) has applied for directions in respect of its security as lender over cows owned by the first respondent.

[2] The cows originally were on land owned by the Oruawharo Maori Incorporation on a farm near Wellsford. The Bank has security pursuant to a general security agreement with the first respondent, SNJ, and an agreement with Oruawharo Maori Incorporation entitling the Bank to enter, if necessary, on the land to enforce its security. There was a sharemilking agreement between SNJ and the Oruawharo Maori Incorporation.

[3] The arrangements just mentioned were made in July 2008. In August 2009 the Bank became aware that, without any prior notice to the Bank, let alone the Bank's agreement, SNJ's sharemilking arrangements with the Oruawharo Maori Incorporation had been terminated and the cows had been leased, seemingly on oral terms, to the second respondent, DNT. There is a common shareholding and directorships of SNJ and DNT through Mr Neil Bowater.

[4] The cows are now on land at Paparoa. The Bank, from a title search, understood that this land was owned by the third respondents. It is now apparent that the fourth respondents (subject to clarification of one point) are owners of at least part of the land, if not all of it, as trustees. The one point of clarification is that the fourth respondent, Mr Eades, is no longer a trustee having been replaced by Mr Terence McDell. In that respect I make an order at this point substituting Mr McDell for Mr Eades as one of the fourth respondents.

[5] There has been correspondence between the Bank and the fourth respondent, Mr Callender. Mr Callender advised that he has been managing the Paparoa farm. It appears the fourth respondents have the responsibility for things which now bear on the applicant's application to enforce its security. It is because of matters raised in a letter from Mr Callender that the Bank has brought this application. It has not been possible to get agreement from the owners of the Paparoa farm to the Bank's entry onto the property to take possession of the cows for the purposes of sale.

[6] These proceedings have been brought with some urgency because the value of the security may be reduced substantially if there is delay in sale of the cows. Service of the proceedings has been effected on the first, second and fourth respondents. This followed the correspondence with the fourth respondents and correspondence with the first and second respondents. There were also discussions between a representative of the Bank, Mr Stafford, and Mr David Batten, one of the directors of the second respondent, DNT. In an affidavit Mr Stafford described his discussion with Mr Batten as follows:

38. On 14 October 2009 I had a discussion with David Batten of DNT, about whether DNT would co-operate with the Bank to sell the 115 cows. DNT has cooperated to an extent, by allowing a stock agent onto the Paparoa farm to inspect the 155 cows (both several weeks ago and again on 16 October). However, Mr Batten has given me no absolute assurance that the Bank would be permitted entry to the Paparoa farm for the purposes of taking possession of and selling the 115 cows.

[7] At the hearing this morning Mr Ewen appeared on behalf of the fourth respondents, and a notice of appearance has been filed. Mr Ewen advised that the fourth respondent will abide the decision of the Court.

[8] There has been no appearance on behalf of the first or second respondents, notwithstanding service on them.

[9] As earlier mentioned, service has not been effected on the third respondents. However, I am satisfied that that is not an impediment to proceeding today to make appropriate orders or declarations. The principal reason for that conclusion is that the Bank's entitlement to possession in my judgment is clear. It is a statutory right provided in s 109 of the Personal Property Securities Act 1999. Secondly, the applicant seeks the Court's assistance pursuant to s 200 of the Property Law Act. Although that section does not make provision for an order for possession, it does enable the Court to make a range of orders in favour of the mortgagee, including directing sale of the whole or any part of the mortgaged property. And s 202(2) of the Property Law Act states that the Court may make orders under s 200 even if a person with particular interests is not before the Court. Section 201 also makes provision for what amounts to dispensation with service. Thirdly, Mr Douglas, on

behalf of the Bank, has spoken to solicitors acting for the third respondents, or for the estate of the third respondent, Douglas Hilton Sherwin. They were advised, albeit only yesterday, that there was a hearing this morning. Fourth, there is Mr Callender's advice that he has been managing the farm on behalf of the owners.

[10] I am satisfied from the evidence provided by Mr Stafford that the Bank is entitled to enforce its security over the cows and in consequence, and as already recorded, that the Bank is entitled pursuant to s 109(1) of the Personal Property Securities Act to take possession of the cows that are subject to the security and to sell them. The reason why the Bank is so entitled under s 109 is that the debtor, SNJ Dairy Limited, is in default under the security agreement.

[11] Subject to some modifications for procedural reasons, the Bank is entitled to the relief sought. Accordingly, I rule as follows:

- a) The applicant is entitled to enter onto the land at 181 Paki Road, RD 1, Paparoa, being the land managed by the fourth respondents, and to take possession of the cows on the land that are subject to the applicant's security. Such entry is to be exercised upon reasonable notice to the second respondent, DNT Dairy Limited, and to the fourth respondents. Such notice may be provided by any practicable means, including telephone. The length of reasonable notice is to be determined having regard to the practicalities of the situation and the need for prompt sale of the cows, but there should be at least 24 hours notice.
- b) Pursuant to s 200(3)(a) of the Property Law Act 2007 there is an order directing sale of the cows which are subject to the applicant's security.
- c) Leave is reserved to the parties to make further application if need be.