IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2012-488-780
[2013] NZHC 517

BETWEEN	ANZ BANK LIMITED Plaintiff
AND	CROYDON JERRY THOMPSON First Defendant
AND	DIANNE MARGARET THOMPSON Second Defendant

Hearing: 13 March 2013

Appearances: P Roy for Plaintiff
D W Grove for Defendants

Judgment: 13 March 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

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[1] The ANZ Bank sues Mr and Mrs Thompson for $650,548.33 and interest on that sum at the rate of 28.15 per cent per annum from 8 November 2012 up to and after judgment until date of payment, plus costs on a solicitor-client basis. Its claim is for the shortfall after mortgagee's sales. It applies for summary judgment. Mr and Mrs Thompson oppose.

Leave to amend notice of opposition

[2] The grounds of opposition have changed. At the outset, the Thompsons' defences were: that the bank ought never to have extended credit to them in the first place – in effect, a form of lenders' liability argument; and that the bank had not complied with s 176 of the Property Law Act 2007 in selling the properties over which the bank held a mortgage as security for credit extended to the Thompsons.

[3] More issues emerged. I raised a third issue in my minute of 11 March 2013 when I queried whether the bank was entitled to make demand for the entire debit balance on 29 November 2011, and whether the bank's notice of 12 December 2011 complied with ss 119 and 120 of the Property Law Act 2007.

[4] Mr Grove was instructed late. He raised new issues – arguments under ss 122 and 118 of the Property Law Act. At the outset of the hearing he sought leave to file and serve an amended notice of opposition. The amended notice of opposition relied on all the grounds in the original notice of opposition but also added fresh grounds under ss 118, 119 and 122 of the Property Law Act.

[5] Ms Roy opposed because of the late notice and the absence of time given to address the new issues. She signalled that partly on the issue under s 119 – and certainly on the issue under s 118 – the bank would need time to adduce further evidence to meet these new defences.

[6] I granted leave to amend the notice of opposition. I am conscious that this proceeding is a matter of the utmost seriousness for Mr and Mrs Thompson. There

would be a potential miscarriage of justice if they were not able to present to the court all the defences that they wished to rely on – albeit they had raised them late.

[7] I took account of Ms Roy's submission that the bank would want to adduce further evidence. I explored that with her. I am satisfied that there is already adequate evidence before the court to address the issues raised by Mr Grove without needing to give the bank further time to file further evidence and to put the parties to the cost and trouble of a further hearing. In particular, as to the issue under s 119, Ms Roy submitted that there was correspondence at the time of the bank's demand of 29 November 2011 which would present useful background information. In fact there is already evidence which makes clear what that background correspondence between the parties was. Mrs Thompson had been corresponding with the bank manager about the account. She had made it clear in the correspondence that they (Mr Thompson and she) would not be able to bring the account back within the permitted credit limit. I am able to take notice of that without the bank having to give evidence producing copies of that correspondence.

[8] The evidence the bank would want to rely on under s 118 would show that there was continued default by the Thompsons in not making interest payments under the credit facility. I am satisfied that there is adequate evidence before the court already as to continued defaults by the Thompsons. It is unnecessary to give the bank time to provide evidence which is already available on the record. Accordingly, I did not consider that there was any prejudice to the bank in allowing the Thompsons to advance their defences without deferring the hearing.

Background facts

[9] In November 2004 Mr and Mrs Thompson bought adjoining properties at 12A and 12B Fuller Terrace, Kerikeri. These were lifestyle-block sized properties. They were vacant apart from a boat-shed on the Kerikeri River. They were apparently attractive properties and had subdivision potential. The Thompsons paid the deposit on the purchase of the properties from their own funds but financed the rest of the purchase price with funds advanced by the bank.

[10] The facility under which the bank advanced the funds to them is called a FlexiPlus agreement. Under this facility the Thompsons could draw on funds up to a stated credit limit. The initial credit limit was $1,450,000. The Thompsons were required to pay all their income into the account. They could draw on the account for ordinary expenses. Interest was charged against the account. They had to keep the debit balance of the account under the credit limit.

[11] The FlexiPlus agreement was stated not to have a term but the agreement also provided the bank with a right to review after five years. On review the bank had the right to bring the facility to an end. The Thompsons were entitled to bring the facility to an end at any time by repaying. The FlexiPlus facility also contained provisions for the bank to enforce by requiring repayment in full if certain situations occurred. It will be necessary to look at these provisions in greater depth on the issue under s 119.

[12] The bank also took a registered first mortgage over the properties in Fuller Terrace as security.

[13] In 2009 the bank reduced the credit limit from $1,450,000 to $1,100,000. The Thompsons had difficulty keeping within that limit. Matters came to a head in 2011. On 28 November 2011 Mrs Thompson indicated to the bank manager that they would not be able to meet a requirement by the bank that they reduce the debit balance to within the credit limit of $1,100,000.

[14] On 29 November 2011 the bank made written demand on Mr and Mrs Thompson for the sum of $1,127,440.72, being the debit balance under the facility. With that demand the bank sent a covering letter:

> We wish to advise that as lending in default has not been cleared or firm repayment arrangements are not in place that *as per clause 11* of your FlexiPlus Agreement, the Bank requires the repayment of the whole of the balance owing on your FlexiPlus account and has cancelled your FlexiPlus facility.
>
> In addition the formal recovery process will now commence with the service of Notice of Demand, as attached.

> If the Notice of Demand is not met then the next step will be Property Law Act Notices being served and should they expire unsatisfied the Bank would be looking to sell the securities properties at 12A & 12B Fuller Terrace Kerikeri via mortgagee sale.
>
> (emphasis added)

[15] The Thompsons did not comply with the notice of demand of 29 November 2011. The next stage was that the bank's solicitors issued notices under s 119 of the Property Law Act against Mr and Mrs Thompson. The notices under s 119 identified the relevant default as non-compliance with the bank's demand of 29 November 2011 in that they failed to pay the sum of $1,127,440.72. The remedy required was to pay the sum of $1,128,485.47 which included the sum of $1,000 for the costs of issuing the demand. The notice in all other respects generally meets the requirements of ss 119 and 120 of the Property Law Act. The time for compliance with the s 119 notice was on or before 24 January 2012.

[16] On 2 February 2012 the bank's lawyers sent a call-up notice, which recorded that the Thompsons had not complied with the notice under s 119; that all money secured by the mortgage that the bank had taken over the properties was now due and payable; that the bank was entitled to enter into possession of the properties at Fuller Terrace; that at 31 January 2012 the sum owing to the bank and secured by the mortgage was $1,138,604 exclusive of realisation costs. I infer that between the bank's demand of 29 November 2011 and 2 February 2012 the Thompsons had not been making sufficient payments to meet their interest liabilities under the facility.

[17] The bank gave the Thompsons further opportunity to sell the Fuller Terrace properties themselves. The Thompsons had already gone to extensive efforts to market the properties. They had had the properties listed for $1,300,000 but they say they were prepared to negotiate a sale at lower figures. The property had been extensively marketed – locally, nationally and even internationally. Nevertheless, as a letter from their lawyers related, there had been a low level of interest in the properties.

[18] Then the bank obtained a valuation of the properties by registered valuers in March 2012. Later it instructed land agents who provided a marketing plan.

The bank followed the recommendations of the land agents and appointed the land agents to market the property and hold an auction. The properties were extensively marketed for five weeks leading up to an auction in July 2012. The auction did not result in an immediate sale of the properties but there were subsequent negotiations which resulted in the sale of one property for $375,000 and the sale of the other property for $210,000. The bank received $551,957.13 as the net proceeds of sale. A bank statement for the period up to 24 August 2012 shows that on 25 July 2012, immediately before the bank received the proceeds of sale, the outstanding balance owed by the Thompsons was $1,176,132.89. That sum is consistent with the Thompsons not making continued payments under the facility and not meeting their interest liabilities under the facility.

[19] The valuers appointed by the bank had suggested a forced sale value for one property at $400,000 but that property sold for $375,000. For the other property they suggested a forced sale value of $220,000. That sold for $210,000. In other words, the actual sales were not far off the values given by the valuers for a sale on a forced sale basis.

Defences abandoned at the hearing

[20] Mr Grove indicated that the Thompsons no longer relied on the original defences pleaded in the first notice of opposition. I therefore deal with them briefly.

[21] In submissions prepared for the hearing, the bank had addressed the argument as to lender liability and referred to relevant authorities, including the judgment of Asher J in *Bank of New Zealand v Geddes.*[1] I have found the analysis by Asher J at [20] - [25] helpful. I respectfully apply his reasons to the present case. I see no basis, in fact or in law, for the Thompsons to have a defence that they should be freed from liability because the bank made a bad lending decision and decided to grant the FlexiPlus facility. For the reasons given by Asher J, that is not an arguable defence in this case.

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1 *Bank of New Zealand v Geddes* HC Auckland CIV-2008-404-8082, 28 May 2009.

[22] The second defence was a failure to comply with the duty to exercise reasonable care to obtain the best price obtainable at the time of sale under s 176 of the Property Law Act. In this case the bank followed standard procedures in exercising its powers of sale. In particular, it took advice from reputable local valuers as to what price it could hope to achieve on sales of the properties, including under forced sale circumstances, to guide it as to what it could expect to obtain. It also instructed experienced local agents for advice on a marketing plan and applied that marketing plan. The evidence from the land agent shows that real efforts were made to market the properties to maximise the number of potential purchasers. While the land agent notes that interest was weak, the prices obtained can be compared with the recent efforts of the Thompsons. Their best was an offer of $305,000 for 12A Fuller Terrace – the property the bank sold for $375,000. While it is obviously distressing to the Thompsons that the properties were sold for values far lower than what they had originally paid for them, that simply reflects the current state of the market. The bank was faced with having to sell these properties in a depressed market where buyers could be choosy. I am satisfied from the evidence that the bank did comply with its duty under s 176 of the Property Law Act.

[23] If those were the only defences, the bank would be entitled to recover. However it is now necessary to examine the new defences.

Do the Thompsons have a defence under s 122 of the Property Law Act 2007?

[24] Mr Grove contended that the bank was required to give a notice under s 122 to the Thompsons, and that the bank had failed to do so. Section 122 says:

> **122 Notice of intention to recover deficiency in relation to mortgages over land**
>
> (1) This section applies if, under a mortgage over land,—
>
> (a) the mortgagee or receiver proposes, by reason of a default, to exercise a power to sell the mortgaged land; and
>
> (b) the mortgagee proposes to recover any deficiency on the sale from a former mortgagor or a covenantor.
>
> (2) The mortgagee or receiver must serve notice of the intentions referred to in subsection (1) on the former mortgagor or covenantor

concerned at least 20 working days before the exercise of the power of sale.

(3) Subsection (2) applies whether or not the former mortgagor or covenantor has been served with a copy of the notice required under section 118 or 119.

(4) A failure to serve a notice under subsection (2) on a former mortgagor or a covenantor does not prevent—

(a) the mortgagee or receiver from exercising the power of sale; or

(b) the mortgagee from recovering any deficiency from the former mortgagor or covenantor.

(5) However, a former mortgagor or a covenantor who is prejudiced by a failure to serve a notice under subsection (2) is, to the extent of the prejudice, released from liability to the mortgagee for the deficiency.

[25] The section requires a notice to be given to a former mortgagor or to a covenantor. The section does not require the notice to be given to a current mortgagor. The Act draws a clear distinction between current mortgagors on the one hand and former mortgagors and covenantors on the other. That can be seen from s 176(1) of the Property Law Act. In this case the Thompsons are the current mortgagors. They were the ones who granted the mortgage over the land. They had and still have primary liability under the mortgage as the ones who had given covenants under the mortgage to the bank and had primary liability under the FlexiPlus agreement. Section 122 requires notices to be given to persons who have secondary liability, not primary liability. That is the former mortgagors, such as former owners of the property who had sold the property subject to the mortgage, and covenantors, that is, people who have guaranteed performance by mortgagors. They are at risk if a property is sold by the mortgagee and the sale proceeds are insufficient to cover the debt. Because of that potential liability to those with secondary liability the law requires notice to be given under s 122. It does not apply to current mortgagors because they will have already received notice under s 119.

[26] Accordingly, I find that the Thompsons do not have a defence under s 122 of the Property Law Act.

[27] I also note that anyone who is required to be given a notice under s 122 is freed from liability only to the extent that they are prejudiced by the failure to serve a notice. There is clear evidence of communications passing back and forth between the bank and the Thompsons from November 2011 right down to the date of sale. The Thompsons cannot have been under any illusion whatsoever that the bank would not look to them if the sale proceeds were not sufficient to clear the FlexiPlus facility. Even if they were required to be given a notice, there is no basis for them to claim prejudice under s 122.

Do the Thompsons have a defence under s 119 of the Property Law Act 2007?

[28] This is the matter I raised in my minute of 11 March 2013. Very helpfully, the bank yesterday filed prompt written supplementary submissions. The pivotal question is whether the bank had a contractual right to demand payment of the debit balance under the FlexiPlus facility – whether or not the Thompsons were in default under the facility – or whether the bank could demand repayment of the debit balance only if the Thompsons were in default.

[29] The bank's position is that the FlexiPlus facility was an "on demand" facility so that it could demand repayment of the debit balance at any time, whether or not the Thompsons were in default. Mr Grove's argument is that this was not an on demand facility, but the FlexiPlus agreement contained carefully prescribed provisions allowing the bank to demand repayment of the debit balance. In this case, the bank could only make demand upon default by the Thompsons and that accordingly triggered the requirement to comply with s 119 of the Property Law Act.

[30] Before I refer to the requirements of the Property Law Act, I record that there is clear authority that if the facility is a true on demand facility then the bank is not required to comply with s 119 of the Property Law Act. In *Elders Pastoral Holdings Ltd v Raptorial Holdings Ltd (in rec)*[2] Randerson J said at [37]:

> It is trite that no notice under s 92 is required in the case of an "on demand" mortgage: *Butterworths Land Law in New Zealand,* 1997, para 8.089. The mortgagee may make demand for repayment of the principal and may sue

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2 *Elders Pastoral Holdings Ltd v Raptorial Holdings Ltd (in rec)* (2000) 8 NZCLC 262,192.

the mortgagor without the need for notice under s 92 if the demand is not met. The principal becomes payable by reason of the demand, not by reason of the mortgagor's default in meeting the demand: *O'Brien v Skidmore* [1951] NZLR 884, approved in *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324 (CA) at p 342 per Somers J.[3]

[31] On the other hand, if the bank wishes to call up funds secured by a mortgage over land because of some default by the mortgagor in complying with the terms of the mortgage, then the bank must give notice under s 119 of the Property Law Act. Section 119 says:

> **119 Notice must be given to current mortgagor of mortgaged land of exercise of powers, etc**
>
> (1) No amounts secured by a mortgage over land are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise a power specified in subsection (2), by reason of a default, unless—
>
> (a) a notice complying with section 120 has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor; and
>
> (b) on the expiry of the period specified in the notice, the default has not been remedied.
>
> (2) The powers are—
>
> (a) the mortgagee's power to enter into possession of mortgaged land:
>
> (b) the receiver's power to manage mortgaged land or demand and recover income from mortgaged land:
>
> (c) the mortgagee's or receiver's power to sell mortgaged land.
>
> (3) Subsection (1) is subject to sections 125 and 126.
>
> (4) A notice required by this section may be given in the same document as a notice under section 118.

[32] A provision that allows a mortgagee to call up the balance of a loan on default is an "acceleration clause". An acceleration clause is defined in s 4 of the Property Law Act 2007:

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[3] Section 119 of the Property Law Act 2007 is the counterpart to s 92 of the Property Law Act 1952.

> **4 Interpretation**
>
> In this Act, unless the context otherwise requires,—
>
> **acceleration clause** means an express or implied term in an instrument which provides that, if there is a default, any amounts secured by a mortgage become payable (or may be called up as becoming payable) earlier than would be the case if there had not been a default.
>
> ...
>
> And "default" is defined:
>
> **default** means—
>
> (a) a failure—
>
> (i) to pay on the due date any amounts secured by an instrument; or
>
> (ii) to perform or observe any other express or implied covenant in an instrument; or
>
> (b) any other event (other than the arrival of the due date) on the occurrence of which any amounts secured by an instrument become payable, or may be called up as becoming payable, under any express or implied term in the instrument.

[33] Accordingly, if a mortgagee wants to exercise an acceleration power, the mortgagee must serve a notice under s 119 that complies with s 120. The mortgagee can exercise the power to accelerate only if the mortgagor has not remedied the default in the notice within time.

[34] The mortgage in this case contains a default provision in clause 7. Mr Grove refers to clause 11 of the FlexiPlus agreement as being a relevant default provision.

[35] To ascertain whether the bank could make demand for the debit balance at any time or only upon default, it is necessary to consider the terms of the FlexiPlus agreement. The front page of the agreement sets out what are termed to be "Key Details" of the FlexiPlus account. It includes these words:

> This ANZ FlexiPlus account is reviewable at ANZ's option at five yearly intervals. This does not affect ANZ's right to demand repayment of this ANZ FlexiPlus account at any time.

[36] The FlexiPlus agreement also contains these words:

Please note that these terms and conditions are only some of the terms and conditions for your ANZ FlexiPlus account. Additional terms and conditions may be implied by law or agreed to by you in writing.

[37] The agreement also refers to other further terms and conditions as being contained in other ANZ security documents such as the memorandum of mortgage.

[38] Further on, there are numbered clauses. Clause 3 says:

3 Term

There is no term for your ANZ FlexiPlus account, but it is reviewable by ANZ in accordance with clause 10 of these terms and conditions.

You can terminate your ANZ FlexiPlus account at any time by repaying all amounts owing under the FlexiPlus account and notifying ANZ in writing.

Clause 10 says:

10 Reviewing your ANZ FlexiPlus account

Without prejudice to ANZ's right to demand repayment of your ANZ FlexiPlus Account at any time in accordance with clause 11 of these terms and conditions, ANZ may undertake a review of your ANZ FlexiPlus Account at five yearly intervals from the date that your ANZ FlexiPlus Account Funds become available.

When reviewing your ANZ FlexiPlus Account, ANZ may require a valuation to confirm the current value of the property. If this occurs you may be charged a fee equal to the cost of the valuation incurred by ANZ in employing an external valuer. The fee will be payable on the date the valuation fee is invoiced to ANZ.

If ANZ is satisfied as a result of the review then it may elect to renew your ANZ FlexiPlus Account for a further five year period on the existing terms and conditions.

If ANZ is not satisfied for any reason whatsoever it may, by 14 days written notice to you, either:

(a) refuse to allow you to renew your ANZ FlexiPlus Account, and require you to immediately repay the debit balance on your ANZ FlexiPlus Account (including all undebited interest and fees); or

(b) permit you to renew your ANZ FlexiPlus Account but reduce the maximum amount of credit specified in your ANZ FlexiPlus Agreement and require that you immediately repay the amount by which the debit balance on your ANZ FlexiPlus Account (including all accrued but undebited interest and fees) exceeds the revised maximum amount of credit; or

(c) convert your ANZ FlexiPlus Account to a loan on a principal and interest repayment basis on terms and conditions that are satisfactory to ANZ.

Clause 11 says:

11 ANZ's right of Early Repayment

ANZ may require immediate repayment of the whole of the balance owing on your ANZ FlexiPlus Account and may cancel your ANZ FlexiPlus Account or any undrawn portion of the maximum sum specified in your ANZ FlexiPlus Agreement, if any of the following situations occur:

(a) If your ANZ FlexiPlus Account exceeds the maximum amount of credit approved by ANZ which is specified in your ANZ FlexiPlus Agreement.

(b) If you fail to pay, when due, any amount required to be paid to ANZ in connection with your ANZ FlexiPlus Account.

(c) If you, your Guarantor or your Mortgagor, fail to comply with any of the terms and conditions of your ANZ FlexiPlus Account or you fail to perform any obligation assumed under your ANZ FlexiPlus Agreement, or any loan, or under any guarantee or security document with ANZ (either present or future).

(d) If any event occurs which, in ANZ's opinion, may affect you or your Guarantor's or Mortgagor's:

- financial condition or business operation; or
- willingness or ability to perform any obligations under your ANZ FlexiPlus Agreement, or under any loan, or under any guarantee or security document with ANZ (either present or future).

(e) If you, your Guarantor or your Mortgagor fail to comply with any of the terms of the security document(s) to your ANZ FlexiPlus Account.

(f) If you, your Guarantor or your Mortgagor sell the property which is the security specified in your ANZ FlexiPlus Agreement.

(g) If your, your Guarantor's or your Mortgagor's current employment is terminated.

(h) If you, your Guarantor or your Mortgagor die.

(i) If any other event occurs, whether through your action or otherwise, which results in ANZ forming the opinion that it does not want you to continue to operate your ANZ FlexiPlus Account.

You will also be required to immediately repay any amount by which the balance owing on your ANZ FlexiPlus Account exceeds the maximum

amount of credit approved by ANZ which is specified in our ANZ FlexiPlus Agreement. In addition, you will be required to immediately repay any outstanding interest and fees, including all ANZ's costs and expenses (including legal costs, expenses), incurred in exercising, protecting or recovering the loan, and any other amount payable in connection with the loan on a full indemnity basis.

Clause 12 says:

> **12 Alteration of terms**
>
> ANZ may alter these terms and conditions at any time at its discretion. This may include changes to the interest rates, fees and any interest or fee debit dates. ANZ may also change the maximum amount of credit specified in your FlexiPlus Agreement. ANZ will advise you of any changes by branch notice, public notice or personal letter to you at least 14 days before these changes take effect.

[39] Mr Grove refers to clause 3 as indicating that whereas the customer can terminate at any time by repayment, there is otherwise no term to the FlexiPlus account. He accepts that that is subject to the bank's right of review under clause 10. His argument is that if there is no term to the account then a provision for a right of immediate repayment at any time is inconsistent with that.

[40] The right of review under clause 10 confers on the bank a number of powers. One of those is to refuse to allow the customer to renew the account and also to require the customer to immediately repay the debit balance. That power is exercisable only when the bank exercises its review every five years. The bank was not purporting to exercise its power of review in November 2011.

[41] Clause 12 allows the bank to alter the terms and conditions at any time. That includes the right to change the maximum amount of credit but, if it does so, it has to give at least 10 days' notice to the customer before that change takes effect.

[42] It would be open to the bank to change the amount of credit. I do not understand that the power to change the amount of credit extends so far as eliminating credit altogether. If it is to include the right to eliminate credit altogether and in effect to bring the facility to an end, I would expect clause 12 to say so expressly.

[43] When the bank issued its notice of 29 November 2011, it was not purporting to change the terms and conditions of the account under clause 12. It did not give the 14 days' notice required under clause 12. Instead, it demanded an immediate payment. Accordingly it cannot invoke clause 12.

[44] Now for clause 11. Clause 11 identifies situations in which the bank is given the right to require immediate repayment. The bank's right to require immediate repayment under clause 11 is expressly saved under clause 10. Clause 11 allows the bank to require early repayment only if any of the situations listed in the clause actually occur. One of those situations is one that had occurred in November 2011. That was that the debit balance exceeded the maximum amount of credit approved by the bank. The amount of the excess was over $27,000.

[45] The situations set out in clause 11 are defaults which give the bank the right to invoke the default provisions of clause 7 of the bank's mortgage. They are also defaults within the definition of "default" in s 4 of the Property Law Act. For the bank to call up the full debit balance under clause 11 it is exercising a power consequential upon a default by a customer. Accordingly clause 11 is an acceleration clause as defined by s 4 of the Property Law Act. I note that when the bank issued the notice of demand on 29 November its covering letter stated that it was exercising the power to call up the debit balance under clause 11. Clearly the bank was intending to exercise an acceleration power under clause 11. It was accordingly required to comply with s 119 of the Property Law Act.

[46] Against those provisions, Ms Roy refers to the wording of the Key Details, specifically the words, "this does not affect ANZ's right to demand repayment of this ANZ FlexiPlus facility at any time". If those words were read on their own, they might support an argument that this was an "on demand" facility. However, that would be to take them out of context. The Key Details on the front page of the agreement present in effect an executive summary of the facility. The Key Details contain an "IMPORTANT NOTICE". That important notice makes clear to the customer that there are further terms and conditions that apply, and the terms and conditions include those set out within the FlexiPlus agreement. The customer cannot simply take the first page of the agreement on its face and treat that on its

own as setting out the entire terms and conditions. The statements on the first page are modified by other provisions. It is quite clear that the Key Details are in part a summary of matters that are spelt out in greater detail later in the document. The reference in the Key Details to the bank's right to demand repayment of the facility at any time is the same right to demand repayment at any time referred to in the introductory words to clause 10 – that is, it is the right of early repayment set out in detail in clause 11 of the facility agreement. There is no basis for taking the Key Details out of context and holding that they give a right to make demand at any time independently of the express provisions for requiring repayment within clauses 10 and 11.

[47] Likewise, I am unable to accept that the bank has any general implied right to make demand at any time. That would run contrary to the business purpose of this agreement as well as the detailed provisions in clauses 10 and 11 which carefully define the circumstances when the bank can make demand. The facility is set up to allow bank and customer to operate the facility over an extended period of time, so long as the customer complies with the terms of the facility. A customer complying with the terms of the facility can count on the facility being available to him or her for five years. After five years the facility may be up for review and may not be renewed. It would cut across that purpose if the bank were to have the right to demand at any time. For example, if a customer had drawn down under the facility and applied the funds to purchase a property which the customer intended to hold for an extended period, it would be absurd to suggest that the bank could, the day after drawdown, immediately ask for repayment and treat the customer as being in default, if the customer did not promptly comply. And yet that is the position which the bank advances today.

[48] I reject the bank's argument that its ANZ FlexiPlus agreement gives it the right to demand immediate repayment of the debit balance independently of default by the customer and outside a five year review. The bank can only make demand of the debit balance under clause 10, which does not turn on default by the customer, or under clause 11 which does. In this case, the facts show that the bank clearly intended to exercise its powers under clause 11 consequential upon the default by the

customers, because the debit balance exceeded the credit limit. But, to do so effectively, the bank had to give notice under s 119 of the Property Law Act.

[49] The demand of 29 November 2011 is ineffective as a notice under s 119 of the Property Law Act. It does not identify a default that has to be complied with. It does not identify the action to be taken to remedy the default. A potential default the bank could rely on was the excess over the credit limit. The demand did not require the debit balance to be brought down within the credit limit. Instead the bank simply accelerated. That purported acceleration was invalid because s 119 had not been complied with.

[50] That means that when the bank issued its notice under s 119 on 12 December 2012, the sum of $1,127,440.72 had not fallen due. Because it had not fallen due, the bank could not rely on it as a relevant default on which it could issue a notice under s 119. The bank could have issued a notice requiring payment of $27,440.72 as the amount by which the debit balance exceeded the credit limit. But it did not rely on that as a relevant default. The amount it made demand for was $1,100,000 more than the actual default. The notice under s 119 of the Property Law Act was invalid not only because the amount demanded grossly exceeded what could be lawfully demanded, but also because the notice did not refer to a relevant default. Instead it relied on a non-existent default.

[51] Because the notice under s 119 did not comply with the statute, the Thompsons have not failed to remedy a default in a notice under s 119 of the Property Law Act. And, because there has not been any relevant failure to remedy a default, the power of sale and the power to accelerate did not accrue. Even though the bank did not have the power to do so, the bank still sold the Fuller Terrace properties. From the proceeds of the sales it has been paid enough to cover the amount by which the Thompsons' debit balance had exceeded the credit limit under the FlexiPlus facility. Accordingly, as the bank has already been repaid that excess, to succeed in a claim for the balance under the facility it would need to rely on the valid exercise of the acceleration power. The bank cannot point to any valid exercise of the acceleration power. That means that at this stage the Thompsons have an

arguable defence to the bank's claim because of the invalidity of the demand of 29 November 2011 and the Property Law Act notice of 12 December 2011.

Do the Thompsons have a defence under s 118 of the Property Law Act 2007?

[52] Having found that the Thompsons have an arguable defence, I do not need to go further and consider s 118 of the Property Law Act but I do so to assist the parties in resolving matters further.

[53] Section 118 says:

> **Mortgagee accepting interest after expiry of term not to call up without notice**
>
> (1) This section applies if—
>
> (a) the term of a mortgage over property, or any period for which the term has been renewed or extended, has expired; and
>
> (b) the principal amount secured by the mortgage has not been repaid; and
>
> (c) the mortgagee has, after the date of expiry, accepted interest on the principal amount (except by entering into possession of the property or appointing a receiver) for a period not shorter than 3 months after that date; and
>
> (d) the mortgagor has observed all covenants under the mortgage instrument except the covenant to repay the principal amount on the due date.
>
> (2) The mortgagee must not call up as payable the principal amount unless—
>
> (a) the mortgagee has served on the current mortgagor a notice of the intention to do so at the expiry of the period specified in the notice; and
>
> (b) that period has expired.
>
> (3) The period specified in the notice under subsection (2) must not be shorter than 60 working days after the date of service of the notice.
>
> (4) A notice under subsection (2) may be given in the same document as a notice under section 119 or 128.

[54] Section 118 seems to be designed for a mortgage under which there is a loan for a fixed term and, on the expiry of that fixed term, the bank is able to ask for repayment of the principal. The section requires a notice of intention to call up the principal to be given in certain conditions. If the principal has not been repaid but the mortgagor has continued to pay interest on the principal amount for a period no shorter than three months after that date, and the mortgagor has observed all covenants under the mortgage instrument, then the mortgagee cannot call up the principal without first giving 60 working days' notice.

[55] On the facts, the Thompsons have difficulty relying on s 118. Mr Grove asserted that there had been payments of interest after November 2011, but the documentary evidence shows that there were continued defaults by the Thompsons after 29 November 2011. The evidence for that is the increasing debit balance. It appears that the bank was not extending any further credit to the Thompsons and that the bank cancelled Mrs Thompson's credit card. If the bank had not been accepting any further debits, interest must have accumulated on the account. That being the case, I do not find it tenable for the Thompsons to allege that they were continuing to meet interest commitments under the facility. That is enough to dispose of the s 118 issue on the facts.

[56] But there is a difficulty in applying s 118 to a facility such as this FlexiPlus agreement which does not have a fixed term. Mr Grove tried to raise an argument that once the bank had given its demand in November 2011 – that is assuming that that demand was valid and that the defence under s 119 had failed – then that marked a term which could then trigger s 118. I did not find that argument easy to follow. At the end of the day it is not critical that I do find on that issue.

Outcome

[57] I have found that the Thompsons have an arguable defence because the bank did not validly accelerate by complying with ss 119 and 120 of the Property Law Act 2007. Because the bank has not validly accelerated the debt, it cannot today seek payment of the debit balance under the FlexiPlus facility.

[58] There are other issues to be explored which might arise out of the bank having sold up the properties at Fuller Terrace without having an accrued power of sale, but I do not have to consider them today. It is sufficient for me to dismiss the application for a summary judgment. Both parties will need to consider further what steps will need to be taken.

[59] I make these orders:

(a) I dismiss the application for summary judgment;

(b) The Thompsons are to file and serve a statement of defence within 15 working days. The statement of defence should not plead any defences as to lender's liability or under ss 118, 122 and 176 of the Property Law Act, but it may plead a defence under s 119 of the Property Law Act;

(c) There will be a telephone case management conference on **8 May 2013** at **9:00am** for further directions to be given; and

(d) Costs are reserved.

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Associate Judge R M Bell