

update

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Friday Facts: Judge considers whether financier should have regard to borrower's desire to retain family home

In the recent decision of Nolan v MBF Investments Pty Ltd [2009], the Victorian Supreme Court had to determine whether a mortgagee, in exercising its power of sale over a range of properties, is to have regard to the mortgagor's interest to retain the family home.

The borrower was the owner of three adjoining properties all mortgaged to the defendant, MBF Investments Pty Ltd (“**MBF**”). One of the three properties was the borrower's family home which the borrower's family had occupied for 10 years (Lot 1). The other two properties were vacant land (Lots 2 and 3).

The borrower was in default of the mortgage. MBF took possession and made arrangements to sell all three properties by public auction occurring on the same day. The order that properties were to be auctioned had been determined on advice from a real estate agent the day before the auction. It was decided that Lot 2 was to be auctioned first, followed by Lot 1 and then Lot 3.

A much higher than expected sale price was achieved for Lot 2 and as a result, MBF only needed to realise a further \$230,000 to discharge the debt owing. The estimated sale price for Lot 3, the other vacant property, was over \$600,000 and would have been adequate to discharge the debt owing if MBF had changed the order of sale.

After the sale of Lot 2, the borrower approached the director of MBF and pleaded with him to auction Lot 3 next by changing the order of properties as he didn't want to lose the family home.

However, MBF decided not to alter the order of properties and Lot 1, the family home, was auctioned next and sold for the sum \$915,000.

Following the sale of Lots 2 and 1, it was not necessary to MBF to sell Lot 3 to clear the debt. However, the borrower then requested that this property also be sold. A sale price of \$690,000 was achieved.

The borrower subsequently issued proceedings against MBF on that basis that MBF breached its obligations under section 77(1) of the *Transfer of Land Act 1958* (“**Act**”) by failing to have regard to the borrower's interests and acting in bad faith in selling the defendant's family home when it was unnecessary to do so. It was argued that the sale of the two vacant blocks was all that was necessary to satisfy the amount owing to MBF.

Section 77(1) of the Act provides that a mortgagee must exercise its power of sale “in good faith and having regard to the interests of the mortgagor, grantor or other persons”.

In defending the proceedings, MBF argued that the scope of the borrower's interest to be protected under section 77(1) is limited to an interest in the proceeds of sale.

Justice Vickery of the Supreme Court disagreed and held that the scope of the “interests” of the borrower under section 77(1) is much wider and can extend to the borrower's interest to occupy his home.

The Court held that the decision to sell Lot 1 at the auction was not made in good faith having regard to the relevant “interest” of the mortgagor under section 77(1) of the Act.

Justice Vickery found that MBF completely disregarded the borrower's interest in Lot 1 to exercise his right of redemption (the right to have the property discharged from the mortgage upon payment in full of the amount owing) which would have resulted in the borrower retaining ownership of that property being his family home. However, by not making a decision to alter the order of properties to be auctioned, the borrower lost the use and enjoyment of Lot 1 for use as his home.

In his judgment, Justice Vickery also referred to the Victorian Charter of Human Rights (“**Charter**”). The Charter was not in operation when MBF made its decision to sell the property occupied by the borrower's family and as such, had no application in this case. However, Justice Vickery noted that his construction of section 77(1) of the Act is consistent with the provisions contained in the Charter to protect a person's home from “arbitrary interference”.

This decision does not prevent a mortgagee from exercising its power of sale over a family home. However, a mortgagee must take care to ensure it has regard to the borrower's interests where there are a number of properties available and the value of properties exceeds the sum owing.

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