IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2015-485-287
[2016] NZHC 932

BETWEEN	DEBT BUYERS LIMITED Plaintiff
AND	JASON PAUL ADAMSON Defendant

Hearing: 21 March 2016

Appearances: A Cherkashina and B J Norling for the Plaintiff
D G Dewar and M W Anderson for the Defendant

Judgment: 9 May 2016

JUDGMENT OF MALLON J

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Introduction

[1] The plaintiff (Debt Buyers) sues Mr Adamson in respect of a loan agreement he and his wife entered into with Propertyfinance Securities Limited (PFSL). The amount claimed is $791,846.84, made up of $286,794.08 principal and $505,052.76 interest. Interest at the default rate of 18.4 per cent from the date of filing this proceeding is also claimed.

[2] Mr Adamson opposes the claim on the following grounds:[1]

(a) Debt Buyers has failed to prove the assignments through which it ultimately acquired the claim against Mr Adamson;

(b) Debt Buyers' entire claim is statute barred; and

(c) Debt Buyers has not proven the interest component its claim.

Background

[3] The loan agreement was entered into on 5 March 2007. The parties were PFSL (the lender) and Jason and Adrianne Adamson (the borrowers). The sum advanced was $590,850. This agreement was entered into to purchase an investment apartment in Napier. The security for the loan, and interest on the loan, was a registered first mortgage on that property, which was also executed on 5 March 2007.

[4] On 19 April 2007 Mr and Mrs Adamson were advised that the loan agreement and mortgage had been assigned to New Zealand Guardian Trust (NZGT) and Propertyfinance Funding Nominee Limited (PFNL) (the first assignment).

[5] On 20 September 2008 Mr and Mrs Adamson defaulted by failing to make a payment under the loan. On 30 September 2008 PFNL gave notice under s 119 of the Property Law Act 2007 of default under the mortgage. The notice required the Adamsons to remedy the default by payment of the sum of $22,229.92 on or before 7 November 2008. It advised Mr and Mrs Adamson that if they did not do so "all amounts secured by the mortgage will become payable" and the mortgagee's power to sell the mortgaged land would become exercisable. Mr and Mrs Adamson failed to remedy the default as required by the notice.

[6] On 21 April 2009 PFNL sold the property for $360,000. After deducting costs and disbursements, this left a shortfall $362,137.70 under the loan. This comprised $286,794.08 of the principal and $75,343.62 in interest.

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1 Other pleaded grounds were abandoned at the hearing.

[7] On 15 July 2009 Mrs Adamson was adjudicated bankrupt.

[8] On 30 August 2013 NZGT assigned its interests in the loan agreement and the mortgage to PFSL (the second assignment). On 29 August 2014 PFSL assigned its interest in its "Loan Book" to Debt Buyers (the third assignment).[2] PFSL gave notice to Mr and Mrs Adamson of that assignment on the same day.

[9] On 11 September 2014 Debt Buyers wrote to Mr and Mrs Adamson making demand for $774,869.61. The letter advised that Debt Buyers had calculated this sum as the outstanding amount under the loan including all interest outstanding. Mr Adamson did not make any payment towards this debt.

[10] On 14 April 2015 Debt Buyers brought this proceeding. It claimed the shortfall of $362,137.70 under the loan after the sale of the property on 21 April 2009. It also claimed interest of $505,052.76, being Debt Buyers' calculation of the interest (including default interest) under the loan agreement for the period 22 April 2009 to 14 April 2015.[3]

Issue 1: proof of assignments

[11] Mr Adamson puts Debt Buyers to proving that it is the owner of the debt. The evidence of the assignments must therefore be considered.

[12] Two documents were executed by Mr and Mrs Adamson on 5 March 2007: a loan agreement and a mortgage. The loan agreement provided that this mortgage was the security for the loan and interest on the loan (and defined "Securities" as this mortgage). It also provided that if there was any conflict between the loan and the mortgage, the lender (PFSL) could determine which provision prevailed.

[13] The loan agreement provided that the lender could "assign its rights and transfer its obligations" under the agreement to any person. It provided that if this

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2 The Loan Book was a number of shortfall loans as described in the Deed of Assignment. This included the Adamsons' loan.

3 These two sums total $867,190.46. However Debt Buyers acknowledges that the interest component of the shortfall ($75,343.62) is statute barred, which reduces its claim to $791,846.84.

happened, "the assignee may exercise all of the Lender's rights under this agreement (and any Securities)...". The mortgage provided that the security holder "may without notice at any time assign or transfer, or grant a security interest in this instrument and the security interests witnessed herein."

[14] The document(s) pursuant to which the loan agreement and the mortgage were assigned to NZGT and PFNL (the first assignment) were not produced in evidence. To prove the first assignment Debt Buyers relies on the following evidence.

[15] First, Debt Buyers relies on a letter dated 19 April 2007 from PFSL to Mr and Mrs Adamson. This letter stated:

> As part of our funding arrangements, from 08/03/2007 your loan and its associated mortgage have been transferred from Propertyfinance Securities Limited to The New Zealand Guardian Trust Company Limited (as trustee of the Propertyfinance Securities RML2005-3 Trust) ("Trustee") and Propertyfinance Funding Nominees Limited (as nominee and bare trustee for the Trustee) ("Nominee").
>
> Propertyfinance Securities Limited will until further notice continue to be responsible for the day to day servicing of your loan including receipting your payments, sending out statements and answering your general enquiries.
>
> Please note you are not required to make any changes to your loan payments. Your existing direct debit authorities will now be used to make payments to the account of Propertyfinance Securities Operations Limited, which receives those payments as Collection Agent for the Trustee and the Nominee. Your continued payments will satisfy your payment obligations under your loan.

[16] Second, Debt Buyers called evidence from Mr Queen, the managing director of PFSL at the time of the assignment referred to. Mr Queen confirmed that this letter correctly recorded what occurred. He advised that PFNL was a wholly owned subsidiary of NZGT at the time. It was not associated with PFSL.

[17] Third, Debt Buyers relies on the certificate of title for the property. This records (as relevant):

(a) a transfer to Mr and Mrs Adamson on 21 March 2007 at 10.18 am;

(b) a mortgage (number 7267460.3) to PFSL on 21 March 2007 at 10.18 am; and

(c) a transfer of mortgage (number 7267460.3) to PFNL on 2 July 2007 at 9 am.

[18] Fourth, Debt Buyers relies on the notice under s 119 of the Property Law Act 2007 given by PFNL to Mr and Mrs Adamson on 30 September 2008. That notice described PFNL as the "mortgagee" under the memorandum of mortgage.

[19] Fifth, Debt Buyers refers to the mandate dated 23 January 2009 which NZGT issued to Standby Services Limited for the sale of the property. The mandate, amongst other things, described PFNL as the mortgagee of the property and referred to the Property Law Act notice expiring on 7 November 2008.

[20] Sixth, Debt Buyers notes that there is no evidence of Mr Adamson having challenged the sale by PFNL.

[21] Seventh, Debt Buyers refers to NZGT assigning its interest in the loan agreement back to PFSL on 30 August 2008. The terms of that assignment recorded that the Vendor of the assets being assigned was NZGT (as trustee of the Propertyfinance Securities RML2005-3 Trust) and included PFNL "as the trustee's nominee to hold the assets …". The terms also included a warranty from the Vendor that it was "the sole and beneficial owner" of the assets.

[22] Lastly, Debt Buyers refers to a letter dated 4 June 2015 from NZGT to Debt Buyers. This letter is said to be concerning PFSL and NZGT "in its capacity of trustee of the Propertyfinance Securities RM 2005-1 Trust and in its capacity as trustee of the Propertyfinance Securities RML 2005-3 Trust (the "Trustee")". The letter stated:

> We understand that you have approached PFSL requesting evidence to support the assignment of the loan book as set out in the attached schedule to this letter (the "Loan Book") from PFSL to the Trustee.
>
> On behalf of the Trustee and its nominee, Propertyfinance Funding Nominees Limited, for each and every assignment we can confirm that the

> Trustee purchased the Loan Book and associated securities from PFSL and that PFSL assigned absolutely to the Trustee all PFSL's right, title and interest in the Loan Book and associated securities and the Trustee assumed all obligations in relation to those rights.

[23] The first assignment must be proven on the balance of probabilities. It may be proved by evidence other than by producing the assignment document.[4] The letter from PFSL (first item) is evidence of an assignment having taken place. The assignment is said to be of the loan agreement and the associated mortgage. The assignment is said to have been to two parties: NZGT and PFNL. NZGT is said to have taken the assignment as trustee of the Propertyfinance Securities RML2005-3 Trust and PFNL has taken the assignment as a bare trustee and NZGT's nominee. All the other items are consistent with this (including the seventh item when an assignment from NZGT as trustee of the RML2005-3 Trust and PFNL as nominee back to PFSL was entered into). In so far as PFNL was registered as the mortgagee (third item), and issued the Property Law Act notice as mortgagee (fourth item), other evidence (first, seventh and last items) is consistent with PFNL having done so as NZGT's nominee and there is no evidence it did so in any other capacity.

[24] As noted above a second assignment took place. Mr Queen gave evidence that PFSL was an investor in the Propertyfinance Securities RML 2005-3 Trust and it purchased from NZGT the shortfall under the loan agreement. The terms of the second assignment are recorded in an agreement which has been produced in evidence. The agreement is dated 30 August 2013 between NZGT "in its capacity as trustee of the Propertyfinance Securities RML 2005-3 Trust" and PFSL as "Purchaser."

[25] The vendor was defined as follows:

> "Vendor" means the Trustee and includes Propertyfinance Funding Nominees Limited as the Trustee's nominee to hold the Assets and perform the Obligations on its behalf.

[26] The agreement provided:

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4 See *R v Whimp* [2008] NZCA 405; *Rameka v Wikatene* (2008) 27 FRNZ 149 (HC); *ANZ Bank of New Zealand Limited v Bell* [2015] NZHC 391.

The Vendor has agreed to sell, assign and transfer, and the Purchaser has agreed to purchase and assume, the Assets and the Obligations on the terms and conditions set out in this agreement.

[27] "Assets" was defined as meaning:

all of the Vendor's right, title and interest ... under and in connection with the Documents and Related Documents including (without limitation):

(a) all amounts due or to become due to the Vendor under or in connection with the Documents;

(b) all rights to any cause of action or remedy under or in connection with the Documents and the Related Documents; and

(c) all other rights, powers and benefits (express or implied) of the Vendor arising under or in connection with the Documents and the Related Documents.

[28] "Documents" was defined as meaning:

(a) each Loan Agreement; and

(b) in relation to each Loan Agreement, each:

(i) Mortgage;

(ii) deed of priority;

(iii) guarantee or collateral security;

(c) each Liquidated Loss; and

(d) in relation to each Liquidated Loss, each

(i) loan agreement;

(ii) deed of priority;

(iii) guarantee or collateral security; and

(iv) loan statement.

[29] "Related Documents" was defined as meaning, in relation to each Loan Agreement, each (if any) solicitor's certificate, policy of insurance which records the interest of the Vendor as mortgagee, loan application form and loan file.

[30] "Loan Agreement" was defined as meaning "a loan agreement described in schedule 1". Mortgage was defined as meaning "a registered mortgage over Land,

situated in New Zealand, which is held by the Vendor to secure an Obligor's obligations under a Loan Agreement." "Liquidated Loss" was defined as meaning "a liquidated loss described in schedule 6.

[31] Under the agreement the Vendor agreed to comply with all reasonable requests of the Purchaser to:

> ...
>
> (c) deliver to each Obligor pursuant to a Loan Agreement a notice in substantially the form set out in schedule 2;
>
> (d) deliver to each Obligor in respect of a Liquidated Loss, a notice in substantially the form set out in schedule 7;
>
> ...

[32] The schedule 2 notice gave notice of assignment of "Loan Rights" being the term loan agreement, the mortgage and any other security granted in favour of PFNL in support of the obligations under the loan agreement. The schedule 7 notice gave notice of assignment of a "Residual Claim Amount" as follows:

> We refer to the term loan agreement between us. The loan was secured by a mortgage over property that was subsequently sold under mortgagee sale. As the proceeds from the sale of the property were insufficient to satisfy your obligations to us under the loan agreement in full, we have a residual claim against you for the amount of $[*] ("Residual Claim Amount).
>
> We have, today, assigned to the New Lender [PFSL] all of our right, title and interest, present and future, vested and contingent under, and in connection with the Residual Claim Amount.
>
> To discharge your obligations in relation to the Residual Claim Amount you must make payment of this amount to the New Lender at the following account:
>
> ...

[33] The agreement therefore assigned two categories of assets. One category was where the remained a registered mortgage over the property. In that case the rights under the loan agreement and mortgage were assigned and the borrower was to receive the schedule 2 notice. The other category was where a mortgagee sale had taken place and there remained a residual amount owing under the loan agreement.

In that case the rights in respect of the residual amount owing were assigned and the borrower was to receive the schedule 7 notice.

[34] At the time of the second assignment the property which secured Mr and Mrs Adamson's loan had been sold by mortgagee sale and the mortgage was discharged. There was no mortgage to assign. There was, however, a residual amount under the loan agreement. Accordingly schedule 1 did not refer to the loan agreement with Mr and Mrs Adamson. Schedule 6 referred to Mr and Mrs Adamson.

[35] Under the agreement PFSL therefore did not obtain an assignment of the Loan Agreement (it not being listed in schedule 1). Nor did PFSL receive an assignment of the discharged mortgage. Rather PFSL obtained an assignment of NZGT's rights to, and cause of action in relation to, the residual claim amount (being NZGT's liquidated loss following the mortgagee sale) under Mr and Mrs Adamson's loan agreement. The amount which comprised the Residual Claim Amount was not specified in schedule 6, but was defined as the amount outstanding under the loan after the mortgagee sale. No evidence was adduced as to whether a notice in the schedule 7 form was given by NZGT and/or PFNL in respect of this assignment.[5]

[36] The third assignment took place on 29 August 2014 when Debt Buyers purchased PFSL's loan book which included Mr and Mrs Adamson's loan. The terms of this assignment were adduced in evidence. Under this document PFSL was described as the assignor and Debt Buyers was described as the assignee. The assignment was as follows:

> In consideration for the payment made by the Assignee in accordance with the Letter of Offer, the Assignor hereby assigns to the Assignee absolutely, and the Assignee takes assignment of, all of the Assignor's right, title and interest in the Loan Book with effect from the date of this Deed.

[37] The Loan Book was defined as meaning "the shortfall loans described in schedule 1 of this Deed." Schedule 1 contained a list of loans by account name and balance as at 10 January 2013 and/or 20 August 2014. The account names in the list

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5 Notice of an assignment is not a legal requirement under the Property Law Act 2007 but determines to whom the debtor is to make payment, in contrast with the position under s 130(1) of the Property Law Act 1952 which applies to assignments made before 1 January 2008. Burrows, Finn and Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at [17.1.5].

included Mr and Mrs Adamson. Their balance as at 10 January 2013 was recorded as being $362,137.70 (that is, the shortfall after the sale of the property on 21 April 2009). No amount was recorded for the balance as at 20 August 2014.

[38] On 29 August 2014 PFSL gave notice to Mr and Mrs Adamson that it has "assigned and transferred all of its rights, title and interest in the residual debt owing by you to PFSL under your loan account of $362,137.70 to [Debt Buyers]".

[39] I am satisfied on the evidence on the balance of probabilities that:

(a) PFSL assigned its rights under the loan agreement and the mortgage to NZGT (as trustee of the trust) and that PFNL was NZGT's nominee for holding the mortgage on its behalf.

(b) NZGT (as trustee of the trust) assigned to PFSL its rights under the loan agreement, following the mortgagee sale and the discharge of the mortgage, to recover the residual sum owing under the loan agreement of $362,137.70. The assignment did not include an assignment of the mortgage.

(c) PFSL assigned its rights in the residual debt of $362,137.70 owing under the loan agreement to Debt Buyers. This assignment did not include an assignment of the mortgage.

[40] Accordingly Debt Buyers has standing to bring the proceeding against Mr Adamson in respect of the residual debt of $362,137.70 which arose under the loan agreement with PFSL, pursuant to an assignment from PFSL to NZGT, a further assignment from NZGT (back) to PFSL, and a further assignment from PFSL to Debt Buyers.

Issue 2: limitation defence in respect of whole claim

[41] By s 4 of the Limitation Act 1950 (the 1950 Act) "actions founded on simple contract" must be brought within 6 years of the date the cause of action accrued.[6] This is subject to other provisions of the Act.

[42] Section 20 provides:

> **20 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land**
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale), after the expiration of 12 years from the date when the right to receive the money accrued.
>
> ...
>
> (4) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due:
>
> ...

[43] Debt Buyers submits that s 20 of the 1950 Act applies. It submits it accordingly had 12 years to bring its claim for the principal sum and that it can claim interest under the loan agreement for the six years prior to commencing its proceeding. In support of its submissions it relies on a line of authorities in England which were recently applied in the New Zealand High Court in a proceeding similar to the present one.

[44] The first of that line of authorities is *Bristol & West Plc v Bartlett*.[7] In this case the English Court of Appeal heard three appeals together. In each appeal the lender had exercised its mortgagee power of sale and was seeking to recover the shortfall under the loan. The claims for the shortfall were brought outside the six

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6 The Limitation Act 2010 does not apply because s 59 of that Act provides that actions based on acts or omissions before 1 January 2011 are governed by the Limitation Act 1950. The Adamsons' omission to pay occurred in 2008.

7 *Bristol and West plc v Bartlett* [2002] EWCA Civ 1181, [2003] 1 WLR 284.

year period for a simple contract action. The Court had to consider whether s 20 of the Limitation Act 1980 (UK) applied to the claims. That section is identical to s 20 of the 1950 Act in all material respects although s 20(5) of the UK provision corresponds with s 20(4) of the 1950 Act.

[45] The borrowers contended that the claims were not for "money secured by a mortgage" because the mortgages were discharged when the properties were sold by the mortgagee. The claims for the shortfall were said to be brought pursuant to the underlying contract of loan, which was a simple contract action and thus time-barred.

[46] The terms of the mortgage deed varied in each case. However in each case the Court considered that the cause of action arose in respect of money secured under the mortgage:

(a) Where there was an antecedent contract of loan, the Court rejected an argument that the shortfall was claimed pursuant to that contract rather than pursuant to the mortgage deed. The Court considered the loan contract had merged with the mortgage contract. Even if these had not merged, the lender would be entitled to choose to recover the shortfall under the mortgage deed rather than the contract.

(b) Where the mortgage deed expressly provided that the borrower was required to pay any shortfall after a mortgagee sale, the Court rejected an argument that a separate cause of action accrued when the shortfall was ascertained. The Court considered the relevant cause of action arose from the default under the mortgage deed.

[47] The Court concluded as follows:[8]

> We do not consider that there is any question of reading words into the statute. The question is whether the phrasing of section 20(1) of the statute "any principal sum of money secured by a mortgage" refers only to a principal sum secured by a mortgage at the time when action is brought or whether it is sufficient that the principal sum of money be secured by a

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8 *Bristol and West plc v Bartlett*, above n 7, at [30]-[32].

> mortgage at the start of the twelve-year limitation period, whatever may have happened thereafter. Since the subsection refers to "the date on which the right to receive the money accrued" it is much more natural to read the sub-section as applying to mortgages existing on the date on which such right accrued. It is the borrowers rather than the lenders who seek to read words into the statute when they submit that the principal must continue to be secured by a mortgage at the time when action is brought.
>
> We, therefore, reject the borrower's submissions on s 20(1) and decide that the section applies to any action to recover any principal sum of money secured by a mortgage which existed when (as here) the right to recover the money accrued.
>
> On the basis that s 20(1) continues to apply to claims for principal, although the mortgage has been discharged when a sale is made, it must follow that claims for interest will be governed by section 20(5) and we so hold.

[48] Of the three cases in the appeal, one did not include a claim for interest but the other two did. In each of these cases the amount claimed was the interest accrued as at the time of the mortgagee sale. The lenders relied on the principle that, in the absence of appropriation by either the debtor or the creditor, payments will discharge interest before they discharge capital. Because of the way the arguments had proceeded in the lower court, the borrowers had not considered whether to call evidence on the question of appropriation after sale and whether any prior payments of principal had been made. The Court decided the borrowers should be allowed the opportunity to investigate the extent to which the lenders were seeking to claim interest which had been due for more than six years as opposed to principal. The outcome following that opportunity is not before me.

[49] The second case is *Scottish Equitable plc v Thomson*.[9] This also involved a lender attempting to recover the shortfall owing under a loan following a mortgagee sale from the borrower. The borrower was in substantial arrears by April 1991. The mortgagee sale took place in 1993 (the exact date is not specified). Proceedings to recover the shortfall were commenced on 2 March 1999. The amount claimed included outstanding principal, interest arrears and a further claim for interest until payment. The mortgage included an obligation to pay interest at the defined rate on any amount which remained unpaid after the date payment was due.

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9 *Scottish Equitable plc v Thomson* [2003] EWCA 211, [2003] All ER 59.

[50] Following *Bristol & West plc v Bartlett* the Court of Appeal held that the lender was seeking to recover the principal sum and interest which was money secured by a mortgage at the time the cause of action arose. Accordingly s 20(1) and (5) of the Limitation Act 1980 (UK) applied. This meant the proceeding to recover the shortfall in so far as it comprised the principal sum had been commenced in time. However only interest which had accrued under the mortgage from 2 March 1993 (that is, six years before the proceeding was commenced) could be claimed, as interest before that date was barred by s 20(5). The matter was remitted back to the lower court for interest to be calculated.

[51] The third case is *West Bromwich Building Society v Wilkinson.*[10] This also involved a lender attempting to recover the shortfall in repayment of a loan following a mortgagee sale, together with interest, many years after the default and resulting mortgagee sale. As with the other two cases, one of the issues was whether s 20 applied where an advance was originally secured by a mortgage but the security was realised before the proceeding commenced. The House of Lords held that *Bristol & West plc v Bartlett* was correctly decided on this issue. The cause of action arose when the default occurred. At the time of default the loan was secured by the mortgage. In this case the default had occurred more than twelve years before the proceeding was commenced. Accordingly the claim was statute barred. The Court did not address the question of when the interest claimed became statute barred.

[52] This line of authorities was followed in New Zealand by *Debt Buyers Limited v Hancox.*[11] This case is similar to the present in that Debt Buyers was suing a borrower as an assignee of the debt from PFSL, who in turn was an assignee of NZGT as trustee of a Propertyfinance Securities Trust and which had transferred the mortgage to PFNL as nominee, who in turn was an assignee of PFSL. The loan agreement and mortgage were also in the same terms as the present case.

[53] The borrower was in default in May 2008. The property was sold by mortgagee sale leaving a shortfall under the loan of $552,537.14 as at November 2008. Debt Buyers commenced proceedings in October 2014. As at the hearing in

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10 *West Bromwich Building Society v Wilkinson* [2005] UKHL 44, [2005] 1 WLR 2303.
11 *Debt Buyers Limited v Hancox* [2015] NZHC 2484.

September 2015 Debt Buyers' claim was for the $552,537.14 shortfall together with interest and default interest of $965,665.61.

[54] The borrower took no steps in the proceeding. An application by Debt Buyers for summary judgment was unsuccessful.[12] This was because the Associate Judge considered it was necessary to give a notice, separate from a default notice, calling up the principal sum. The matter then proceeded by way of formal proof. Debt Buyers succeeded in its claim against the borrower at the formal proof hearing.

[55] The main issue at the formal proof hearing was whether the Associate Judge was correct about the notice requirement. The High Court Judge considered he was not. The Judge also addressed the limitation period. He referred to *Bristol & West plc v Bartlett* and held that s 20(1) of the 1950 Act applied to Debt Buyers' claim. This meant that a twelve year limitation period applied and the claim had been brought in time. As to the interest claimed, the Judge referred to s 20(4) and said:[13]

> It is clear therefore that the lender is entitled to recover the interest falling due in the six year period prior to the issue of proceedings. This was the view of the English Court of Appeal again in relation to the provision of the same wording in the English Act in *Scottish Equitable plc v Thomson.* The plaintiff's claim is calculated on this basis.

[56] In the present case counsel for Mr Anderson submits that the *Bristol & West plc v Bartlett* line of authorities is distinguishable. They did not deal with a situation where the rights under the loan and the mortgage were split. Here the mortgage was held by PFNL which exercised the power of sale. Counsel submits that when NZGT subsequently assigned its rights under the loan agreement to PFSL it was only the rights under that agreement that were assigned. The mortgage did not travel with the assigned agreement because it was discharged at the time of the assignment. This issue was not put to the High Court in *Debt Buyers Limited v Hancox* and therefore not addressed.[14]

[57] Debt Buyers submits that PFNL held the mortgage as nominee and bare trustee for NZGT. It submits that the loan monies were secured by a mortgage and it

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12 *Debt Buyers Limited v Hancox* [2015] NZHC 668.
13 *Debt Buyers Limited v Hancox*, above n 11, at [14].
14 *Debt Buyers Limited v Hancox*, above n 11.

is irrelevant for the purposes of s 20(1) that the mortgage was held in the name of another party.

[58] The *Bristol & West plc v Bartlett* line of authorities were considering the mortgagee's cause of action under the mortgage. They emphasise the need to examine whether the principal sum of money was secured by a mortgage at the time when the right to receive the money accrued. As the default gave rise to a right to repayment of the loan, and the loan was secured by a mortgage at the time of the default, the twelve year period applied even though the mortgage had been discharged. In the present case it is necessary to identify when the cause of action arose and precisely what was assigned after the mortgagee sale.

[59] As discussed above, after the mortgagee sale NZGT assigned to PFSL its rights to the residual claim amount, including its rights to any cause of action in respect of the residual claim amount. It is apparent from the subsequent assignment from PFSL to Debt Buyers that the residual claim amount assigned to PFSL was $362,137.70 being the shortfall after the mortgagee sale on 29 April 2009.

[60] NZGT's rights to receive payment of $362,137.70 depend on the terms of the loan agreement and/or the mortgage. The loan agreement provided as follows:

(a) The term of the agreement was three years from the date of the advance (that is, March 2010).

(b) Clause 3.1 provided that interest at the Interest Rate would be charged on the Loan at monthly intervals calculated from the Date of the Advance.

(c) Clause 3.2 provided that interest would be calculated on a daily basis on the amount of the Loan outstanding each day. It further provided that interest would accrue from the Date of the Advance until the Loan was repaid in full.

(d) Clause 4.1 required the borrower to "repay the Loan and pay interest on the Loan as referred to in the Loan Schedule and Disclosure Statement" (the statement). The statement provided that the borrower was to pay interest only monthly payments of $4,406.76 for the first 24 months of the Loan and the remaining monthly payments in an amount to be determined.

(e) Clause 4.2 required the Borrower to pay "all other amounts payable under this agreement to the Lender on written demand being made by the Lender."

(f) Clause 4.3 required the borrower to pay any remaining part of the Loan, and interest on the Loan, on the last day of the term (that is, by March 2010);

(g) Clause 4.11 provided that if any money payable by the Borrower to the Lender was not paid when due "the Borrower must pay the Lender interest on the Loan at the Default Interest Rate from the time the payment was due until the payment is made."

(h) Clause 5.1 provided that the borrower is in default under the agreement if it "fails to make a payment under this agreement ... when it is due."

(i) Clause 5.2 of the loan agreement provided:

> If the Borrower is in default under this agreement, then, without prejudice to its other rights and remedies, the Lender may do any one or more of the following (but without being required to do so):
>
> (a) Cancel any undrawn amount of the Loan; and
>
> (b) Cancel any of the Lender's other obligations to the Borrower under this agreement or any other loan agreement between the Lender and the Borrower; and
>
> (c) Require the Borrower to immediately repay the Loan, pay all accrued interest on the Loan, and pay all other amounts payable under this agreement or any one or more of the

Securities or any other loan agreement between the Lender and the Borrower; and

(d) Enforce any one or more of the Securities.

(j) Clause 1 provided that where there was a conflict between any provision in the statement, the loan agreement or the securities, the Lender may determine which provision prevailed.

(k) Clause 11.1 provided that the Lender may assign its rights and transfer its obligations under the agreement to any person and "[i]f this happens the assignee may exercise all of the Lender's rights under this agreement (and any Securities) and a reference to the Lender in this agreement will include a reference to the assignee."

[61] The mortgage provided that "the provisions of memorandum number 2002/4119 registered in the Land Registry Office for [the Hawke's Bay District] shall be deemed to be incorporated".

[62] Clause 2 of the memorandum defined "the secured moneys" as meaning "all moneys which are now or at any time in the future owing to the security holder".

[63] Clause 20(a) of the memorandum provided:

20. RIGHTS AND POWERS OF SECURITY HOLDER ON DEFAULT

(a) Rights and powers generally: If default occurs, the security holder may at any time or times thereafter, in addition to any rights, remedies or powers otherwise conferred upon the security holder by law, exercise all or any of the following rights and powers separately or any two (2) or more of them concurrently.

(i) call up the balance of the secured moneys in accordance with clause 21; or

...

(iv) in respect of land, sell, enter into possession of or appoint a receiver of rental income of that land in accordance with clause 23; or

...

(vi) obtain judgement and enforce such judgement against the party granting the security (and if more than one all or any one of them) for all of the secured moneys or if the amount realised from the exercise of any of the security holder's rights and powers is not sufficient to pay the secured moneys in full, the amount of such deficiency.

...

[64] Clause 21 of the memorandum provided:

> 21. ACCELERATING PAYMENT OF SECURED MONEYS ON DEFAULT
>
> If default occurs, the secured moneys will become due and payable by the party granting the security in accordance with the provisions in any agreement relating to their payment and, to the extent that there is no agreement then:
>
> (a) in respect of any land, immediately upon expiry of a notice served under section 92 of the Property Law Act 1952 without the need for any further notice of demand; and
>
> (b) in respect of personal property, immediately without the need for any notice or demand;
>
> and in either case together with interest calculated at the prescribed interest rate for a period of one month in addition to interest to the date of repayment of the secured moneys.

[65] Accordingly when a default occurred the mortgagee could call up the balance of the secured amounts in accordance with clause 21 of the memorandum and/or exercise the power of sale under the mortgage and/or obtain judgment for any deficiency if the amount it realised from the sale was insufficient to repay the secured monies in full. Under clause 21 of the memorandum the secured moneys were due and payable "in accordance with the provisions in any agreement relating to their payment". Under the loan agreement the Lender could require Mr and Mrs Adamson "to immediately repay the Loan, pay all accrued interest on the Loan, and pay all other amounts payable under this agreement" if they were in default by failing to make any payment under the loan agreement when it was due.

[66] In this case the evidence is that PFNL, as mortgagee under the memorandum of mortgage, gave notice that Mr and Mrs Adamson were in default as at 24 September 2008, the amount of the default at that date was $22,229.92, if this default was not remedied by 7 November 2008 "all amounts secured by the mortgage will

become payable" and the mortgagee could exercise its power of sale. The amounts secured by the mortgage were the amounts owing under the loan agreement. Under the loan agreement, as a result of the default, NZGT had the right to require payment of all amounts owing as at 7 November 2008. Through PFNL, it gave notice that these amounts were payable.

[67] NZGT's cause of action therefore arose on 8 November 2008 when the default had not been remedied by 7 November 2008. As at that date the amounts owing were "secured by a mortgage". NZGT's right to recover the shortfall, in so far as it represented principal, was subject to the twelve year time limit under s 20(1) and, in so far as it represented interest, was subject to the six year time limit under s 20(4). When NZGT assigned its right to recover the amount owing to PFSL, that assignment included NZGT's "rights to any cause of action" in connection with the Liquidated Loss (namely, the amount of $362,137.70). That was a cause of action subject to those time limits. Likewise, PFSL assigned to Debt Buyers all its rights in the Loan Book, which included the amount of $362,137.70 owing by Mr and Mrs Adamson. By that assignment Debt Buyers obtained the right to sue Mr and Mrs Adamson for that outstanding amount subject to those time limits.

[68] I therefore conclude that Debt Buyers' claim is subject to the time limits in s 20 even though it did not receive an assignment of the mortgage and even though the mortgage was discharged when the assignment(s) took place.

Issue 3: the interest claim

[69] Under the loan agreement interest accrued on a daily basis and default interest was payable if any money payable to the Lender was not paid when due. The default interest rate was 5 per cent above the annual interest rate. In reliance on these provisions, Debt Buyers calculated interest and default interest for the period from 22 April 2009 (that is, from the date of the mortgagee sale) to 14 April 2015 on the outstanding amount of $362,137.70 as at 22 April 2009. This amounted to $505,052.76.

[70] There is a difficulty with this calculation. It is calculated on the basis of an outstanding amount ($362,137.70) which includes both principal ($286,794.08) and

interest ($75,343.62). Debt Buyers accepts that its claim for the interest component of that outstanding amount is statute barred. As such interest has been calculated on an amount which is statute barred.

[71] There is a further difficulty. Debt Buyers' claim to interest accrued and continuing to accrue under the loan agreement depends on whether it received an assignment of the Lender's right to claim that interest. For the period from the mortgagee sale (21 April 2009) until the second assignment (30 August 2013) NZGT had not made a claim for that interest (or, at least, there is no evidence that it did). That is apparent from schedule 7 which referred to a residual claim amount of a specific sum. In accordance with the terms of that schedule, payment of that specific sum would discharge the borrower's obligations in relation to that sum. Although a notice in that form is not in evidence, it is apparent from the terms of the second assignment to PFSL (which referred to an assignment of a "Liquidated Loss") and the notice with PFSL later gave to Mr and Mrs Adamson that the residual claim amount was $362,137.70.

[72] I consider that NZGT assigned to PFSL its rights to recover that specified sum. I consider that if the assignment was intended to include the right to recover interest and default interest accruing on that specified sum under the loan agreement on or after 21 April 2009 until the Residual Claim Amount was paid in full it needed to do so in clear terms. In my view it did not do so. It might be argued that the right to recover future interest accruing on the Residual Claim Amount was a right "in connection with the Residual Claim Amount". However, NZGT had not asserted that right. Rather it had specified the amount of its claim and assigned the right to pursue that specified claim to PFSL. NZGT did assign its rights and interests under the Loan Agreements specified in Schedule 1. Mr and Mrs Adamson's Loan Agreement was not included in that schedule.

[73] The notice which PFSL gave to Mr and Mrs Adamson of the assignment to Debt Buyers is consistent with my view that PFSL did not receive such an assignment. That notice referred to an assignment of its "rights, title and interest in the residual debt owing by you to PFSL under your loan account of $362,137.70 to [Debt Buyers]." It did not refer to an assignment of Mr and Mrs Adamson's

outstanding and continuing interest obligations under the loan agreement. Rather, the notice was consistent with a debt of a fixed sum having been assigned.

[74] If PFSL did not receive an assignment of the right to recover interest accruing under the loan agreement after 21 April 2009, then it follows that Debt Buyers did not receive that assignment either. Consistent with that view, "the Loan Book" was defined by reference to an amount set out in schedule 1 of the agreement. In relation to Mr and Mrs Adamson that amount was $362,137.70, and was described as the balance as at 10 January 2013. No amount for accrued interest was included as at that date and no amount was specified for the 20 August 2014 date.

[75] Further, clause 2.2 of the agreement between PFSL and Debt Buyers required PFSL to "immediately deliver to [Debt Buyers] the original documents comprising the Loan Book." NZGT was asked to and did provide confirmation that it had received all PFSL's right, title and interest in the Loan Book and associated securities. It is, however, unclear whether PFSL delivered to Debt Buyers the loan agreement pursuant to this clause.

[76] Additionally, clause 2.2 provided that PFSL was to give notice to the debtor of each Loan described in the Loan Book in the form set out in Schedule 2. That form referred to an assignment of "the residual debt owing by you to PFSL under [*describe relevant document*] of [*insert amount owing*] to" Debt Buyers. However, the notice which PFSL in fact gave Mr and Mrs Adamson did not refer to the loan agreement. Rather it referred only to their "loan account."

[77] Counsel for Debt Buyers submitted that the documents indicated that for a period PFSL calculated interest on the Residual Claim Amount. However Mr Queen was not asked about that and there is no evidence that PFSL made any demand of Mr and Mrs Adamson for that interest.

[78] PFSL's actions in respect of the assignment to Debt Buyers are therefore consistent with it having received from NZGT only an assignment of NZGT's rights, title and interest in the residual debt of $362,137.70 and not a right to claim interest under the loan agreement from 20 August 2009 until the loan was repaid in full.

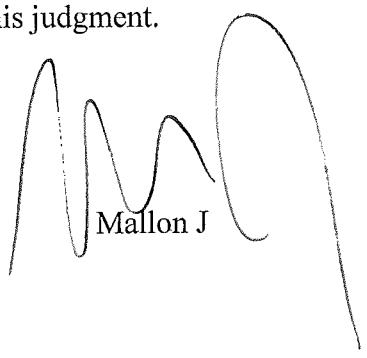
[79] I conclude that Debt Buyers has failed to prove that it obtained an assignment of NZGT's right to claim interest under the loan agreement from 20 August 2009 until the loan is repaid in full. It is therefore not entitled to the interest it has claimed of $505,052.76. For the same reason it cannot recover interest from the date of filing the proceeding at the default interest rate. Lastly, as Debt Buyers accepts, the interest component of the residual debt of $362,137.70 is statute barred.

Result

[80] Debt Buyers is entitled to judgment in the sum of $286,794.08.

[81] In the alternative to interest under the loan agreement, Debt Buyers claimed interest pursuant to the District Courts Act 1947 at 5 per cent. The reference to the District Courts Act appears to be an error. Interest can be claimed pursuant to s 87 of the Judicature Act 1908. As the cause of action against Mr Adamson accrued on 8 November 2007, this proceeding was not brought until 14 April 2015 and no explanation was provided as to why a proceeding was not brought years earlier, it is not appropriate to award interest from the date the cause of action accrued. Interest pursuant to s 87 of the Judicature Act at 5 per cent from 14 April 2015 until the date of the hearing before me is awarded on the judgment sum of $286,794.08.

[82] My preliminary view is that costs on a 2B basis should be ordered in Debt Buyers' favour. If costs on the basis of that indication are not agreed, the parties may submit brief memoranda on costs within three weeks of the date of this judgment.



Mallon J