Hamwood & Ors v Murdoch [2010] NTSC 62

PARTIES:	KERRY RAYMOND HAMWOOD AND CAROL ELLEN HAMWOOD AS TRUSTEES FOR THE SUNSHINE FAMILY TRUST AND PAUL WILLIAM STONE AND TINA STONE AS TRUSTEES FOR THE PAUL & TINA STONE SUPER FUND v GERALD MURDOCH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 89 of 2010 (21027580)
DELIVERED:	18 NOVEMBER 2010
HEARING DATES:	28 OCTOBER 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Mortgages – Application for possession – Whether notice is defective – Effect of defect in notice – Whether unconscionable conduct by a mortgagee is a bar to an order for possession.

Law of Property Act (NT) s 86, s 89

Sibard Pty Ltd v AGC (Advances) Ltd (1992) 6 BPR 13-178; *Websdale v S & JD Investments Pty Ltd* (1991) 24 NSWLR 573; *Starceavich & Anor v Swart & Associates Pty Ltd* [2006] NSWSC 960, (2006) ANZ ConvR 527.

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	A McLaren

Solicitors:

Plaintiff:	Halfpennys
Defendant:	A McLaren

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hamwood & Ors v Murdoch [2010] NTSC 62
No. 89 of 2010 (21027580)

BETWEEN:

KERRY RAYMOND HAMWOOD AND CAROL ELLEN HAMWOOD AS TRUSTEES FOR THE SUNSHINE FAMILY TRUST AND PAUL WILLIAM STONE AND TINA STONE AS TRUSTEES FOR THE PAUL & TINA STONE SUPER FUND
Plaintiff

AND:

GERALD MURDOCH
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 18 November 2010)

[1] The Plaintiff has applied by Originating Motion and Summons seeking an order for possession of a property consequent upon an alleged default under a mortgage. The Plaintiff does not seek judgment for the debt. The Defendant has filed a Summons seeking dismissal of the Plaintiffs' motion and various alternative procedural orders, essentially that the matter proceeds as if commenced by Writ. The Defendant has not applied for an interim injunction restraining the Plaintiffs from exercising their power of sale.

[2] Affidavit material was filed by both parties. The Plaintiffs rely on the affidavit of Paul William Stone sworn 13 August 2010 and Hieu Van Nguyen sworn 30 September 2010. Two affidavits were filed by the Defendant, sworn on 1 September 2010 and 27 October 2010. There was some controversy regarding the admissibility of part of the Defendant's affidavits on relevance grounds. In some instances the relevance was arguable but could not be established without the benefit of the substantive argument and I accepted the evidence *de bene esse*. Having heard the Defendant's argument I am satisfied that the evidence in question remains relevant, albeit marginally.

[3] In summary form the relevant facts are:-

a. The Defendant was constructing a house on property owned by him at Wagait Beach ("the Property").

b. Construction had been funded initially from his available funds.

c. The Defendant had an expectation of receiving further funds within the short term.

d. The Defendant was overdue on a progress payment and his builder would not continue with construction.

e. The Defendant sought a short term loan to cover the interim period.

f. The Defendant had applied for a short term loan from a mainstream lender and had been refused.

g. Application was made to the Plaintiffs for the short term loan by a finance broker on behalf of the Defendant.

h. The Plaintiffs agreed to advance the Defendant the sum of $252,000.00 on security of a mortgage ("the Mortgage") over the Property on terms including the following:-

   a) Repayment within one month;

   b) Interest payable monthly at the rate of 6% per calendar month and 12% in the event of default;

   c) The first month's interest was to be calculated on the full amount of the loan and was to be paid in advance.

   d) There were provisions for progress payments.

i. The Plaintiffs required that the Defendant obtain independent legal advice in respect of the documentation and the Defendant obtained such advice and provided a certificate to that effect.

j. The loan was taken out on 9 November 2009 with an initial draw down on that date.

k. The initial draw down paid out all bar $88,205.00 of the sum borrowed.

l. Further draws made on 30 November 2009 ($53,120.00) and 23 December 2009 ($28,000.00) which left all bar $7,085.00 of the amount of the loan fully drawn.

m. Repayment of the loan did not occur on 9 December 2009. On 14 December 2009 the Plaintiff's agent wrote to the Defendant advising that he was in default and confirming that default interest would apply.

n. A further warning letter was sent to the Defendant on 22 March 2010.

o. On 24 May 2010 a Notice of Demand pursuant to the Mortgage was served on the Defendant.

p. On 9 July 2010 a Notice of Intention To Exercise Power of Sale pursuant to section 89(2) of the Law of Property Act ("the Act") bearing that date was served on the Defendant.

q. The Defendant has not made any payments at all, whether of principal or interest, since the date of the loan.

r. The amount of the Defendant's debt with interest was approximately $490,000.00 in May 2010 and as at the date hereof will now be well in excess of $500,000.00.

[4] Ms McLaren, counsel for the Defendant argues that the Plaintiffs' application for possession ought to be dismissed on a number alternative grounds namely:-

a. That the Defendant is not in default.

b. The Plaintiffs are in breach of the terms of the loan agreement ("the Loan Agreement") as they have failed to refinance the debt and had

been authorised to do so. The Defendant's affidavit also alleged breaches of an agreement to obtain certificates from the builder before making payments.

c. The notices given are defective and invalid.

d. It is harsh, oppressive, unjust or unconscionable that the Plaintiffs be permitted to have possession of the Property.

[5] The first basis i.e., that the Defendant is not in default, turns on a novel construction of the relevant documents. If I understand the argument put forward by Ms McLaren, she argues that the Loan Agreement specifies the "Repayment Date" as being one month after the "Advance Date". In turn, she submits that the "Advance Date" has not occurred because the full amount of the loan has not been drawn. Alternatively, she argues that as three draws have occurred on the loan it is not possible to determine the "Advance Date". On either basis she submits that the one month that must expire before the "Repayment Date" is reached has not commenced. Logically if that position were to be correct then repayment would not be due until one month after the balance of the loan was drawn notwithstanding that the loan was clearly approved to only be for a one month period. The argument overlooks that the failure to pay interest is a default in its own right and there is no dispute on the evidence that the Defendant has not made any payments, whether or interest or principal pursuant to the Loan Agreement or Mortgage.

[6] The relevant Loan Agreement provides, in clause 3.1 as follows:-

> "The Borrower must, unless required under another provision of this Agreement to repay the Debt at an earlier date, repay the balance outstanding of the Debt to the lender on the Repayment Date".

In turn "Repayment Date" is defined in the Schedule to the Loan Agreement as:-

> "means the date for repayment of the Debt as specified in the Reference Schedule;".

In turn again the Reference Schedule provides in respect of the Repayment Date that:-

> "The Debt must be repaid in full by the date which is one month after the Advance Date".

The Advance Date is defined in the Reference Schedule as:-

> "The date that the Lender makes the advance to the Borrower, which will not be before 6 November 2009."

Clause 2.4 of the Loan Agreement is also relevant and that provides:-

> "The Borrower must draw down the Principal Sum on the Advance Date or as soon as reasonably practicable thereafter."

[7] The bulk of the loan was drawn on 9 November 2009 when approximately $166,000.00 was paid out as directed by the Defendant. Noting that the "Advance Date" is the date when "the advance" is made, there is nothing in the documents that I can see that prohibits multiple advances or that requires or supports an argument that the full amount borrowed has to be drawn before the "Advance Date" occurs. That was clearly not in contemplation of the parties, including the Defendant as is evident from his evidence and given the draws were made at his request or on his authority. If the contrary

were correct then the Defendant would be in breach of clause 2.4 of the Loan Agreement. In my view the only appropriate interpretation which is consistent with the apparent intentions of the parties and which will give the agreement efficacy is the date of the initial draw down i.e., 9 November 2009, is the "Advance Date" for the purposes of the Loan Agreement.

[8] Ms McLaren submitted in the alternative that the date of each draw was an "Advance Date" pursuant to the Loan Agreement. She argued that as there were three advance dates then three separate notices had to be given. There is likewise nothing in the wording of the documents to support that contention. In my view, the "Advance Date" is 9 November 2009 and the "Repayment Date" is consequently 9 December 2009. On my reading of the documents therefore the Defendant's failure to repay the principal sum on or after the 9th of December 2009 amounts to a default under the terms of the loan documentation.

[9] The second ground is based on allegations of breach by the Plaintiffs. The Defendant contends the Plaintiffs were required to refinance the debt in the event of the Defendant's default. Ms McLaren relies on clause 17.1 of the Loan Agreement and clause 3 of the Mortgage. The former provides:-

> "If the Borrower is in default of this Agreement or at any time after the date which is 1 month before the Repayment Date, the Lender is authorised to make applications for refinance of the Debt and sign supporting documents on behalf of the Borrower to other financial institutions for finance to repay the Debt."

Paragraph 3 of the Mortgage provides:-

> "The Mortgagor hereby irrevocably appoints the Mortgagee the attorney of the Mortgagor immediately on or at any time after any breach or default by the Mortgagor to exercise in the name of the Mortgagor all rights, powers and remedies of the Mortgagee expressed or implied herein and to receive any monies payable to the Mortgagor in respect of the Mortgaged Land whether in respect of the insurance compensation or otherwise to do all things required to be done by the Mortgagor and to execute all documents and do all things necessary in regard to such matters."

[10] There is no evidence of any agreement by the Plaintiffs to undertake the refinancing of the Defendant's debt. Although clause 17.1 of the Loan Agreement authorises the Plaintiffs to refinance and paragraph 3 of the Mortgage contains the necessary enabling provisions, those provisions only authorise the Plaintiffs. It is not a positive covenant undertaken by the Plaintiffs and the utilisation of that authority remains optional on their part. The authority in the provisions relied upon is not an authority which is exclusive of the Defendant and it does not preclude the Defendant from refinancing the debt. The provisions are clearly a back up for the Plaintiffs' benefit and protection. There being no evidence of any agreement whereby the Plaintiffs agreed to arrange refinancing and having thereby suspended or waived their rights under the loan documentation, the argument has no merit.

[11] If the Defendant could establish that the Plaintiffs were in breach for failing to refinance, it was not made entirely clear as to how this would bar the Plaintiffs' entitlement to an order for possession. It is difficult to see how any loss could flow from that or if it was causative of loss, how that could operate to prevent possession unless for instance the Defendant's damages

exceeded the debt. Similarly in relation to another allegation by the Defendant of a breach by the Plaintiffs. Although this was not argued by Ms McLaren, it was raised in the Defendant's first affidavit. The Defendant alleges that it was agreed that the Plaintiffs would obtain a certificate of completion and invoice from the builder before final payment was made and, in the case of progress payments, a certificate of inspection and invoice before the progress payment was made. The Defendant asserts that the Mortgage requires this and that it did not occur. He claims that in lieu the Plaintiffs only obtained his approval before making payments.

[12] Firstly, I cannot find any provision to this effect in either the Mortgage or the Loan Agreement. It would need to be established that it were a positive covenant on the part of the Plaintiffs before it had any bearing on the current application. There is a reference to something along these lines in a document titled "Settlement Instructions" however that only specifies a payment to the named builder "…upon receipt of invoices". Secondly, the Defendant's bare assertion that the Plaintiffs did not obtain a certificate from the builder, without more, is not proof. Lastly, if a breach could be established then at best this would give the Defendant a right to damages. The Defendant's evidence is that he nonetheless approved of the payments. That could be seen as a waiver by the Defendant but at the very least it would seriously and negatively impact on the question of damages. Therefore even if the Defendant could overcome the legal and evidentiary hurdles to support his allegations claims, it remains to be demonstrated as to

how or why an order for possession should be refused. This ground is therefore also dismissed.

[13] The Defendant's third basis is that the notices given by the Plaintiffs are invalid and of no effect. There are three notices given to the Defendant by the Plaintiffs. The first is what appears to be an informal notice, almost a courtesy letter. Its primary purpose appears to be to notify the Defendant that the default interest rate had commenced. It is a letter from the Plaintiffs' agent dated 14 December 2009. It states in the first paragraph:-

> "I am writing to notify you that your loan is now in DEFAULT. The default rate of interest of 12% per month is being applied to the balance outstanding."

Ms McLaren argued the reference to "your loan" must mean the full amount borrowed and, as at that time the full amount had not been drawn down (in breach of clause 2.4 of the Loan Agreement in any case), the Defendant could therefore not be in default as alleged in the letter. Whether default exists is a matter of fact. It cannot depend on the construction of a letter such as this. There is nothing to warrant that interpretation. The remaining words of that paragraph make it clear that the full amount borrowed is not being referred to. Moreover that letter is not relied upon by the Plaintiff as a notice for the purposes of satisfying the pre-requisites to possession. There is no merit in this argument.

[14] Ms McLaren also attempted to draw support for the contention that default had not occurred from the date of the last draw. This occurred on 23

December 2009 whereas the Plaintiffs allege that the Defendant was in default from 9 December 2009. Ms McLaren relied on this as evidence that the Defendant was not in default, submitting that the further draw would not have been permitted if the Defendant was in default. Mr Roper submitted that all it evidences is that the Plaintiffs had set aside the full amount agreed to be lent until drawn down pursuant to the terms of the loan. Although it is unusual for a lender to permit further draws while a borrower is in default, the contention of Mr Roper sits better with the facts overall. It is also possible that the Plaintiffs were prepared to still then consider an application by the Defendant for an extension of the Repayment Date pursuant to clause 3.6 of the Loan Agreement. The letter of 14 December 2009 discussed in the preceding paragraph seems to support this.

[15] Ms McLaren then went on to submit that if the draw was made after default had occurred, then it must be a "new" and separate loan. She argued therefore that it was not regulated by the Mortgage or the Loan Agreement and therefore subject to different enforcement pre-requisites. That is untenable. The Defendant authorised that draw and whether the Plaintiffs may have been entitled to refuse the payment, it is clearly still part of the one loan.

[16] The second notice is dated 26 March 2010 and again is from the Plaintiff's agent. It commences by alleging a default under the Mortgage and sufficiently identifies the Mortgage. Demand is then made for payment in the following terms:-

> "The Lender now demands that you pay the amount of $372,960.00 being the amount owing by you to the Lender under your mortgage."

The amount of $372,960.00 is presumably the amount calculated by or on behalf of the Plaintiffs as being due as at that date. The letter then goes on to require payment of that amount, plus accruing interest at 12% per month, on or before 27 April 2010 (i.e., one month plus one day), under threat of legal proceedings to recover payments or possession.

[17] The third notice is titled "NOTICE OF DEMAND" and is dated 18 May 2010. It is a document prepared and signed by the Plaintiffs' solicitor. That notice alleges that there has been a default under the Mortgage. It identifies the Mortgage and recites that the mortgagee demands payment. The demand is made for payment of the amount of $403,420.00 and the schedule to the notice sets out how that is calculated. As with the second notice, there is no demarcation between principal and interest, something which Ms McLaren relies on to assert that interest has been capitalised. It is in any event a very simple calculation to demarcate principal and interest given that no repayments have been made. The notice requires payment within 14 days after service and warns that in the event of non compliance the Plaintiffs intend to exercise their powers under the Mortgage by selling the Property.

[18] The last notice is titled "NOTICE OF EXERCISE OF POWER OF SALE". It purports to be a notice pursuant to section 89 of the Act. It is addressed to the Defendant and it is signed by the Plaintiffs' solicitors on behalf of the Plaintiffs. It is dated 9 July 2010. It alleges default under the Mortgage in

the amount of $494,738.53 (as at 17 May 2010) for principal and interest, again without demarcating how much is principal and how much is interest. It sufficiently identifies the Mortgage and the security Property. It requires payment of the specified amount plus accruing interest within 31 days after service of the notice and also warns that the Plaintiffs may proceed to sell the Property in the event of non compliance.

[19] The relevant provisions of the Mortgage and Loan Agreement dealing with the provision of notices are clauses 8 and 9.2 respectively. Clause 8 of the Mortgage provides:-

> "That upon default being made in payment at the respective times and in the manner hereinbefore mentioned of the principal sum or any part thereof or interest thereon, or upon default being made in the observance or performance of any of the covenants herein contained or implied by the Law of Property Act the Mortgagee shall (notwithstanding any omission, neglect or waiver of the right to exercise or any of such powers on any former occasion) be at liberty to exercise all or any of the powers of a Mortgagee under those Acts immediately upon or at any time after default as hereinbefore mentioned, without the necessity of giving the Mortgagor any notice whatsoever required by those Acts or otherwise. And that if at any time default shall be made in the due payment of the interest on any of the days when the same respectively shall become payable or within the time thereafter hereinbefore mentioned, if any mentioned, or if the power of sale given to the Mortgagee under either of those Acts shall become exercisable, then the principal sum shall immediately become due and the Mortgagor will thereafter pay the same on demand."

Clause 9.2 of the Loan Agreement provides:-

> "If an Event of Default occurs under this Agreement:

i) the Debt shall, at the option of the Lender, immediately become due and payable upon the Lender making a written demand upon the Borrower;

ii) the Event of Default shall be deemed to be an event of default under the Transaction Documents; and

iii) the Lender shall be entitled to exercise all or any of its Rights or remedies under each of the Securities and the Transaction Documents."

[20] "Transaction Documents" are defined in the Loan Agreement to include all correspondence between the parties, the Loan Agreement itself, and each "Security". The latter is defined as being the Mortgage. Also relevant is clause 34 of the Mortgage which stipulates that the Mortgage is collateral to the Loan Agreement and that the covenants in the Loan Agreement are deemed to be covenants under the Mortgage. In particular it states that a default under the Loan Agreement is treated as a default under the Mortgage.

[21] Ms McLaren relied on a number of authorities in support of her challenge to the validity of the notices. Her challenge is partly based on the Plaintiffs having capitalised, and therefore compounded, interest on default. Ms McLaren argued that the notice was rendered invalid as it did not correctly stipulate what was principal and what was interest. If I understood her argument correctly she seems to rely in part on authorities which state that once interest is capitalised it becomes part of principal and not interest. The effect of the authorities is that once interest is capitalised, it is no longer open to a lender to treat non payment of interest as a default. See *Sibard Pty*

Ltd v AGC (Advances) Ltd[1] and the line of authorities discussed there. In my view the distinction is meaningless in this case as the default is of both principal and interest.

[22] Ms McLaren also relied on *Websdale v S & JD Investments Pty Ltd*[2] *("Websdale").* She submitted that the case is authority for the principle that a notice which demands payment of principal which is not then due cannot be valid. This seems to rely in part on her submission based on the construction of the documents, that the Defendant was not in default or that principal was otherwise not due. I have found to the contrary. To the extent therefore that the submission is predicated on that finding, it fails.

[23] In any event the general principle in *Websdale* does not support Ms McLaren's contention in my view. That case involved a situation where the requisite notice contained both a correct assertion that the mortgagor had defaulted in the payment of interest and an erroneous statement that the principal was then outstanding. That was held to be defective resulting in a finding that the relevant statutory requirements had not been satisfied. The case is not authority for the proposition that an error in the amount claimed in a statutory notice invalidates the notice which appears to be Ms McLaren's point. This is clear from the judgment of Clarke JA where, as to the effect of referring to an incorrect amount alone in a statutory notice, he said:-

[1] (1992) 6 BPR 13-178
[2] (1991) 24 NSWLR 573

> "The section requires the mortgagee to bring to the attention of the mortgagor the particular default and to require him to make it good. It does not in terms require the mortgagee, in a case in which it is claimed that the mortgagor is in default in the payment of interest or principal, to specify the particular amount outstanding. What it requires is that the mortgagee identify the particular default or defaults. In these circumstances it is difficult to see why, provided the default is correctly identified, the specification of a greater or lesser amount than actually due should affect the validity of the notice….in the absence of a requirement that the notice identify with particularity the precise amount outstanding, it will be good so long as it identifies correctly the defaults which the mortgagor is given the opportunity of remedying."[3]

[24] *Websdale* dealt with the statutory notice required before a mortgagee's power of sale could be exercised. Although one of the notices in the current case purports to be given under the equivalent Northern Territory legislation (section 89 of the Act), the other notices are notices of demand pursuant to the Loan Agreement and Mortgage. Although there is some scope for application of the aforesaid principles to the current case it needs to be noted, as Mr Roper pointed out, that the section 89 notice is not required to be given as a pre-requisite to an order for possession. It is only a pre-requisite to the exercise of the power of sale. Without conceding that there is any defect in any of the notices that have been given, Mr Roper submitted, correctly in my view, that if there is a defect in the section 89 notice, that is not fatal to an order for possession as there is nothing to prevent the Plaintiffs from giving a further, and valid, notice pursuant to section 89 of the Act.

[3] (1991) 24 NSWLR 573 at p 578-579

[25] The applicable statutory provisions are sections 86 and 89 of the Act. The former sets out the powers of a mortgagee which apply to all mortgages and relevantly provides as follows:-

> **86 Powers incident to interest of mortgagee**
>
> If a mortgage is made by instrument, the mortgagee has the following powers to the like extent, but not further, as if they are conferred by terms contained in the instrument of mortgage:
>
> (a) subject to section 89, a power to sell, or to concur with any other person in selling, the mortgaged property or a part of the mortgaged property, and all the interest of the mortgagor in the property or part whether subject to prior charges or not and whether together or in lots or in subdivision or otherwise, by public auction or by private contract and for a sum payable either in one sum or by instalments, subject to the conditions with respect to title, evidence of title or other matters as the mortgagee thinks appropriate, and with power to vary any contract for sale, buy in at an auction or rescind any contract for sale and to resell, without being answerable for any loss occasioned by the exercise of the power, with power to make the roads, streets and passages and grant the easements of right of way or drainage over the mortgaged property as the circumstances may require and the mortgagee thinks appropriate;
>
> (b)-(c) Omitted
>
> (e) a power (on default) to enter into possession of the land and receive the rents and profits of the land or from time to time let the land for a term not exceeding 12 months;
>
> (d)-(f) Omitted
>
> (g) subject to section 89, a power to sell an easement, right or privilege of any kind over or in relation to the mortgaged property;

[26] Although the power to sell in section 86(a) is specifically made subject to section 89 (as is the power in section 86(g)), the power to enter into possession of land in section 86(e) is not similarly preconditioned. It only

requires that there be default. That supports an interpretation that a notice under section 89 of the Act is not a pre-requisite to an order for possession. That has further support from the wording of section 89 of the Act which provides as follows:-

> **89 Regulation of exercise of power of sale**
>
> (1) A mortgagee must not exercise the mortgagee's power of sale (whether conferred by an Act or an instrument of mortgage) unless:
>
> (a) default has been made in the payment of the principal money or interest (or a part of it) secured by the instrument of mortgage, notice requiring the payment of the amount that constitutes the default has been served on the mortgagor and the default has continued for 30 days (or any other period of not less than one day as agreed) after the service of the notice; or
>
> (b) default has been made on the part of the mortgagor or of some other person concurring in the making the mortgage in the observance or fulfilment of a provision contained in the instrument of mortgage or implied by this or another Act, notice requiring the default to be remedied has been served on the mortgagor and the default has continued for 14 days after the service of the notice.
>
> (2) A notice under subsection (1) is to be in the approved form.
>
> (3) Omitted.

[27] Subsection (1) is clearly stated to apply only in respect of the mortgagee's power of sale. There is no reference to the power to take possession. Even if section 89 applied to a mortgagee's power to take possession on default, it seems to me that, consistent with *Websdale* the notice will be sufficient if it specifies "the payment of the amount that constitutes the default". Although the default can be either principal or interest or both, in my view stipulating one global amount is sufficient.

[28] Subsection (2) requires the notice to be in approved form. Ms McLaren tendered the approved form. The notice purporting to be under section 89 of the Act which was served on the Defendant complies. Interestingly, the notes in the approved form which serve as a guide to the completion of the form, stipulate as requiring, in respect of the description of the default:-

> "*In specifying the default include the details of the default such as (a) the amount due and owing and the date on which the amount was to be paid; or (b) other action not taken as required under the mortgage or in compliance with a legislative provision and the date when the action should have been taken.*"

There is nothing which requires demarcation of the principal and interest. Indeed, all the notice requires is the total outstanding which sits well with the apparent purpose of the notice.

[29] The power to take possession pursuant to section 86(e) only requires that there has been default. No statutory notice is required. Clause 9.2 of the Loan Agreement does not require a notice. The Mortgage requires a demand but does not set out any pre-requisites or requirements for particulars in that notice (see paragraph 19 above). Accordingly, specifying the one amount including interest satisfies the requirements of notice under the Mortgage.

[30] In my view, the necessary pre-conditions to the Plaintiff taking possession, and, to the extent that it is necessary that I decide that at this stage, the exercise of the power of sale have been satisfied.

[31] That then leads to the last basis upon which the Plaintiffs' application is challenged namely, that the terms of the Loan Agreement and Mortgage are harsh, oppressive, unjust and unconscionable.

[32] The nub of Ms McLaren's argument is that the Defendant was in desperate need for the loan and was thereby vulnerable to exploitation by the Plaintiffs and was so exploited. She relies on the high rate of interest, i.e., 6% per month which doubles on default. That however is something which the evidence shows the Defendant was aware of and accepted. Ms McLaren submits that the requirement of payment of the first month's interest in advance is exorbitant. Again it appears that the Defendant was aware of this. Ms McLaren did not cite any authority for that proposition. In my view, requiring payment of interest in advance is quite normal. She claims the establishment costs and costs including legal fees ($16,770.00) are exorbitant. She says the overall terms of the Loan Agreement and the Mortgage evidence the Defendant was specifically vulnerable. I cannot agree with that bare statement. Ms McLaren goes on to allege that the Plaintiffs acted unconscionably and took advantage of the Defendant's vulnerability.

[33] If there is anything which could be said to be unconscionable in the transaction that could only relate to the rate and calculation of interest, including default interest, and to the establishment costs. There is no genuine dispute or arguable case as to the principal being due.

[34] Ms McLaren referred me to the case of *Starceavich & Anor v Swart & Associates Pty Ltd*[4] ("*Starceavich*") as the basis in law for her submission. That case is authority for the proposition that an arguable case of a mortgagee taking unconscientious advantage of a special disadvantage of the mortgagor and the mortgagor being vulnerable to exploitation can be the foundation for an interim injunction restraining the exercise of a mortgagee's power of sale. I accept that as a general principle. The current application of the Defendant is not for an interim injunction although Ms McLaren seems to be treating it as such.

[35] Even if it were, it is difficult to see how, on the facts before the Court, it could be said the Defendant's case is arguable. The Defendant needs to show that the Plaintiffs took unconscientious advantage of a special disadvantage of the Defendant. It appears the Defendant was eager to secure a short term loan for one month. He had already been rejected by a mainstream lender which suggests that he was a high lending risk. Although the terms of the extant loan provide for high rates of interest, higher than usual interest rates for a short term loans and for high lending risks are not unusual. I do not see how it could be said that the Defendant was vulnerable or was exploited when he had options. As things stood at the time that he borrowed the funds he only required funds for one month. On what he then knew, he could have simply waited one month.

[4] [2006] NSWSC 960, (2006) ANZ ConvR 527

[36] The evidence therefore does not establish vulnerability, at best it establishes that the Defendant was over confident and eager to continue building works and was prepared to pay the price of a short term loan. There is no evidence to support Ms McLaren's contention that the Plaintiffs took advantage of anything other than perhaps the opportunity to earn a high rate of investment over a short period. The Defendant obtained independent legal advice in respect of the transaction. There is no evidence at all from the Defendant as to the nature of that advice, in particular regarding interest rates, default rates and the compounding effect of default. There is no suggestion of the inadequacy of that advice. The facts of this case on the available evidence, including the evidence of the Defendant's understanding and advice in respect of the documentation, fall far short of the position in *Starceavich.*

[37] In cases of interim injunctions in respect of restraining a mortgagee's power of sale, the general rule is that a mortgagee will not be restrained merely because the amount due is in dispute. In such cases the mortgagee will only be restrained if the mortgagor pays the amount claimed into Court with some exceptions. Even noting the dispute as to the high rate of interest and the high level of establishment costs, it is inconceivable that the Defendant should not be required to at least pay in the amount of the principal and interest at mainstream lender rates. Some allowance for establishment costs would also likely be required. This leaves aside for the moment the issue that the Defendant would also face arguments concerning his apparent acquiescence. He has been in default for almost a year, he has not made any

payments at all, he ignored all notices and only acted formally when served with the application for the order for possession. There has been no explanation for that.

[38] The Defendant has not offered to pay any amount into Court, nor is there any evidence of his capacity to do so. If he is not even in the position to pay in the amount of principal into Court, as there is really credible argument that has been advanced in respect of at least the principal, any steps to prevent the exercise of the power of sale appear futile. He has not sought to do that other than indirectly by challenging the application for an order for possession.

[39] He is still able to separately seek an account if so advised, including in respect of any discrepancies in the calculation of interest. He is able to issue proceedings in respect of any available relief. He is still able to seek the interim injunction.

[40] In summary I find there is no merit in any of the arguments advanced on behalf of the Defendant to deny the order for possession. On the other hand, all the pre-requisites for an order for possession are satisfied. I am prepared to make the orders sought in the Plaintiffs' Summons dated 17 August 2010. There will be orders in terms of paragraphs 1, 2 and 3 of that Summons. The Defendant's Summons is dismissed.

[41] I will hear the parties as to costs.