



Legislative Assembly

Conveyancing Amendment (Mortgages) Bill Hansard

Extract

08/03/2001

Second Reading

Mr D. L. PAGE (Ballina) [11.20 a.m.]: I move:

That this bill be now read a second time.

This bill will amend the Conveyancing Act 1919 to impose a higher duty of care than currently exists for mortgagees and chargees in New South Wales with regard to the sale of the property. The object of the bill is to amend the Conveyancing Act 1919 to impose a duty on mortgagees and chargees, that when exercising a power of sale in respect of mortgaged or charged property, to take all reasonable care to ensure that the property is sold for not less than its market value if the property has a market value, or for the best price reasonably obtainable if the property does not have a market value. Furthermore, that when in possession of mortgaged or charged property, the mortgagee or chargee must take all reasonable care to ensure that the value of the property is not diminished.

The intention of the legislation is to increase the duty of care of financiers when they take possession of the assets of a defaulting borrower. There is a difference between the Federal and State law regarding the duty of care for financiers concerning the disposal of assets when they become mortgagee in possession. In New South Wales case law the only requirement is that a selling mortgagee act with good faith and not act wilfully or recklessly. This relatively low duty of care can have the effect of sacrificing the mortgagor's interests when the property is sold. Yet under Federal Corporations law when exercising a power of sale in respect of property the selling mortgagee must take all reasonable care to sell the property at not less than its market value, or otherwise the best price that is obtainable, in view of the circumstances under which the property is being sold. The temptation for financiers in New South Wales is to sell the assets with a view to ensuring their own debt is covered with little regard to any remaining equity held by the borrower.

Other common ways for financiers or mortgagees not to fulfil their duty of care includes failing to advertise the property for a sufficient period, incorrectly describing the size of the property, failing to pursue prospective buyers interested in purchasing the property at a higher price and failing to generally promote the property to obtain the best possible price. The amendment also provides that a mortgagee maintains the asset in a marketable form prior to its sale. In increasing the duty of care for the mortgagee it is envisaged that the mortgagor, who may already be experiencing unfortunate financial circumstances, will not be further disadvantaged. In respect of the details of the bill, new section 111A provides that:

- (1) In exercising a power of sale in respect of mortgaged or charged property, a mortgagee or chargee must take all reasonable care to sell the property for:
 - (a) not less than its market value, if the property has a market value when it is sold, or
 - (b) the best price that is reasonable obtainable, having regard to the circumstances existing when the property is sold, if the property does not have a market value when it is sold.
- (2) It is the duty of a mortgagee or chargee in possession of mortgaged or charged property to take all reasonable care to prevent the value of the mortgaged or charged property from being diminished.
- (3) The title of the purchaser is not impeachable on the ground that the mortgagee or chargee has committed a breach of any duty imposed by this section, but a person damaged by the breach of duty has a remedy in damages against the mortgagee or chargee exercising the power of sale.
- (4) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or chargee from a duty imposed by this section.
- (5) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee or chargee to account to the mortgagor or charger.
- (6) This section applies to mortgages and charges whether made before or after the commencement of this section but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement of this section.

In other words, this legislation is not retrospective. Sub-paragraph (7) makes it clear that:

This section applies to mortgages and charges under the Real Property Act 1900.

In summary, this legislation is designed to increase the duty of care of mortgagees and chargees from merely acting in good faith and not acting wilfully or recklessly, to the higher duty of care as prescribed in the Federal Corporations Law. When exercising a power of sale in respect of mortgaged or charged property, they must take all reasonable care to ensure the property is sold for not less than its market value if the property has a market value, or for the best price reasonably obtainable if the property does not have a market value. It also provides that when in possession of a mortgaged or charged property, the mortgagee must take all reasonable care to ensure that the value of the property is not diminished.

Finally, I would like to thank Mr Peter Jackson from Jackson Smith Solicitors, for drawing the weakness in the New South Wales legislation to my attention. He has provided case studies of circumstances where mortgagors have been disadvantaged by the relatively low duty of care that prevails in New South Wales compared with the Federal jurisdiction and where litigation has often ensued. I thank him for his valued input. I believe this legislation is morally and legally the correct approach to take in relation to a mortgagee or chargee's duty of care. I commend the bill to the House.