

(1) Brian Oswald Barber and  
(2) B.O. Barber (Himatangi) Limited *Appellants*

v.

(1) Henry Otho Barber and  
(2) Francis Henry Kember *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
4TH MAY 1989  
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*Present at the hearing:-*

LORD BRIDGE OF HARWICH  
LORD BRANDON OF OAKBROOK  
LORD OLIVER OF AYLMEYTON  
LORD GOFF OF CHIEVELEY  
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by Lord Oliver of Aylmerton]*

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This is an appeal from an order of the Court of Appeal of New Zealand (Cooke P. and Somers and Casey J.J.) made on 6th July 1987 varying (although not in any respect material to this appeal) an order of Greig J. in the High Court of New Zealand on 29th March 1985 whereby it was ordered that a mortgage dated 3rd March 1978 and made between the second appellant as mortgagor and the respondents as mortgagees be rectified by inserting therein a provision giving to the mortgagees the right, on or after 1st June 1979, to increase the rate of interest if the ruling rates of interest at that time in respect of farm property justified such increase and ordering that the respondents were entitled to damages as against the appellants in (*inter alia*) a sum of \$40,000 and to interest on such sum from 1st June 1984 to the date of judgment at the rate of 11% per annum. The sum of \$40,000 was the amount of the difference between interest on a sum of \$160,000 at the rate of 3% per annum and interest on the same sum at the rate of 13% per annum from 1st June 1979 to 1st June 1984.

The appeal raises no profound issues of law of general importance but merely a single short but difficult point of construction. The background can be shortly stated.

The respondents (together with the first-named respondent's wife) were at the material time the trustees of a family trust comprising certain farmland at Himatangi which, prior to 1974, had been occupied by the first-named respondent Mr. H.O. Barber and his wife. Mrs. Barber has since died. In 1974 Mr. and Mrs. Barber decided to retire from active farming and to sell the farm to a relative, the first-named appellant. Negotiations thereupon ensued for the settlement of a suitable price and of the necessary financing arrangements. These latter arrangements contemplated a part of the purchase price being left outstanding on mortgage for a period of ten years with interest at 3% per annum reviewable after five years. On 31st May 1974 a preliminary agreement was signed to give effect to the arrangements and it is the construction and effect of clause 4 of that agreement which have led to the present dispute. At that time the actual sum to be left outstanding had not been finally determined, but it ultimately crystallised at \$165,000. A purchase price was agreed at a sum of \$525,000 with certain provisions for adjustment according to a stock valuation to be carried out subsequently. Clause 4 of the agreement, so far as material, was in the following terms:-

"THAT settlement shall be effected on the 1st day of June 1974 on which date the sum of \$180,000 (\$190,000) ? shall be paid in cash ... and contemporaneously therewith the Purchaser will execute in favour of the Vendors a 1st Mortgage for \$165,000 - (\$180,000) ? over the freehold land comprised in the purchase for a term of ten years with interest at the lower rate of 8%, the said mortgage to provide inter alia that the mortgagees will have the right after five years to increase the rate of interest if the ruling rates of interest at that time in respect of first mortgages of farm property shall justify such increase."

Possession was taken on 1st June 1974 and a cash sum of \$180,000 was paid. A further sum of \$60,000 was paid in April 1975, thus leaving outstanding (a) the sum of \$165,000 to be secured by a first mortgage and (b) an additional sum of \$120,000.

There was some delay in executing the mortgage and certain negotiations took place during 1977 about the interest rate - the original suggestion being that the rates should be increased to 10% on the whole of the outstanding sums. It was finally agreed that the rate payable on the outstanding \$165,000 should be 10% reducible to 8% on punctual payment and the rate payable on the balance \$120,000 should be 12% reducible to 10%. A letter from the trustees' solicitors dated 21st March 1977 indicates that 12% was the then current mortgage rate. The mortgage was finally executed on 3rd March 1978, by which time the land had been vested in the second appellant, a limited company controlled by the first appellant. It secured the total

sum of \$285,000 and contained a covenant for the repayment of the principal on 1st June 1984 with payment of interest quarterly in arrears in the meantime at the rates agreed on the component parts of \$165,000 and \$120,000 respectively. It contained, however, no provision for the rate of interest to be altered or reviewed.

Thereafter quarterly demands for interest at the appropriate rates, differentiating between the sum of \$165,000 and the sum of \$120,000 were regularly sent out and met. The only alterations were that in June 1978 the sum of \$165,000 was reduced to \$160,000 and that from September 1978 onwards demands were sent out for interest on the sum of \$120,000 at the rate of 12%. These were met without, apparently, any question being raised. Although suggestions were made from time to time in correspondence that the rate of 8% was well below the current market interest rate no steps were taken to increase it nor was any demand made for any higher rate prior to 20th November 1981 when, in a letter from the respondents' solicitors, interest was claimed at the rate of 13% from 1st June 1979. It is common ground that until October 1981 both the appellants and the respondents had overlooked the provisions of clause 4 of the preliminary agreement and were unaware that there was any right reserved to increase the rate of interest. It is also common ground that 13% was on 1st June 1979 and at all material times thereafter the ruling rate for first mortgages of farmland in New Zealand.

The right of the respondents to increase the rate of interest having been disputed, proceedings were commenced on 3rd February 1983 seeking rectification of the mortgage, the repayment of the outstanding sum of \$120,000 and damages, being the difference between the rate of 8% on the sum of \$160,000 (and 12% on the sum of \$120,000) and 13% on both sums as from 1st June 1979. On 29th March 1985 Greig J. ordered that the mortgage be rectified and awarded the respondents damages in the amounts claimed with interest at the rate of 11% from 1st June 1984. From this decision the appellants appealed to the Court of Appeal which, on 6th July 1987, allowed the appeal as to one matter not material to this appeal relating to interest on the sum of \$120,000 but otherwise affirmed the order of Greig J. The appellants now accept the correctness of the decision of the High Court and the Court of Appeal as regards rectification of the mortgage so that the only matter now in dispute is the correctness of the award of damages assessed by reference to the difference over the whole period from 1st June 1979 onwards until 1st June 1984, when the mortgage was repaid, between 8% per annum on \$160,000 and 13% per annum on the same sum.

The wording of clause 4 of the agreement gives rise to obvious difficulties of construction which are in no way eased when it is read, as it now has to be read, in the context of the mortgage in which it has been inserted by way of rectification. Before the High Court, the appellants argued that the continued demands made by the respondents for interest at the rate of 3% and their failure for 2½ years to demand any increase in the interest paid constituted a waiver of any right conferred on them to receive an increased rate of interest and that such waiver barred any claim at all for additional interest. Alternatively, it was claimed that the respondents were at least debarred from claiming any interest at an increased rate prior to November 1981 when they notified the appellants that they required the interest at the rate of 13%. Greig J. expressed the view that the clause conferred an option on the respondents which could be exercised at any time after 1st June 1979 and that, when exercised, it operated retrospectively to increase the interest payable from the earliest date at which it could have been exercised if the respondents had chosen to exercise it.

The Court of Appeal adopted a somewhat different approach. Cooke P. concluded that, on a reasonable interpretation, the clause authorised one increase only by reference to the ruling rates at the end of the first five years but that the right to the increase was one which had to be exercised within a reasonable time after the expiration of the five years. Although he expressed some misgivings about the question whether 2½ years was a reasonable time, he was not prepared to differ from his brethren, both of whom thought that, in the circumstances, it was. Somers J. adopted a somewhat similar approach to the clause, but with this variant that he held that the right to increase the rate of interest had to be exercised within a reasonable time if it was to have retrospective operation from the beginning of the second five year period; but if it was not so exercised, it still continued to be exercisable but only with effect from the date of the exercise. Casey J. agreed that the clause must be construed on the footing that the parties contemplated an increased rate of interest being fixed at or reasonably close to the expiry of the first five years. He thought that it must be subject to an implied term that any increase must be made within a reasonable time thereafter. Both he and Somers J., however, held that, in the light of the fact that all the parties had overlooked the terms of the preliminary agreement, the period of 2½ years was reasonable and that, accordingly, interest at the rate of 13% was claimable from 1st June 1979.

The relevant clause is expressed in terms which are clearly susceptible of a number of different meanings. To begin with, to speak of the mortgagees as having "the right to increase the rate of interest" is capable of meaning that they are to have a vested right, without

more, to receive an increased rate of interest over the period mentioned or that they have then the right, or more properly the option, of imposing on the mortgagor, by some unilateral action, an obligation to pay an increased rate of interest in respect of the whole period once the option has been exercised. The latter seems to have been the view of the Court of Appeal, for otherwise the question of whether or not the right had been exercised within a reasonable time would appear to be irrelevant. Again the word "after" is capable of meaning either "on the expiry of" or "at any time after". Yet again, the reference to a rate prevailing "at that time" can relate back either to the end of five years, which is the only "time" actually mentioned, or to the date upon which the hypothetical increase is to take effect if the option is exercised at some other time.

A substantial part of the argument before their Lordships has been directed to the question of whether, in the circumstances, any right conferred on the respondents by clause 4 of the preliminary agreement was waived or whether the respondents were precluded from seeking an increase by the application of the doctrine of election. These are interesting and difficult questions but they either do not arise or at least cannot be answered until the logically anterior question of the proper construction of the clause has been determined.

That is a question which their Lordships have found to be one of considerable difficulty. In approaching it, it has always to be borne in mind that although the clause has, as a result of a decree of rectification, been lifted in its entirety from the antecedent agreement and inserted in the mortgage, so that it falls to be construed as part of that document and in the context of the other terms which that document contains, it cannot be overlooked that it was a term of a preliminary agreement which was intended to be translated into more formal terms and has to be interpreted accordingly against the background of the facts as they then existed. In the ultimate analysis, what has to be asked and answered is the question "what terms could both parties have insisted upon having incorporated into the mortgage if the agreement had come to be specifically performed?"

There appear to be at least three possible constructions that could be placed upon the somewhat delphic terms in which clause 4 is expressed. The one which is most favoured by the respondents is that it imposes upon the mortgagor an obligation to pay, as from 1st June 1979, an increased rate of interest equal to the ruling rate at that time, an obligation requiring no action on the part of the mortgagee before it arises. Their Lordships have not felt able to accept this, first because it fails to give any force to the requirement

to "justify" the rate of interest, and, secondly, because the reference to "rates" of interest in the clause indicate the possibility - a very practical possibility - of there being more than one "ruling rate". It has also to be borne in mind that this was a family transaction in which the mortgagor was, during the first five years, given the benefit of a reduced rate of interest which seems to have been well below the current market rate - at any rate if the rate current in 1977 immediately before the mortgage was executed is any guide. It would be entirely consistent with the genesis of the transaction that the respondents should wish to preserve some flexibility as to the interest rate to be charged without necessarily imposing an immutable obligation to pay the maximum rate which the market would stand. Finally, if the intention had been simply to substitute the ruling rate on 1st June 1979 for the rate of interest payable during the first five years nothing could have been easier to express.

A second construction and one which is much more consistent with the terms used is that there was to be imposed on the mortgagor an obligation to pay, in respect of the period of the mortgage commencing on 1st June 1979, such rate of interest as might be specified by the mortgagees subject only to its being a rate which, if challenged, could be justified by reference to the ruling rate on that date. This is, in substance, the alternative construction for which the respondents contend. Counsel paraphrases the clause thus:-

"The mortgagees will have the right to charge an increased rate of interest in respect of the period after the expiry of the first five years if the ruling rates of interest at the expiry of the first five years in respect of first mortgages of farm property shall justify such increase."

It is pointed out on behalf of the appellants, however, that clause 4 does not use the words "in respect of the period" and that even in counsel's paraphrase nothing is said about how or when the right is to be exercised or how the rate is to be specified. It can be said that it might operate very unfairly to the mortgagor to find, possibly several years into the second quinquennium, that the mortgagee was charging retrospectively interest at a rate which, if the mortgagor had known about it at the time, might have induced him to re-finance his purchase by redeeming and seeking finance elsewhere at a lower rate of interest. On the other hand, on this construction, the mortgagor is throughout aware both of the obligation to pay increased interest and of the ceiling within which the obligation can operate.

A third possible construction is that the clause imposes no obligation on the mortgagor at all unless and until the mortgagees seek to charge a higher rate of interest and that the obligation which then arises is to

pay the increased rate only in respect of the future—in other words, the clause confers upon the mortgagee an option arising on 1st June 1979 and exercisable at any time thereafter unilaterally to increase the rate for the future so long as the increase does not exceed the ruling rate at the time when the option is exercised. There are, however, equal difficulties about this. It seems in the highest degree unlikely that the parties can have contemplated that there should be more than one increase. If the words "at that time" refer to 1st June 1979 (which, on the face of them, they appear to do since no other time is specified) there is no logic in applying that date as the yardstick for an increase taking effect at some later time. If, on the other hand, "at that time" refers to the date of the increase, there is no machinery specified for ascertaining the date from which the increase is to take effect (for instance, from the date when the intention to impose the increase is notified, from the quarter day immediately preceding that date or from the next following quarter day).

Although there are powerful arguments for all three possible constructions which have been ably advanced by counsel for the parties, their Lordships are in the end persuaded that that which more closely accords with the practicalities and with the words which the parties chose to employ is the second construction already referred to. Clearly what the parties were seeking to provide for was the rate of interest which was to be chargeable for the second five years of the term of the mortgage. Equally clearly, as it seems to their Lordships, they were seeking to confer on the mortgagees a flexibility as to the rate to be imposed but at the same time to provide a readily ascertainable ceiling for the protection of the mortgagor. It is entirely consistent with this approach that there should be conferred on the mortgagees a right, once the first quinquennium has expired, to specify the rate of interest to be charged over the balance of the period. Had that been intended to operate from a date which might be other than the expiry of the period, the absence of any machinery regulating the mode of specification and of an express provision as to how and when it was intended to operate is not readily explicable.

Their Lordships differ from the approach of the Court of Appeal of New Zealand only in this that they see no reason why there should need to be implied into the clause the necessity for specifying the increased rate of interest either on the date of expiry of the first quinquennium or within a reasonable time thereafter, an implication which must, it seems, rest upon construing the word "after" as meaning "on the expiry of". Their Lordships can find no context for this in the words used nor any necessary justification for it in the surrounding circumstances against which the clause falls

to be construed. In particular their Lordships find difficulty in accepting the suggestion in the judgment of Somers J. that the effect of the exercise of the right by specifying the increased rate could vary according to whether it was or was not exercised within a reasonable time after 1st June 1979. There is no context from which such an intention can be gathered nor is it easy to see how, on the bare wording of the clause, the mortgagor could have insisted upon such a provision being inserted in the mortgage. Were it necessary to imply a term as to the giving of notice of increase within a reasonable time their Lordships share the misgivings of Cooke P. with regard to the question whether the mere failure to recall the existence of the clause can be a good ground for extending the period which would otherwise be considered reasonable. But their Lordships see no necessity for such an implication. A construction of the clause which imposes on the mortgagor an obligation to pay an enhanced rate within the agreed ceiling over the whole period of the second quinquennium makes good commercial sense and accords with the words which the parties have used. Clearly it could not have been intended that there should be more than one increase, but their Lordships see no reason why, as a matter of construction, the clause, which does not seek to impose any timetable in terms, should be subject to a requirement that the mortgagees should be under an obligation to specify the rate which they seek to charge within the agreed ceiling at any particular time after the expiry of the first five years. On the footing that the clause is treated as having been in the mortgage from the inception, the mortgagor suffers no detriment by the failure to specify the rate which he is going to be required to pay for the balance of the period of the mortgage. He knows of the obligation and can always seek to have it quantified if he wishes.

In their Lordships' view and having regard to the construction of the clause to which they have been persuaded, the mere continuance of demands for interest at the original rate up to November 1981 could not possibly constitute a waiver of the mortgagees' right to receive the increased rate nor can any question of an election to abandon the right arise. Although they have reached their conclusion by a slightly different route from that traversed by the Court of Appeal, the result is the same and the decision of the Court of Appeal must therefore be affirmed.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. It was agreed between the parties that whatever the result of the appeal there should be no order for costs of the proceedings before the Board.





