IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2026-404-443
[2026] NZHC 1874

UNDER	s 176 of the Property Law Act 2007 and pt 18 of the High Court Rules 2016
BETWEEN	JIVAN JYOTI RAHAL Plaintiff
AND	ASB BANK LIMITED Defendant
AND	TARA HOMES AKL LIMITED Intervenor

Hearing:	29 April 2026 and 9 June 2026
Appearances:	S P Pope and C F Butters for Jivan Rahal S L Hawksworth and S J McLean for ASB Bank Limited S E Wroe for Tara Homes Akl Limited as intervenor (on 9 June 2026)
Judgment:	30 June 2026

JUDGMENT OF JOHNSTONE J

This judgment was delivered by me on 30 June 2026 at 4pm
pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
One Legal Limited, Auckland
Simpson Grierson, Auckland
Pidgeon Judd, Auckland

[1] ASB Bank Limited is the mortgagee of a property in Penrose, held in the registered ownership of Jivan Jyoti Rahal (Mrs Rahal) and Davinder Singh Rahal (Mr Rahal). Following the expiry of default notices, the Bank (as mortgagee) entered an agreement to sell the property to Tara Homes Akl Ltd. Mrs Rahal applies for interim orders restraining ASB from settling the sale. She says:

(a) There is a serious question to be tried whether:

(i) she retains her entitlement under s 97(1) of the Property Law Act 2007 to redeem the mortgage, given ASB's unfettered entitlement to cancel its sale agreement with Tara Homes; or alternatively

(ii) in conducting the mortgagee sale, ASB did not discharge its statutory and equitable duties.

(b) The balance of convenience favours the grant of interim orders.

(c) As does overall justice.

[2] The Court's assessment of these propositions will determine the outcome of Mrs Rahal's application.[1]

Background

[3] Mrs and Mr Rahal married in 1990. In November 2005, Mr Rahal settled the Times Trust. Mrs and Mr Rahal became its trustees. As Times Trust trustees, Mrs and Mr Rahal purchased the Penrose property (Property) in 2011. Mrs Rahal says this was for the purpose of providing security in their retirement, for themselves and their family. The Property is comprised of a 2,403 square metre site on Great South Road, with a 715 square metre building housing a restaurant, 34 on-site car parks and multiple access points.

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1 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12], affirmed in *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344, [2020] NZCCLR 29 at [23].

[4] In April 2018, ASB advanced funds to Mrs and Mr Rahal directly, in their capacities as trustees, the lending secured by mortgage registered against the Penrose property's title. And in December 2018, ASB advanced funds to Bath and Tile Limited (later in liquidation), that lending secured by a limited guarantee and indemnity provided by Mrs and Mr Rahal as trustees, and further by the mortgage.

[5] In April 2020, Mrs and Mr Rahal leased the Property to Sohal Associates Limited. Sohal Associates has subsequently conducted the business of the restaurant housed at the Property. The lease is a five-year lease, with three rights of renewal of five years upon expiry of each term. It appears to have been entered without ASB's approval.

[6] In June 2024, ASB made demand on Mrs and Mr Rahal as guarantors, for $605,431.63, the amount then owing by Bath and Tile. The demand expired unremedied.

[7] In October 2024, ASB served default notices under s 119 of the Property Law Act. And in November 2024, it served notices under s 122 of that Act. The notices expired unremedied on 27 November 2024. At that point, ASB became entitled to exercise its mortgagee power to sell the Property.

[8] ASB commenced the mortgagee sale process by instructing real estate agents in June 2025. It received five tender offers. It invited the two highest offerors to submit best and final offers. On 6 November 2025, it accepted the offer made by Tara Homes, an entity related to Sohal Associates, at a price of $3,225,000 plus GST.

A serious question to be tried?

[9] I must consider whether there is a tenable combination of resolutions of the issues of fact and law on which Mrs Rahal could succeed at trial.[2]

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2 *Mikitasova v ASB Bank Ltd* [2016] NZHC 897, (2016) 17 NZCPR 419 at [77], citing *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 (VSC) at 311.

Issue One, My View: Mrs Rahal retains her entitlement under s 97(1) to redeem the mortgage

[10] Section 97(1) of the Property Law Act (the current Act) provides:

> **97 Equity of redemption**
>
> (1) The current mortgagor or any other person entitled to redeem mortgaged property may redeem it in accordance with this subpart at any time before it **has been sold**, under a power of sale, by the mortgagee or a receiver. …
>
> (emphasis added)

[11] For Mrs Rahal, Ms Pope submits that the terms of the agreement between ASB and Tara Homes (the Agreement) are such that the Property has not as yet "been sold" in the sense intended by s 97(1). She observes that cl 14 of the Agreement relevantly provides:

> **14. Intervening Events**
>
> 14.1 **If**:
>
> 14.1.1 any proper objection or requisition be insisted on which the vendor is unable or unwilling to satisfy or comply with; or
>
> 14.1.2 it is necessary for the vendor to obtain any consent or consents to the sale; or
>
> 14.1.3 as at the date of the auction or at any time before completion of the purchase any charging order, lien, caveat, notice of claim of interest under the Property (Relationships) Act 1976 or statutory charge is registered against the title to the Property sold, or if an injunction proceeding is issued, or any court order granted preventing sale and/or registration of a transfer in pursuance of this sale; or
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> 14.1.4 **for any other reason whatsoever** (not being limited in any way by reference to the foregoing);
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> (such events being an Impediment), **then the date for completion shall be deferred** to the third Working Day after such Impediment is discharged or removed, or consent obtained (in which case the date for completion shall be deemed to be such date for settlement) but **subject to the vendor's right to cancel this agreement as specified in clause 14.2**.
>
> 14.2 **If before settlement any of the events referred to in clause 14.1 occur, then the deposit (if paid) shall be refunded to the purchaser**

> **and this agreement will be at an end, and neither party shall have any claim or further rights against the other**.

(emphasis added)

[12] It thus appears ASB is entitled to cancel the Agreement, at any time prior to settlement, for "any … reason whatsoever". And that, beyond Tara Homes' claim to a refund of its deposit, it would then have no claim or further rights against ASB.

[13] Ms Pope submits that the nature of ASB's entitlement to cancel is therefore so comprehensive that it preserves Mrs Rahal's right of redemption until the Agreement is settled.

[14] For ASB, Ms Hawksworth submits that the entitlement to redeem under s 97(1) is lost when a mortgagee enters an unconditional agreement to sell, an exception to that principle arising only if the agreement is properly interpreted to preserve the right of redemption. Ms Hawksworth submits there is settled authority to this effect, relying in particular on the judgments of this Court in *Davison v Westpac Banking Corporation*[3] and *ASB Bank Ltd v Urquhart*.[4] And she submits that the Agreement, consistently with this Court's interpretation of the agreements in *Davison* and *Urquhart*, did not preserve the right of redemption.

[15] Tara Homes was granted leave to intervene in this proceeding. It commends ASB's submissions. For Tara Homes, Ms Wroe adds that the Court should interpret the Agreement as a whole. She submits that, reading the Agreement as a whole, the beneficial interest in the Property passed on the Agreement's execution, and on that basis the Property was therefore "sold" pending transfer of the legal title.

[16] The state of the case law relating to when mortgaged property "has been sold" in terms of s 97(1) is unsatisfactory. The principles are stated and applied unevenly. For the reasons set out below, I consider it best to interpret the phrase as applying, so that the mortgagor's entitlement to redeem is lost, when the mortgagee is bound by the

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3 *Davison v Westpac Banking Corporation* HC Auckland CP490/98, 5 November 1998 (Judgment of Randerson J).

4 *ASB Bank Ltd v Urquhart* HC Auckland CIV-2010-404-6913, 20 May 2011.

terms of its sale agreement to complete the sale (subject only to contingencies beyond the mortgagee's control).

[17] Applying that yardstick, since ASB is entitled to cancel the Agreement at any time prior to settlement for "any … reason whatsoever", and since ASB therefore has not bound itself to complete the Agreement except in the event of contingencies beyond its control, it has not yet "sold" the Property. In my view, there is (at least) a serious question for trial if Mrs Rahal retains her entitlement to redeem the mortgage.

Issue One, Reason One: a mortgagee vendor must be permitted to agree to a (deferred) sale of mortgaged property, in a manner binding the mortgagor

[18] A first step in identifying the point at which mortgaged property "has been sold" in terms of s 97(1) requires recognition that mortgagee vendors must be permitted to agree to sell mortgaged property, in a manner that binds the mortgagor and extinguishes their entitlement to redeem the mortgage. Preserving the entitlement to redeem until eventual settlement of a mortgagee sale and purchase agreement introduces unacceptable uncertainty and renders the mortgagee's position untenable.

[19] The following comments of Crossman J in *Waring v London Manchester Assurance Co Ltd*, made in respect of a statutory power of mortgagee sale, explain the point:[5]

> In my judgment, s 101(1)(i) of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract, liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor.

5 *Waring (Lord) v London and Manchester Assurance Co Ltd* [1935] 1 Ch 310 at 317–318, [1934] All ER Rep 642 at 644.

Issue One, Reason Two: a mortgagee vendor that permits itself a discretion to complete similarly introduces unwarranted uncertainty and risks disadvantaging the mortgagor, including by undermining the sale price

[20] On the other hand, treating the point at which a mortgagee vendor merely enters an agreement to sell as the point at which the property "has been sold" introduces similar uncertainty and illogicality, and may disadvantage the mortgagor.

[21] The uncertainty arising if the mortgagee vendor is not bound to complete the sale is readily understood. And if (in that case) the mortgagee resolves not to settle, it seems illogical to have thought previously that the property "has been sold". Plainly, entry into the agreement has not resulted in the property's sale.

[22] Further, when a mortgagee chooses terms which do not bind it to complete (until exercising a discretion to do so at settlement), purchasers are likely to factor in the potential inconvenience and opportunity cost of committing resources to a less certain purchase, offering to pay lower prices. And if purchasers at mortgagee sale are in a better position to compel settlement, they are likely to offer higher prices. If the redemption entitlement is to be lost earlier than the point at which the mortgagee is bound, the mortgagor gains nothing in return for the mortgagee's choice of terms, which arrogate to itself a discretion whether to complete its sale. In any event, while the mortgagee considers whether to settle, mortgagor liability is likely to increase or at least continue. These outcomes risk disadvantaging the mortgagor for no particular reason other than the mortgagee's convenience.

Issue One, Reason Three: interpreting "has been sold" as the point at which the mortgagee is bound to complete the sale (subject to contingencies beyond its control) makes sense of the authorities

[23] In my view, interpreting the phrase "has been sold" as it appears in s 97(1) as the point at which the mortgagee is bound to complete its agreement to sell the mortgaged property (subject to contingencies beyond its control) makes sense of the authorities.

[24] My starting point here is the following statement of principles relating to the point at which property is "actually sold" in a mortgagee sale process for the purposes

of s 81(1) of the Property Law Act 1952, the predecessor provision to s 97(1) of the current Act, set out by Randerson J in *Davison*:[6]

> 1. Ordinarily, the mortgagor's right of redemption will be lost once the mortgagee enters into a binding contract of sale in exercise of the powers under the mortgage.
>
> 2. Where the contract is unconditional, there can be no question that a binding contract has been entered into. In such a case, both parties are bound to complete the contract.
>
> 3. Where there is a conditional contract, it will be a question of construction whether, in the circumstances of the case, the parties are bound to complete. Usually, one or more of the parties will be bound, either expressly or by implication, to take reasonable steps to satisfy the conditions: Burrows, Finn and Todd, *Law of Contract in New Zealand*, 1997, paragraph 7.2.5. Cases such as *Howson v Little* (supra) demonstrate that the Courts treat contracts of the type involved in that case as binding notwithstanding their conditional nature, such as to exclude the right of redemption as from the date the contract of sale is entered into.
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> 4. Where, as a matter of construction, the contract of sale expressly or impliedly preserves the right of redemption, the right will be retained in accordance with the contractual term. *Pickersgill* (supra) is an example of that type of case.

[25] Broadly speaking, I endorse these statements of principle, insofar as they inform the question whether mortgaged property "has been sold" for the purposes of s 97(1). However, there is within them elements of both imprecision and inconsistency.

[26] Principle 1 and the first half of Principle 2 are concerned with whether the sale contract is binding. The second half of Principle 2 and Principles 3 and 4 are concerned with whether the mortgagee is bound to complete the sale (subject to contingencies over which the mortgagee has no control). As I have indicated above and explain below, further reflection upon these principles and the authorities informing them confirm that the latter determines the point at which the property has been sold.

[27] Principle 1 is imprecise. It can only be regarded as correctly stated if it is correct that "ordinarily" a binding mortgagee sale contract will not entitle the

6 *Davison*, above n 3, at 12.

mortgagee to cancel at its own discretion. If, instead, the mortgagee is so entitled, the contract (even if notionally binding until the point at which it is cancelled) impliedly preserves the redemption entitlement in the manner described in Principle 4.

[28] Similarly, Principle 2 correctly implies that an unconditional mortgagee sale contract extinguishes the redemption entitlement, not simply because it is binding, but because its unconditional nature means the parties are bound to complete.

[29] Principle 3 does not significantly advance the point made in Principle 2, except for its reference to *Howson v Little.*[7] In that case, the defendant mortgagees were bound by their sale contract to apply for the necessary consent of the Land Sales Court, and to use their best endeavours to obtain that consent without delay. The Court found the subject property had been "actually sold" in terms of the then-applicable provision, so that the mortgagors' entitlement to redeem had been lost.[8] Beyond contingencies over which the mortgagees had no control, the sale contract left them without a discretion whether to complete.

[30] Principle 3 would better capture the essence of *Howson v Little* if it noted that courts have treated the entitlement to redeem as excluded, as from the point a contract is entered, so long at the contract binds the parties to complete, subject to contingencies over which they have no control.

[31] In my view, Principle 4 is correctly stated. In *Pickersgill v Southland Building and Investment Society,* the case cited as an illustration of Principle 4, Fraser J observed that the time of sale is "when the mortgagee is bound by contract to sell without the mortgagor having the right to redeem or sell the property and repay the mortgage".[9] To the extent of this observation by Fraser J, *Pickersgill* is indeed an

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7 *Howson v Little* [1948] NZLR 1073.

8 The then-applicable provision was s 70(1) of the Property Law Act 1908.

9 *Pickersgill v Southland Building and Investment Society* (1994) 2 NZ ConvC 191,799 at 191,805. The then-applicable provision was s 81(1) of the Property Law Act 1952.

illustration of Principle 4. Regrettably, the observed principle was not then correctly applied:

(a) The sale contract in *Pickersgill* provided for the vendor to cancel "if it is for any reason other than its own default unable to complete the sale of the property".[10]

(b) Accordingly, cancellation was limited to situations where the mortgagee was unable to complete sale, for reasons beyond its control. The mortgagee was otherwise bound to complete.

(c) Despite this, Fraser J found the subject property was not "actually sold" and the mortgagors' entitlement to redeem was not lost until settlement.[11]

[32] Against Randerson J's statement of principles in *Davison*, the result in that case also is surprising. That is, the Judge held that the mortgagor's redemption entitlement was lost upon entry by the mortgagee into a sale contract which provided that it might rescind "for any … reason whatsoever". The essential reasoning was as follows:[12]

> In my view, the reservation of the right of rescission under this clause does not derogate from its binding nature. In particular, it does not cause it to become a conditional contract and the agreement for sale remains binding upon both parties unless and until the vendor exercises the right of rescission. The clause is primarily intended as a protection to the vendor in case it becomes difficult or impossible to achieve the sale due (for example) to the need to obtain a consent from a third party, the intervention of a charging order or caveat, or notice of interest under the Matrimonial Property Act. The vendor may exercise the right of rescission for other reasons as well but, until that time, the clause itself recognises that a contract exists. Otherwise, there would be no need to provide for a rescission of it.

[33] I respectfully suggest this reasoning is flawed. It focusses on whether the mortgagee sale contract is binding, not upon whether the mortgagee is bound to complete the sale. The clause at issue was titled, as with that in the present case,

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10 At 191,802.

11 At 191,805. Following *Pickersgill*, the same cancellation clause gave rise to the same result in *Masefield Mall Ltd v Gasson Street Properties Ltd* [2012] NZHC 2383. To the same extent, I consider that case also to be wrongly decided.

12 *Davison,* above n 3, at 13.

"Intervening Events". While it was thus presented as "primarily intended" to protect against contingencies beyond the mortgagee's control, its terms were not confined to implement that intention. Instead, the clause permitted rescission "for any … reason whatsoever", in that way reflecting a broader intention, to reserve entirely to the mortgagee an unfettered discretion. Whether the contract "exist[ed]" or not, and whether rescission was required or not, the mortgagee was not bound to complete it.

[34] I observed above that Ms Hawksworth and Ms Wroe rely upon *Davison*. They also rely on *Urquhart*, a case where a draft of the mortgagee sale contract contained a clause, headed "intervening events", which similarly provided for cancellation "for any reason whatsoever". But the contract entered did not contain that clause. Instead, it contained a clause headed "Failure to Pass Title", providing the mortgagee with a right of cancellation in the event title to the property could not be provided.[13] Associate Judge Christiansen:

(a) rejected the proposition that "an intervening events type clause … would have transformed any contract which otherwise on its face was unconditional, into a conditional contract";[14] and

(b) observed that:

> [102] Mortgagees cannot cancel contracts at a whim. A mortgagor cannot redeem its mortgage once an unconditional contract has been entered into by the mortgagee for the sale of the land.
>
> [103] In the context of redemption cases a mortgagee's duty to a mortgagor will probably always come to an end when an unconditional offer for purchase has been accepted.

[35] Of course, an unconditional mortgagee sale contract would have prevented cancellation at the mortgagee's discretion, binding it to complete, and in this way overcoming the mortgagor's redemption entitlement. But a conditional contract may nevertheless bind the mortgagee to complete; for example, when obliged to use best endeavours to fulfil a condition. The question whether the redemption entitlement under s 97(1) has expired because the property has been sold does not turn on whether

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[13] *Urquhart,* above n 4, at [12]–[13].
[14] At [97].

the sale contract is conditional. It turns on whether the parties, the mortgagee in particular, are bound to complete the sale. To the extent the reasoning in *Urquhart* suggests otherwise, I respectfully disagree.

[36] On the other hand, I agree with Gendall J's observation in *Horne v Westpac Banking Corporation Ltd* that:[15]

> A mortgagor has the right to redeem his equity or redemption at any time before the property has been sold under a power of sale. … It has been held that a mortgagor cannot redeem if the mortgagee in exercise of its power of sale has entered into a binding contract for the sale of the property. I refer to *Howson v Little* [1948] NZLR 1073 (I note that this decision was not overruled on this point by the Court of Appeal in *Sharp v Amen* [1965] NZLR 760 (CA)).

[37] Alongside this citation of *Howson v Little,* the reference to entry into a "binding contract" must simply be understood as entry into a contract that binds the parties (subject to uncontrollable contingencies) to complete.

[38] Ms Wroe's submissions amounted to support for the expiry of the redemption entitlement when there is a binding contract, independently of any obligation to complete the sale. She submits that it makes no commercial sense for a purchaser to enter into an agreement that requires it to pay a sizeable deposit if the mortgagor can "still swoop in and undo the deal regardless of the wishes of the parties to the contract". I do not accept these submissions. First, they assume the mortgagee wishes to sell, rather than to reserve to the mortgagor (usually its customer) an ongoing opportunity to redeem. Second, the purchaser enters such an agreement taking a chance on a set of contingencies affecting the mortgagee's inclination to complete going further than that of the mortgagor's impecuniosity. The commerciality of the agreement will depend in part on its assessment of the risk of redemption, but more broadly upon a simple change of heart on the part of the mortgagee "for any reason".

[39] I recognise that, in *Bhana v Westpac Banking Corporation*, Venning J was unwilling to accept that the test in *Pickersgill*—"when the mortgagee is bound by the contract to sell without the mortgagor having the right to redeem or sell the property and repay the mortgage"[16]—should determine whether there had been an "actual sale"

[15] *Horne v Westpac Banking Corporation Ltd* HC Wellington CP207/97, 26 August 1997 at 13.
[16] *Pickersgill,* above n 9, at 191,805.

for the purposes of s 81(1) of the Property Law Act 1952.[17] The Judge said *Pickersgill* could be distinguished because its focus was upon whether notice had been given under s 92(6) of the Property Law Act 1952. That provision prohibited mortgagees from commencing any action to recover a shortfall between the amount realised upon exercise of the power of sale and the amount owing under the covenant to repay expressed or implied in the mortgage, unless notice of the intention to exercise the power to sell and commence action for the deficiency had been given at least one month before the exercise of sale. The Judge observed that the wording of the sections was "different and distinct", and that they dealt with "different concepts". Sections 81(1) and 92(6) have their substantive equivalents in ss 97(1) and 122 respectively under the current Act.

[40] However, although the wording of ss 97(1) and 122 are indeed different, they appear intended to address the same concept: the point at which the mortgaged property is sold. The mortgagee is required, prior to that point, to give notice of an intention to recover the shortfall, because doing so allows the person given notice a fair opportunity to assist in achieving a better price or to redeem the mortgage. In each case, the notice period is logically tied to the point at which the mortgagee becomes bound to complete its sale contract. Before then, the mortgagee should be inclined to advantage the mortgagor by allowing the achievement of the better price, or redemption.

[41] Also, I note that, in *Bhana*, Venning J wrote:

> [18] *Howson v Little* is authority for the proposition that a conditional sale is an actual sale for the purposes of s 81(1).

[42] I respectfully disagree. Instead, as explored above, *Howson v Little* is authority for the proposition that the redemption entitlement under s 97(1) expires when the mortgagee is bound by the terms of its sale contract (subject to contingencies over which it has no control) to complete the sale. It is not authority for the proposition that, if the sale remains conditional upon exercise of a mortgagee's untrammelled discretion, the property has not as yet "been sold".

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17 *Bhana v Westpac Banking Corporation* (2003) 5 NZCPR 114 (HC) at [20].

[43] The Judge also observed:[18]

> It is difficult to reconcile *Pickersgill* with the authority of *Howson v Little*, and with the subsequent decision of the Court of Appeal in *Bevin v Smith* [1994] 3 NZLR 648 that at the time the mortgagee makes the contract, albeit a conditional one with the third party, the third party has an equitable interest in the land which once the contract becomes unconditional will enable the third party to obtain specific performance: *Bevin v Smith*.

[44] I agree with that observation.

[45] But *Pickersgill* is difficult to reconcile with *Howson v Little* only because *Pickersgill* appears wrongly decided on its facts (see [31] above). The statement of principle in *Pickersgill* is, in contrast, consistent with the reasoning and outcome in *Howson v Little.*

[46] And the Court of Appeal's judgment in *Bevin v Smith* does not suggest a different test for when the redemption entitlement expires. In that case, the Court's relevant finding was that an equitable interest in land should, and does, pass under a conditional contract of a kind that requires the parties to seek the consent (ordinarily given as a matter of course) of a statutory board, even though specific performance of the contract in the strict sense is not available.[19] In that case, the Court stressed that "whether the equitable interest has passed must always depend on the terms of the contract itself".[20] In my view—despite Venning J's reservations expressed in *Bhana*[21]—whether a property has been sold by a mortgagee upon entry into a sale contract depends similarly on the wording of the contract.

[47] Relatedly, I do not accept Ms Wroe's submission that ASB has "sold" the Property to Tara Homes because the beneficial interest passed upon entry into the Agreement. Even if payment of the deposit and transfer of risk in the Property caused an equitable interest to pass, specific performance of the Agreement in favour of Tara Homes would not have been available in light of ASB's entitlement to cancel "for any reason". If ASB elects to cancel, such equitable interest as has passed to Tara Homes will revert.

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18 At [24].
19 *Bevan v Smith* [1994] 3 NZLR 648 (CA) at 652, 664 and 665.
20 At 665.
21 *Bhana,* above n 17, at [20].

[48] I note that in *Davison*, a case where the mortgagee sale contract was entered at auction, Randerson J observed the importance of maintaining the integrity of the auction process, and various practical implications of "permitting extension of the right of redemption past the fall of the hammer":[22]

(a) First, the Judge asserted this "would be contrary to the ordinary contemplation of the participants".

(b) Next, the Judge observed that other sale clauses provided for immediate payment of a deposit and the passing of risk in the property to the purchaser.

(c) Further, the Judge observed (drawing on comments of Crossman J in *Waring*[23]) that "serious uncertainty" would arise.

(d) And finally, while observing that an untrammelled right of rescission could also lead to uncertainty, the Judge thought such a discretionary power would "usually only likely … be exercised in the case of real difficulty in completing the sale". Whereas a right of redemption extending beyond the fall of the hammer could intervene to thwart a sale achieved in good faith at auction and would be exercisable as a matter of right on the part of the mortgagor.

[49] In response, I observe that the dominant feature of the parties' contemplation relating to a sale on terms permitting the vendor not to complete "for any reason" would likely have rather less to do with the right of redemption, and rather more with the simple prospect of the sale ever completing. That is, if the purchaser had read and understood the contract terms it would know the mortgagee could cancel at any time, whether the mortgagor had exercised its right to redeem, whether the mortgagee had managed to extract a better price from a third party, or simply as a matter of whim. The last of these possibilities would be unlikely, given the mortgagee's duty to obtain the best reasonably available price, but not out of the question (say in the event of

22 *Davison,* above n 3, at 14.
23 *Waring*, above n 5.

delay in settlement and a rising market). More prosaically, it might be said that, in the context of an agreement providing for post-auction vendor entitlement to withdraw at any time, the hammer may fall twice; in a preliminary way at auction; and finally, when the vendor permits the sale to complete. Until then, the serious uncertainty described in *Waring* remains (see [19] above).

[50] The logical consequence of the uncertainty created by the right of redemption continuing past the fall of the hammer is simply a function of the terms of the sale and purchase agreement devised by the mortgagee.

[51] It is important to recognise that, in *Waring*, the sale contract was unconditional. And the "power to sell", described by Crossman J as "a power by selling to bind the mortgagor", was (on the facts of that case) referable to the power to enter a contract binding the mortgagee to complete. The undesirable uncertainty being described as involving "an extraordinary result" was one that would thus arise in the hypothetical event that, regardless of the nature of the mortgagee sale contract, the law maintained the redemption entitlement until settlement.

[52] *Waring* therefore stands as persuasive authority for the proposition that the law should not extend the expiry of the redemption entitlement beyond the point at which the mortgagee is bound to complete. It does not go further. In cases where, for reasons that can be intended only to suit the convenience of the mortgagee, the mortgagee sale contract is one the mortgagee can cancel for any reason, all of the undesirable uncertainty remains. Not only would the purchaser's contract be "liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs", it would be liable to be set aside for any reason. That is simply a consequence the mortgagee has elected to bring upon itself.

[53] The last sentence of the cited passage of *Waring* (at [19] above) recognises the difficulty arising if a mortgagee chooses not to bind itself to a mortgagee sale. But this difficulty can be addressed by the simple expedient of the mortgagee sale contract being drafted so as to bind the mortgagee to complete, except in circumstances beyond its control. The difficulty is one of contractual design.

[54] I referred at [22] above to the commercial sense involved in timing the expiry of the redemption entitlement to coincide with the point at which the mortgagee is bound to complete. Relatedly, timing the expiry at that point is consistent with the duty owed by mortgagees to obtain the best price reasonably available.[24]

Issue Two: has ASB failed in its statutory and equitable duties?

[55] Under s 176(1) of the current Act, ASB owes Mrs Rahal a duty of reasonable care, to obtain the best price reasonably obtainable at the time of sale. This statutory duty is supplemented by ASB's equitable duty to exercise its power of sale in good faith and for the predominant purpose of obtaining repayment of its debt.[25]

[56] Ms Pope's alternative submission, offered on an assumption that the Court finds the mortgagee sale process to have concluded, is that ASB has failed to take reasonable care to obtain the best price reasonably obtainable. Ms Pope submits that the sales process which resulted in Tara Homes' successful bid at tender suppressed competition and conferred upon Tara Homes a material advantage.

[57] This submission is informed by the context, relating in particular to the five-year lease of the Property, with three five-year rights of renewal, held by Tara Homes' related entity, Sohal Associates. Mr and Mrs Rahal are in dispute with Sohal Associates over rent, outgoings, maintenance and works, and the use of car parks.[26] Sohal Associates has registered charging orders on the Property's title relating to arbitral awards in its favour. The marketing campaign which resulted in ASB's sale contract with Tara Homes featured sustained feedback to the effect that the majority of prospective purchasers were concerned about the lease and the complication of obtaining vacant possession.

[58] Ms Pope submits that, since the lease was entered without ASB's approval, neither ASB nor any purchaser from ASB as mortgagee vendor is bound by the lease. She submits that ASB did not take sufficient action to ensure the market was aware of this apparent advantage of a mortgagee sale.

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24 Property Law Act 2007, s 176(1).
25 *Green & McCahill Holdings Ltd v Williams* [2025] NZHC 2581 at [1112].
26 *Rahal v Sohal Associates Ltd* [2025] NZHC 2803 at [5].

[59] Ms Hawksworth submits that ASB appropriately advised potential purchasers to do their own due diligence in relation to the lease. And she notes the affidavit evidence to the effect that ASB's real estate agents orally advised potential purchasers that ASB was not bound by the lease.

[60] In my assessment, had the mortgagee sale process concluded, there would have been a serious question whether ASB had failed in its duty under s 176(1) to obtain the best reasonably obtainable price. The marketing campaign referred to the potential for "development of up to twenty-seven metres in height (subject to consents)". But without a campaign founded on the proposition that purchasers would at least be unlikely to be bound by the lease, all reasonable steps to achieve the best price might not have been taken. I do not regard oral advice to potential purchasers, assuming it occurred, to go far enough to avoid this serious question arising.

Does the balance of convenience favour a grant of interim orders?

[61] As stated at the outset, Mrs Rahal seeks interim orders restraining ASB from settling the sale, or exercising any other power of sale of the Property. While in default of her obligations to ASB, she has for a considerable period sought to present solutions involving refinancing or sale to related entities. Her proposals have not been acceptable to ASB. At Mrs Rahal's request, I directed that the hearing of her application be adjourned almost fully heard to 9 June 2026, so that she might provide further evidence of her ability to pay all amounts owing to ASB or of the ability and intention of a related entity to purchase at a higher price than that set out in the Agreement with Tara Homes. On 9 June 2026, Mrs Rahal filed an affidavit exhibiting a financier's offer to lend her the amount she requires to redeem ASB's mortgage and remove the other security interests registered against the title. The offer is conditional on the financier obtaining a registered first mortgage.

[62] Ms Pope submits that the balance of convenience is aptly described as "the balance of risk of doing an injustice".[27] She submits that it lies in favour of interim relief.

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27 *McLaughlin v McLaughlin* [2019] NZHC 2597, [2019] NZFLR 299 at [37]; and *Kwok v HND Holding Ltd* [2024] NZHC 1153 at [91], citing *Cayne v Global Natural Resources Plc* [1984] 1 All ER 225 (CA) at 237.

[63] I must consider the impact on the parties, arising if the interim orders are granted, and if they are refused.[28]

[64] If the interim orders are granted in full, ASB will not have direct recourse to the Property as a means of enforcing payment of the amount Mr and Mrs Rahal owe it. It is unlikely Mrs Rahal would have alternative means of paying that amount. She might be bankrupted, and ASB left to the vagaries of asset realisation by the Official Assignee.

[65] If the interim orders are refused in full, uncertainty will arise in light of the view I have expressed as to the ongoing nature of Mrs Rahal's redemption entitlement based on clause 14 of ASB's sale contract with Tara Homes. ASB might simply complete the sale to Tara Homes, anticipating that my view might be overcome at trial, or that (in light of the sale price) damages would be modest.

[66] On that topic, Ms Hawksworth submits that damages would be an adequate remedy. She points out that Mr and Mrs Rahal have been in default of their obligations to ASB for over two years, with debt exceeding $1,360,000 and interest continuing to accrue. She submits that ASB afforded them ample opportunity to redeem or sell voluntarily before it entered the Agreement with Tara Homes. She further submits that the prejudicial impact of the interim orders sought, upon Tara Homes and others who have registered interests against the Property's title, is relevant. She observes that those parties hold an interest in the equity, which continues to erode while the outstanding debt accrues interest.

[67] Ms Wroe has not had the advantage of seeing the Mrs Rahal's affidavit setting out her particular interest in retaining the Property. Ms Wroe submits it is not clear why the Property is of particular importance, or why funds intended for the redemption, or purchase by a related entity, could not be used to buy another property. She submits there is nothing unique about the Property's development potential that could not be found elsewhere. Indeed, she asserts that a property without a long lease would have greater potential.

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28 *NZ Tax Refunds,* above n 1, at [12].

[68] Mrs Rahal's affidavit contains her assertion that she has often spoken with her family, including her son (a medical doctor), about holding the Property long-term with the intention of developing it for use as a medical practice. Given the circumstances indicated by the extensive but unsuccessful negotiations with Mrs Rahal and related entities, and the last-minute presentation of her financier's offer, I consider it likely Mrs Rahal's preferred strategy has been to seek to capitalise on the development potential of the Property and the opportunity presented by a mortgagee sale which would void the lengthy lease to Sohal Associates, with which she is in dispute.

[69] Nevertheless, essential points remain in Mrs Rahal's favour:

(a) The arguable deficiency in the marketing campaign raises the prospect of her being deprived of funds that would have accrued to her benefit had the marketing campaign adequately notified the unenforceability of the lease as against a purchaser at mortgagee sale. If required to apply her funds elsewhere, they should include not only those intended for redemption, but also those that should have been raised following an adequate marketing campaign.

(b) On my view, Mrs Rahal remains entitled to redeem the mortgage. My view necessarily implies that ASB's stance as to redemption following entry into the Agreement has been in error.

[70] I am not persuaded that the interests of Tara Homes and others who have registered interests against the Property's title are of particular concern. Those others' interests were always subject to the mortgage and its consequences. And Tara Homes was content to enter a mortgagee sale contract providing that events might intervene to defer settlement, or to permit cancellation, in the event of an injunction preventing sale or indeed "any reason … whatsoever". [29] Whatever the outcome in this case, it is one Tara Homes bargained for.

[29] See cl 14 "Intervening Events", set out at [11].

[71] As Venning J observed in *Bhana*, an arguable case for sale at an undervalue does not go to a mortgagee's right to sell but only the amount obtained as a result of that right, which can be compensated for by an award of damages.[30] This addresses the point at [69](a) but not that at [69](b).

[72] In my view, while ASB afforded Mrs Rahal ample opportunity to redeem before it entered the Agreement, its own choice of terms served to preserve that opportunity until such time as the Agreement settled. The balance of convenience falls clearly in favour of Mrs Rahal being permitted a final opportunity to redeem.

Does the overall justice favour a grant of interim orders?

[73] For the reasons leading to my conclusions at [69](b) and [72], the overall justice favours a grant of interim orders permitting Mrs Rahal a final, time-limited opportunity to redeem. If that opportunity is not taken, it will fall to ASB to decide whether the criticisms made of its sale process and the potential for it to have resulted in a sale at an undervalue justify it conducting a further sale process.

Result

[74] Mrs Rahal's application for interim orders is granted.

[75] I order that ASB must not proceed to settle the Agreement for a period of 15 working days following delivery of this judgment. During that period, ASB must permit Mrs Rahal to redeem the mortgage in accordance with standard conveyancing practices relating to the replacement of a secured lender's registered interests by those of another in circumstances where the replaced lender is owed money by the titleholder. For the avoidance of doubt, in permitting such redemption, ASB is not required to assume any greater risk than it would ordinarily assume in cases where it is to be refinanced out of distressed lending. I grant leave to the parties to apply further in respect of the wording or application of this order.

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30 *Bhana,* above n 17, at [42]–[43], citing *Bevin v Public Service Investment Society* Ltd [1994] 2 NZConvC 191,821 (CA) at 191,824.

[76] Mrs Rahal appears entitled to scale 2B costs. If costs cannot be agreed:

(a) Mrs Rahal is, by **5 pm on 3 August 2026**, to file and serve a memorandum, no more than five pages in length, setting out the desired basis and quantum of an award; and

(b) ASB and Tara Homes are both to respond in kind by **5 pm on 17 August 2026**.

(c) The issue will then be determined on the papers.

Johnstone J