[HIGH COURT OF AUSTRALIA.]

## In re ALLEN.

H. C. of A. 1917.

Melbourne, *June* 29 ; *July* 3.

Isaacs J.

In Chambers.

*Mortgage—Foreclosure—Leave to proceed—Discretion—Grounds for granting leave—Judgment in State Court for amount of mortgage—Rights and duties of mortgagor and mortgagee—War Precautions (Moratorium) Regulations (Statutory Rules* 1916, *Nos.* 284 *and* 324 ; *Statutory Rules* 1917, *Nos.* 13 *and* 76), *reg.* 4.

An application by a mortgagee under the *War Precautions (Moratorium) Regulations* for leave to call up the mortgage, to exercise the power of sale or to take steps for foreclosure or possession, was refused on the ground that the mortgagee had not satisfied the Court that the existing circumstances justified the giving of leave to depart from the *primâ facie* provision of the Regulations, namely, that, having regard to the general dislocation of affairs directly and indirectly occasioned by the War, it is contrary to the public welfare to permit mortgagees to rigidly enforce their strict rights against their debtors.

The fact that a mortgagee had, before the making of the *War Precautions (Moratorium) Regulations*, obtained a judgment against his mortgagor for the amount of principal and interest due under the mortgage, which he may have a right to enforce, is not a ground for giving leave to proceed as above mentioned under the Regulations.

Observations as to the respective rights and duties of mortgagor and mortgagee under the Regulations.

Motions.

An application was made to the High Court on motion by Robert Crawford pursuant to the *War Precautions (Moratorium) Regulations* for leave to call up or demand payment of the amount of money due and owing under certain freehold mortgages given by Arthur Joseph Allen, the mortgagor ; to exercise the respective powers of sale under the mortgages ; and to take steps for obtaining orders for foreclosure or possession or occupation of the mortgaged premises.

The mortgagor also applied on motion that the rate of interest on the mortgages should be reduced.

The material facts appear in the judgment hereunder.

*Starke*, for the mortgagee.

*Hassett*, for the mortgagor.

*Cur. adv. vult.*

July 3.

ISAACS J. read the following judgment:—This is an application to the Court by Robert Crawford, a mortgagee, under the *War Precautions* (*Moratorium*) *Regulations*, reg. 4, made under the *War Precautions Act* 1914-1916. The application is for leave: (1) to call up or demand payment of the amount of money due and owing under certain freehold mortgages given by Arthur Joseph Allen, the mortgagor; (2) to exercise the respective powers of sale under the mortgages; (3) to take steps for obtaining orders for foreclosure, or for possession or occupation of the mortgaged premises.

The facts so far as material are these:—

The freehold mortgages are over property consisting practically of two hotels. One hotel is situate at Barooga, a small hamlet on the Murray River, in New South Wales. A small cottage and bakehouse go with the hotel in the mortgage, but are not apparently of any importance in this application. The other hotel is the Broken River Hotel at Benalla in Victoria. These properties became mortgaged to the applicant at different times.

In 1906 Allen owed a floating balance with interest to the Commercial Bank of Australia, secured by a mortgage over the Barooga Hotel. In 1908 on paying off the debt Crawford took a transfer of the mortgage, and he still holds it. The amount so paid off is not stated, nor have I any evidence as to the amount now due and unpaid in respect of this particular property. But in 1916, after notice to pay and default, the property was offered for sale at public auction last September at Cobram, just across the River Murray, but no bid was made.

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As to the Broken River Hotel, the debt arose thus:—In May 1909 the mortgagee made an advance to the mortgagor of £4,800 in order to enable the latter to purchase the property, and to secure that sum and any further indebtedness to the mortgagee the premises were mortgaged to him. The agreed interest was 7 per cent. In February 1915 a further sum of £757 was advanced at 8 per cent., and to secure it a second mortgage was taken over the hotel and, as further security, a mortgage was given over Allen's interest in his deceased mother's estate. The probable present value of the last-mentioned interest, according to the evidence before me, is between £400 and £500. What its estimated value was in February 1915 I do not know.

Default was made in payment of interest on all three mortgages. In March and April 1916 notices to pay were given, and in July 1916 the properties in the two last-mentioned mortgages were offered for sale in Melbourne, but there was no bid. The mortgagor is still in possession of the freeholds.

As to the Barooga Hotel, he occupies it as the licensee, and the business there carried on is the only support of himself and his family at the present time. It is in need of repairs, and unless they are done there is a suggestion of some danger that the police will oppose the renewal or transfer. There is no specific evidence of this, nor what repairs would satisfy the police, nor the cost of them. But allowing for the necessity of repairs, the value of the property with the bakehouse and cottage is said by the mortgagee's valuer to be £700. The mortgagor, however, gives £1,500 as the present value, and says that immediately before the War it was worth £2,500, and that twelve months before the War he refused £2,000 cash for it.

As to the Broken River Hotel, the mortgagee places its present value at £3,000. But it is to be noticed that in February 1915, six months after the War began, he was willing to increase his advances from £4,800 to £5,557 on its security plus an indeterminate security on the trust estate, the present value of which is less than the difference. This stands unexplained, except that the diminution in value is due to war circumstances. I say that, with full recollection of the recent provisions in the Victorian Acts No. 2584, secs. 3 and 5,

No. 2827, sec. 2, and No. 2855, sec. 25, and recognizing the practical effect those provisions may have in applying Act No. 2776. But those provisions, to which at least in part the diminution in value is attributable, are also war circumstances.

The mortgagor, however, puts the present value of the securities at £6,950, being Barooga Hotel £1,500, Broken River Hotel £5,000, and estate interest £450. The present amount of indebtedness is £5,252 1s. 9d. for principal and £139 9s. 6d. for interest. The Broken River Hotel has been let by the mortgagor to a tenant who is licensee. The lease was made in March 1911 for ten years from January 1911 at £364 a year. The mortgagee consented to the lease and has, with a certain exception to be mentioned, been regularly receiving the rent direct from the tenant. At the present amount of principal indebtedness, £364 would substantially represent 7 per cent. interest. The exception referred to is that the mortgagor gave written notice to the tenant to pay the rent to him. It is not explained how this notice came to be given, nor does it appear that any explanation was asked for. The notice has, however, been withdrawn, and the mortgagee has now received the whole of the rent less what the tenant expended in repairs. The tenant has, however, applied under Act No. 2776 for a reduction of rent. It is anticipated by the parties that the rent will be reduced, but will leave enough to pay about 6 per cent. per annum, a little more or a little less, on the amount now due. The mortgagor says his other indebtedness is not above £410. He says that he had heavy losses in consequence of the War, that the depreciation in value of the freeholds is temporary, that granting the application will mean ruin, and that giving time will enable him to pay all his debts, and improve the mortgagee's position. The mortgagee thinks his position will get worse.

In those circumstances what ought the Court to do on this application? The intent of the Regulations—and a Court is to have regard to that "intent" (see reg. 5)—is that having regard to the general dislocation of affairs directly and indirectly occasioned by the War, it is *primâ facie* contrary to the public welfare to permit mortgagees to rigidly enforce their strict rights against their debtors; but that this restriction is limited by due regard to special circumstances, some of which are specifically provided for and others are necessarily

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left to be dealt with consistently with any express provisions, according to the Court's sense of what is just as between the parties.

There is one special fact I must refer to. It is that on 14th August 1916 the mortgagee recovered, and still holds, a judgment in the Supreme Court of Victoria against the mortgagor for £5,288 6s. 1d., and £5 19s. costs, for principal and interest due under the mortgage of 17th February 1915. The mortgagee has urged that as he has a right to proceed under that judgment, obtained before the earliest extant Moratorium Regulations, Statutory Rules 1916, No. 284 (10th November 1916), it is an additional reason for granting his application, because it would save expense and trouble. I do not so regard it. If he has the right so to proceed under his judgment—as to which I say nothing—it is because the prior judgment is something designedly left outside the scope of the Regulations. In that event I am best following the intent of those regulations in the circumstances before me by excluding the assumed right to proceed from my consideration of this particular application.

Two other matters are present to my mind to which the attention of the parties should be directed.

The first matter is that the licence of the Barooga Hotel ought not to be allowed to lapse by reason of disrepair. Apparently it is the duty of the mortgagor to see to this. I have considered the question of getting an undertaking from him in this connection, though I see some difficulties in framing it. I do not, however, ask for that undertaking for two reasons. One reason is afforded by the proviso to reg. 4, to which I invite the mortgagor's attention. It runs in these terms: "Provided that where interest is in arrear for not less than thirty days and the mortgagor fails to observe the provisions of any covenant, agreement or condition express or implied in the mortgage for any of the matters specified in sub-par. (ii.) of par. (*c*) of sub-reg. (1) of this regulation, nothing in this paragraph shall preclude the mortgagee from entering into possession of the mortgaged property, but in any such case the mortgagor may apply to the Court for an order requiring the mortgagee to vacate the mortgaged property, and in the event of the application being granted by the Court the mortgagee shall vacate

the mortgaged property in accordance with the order of the Court." The matters specified in sub-par. (ii.) of par. (*c*) of sub-reg. (1) of the regulation are as follows: "the insurance, maintenance, or cultivation of the mortgaged property, or the payment of rates, taxes and other charges, or the doing of any acts for the preservation of the security." The other reason is that any unreasonable conduct on his part would seriously affect any future application by the mortgagee should it be made. A mortgagor gets great relief under the Regulations. But he should treat his mortgagee fairly, the security must not be sacrificed, and he should not wilfully neglect to do what a fair-minded mortgagor might be expected to do in order to conserve his creditor's security, and prevent unnecessary deterioration pending the time when normal legal relations are restored. What I have said as to Barooga repairs does not mean that the mortgagee may not be under some obligation to act reasonably also according as the circumstances may dictate in relation to the possible requirements of the police. Both parties have to act reasonably and with consideration for each other's rights in presence of the common burden of the War, and the necessary disarrangement it involves.

The second matter I refer to is in relation to the rent of the Broken River Hotel, and many of the observations I have made with regard to Barooga apply to this property also. As there is a pending application for reduction of rent, I say in addition no more than this: the mortgagor should do all that is reasonable and just in relation to the interests of the mortgagee. When the rent is fixed, the mortgagor should see that the mortgagee gets it, and that no unreasonable deduction be made for repairs. The matter is always in the hands of the Court, which, subject to any express directions in the Regulations, has full discretion, and will consider as one element whether in the circumstances there has been on each side a fair and reasonable attitude towards the other, because obviously that may sensibly affect the financial position.

I propose to refuse this present application of the mortgagee on the ground that, while I do not say he had not some ground for apprehension, yet on the whole he has not satisfied me that the

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circumstances as they exist to-day, justify the Court in giving him leave to depart from the *primâ facie* provision of the Regulations.

From what I have said, it follows that I refuse the counter-application of the mortgagor to reduce his rate of interest.

Each party will bear his own costs.

*Motions dismissed.*

Solicitors for the mortgagee, *Williams & Matthews.*

Solicitors for the mortgagor, *Gavan Duffy & King.*

B. L.

Appl *AMIEU* v *Mudginberri Station Pty Ltd* (1985) 61 ALR 417

Appl *Public Prosecutions, Director of* v *Rogers* (1993) 114 FLR 354

Disod *Stutchbury* v *Pittwater Council* (1999) 105 LGERA 1

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[HIGH COURT OF AUSTRALIA.]

STEMP . . . . . APPELLANT;
DEFENDANT,

AND

THE AUSTRALIAN GLASS MANUFACTURERS COMPANY LIMITED . } RESPONDENTS.
INFORMANTS,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *June* 18, 19, 25.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

*Constitutional Law—Powers of Commonwealth Parliament—Conciliation and arbitration for settlement of disputes—Prohibition of lock-outs and strikes—The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXV.), (XXXIX.), 107—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 4, 6.

The prohibition in sec. 6 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 against doing anything in the nature of a "lock-out"