6
Restraining a Mortgagee's Power of Sale

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6
Restraining a Mortgagee's Power of Sale

INTRODUCTION

[6.100] About this chapter

This chapter canvasses the general rule that applies when applicant mortgagors seek to restrain the exercise of the mortgagee's power of sale, the exceptions to the general rule and factors that weigh in the balance of convenience.

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GENERAL RULE

[6.200] Payment into court

There is now a recognised "general rule" relating to applications to restrain exercise of mortgagees' powers, associated with *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64, where Walsh J stated at 164–165:

> A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this not be in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court.
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> …
>
> In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.

The benefit of having security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against a mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.

Barwick CJ confirmed the general rule on appeal when he observed at 169 that the case was within:

> the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage.

Inglis v Commonwealth Trading Bank of Australia was not a case in which the mortgagor sought to impugn the validity of the mortgage transaction itself. The applicant was only claiming an offset for damages for breach of contract, defamation, fraud and conspiracy. This factor has been regarded as important in subsequent cases relating to the rule when there was a challenge to the mortgage.

[6.210] Exceptions to general rule

There are a number of exceptions to the general rule:

1. where the amount claimed by the mortgagee is plainly wrong (see [6.220]);

2. where there is doubt as to the existence of the power of sale or doubt as to whether it has become exercisable at all (see [6.220] and [6.240]);
3. where the validity of the mortgage is being challenged (see [6.220]); and
4. where the action is pursuant to the *Trade Practices Act 1974* (Cth) (see [6.220] and [6.230]).

There is a fifth circumstance which weighs in favour of an injunction issuing: whether credible substitute security has been offered. This is relevant to the balance of convenience. However, it is also inextricably linked to the exception to the rule in *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64, because once the exceptions apply, then the mortgage does not have to be redeemed and the question of substitute security comes into place. For this reason, substitute security is also discussed at [6.240].

[6.220] Exceptions: overview

The first two exceptions to the general rule were articulated by Barker J in *Linnpark Investments Pty Ltd v Macquarie Property Development Finance Ltd* [2002] WASC 272 (18 October 2002) after his Honour analysed various cases. However, the seminal case in this area is *Harvey v McWatters* (1948) 49 SR (NSW) 173 at 178; 66 WN (NSW) 72, where Sugerman J articulated exceptions to the general rule as follows:

> There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of similar type. But it is a rule resting on different principles and reasoning. These permit of a greater flexibility. They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee.

Glandore Pty Ltd v Elders Finance & Investment Co Ltd (1984) 4 FCR 130 at 135–136; 57 ALR 186; [1985] ATPR ¶40-517 involved a claim by a mortgagor that alleged that it had been induced to borrow moneys secured by the mortgage by reason of misleading conduct in contravention of s 52 of the *Trade Practices Act 1974*. The contravening conduct was allegedly the promise to make future advances. The applicant sought an order that the agreement be varied under s 87(2)(b) of the TPA ie there was a challenge to the validity of the mortgage. Morling J held at 135–136 that the case was thus in the second category discussed in *Harvey v McWatters* and continued:

> I do not think that the present case is a case of the kind to which the general principle in *Inglis' case* applies. It falls more easily into the second class of case discussed by Sugerman J in *Harvey v McWatters*. This being so I am not constrained by authority to require the applicants to pay into court the whole amount of the mortgage debt as a condition of obtaining interlocutory relief. Rather I think the proper approach is to mould an order so as to ensure adequate protection to the mortgagee and to otherwise do justice between the parties during the period pending the final hearing.
>
> Having regard to the fact that the value of the security held by Elders (at Elders' own valuation) is more than double the amount of the mortgage debt it is difficult to see how any

> prejudice will be suffered by Elders by the granting of interlocutory relief, provided the final hearing is not unduly delayed. During the course of argument it was agreed that the parties could be ready for a final hearing with three months. There is no suggestion that the secured property is falling in value and in those circumstances I do not think the applicants should be required to pay any part of the principal debt into court pending the final hearing.
>
> However it is not right that Glandore should have the use of the respondent's money without paying interest on it. There is already an amount of $307,000 unpaid interest and expenses owing to Elders and this must be paid as a term of the grant of interlocutory relief. Moreover, the unpaid interest must be paid to Elders, and not into court. This will ensure that Elders has the use of the money pending the hearing, and will reduce the amount of its mortgage debt to about $1.5 million, for which it will have security in excess of $4 million. Because Elders does not appear to have any immediate plans for the sale of "Oonavale" and as the applicants will want some time to raise the $307,000 to pay Elders I propose to give them until 14 January 1985 to pay the unpaid interest and expenses.

Those exceptions have been applied in other cases, including *Allfox Building Pty Ltd v Bank of Melbourne Ltd* [1992] NSW ConvR ¶55-634 and *National Australia Bank Ltd v Zollo* (1995) 64 SASR 63.

In *Contractor Services Pty Ltd v Esanda Finance Corp Ltd* [1990] ATPR ¶41-020 at 51,355 (cited with approval by various courts including the South Australian Supreme Court in *National Australia Bank Ltd v Zollo* (1995) 64 SASR 63 at 67 per Matheson J (King CJ and Millhouse J concurring) French J stated:

> The full impact of that [*Inglis*] condition has been mitigated in cases where the claim is said to go to the root of the mortgagee's title, including the case in which relief is sought under sec. 87 of the *Trade Practices Act 1974* to vary or set aside the mortgage.

A mere claim for unliquidated damages, which does not impugn the mortgage, is insufficient to relax the general rule: *Cunningham v National Australia Bank Ltd* (1987) 15 FCR 495.

The third exception is articulated in various cases including *Emmanuel Orchards Pty Ltd v National Australia Bank Ltd* (2003) 231 LSJS 118; [2003] SASC 368 at [34] per Bleby J, where it was made clear that it was not appropriate to grant an injunction free of conditions whenever the validity of a mortgage was challenged and there was a serious question to be tried.

A fourth exception is where the cause of action is pursuant to the TPA (Cth) (TPA), because when exercising the powers to enjoin contravening conduct, a court is not confined to those principles guiding a court of equity in its original jurisdiction: *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 545; 97 ALR 315; [1988] ATPR ¶40-911 per the court (a mortgagee case); *ICI Australia Operations Pty Ltd v Trade Practices Commn* (1992) 38 FCR 248 at 266; 110 ALR 47; [1992] ATPR ¶41-185 per Gummow J (a resale price - maintenance case); *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* (2004) 206 ALR 69; (2004) 232 LSJS 314; [2004] SASC 60 (a mortgagee case: see [6.240]). However, whilst the *Andrew Garrett case* included a claim by the mortgagor for conduct contravening s 52 of the TPA, it is not clear from the judgment whether this had any real impact on the outcome: a textual analysis suggests that the attack on the statutory notice loomed larger in the court's eye (see [6.240]).

[6.230] Injunctions based on s 52 of TPA

The judgment of the Full Federal Court (Davies, Gummow and Lee JJ) in *Town & Country Sports Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 545; 97

ALR 315; [1988] ATPR ¶40-911 contains a key passage regarding a claim for an injunction restraining a mortgagee sale based on s 52 of the *Trade Practices Act 1974* (Cth).

Their Honours held that the rule in *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64 may be relaxed:

> where the mortgagor's proceedings involve an attack upon the enforceability of the security documents … As a matter of power rather than as an exercise of discretion in a particular case, the Court may grant interlocutory or final injunctive relief that does not correspond with what would follow from application of the traditional rules. This is not to say that in cases such as the present the rules devised in equity for application in disputes between mortgagor and mortgagee may not provide ready guidance for what is appropriate. But as we have observed, the traditional rule was apparently relaxed where the mortgagor attacked the enforceability of the security. The powers of the Court under s 87 of the Act enable the mortgagor to obtain in an appropriate case orders varying the terms of agreements or declaring them void as a consequence of the contravention of the provisions of the Act by the mortgagee. This may strengthen the inclination of the Court in an appropriate case to refrain from requiring the applicant to provide adequate security for its indebtedness before restraining a mortgagee from exercising its powers … As a matter of discretion the relaxation of such a requirement in this Court usually would be restricted to cases where the allegations which ground the plea for the use of the Court's powers under s 87 are clearly arguable and not merely colourable and to cases which show an obvious nexus between the allegations of misleading or deceptive conduct in contravention of s 52 of the Act and the formation of the security documents sought to be varied or rendered unenforceable by the exercise of those powers (*Town & Country Sports Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 545; 97 ALR 315; [1988] ATPR ¶40-911. See also *Graham v Commonwealth Bank of Australia* [1988] ATPR ¶40-908 and *Contractor Services Pty Ltd v Esanda Finance Corp Ltd* (1990) ATPR ¶41-020 (both decisions of French J); *Larkin v Bank of New Zealand* [1991] ATPR ¶41-066).

In *Mainbanner Pty Ltd v Dadincroft Pty Ltd* [1988] ATPR ¶40-896 at 49,633, in the course of referring to the judicial tendency to relax the *Inglis* rule, Pincus J in the Federal Court held that he had some discretion to relax the requirements of the rule. However, he heavily qualified what he said as follows:

> In my opinion, it would, in general, not be correct to exercise that discretion in favour of an applicant in a case such as this, merely on its being shown that there is a prospect, however modest, of success on an allegation of oral misrepresentation. If that were so, the rule would be, in effect, reversed, and would be that where misrepresentation is alleged in such a way that one could not deny the seriousness of the question to be tried, and the applicant claims rescission, prima facie the contract the mortgagor and mortgagee have made must be suspended.
>
> It seems that the adoption of any such principle would be, in the long run, pernicious, because it would tend to destroy or weaken people's confidence in such bargains and in the rights of holders of security.

[6.240] Where amount claimed by mortgagee is wrong and where doubt whether mortgagee's power of sale is exercisable

As *Andrew Garrett Wines Resorts Pty Ltd v National Australia Bank Ltd* (2004) 206 ALR 69; (2004) 232 LSJS 314; [2004] SASC 60 (2 March 2004) demonstrates, these categories can overlap.

The mortgagee's power of sale can be attacked in a number of ways. *Contractor Services Pty Ltd v Esanda Finance Corp Ltd* [1990] ATPR ¶41-020 at 51,355 (cited with approval by various courts including the South Australian Supreme Court in *National Australia Bank Ltd v Zollo* (1995) 64 SASR 63 at 67 per Matheson J (King CJ and Millhouse J concurring)) per French J demonstrates that there can be an attack based on s 87 of the *Trade Practices Act 1974* (Cth) where an order is sought to vary or set aside the mortgage.

Another basis for challenge is to attack the statutory notice required under s 57(2)(b) of the *Real Property Act 1900* (NSW), s 55A of the *Law of Property Act 1936* (SA) and other State analogues. It was recognised in *Andrew Garrett* that where there was a triable issue that the amount demanded in the statutory notice was substantially greater than could be demanded, then that led to a serious question as to whether the notice was invalid. In that case, the admitted amount of the debt under the facility was to the order of $2.1 m, but the borrower successfully argued that there was a serious question as to whether the mortgage only secured $1.5m. The key passage is at [37] per Besanko J:

> I think the point is arguable having regard to the terms of s 55A and the purpose of the section which I think is to provide a clear opportunity to owners of property used for a particular purpose (that is, domestic or agricultural) to avoid the exercise of certain powers under a mortgage. Furthermore, I cannot exclude the possibility that evidence of what might have happened had the correct amount due been stated may be relevant to the outcome of the issue.

Terms were, however, imposed as to payment of interest, past and future, on the full amount of the debt.

[6.300] Substitute security

Bryson J, writing extra-curially,[1] said that "instances occur in practice where mortgagees are restrained for periods of some days or weeks so that refinancing proposals can be carried out, or are restrained conditionally on their actually being carried out within defined periods".

Later in that article his Honour continued:[2]

> If it is essential that the plaintiff offer to do equity then there must be an offer to redeem the mortgage and pay the amount found to be due on taking the accounts if the court is to act at all, how much of this amount must a plaintiff do at the moment of making an interlocutory application? It must be said that the case law does not seem to explain or even to examine why the need for the plaintiff to do equity leads to an essential requirement that he produce money to repay the mortgage at the moment of making the application. What if he offers to redeem out of the proceeds of the sale which he alleges that he has made or can make, but which will not be completed until some weeks or months have passed? What if he offers to redeem out of the proceeds of another loan? It is hard to accept that for some reason or principle the court cannot or should not hear evidence that money can be expected to be forthcoming in one of those ways, and should not be appraise that evidence and form a view about whether to restrain the mortgagee's sale in the light of it.

Bryson J's comments about the acceptability at an early interlocutory stage of substitute security had even at the time of his Honour's writing (in 1993) a provenance which extended back at least a decade. An example of that approach was *Glandore Pty Ltd v Edlers Finance & Investment Co Ltd* (1984) 4 FCR 130; 57 ALR 186; [1985] ATPR ¶40-517, where the mortgagee was allowed to provide substitute security by way of a first mortgage over a farming property the value of which was in no doubt, especially because it was Elders' own valuer who had verified the value.

Barker J in *Linnpark Investments Pty Ltd v Macquarie Property Development Finance Ltd* [2002] WASC 272 at [16] noted that *Glandore* involved a challenge to the security pursuant to the *Trade Practices Act 1974* and that, in that case, Morling J made express reference to the exceptions to the general rule described by Sugerman J in *Harvey v McWatters*. It seems proper to suggest that his Honour therefore declined to apply the general rule in *Inglis* because he saw the facts of the case before him as coming within the second exception referred to in *Harvey v McWatters*.

However, there is a tension between the paradigm expounded by Barker J in *Linnpark*, and the approach of Bryson J in *Grose v St George Commercial Credit Corp Ltd* [1991] NSW ConvR ¶55-586, in which there was no challenge to the mortgagee's power of sale, although his Honour expressed reservations as to the mode in which that power of sale was being exercised. His Honour was apparently unimpressed at the undue haste and the lack of a proper marketing campaign to generate sufficient interest prior to the auction date and observed:

> The plaintiff's case should be considered on two sides. The first side is that he claims to be in a position to redeem the mortgage, not immediately but as he would put it in June, the prediction being 21 days from today, although complete precision is not to be expected. In support of that he produces a letter offering finance from the Public Investment Company Limited, a company which appears to operate in the very distant places of the Isle of Man and Connecticut, and this offer is borne out to some degree by an affidavit of Mr. MacEnroe, a person associated with Public Investment Company Limited, made on 24 May, some days before the offer…the offer suggests that subject to conditions which in this kind of business are not unusual, there is a willingness to advance to the plaintiff enough money to pay out the defendant's claim within the time I have mentioned. Much experience has taught me that such proposals are not always fulfilled, but on its face it appears to be a suitable and reliable proposal, subject to no abnormal contingencies, although too man contingencies to which finance is subject in the ordinary course of business. That is to say the plaintiff is in substance claiming that he can redeem the mortgage within a fairly short time. He does not exactly conform to what is described as the ordinary rule in the judgment of Sugerman J in *Harvey v McWatters* 49 SR 173 at 174.

In *Grose*, Barker J then restrained the auction that was listed for the following day.

In the more recent case of *Notaras v Hugh* [2003] NSWSC 440 (29 May, 2003) Sperling J was required to consider the *Inglis* line of authority, by way of a side draft, in a professional negligence claim. Notaras alleged that the respondent's solicitors had failed to move for an injunction in circumstances where they could have obtained one. Thus, the question before Sperling J was whether there was more than a non-negligible chance of injunctive relief being granted, had the respondents sought it. In that context, his Honour considered cases such as *Harvey v McWatters* (1948) 49 SR (NSW) 173; 66 WN (NSW) 72 and *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64 and then specifically addressed *Grose* by observing in *Notaras v Hugh* [2003] NSWSC 440 at [216]:

> I think it is fair to say that, at the relevant time, being the year 1992, there was an absence of uniformity between the judges of this Court as to whether invariably or almost invariably a payment into court would be required in such cases, or whether a reasonably promising conditional offer of finance might justify a short postponement of a mortgagee sale if other discretionary considerations favoured it.

Sperling J continued at [217]:

Of course, even among those who took the more liberal view, a conditional offer of finance, however promising, did not automatically lead to the grant of an injunction. A range of discretionary considerations would arise in the circumstances of the particular case. Bryson J[3] said in his article (at 2):

> "The court is taken to consider what in particular is said to be wrong about the lender's proceedings, what will be lost and what will be gained by stopping a sale from taking place in the near future, whether the expense thrown away can be provided for, and (and this is usually of great importance) why the application is made so late. If the application is made at a later stage and there is a purchaser from the mortgagee, the discretionary considerations against interlocutory relief begin to accumulate; but of course there may yet be circumstances which justify restraint if the sale was at an undervalue or there were shortcomings in the way in which the market was approached, the auction was advertised or conducted, or there were associations between the mortgagee and the purchaser, or other grounds for alleging the power was not exercised in good faith."

Sperling J in *Notaras* at [220]–[225] then went to consider whether, even on the liberal value espoused by Bryson J, the applicants would have had more than a mere non-negligible chance of obtaining an injunction. Sperling J noted that there had never been an unconditional offer of finance, but rather there had been a conditional offer that had collapsed. His Honour noted at [226] that there had been unexplained delay and also that there were no other considerations such as undue haste in exercising the power of sale, such as to put the balance "in favour of postponing the auction sales" (at [227]).

His Honour thus concluded there was not more than a negligible prospect that a court would have postponed the sales.

1 Bryson J, "Restraining Sales by Mortgagees and a Curial Myth" (1993) 11 Aust Bar Rev 1 at 16.

2 Bryson J, "Restraining Sales by Mortgagees and a Curial Myth" (1993) 11 Aust Bar Rev 1 at 16.

3 Bryson J, "Restraining Sales by Mortgagees and a Curial Myth" (1993) 11 Aust Bar Rev 1 at 2.

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THE SERIOUS QUESTION

[6.400] Serious questions relating to restraining the calling up of mortgages

Serious questions that might arise include:

- Is the amount claimed by the mortgagee obviously wrong? See [6.240].
- Is the mortgagee's power exercisable? See [6.410].
- Has the mortgagee acted with undue haste and not properly marketed the property so as to realise its market value?
- Does the mortgagee plan to purchase on its own account?
- Does the mortgagee plan to sell to a close associate or agent?
- If the sale is by private contract, has the mortgagee taken reasonable steps to ascertain value? See [6.420].
- Was there any misleading and deceptive conduct that could impeach the mortgagee's power of sale? See [6.430].
- Is the interest secured by the mortgage usurious? See [6.440].
- Does the mortgagor have a set-off or has there been fraud on the power of sale? See [6.450].

[6.410] Is the mortgagee's power exercisable?

The primary analysis as to whether the power of sale has become exercisable focuses on the terms of the facility, any re-negotiations of those terms and whether the machinery provisions in those facilities and otherwise set out in statutes such as s 57(2)(b) of the *Real Property Act 1900* (NSW) and other State analogues have been complied with.

[6.420] Private sale: has the mortgagee sacrificed the interests of the mortgagor?

When a mortgagee exercises its power of sale, whilst it is not a trustee of that power for the mortgagor, it must nevertheless not sacrifice the mortgagor's interests. The mortgagee must not willfully or recklessly sacrifice the interests of the mortgagor and must act in good faith to him or her in the exercise of its power of sale: *James v Australia & New Zealand Banking Group Ltd* (1986) 64 ALR 347 at 391; (1986) 6 IPR 540; [1986] ASC ¶55-477 per Toohey J, following a line of cases such as *Kennedy v De Trafford* [1897] AC 180 at 185 per Lord Herschell; *Davis v Taylor* (1948) 48 SR (NSW) 514; 65 WN (NSW) 209.

What Mason J in *Forsyth v Blundell* (1973) 129 CLR 477 at 506; 47 ALJR 448; 1 ALR 68 labelled the "vexed question whether the mortgagee's duty is merely to act bona fide or

whether, in addition, he is bound to take reasonable precautions to obtain a proper price" is apparently unresolved in Australian jurisprudence, so far as concerns the common law (as opposed to the statutes which apply from State to State).

Section 420A of the *Corporations Act 2001*(Cth) provides that in exercising a power of sale, in respect of property, a controller must take all reasonable care to sell for market (if there is a market) or, alternatively, the best price reasonably available.

It would appear to be an open question as to whether a mortgagee of a single property of a company is a "controller" within s 420A: *Builders Pty Ltd v Elliot & Tuthill (Mortgages) Pty Ltd* (2002) 10 BPR 19,566 at 124. However, Palmer J was prepared to accept that there was an arguable case that such a mortgagee can be viewed as a "controller": *Tekinvest Pty Ltd v Lazarom* [2004] NSWSC 940 (11 October 2004) at [24].

Some of the main cases that consider the content of a mortgagee's duty are set out below, along with brief consideration of the critical findings of fact in those cases.[1]

Martinson v Clowes

In *Martinson v Clowes* (1882) 21 Ch D 857 (confirmed on appeal in *Martinson v Clowes* (1885) 52 LT 706) the mortgagee (a building society) offered the mortgaged property for auction. Mr Culley was the mortgagee's secretary. In conjunction with the mortgagee's solicitor, Culley "instructed the auctioneer". Culley personally took the instructions for sale to the auctioneer and told the auctioneer what the reserve price would be. Culley then bid for and purchased the property. It was known that Culley was the mortgagee's secretary. No-one bid against Culley. North J held at 860:

> It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either … There must be a declaration that the sale and conveyance … are void.

Hodson v Deans

In *Hodson v Deans* [1903] 2 Ch D 647 the mortgagee was a friendly society. Mr Drew was a trustee of the mortgagee and also a member of the investment committee of the society, which dealt with mortgage affairs. Another member of the committee instructed the auctioneer under Drew's control and Drew was present when those instructions were given.

The mortgagor was told on the Friday about the auction which was to take place on the following Monday. Drew attended the auction and outbid the mortgagor to purchase the property. Drew had previously, without the knowledge of other trustees or committee members, inspected the property and had also called upon the mortgagor with the object of trying to buy the property without the expense of an auction. After purchasing the property, Drew obtained a mortgage advance from the society upon the property. There was evidence the sale was at under value, though not very greatly. Joyce J held at 651 that Drew conceived the idea of buying the property and making a profit for himself and that it was highly probable that Drew himself fixed the reserve (at 653). The court concluded that the mortgagor had not been "fairly and honestly" dealt with.

Pendlebury v Colonial Mutual

Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 13 CLR 676; [1912] HCA 9 is a major case in this area. The mortgagee sold up mortgaged property for less than half its value. It was rural land, which was advertised in Melbourne newspapers only, not locally. The

evidence was that this was normal advertising practice on mortgagee sale and that best prices were not normally expected on mortgagee sale.

Griffith CJ held:

> the mortgagee must not recklessly or wilfully sacrifice the interests of the mortgagor (at 680).
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> …
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> The question [is whether the mortgagee] "looked after their own interests alone", and absolutely disregarded the interests of the mortgagor (at 680–681).
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> …
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> It is not disputed that if a mortgagee sells by private contract he is bound to take reasonable means to ascertain the value before selling, and the same rule applies, in my opinion, to a sale by auction (at 683).

Barton J expressed the following views at 694:

> If [the mortgagee] confines his attention to his own interests, and sacrifices the mortgagor's property by doing so, he certainly acts unfairly, that is, in bad faith.

Isaacs J held at 702–703 that:

> [the mortgagee] sold the mortgagor's land without the smallest regard for his interests. He had no real chance whatever to save a plank from the wreck, his very existence was ignored, and his land and improvements and labour were sacrificed without the least sense of obligation to him, though a comparatively small effort was necessary to prevent the disaster.

Latec Investment Ltd v Hotel Terrigal

In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265; 39 ALJR 110; [1965] HCA 17 the mortgagee exercised its power of sale by selling to a wholly owned subsidiary at a price slightly higher than the highest bid at auction, at which the reserve was substantially in excess of that bid. Apart from the fixing of the reserve price, the auction was conducted so as to guarantee the property would not then be sold (unfavourable day of week, no proper advertisement). There was no attempt to negotiate privately with unsuccessful bidders.

There was also an obvious conflict of interest, in that one of the companies in the mortgagee's group also owned a hotel in the area and there were benefits to be gained from "peaceful co-existence". The court had no problem categorising the conduct as fraud.

ANZ Banking Group v Bangadilly Pastoral Co

In *Australia & New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 139 CLR 195; 52 ALJR 529; 19 ALR 519 the mortgagee acquired the mortgage by transfer from the first mortgagee at a time when, to its knowledge, the mortgagor was already in default and was in serious financial difficulties. The mortgagee sold the property to a company it controlled.

Jacobs J:

> The inevitable conflict of interest which arises on a sale to a close associate may be not only consciously but also unconsciously resolved in favour of the associate. The closer the association, the greater the conflict and the greater the possibility of unconscious preference.

…

> I am prepared to assume that in some circumstances not easily conceivable a sale by a mortgagee to a company as closely associated with that mortgagee as was the purchaser company in the present case might be a sale which could be allowed to stand. But before that could be so, it would need to appear from the objective facts that there was no shortcoming in the courses followed by the mortgagee or those acting on its behalf (*Australia & New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 139 CLR 195 at 202; 52 ALJR 529; 19 ALR 519 per Jacobs J).

Aickin J held at 227:

> One of the critical questions here is whether there ever was an independent bargain. The deciding minds were those of Mr. and Mrs. Hall and of no one else. They were the only directors of the mortgagee … they were the only directors of the purchaser … They fixed the reserve; they … were the only bidders, and they fixed the maximum price which the purchaser was prepared to pay. As controllers of the vendor, they knew that a prospective purchaser was prepared to pay $303,000, and as controllers of the purchaser they knew the reserve. In such a situation it seems to me that a purchase at or close to the reserve cannot be an independent bargain.

Tse Kwong Lam v Wong Chit Sen

In *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349; [1983] 3 All ER 54 the mortgagee sold a property to his wife. The purchase had been financed directly by the mortgagee. Lord Templeman held at 1355:

> In the present case in which the mortgagee held a large beneficial interest in the shares of the purchasing company, was a director of the company, and was entirely responsible for financing the company, the other shareholders being his wife and children, the sale must be closely examined and a heavy onus lies on the mortgagee to show that in all respects he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgaged property.

Hallifax Property Corp v GIFC

In *Hallifax Property Corp Pty Ltd v GIFC Ltd* (1987) 4 BPR 9708; [1988] NSW ConvR ¶55-415 Young J took the view that it was not self-evident that advertising a sale as a "mortgagee sale" would depress the price likely to be realised, and that opinions could legitimately differ on this point; a perspective that recently found favour in *Stockl v Rigura Pty Ltd* [2004] NSWCA 73.

1 The author gratefully acknowledges the permission of Simon Davies, 13th Floor Wentworth Chambers, who has provided the research for this section.

[6.430] Was there misleading and deceptive conduct?

The Federal Court in *Glandore Pty Ltd v Elders Finance & Investment Co* (1984) 4 FCR 130; 57 ALR 186; [1985] ATPR ¶40-517 granted an injunction upon it being demonstrated that there was a serious question as to whether Elders had contravened s 52 of the *Trade Practices Act 1974* (Cth) in relation to a facility it had granted to the applicants.

[6.440] Is the interest secured by the mortgage usurious?

Now that the statutes dealing with usury have been repealed, any serious question relating to the rate of interest could only be couched in terms of whether the mortgagor has

unconscionably exploited the necessitous circumstances of the mortgagee to extort exorbitant terms of the loan. The mere fact of a high interest rate is unlikely of itself to cast the onus on the mortgagee to justify it: see *Takemura v National Australia Bank Ltd* (2003) 11 BPR 21,185; [2003] NSW ConvR ¶56-056; [2003] NSWSC 339, especially at [18]–[31] per Young CJ. That case did not concern an injunction, but rather whether the mortgagee was entitled to enforce its security where a high rate of interest had been bargained for.

[6.450] Is the exercise of the power of sale a fraud on a power?

In *Wernard Electrics Pty Ltd v Hatmax Mortgage Management Ltd* (unreported, NSWSC, Young J, 3186 of 1994, 27 July 1994) Young J was required to discern the outer limits of the principle associated with *Popular Homes Ltd v Circuit Developments Ltd* [1979] 2 NZLR 642. *Popular Homes* is associated with a proposition that where there is at the time a mortgage is being negotiated (a) an arrangement that the borrower would be advanced a specific amount of money or (b) an indication from the borrower that unless the full amount was advanced, then there may be difficulty in servicing the debt, then there may be a set-off for damages for breach of that arrangement. In *Wernard Electrics*, Young J stated that:

> [i]t may be that the principle does not go that far, because the *Popular Homes case* involved a mortgagee who was unable to advance the full amount because it itself went into liquidation, but certainly there is that matter which is arguable. Even if the equity was called into play in this case there must be a question as to whether its existence affects the power of sale. It seems to me that the power of sale is not to be exercised in circumstances where there would be a fraud on the power. It might be a fraud on the power to exercise it in circumstances where the mortgagee itself has been guilty of conduct which strongly contributed to the mortgagor's default, which default is the basis for the power of sale. There is no time to explore this matter fully. I will assume for present purposes that there is an arguable case by the mortgagor for relief.

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BALANCE OF CONVENIENCE

[6.500] Credibility of alternative security

In *Linnpark Investments Pty Ltd v Macquarie Property Development Finance Ltd* [2002] WASC 272 one of the matters which the court weighed in the balance was that, regarding a disputed amount of some $600,000, the mortgagor was only offering as security a second mortgage over another property.[1] Macquarie Bank led evidence of its lending practice in aid of the submission that a prudent lender would be cautious in taking a second mortgage security such as that offered by the applicant.

Barker J noted at [83]–[84] that if the court were to accede to the applicant's proposal, then:

> Macquarie would be obliged to give up the securities it initially bargained for and to accept as a replacement, albeit only in respect of the disputed amount of some $590,000, a second mortgage over the Anketell property.
>
> The applicants' redemption proposal is properly analysed by Senior Counsel for Macquarie as being deficient for the following reasons:
>
> - the value of the Anketell mortgage does not fit the defendant's normal lending practice, which is generally to lend no more than 50 per cent of the market value of a property such as Anketell, where the defendant would be the first registered mortgage;
> - standard lending guidelines would require some indication of an income stream to service an initial set up fee and ongoing interest charges;
> - the defendant would be a second registered mortgagee;
> - the realisable value of the property on a mortgagee's sale is uncertain and is likely to be significantly less than any valuations provided to date considering, in particular, that zoning for urban development had not been approved and any approval date for urban rezoning is unclear.

Barker J concluded that a case such as this attracted the general rule in *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64, especially in circumstances where those serious questions which had been identified in respect of the disputed sum were "at the weaker end of a scale of seriousness" (at [86]).

In *Emmanuel Orchards Pty Ltd v National Australia Bank Ltd* (2003) 231 LSJS 118; [2003] SASC 368 at [41] per Bleby J, a factor weighing against relief was that the applicant had not even offered security, let alone paid down the debt.

1 See, for example, *Linnpark Investments Pty Ltd v Macquarie Property Development Finance Ltd* [2002] WASC 272 at [66] per Barker J.

[6.510] Neither principal nor interest paid for considerable time

In *Wernard Electrics Pty Ltd v Hatmax Mortgage Management Ltd* (unreported, NSWSC, Young J, 3186 of 1994, 27 July 1994), after it was held that the mortgagor had "just got over

the barrier so far as prima face case is concerned", the court then addressed where the balance of convenience lay and noted that the borrower had not paid interest for about nine months. Young J noted that:

> [e]quity is loath to restrain mortgagee sales because experience has shown that, although the mortgagor always does intend to refinance, the number of occasions when this has actually happened is relatively few. Equity is particularly loath to interfere when the sale is a day or so's time away and there has been plenty of time to approach the Court before the time the Court is actually approached. Equity is also loath to intervene where there has not been a current payment of interest because, even if a mortgagor does have difficulties with illiquidity, at least it should be able to service the current interest. All those factors tell against granting an injunction in the instant case.

His Honour noted that the property had been close to sale before, that the sale had fallen through and that had caused delay to the mortgagee proceeding.

Whilst his Honour had misgivings as to the ability of the mortgagee to give a proper accounting, in the event of a sale at an undervalue, his Honour drew some comfort by the fact that the mortgagee was prepared to place an appropriate reserve price on the sale. An injunction was refused.

Failure to pay principal weighs against relief: *Tekinvest Pty Ltd v Lazarom* [2004] NSWSC 940 (11 October 2004) at [29] per Palmer J.

[6.520] Sufficiency of undertaking

As a general rule, an insufficient undertaking is a factor weighing against relief: see Chapter 2. The general principle applies to restraining mortgagee sales: *Yellowrock Pty Ltd v Liberty Services Pty Ltd* [2000] VSC 123 at [24] per Eames J (6 April 2000).

[6.530] Strength of applicant's claim

Though the applicant might have an arguable claim, if it is not a particularly strong one, this weights against an injunction: *Emmanuel Orchards Pty Ltd v National Australia Bank Ltd* (2003) 231 LSJS 118; [2003] SASC 368 at [40] per Bleby J; see also *Linnpark Investments Pty Ltd v Macquarie Property Development Finance Ltd* [2002] WASC 272.

In *M & J Pty Ltd v Australian & New Zealand Banking Group Ltd* [1998] FCA 309 the debt had fallen due by effluxion of time, there was no real prospect in the foreseeable future of the applicants being able to pay it and the allegations of misleading conduct were "not overwhelmingly strong":*Mainbanner Pty Ltd v Dadincroft Pty Ltd* [1988] ATPR ¶40-896, considered in *Williams v Abbott Australasia Pty Ltd* [2002] NSWSC 950.

For a case where the strong "prima facie" case as to whether the power of sale had become exercisable was held to demonstrate that the balance favoured an injunction, see *Paul Douglas Williams v Abbot Australasia Pty Ltd* [2002] NSWSC 950 (3 October 2002).

[6.540] Granting relief might only worsen applicant's position

If interest is accumulating and there is little prospect it can be paid, then restraining the sale can only worsen the mortgagor's position and this weighs against an injunction: *Emmanuel Orchards Pty Ltd v National Australia Bank Ltd* (2003) 231 LSJS 118; [2003] SASC 368 at [42] per Bleby J.

[6.550] Default in payment

Default in payment, coupled with failure to pay into court or failure to redeem the mortgage, will weigh against an injunction: *Tekinvest Pty Ltd v Lazarom* [2004] NSWSC 940 (11 October 2004) at [27] per Palmer J.

[6.560] How long has the lender been kept out of its money?

A factor which Palmer J held militated against relief in *Tekinvest Pty Ltd v Lazarom* [2004] NSWSC 940 (11 October 2004) at [28] was that the sale had already been postponed for three months to enable the mortgagor to find a way out of its difficulties.

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FORMS AND PRECEDENTS

[6.700] Mortgages: forms and precedents

The following precedent is supplied:

- orders restraining the mortgagee's power of sale (see [APX1.300]).

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