

SUPREME COURT OF QUEENSLAND

CITATION: *Von Risefer & Ors v Permanent Trustee Company Pty Ltd & Ors* [2004] QSC 248

PARTIES: **EUSTACE von RISEFER**
(first plaintiff)
ELIZABETH von RISEFER
(second plaintiff)
GOLD COAST BARRAMUNDI PTY LTD trading as SATOR AUSTRALIA
(third plaintiff)

v

PERMANENT TRUSTEE COMPANY PTY LTD
(first defendant)
LATROBE HOME LOANS AUSTRALIA PTY LTD
(second defendant)
MACGILLIVRAYS SOLICITORS
(third defendant)
ROBERT EDWARD HALL
(fourth defendant)
ELIZABETH MARY HALL
(fifth defendant)
DEPARTMENT OF NATURAL RESOURCES & MINES
(sixth defendant)

FILE NO/S: BS 9123/03
DIVISION: Trial
PROCEEDING: Application
ORIGINATING COURT: Supreme Court at Brisbane
DELIVERED ON: 16 August 2004
DELIVERED AT: Brisbane
HEARING DATE: 7 May 2004
JUDGE: Atkinson J

ORDER:

1. That there be judgment for the first, second, third, fourth and fifth defendants against the plaintiffs for all of the plaintiffs' claim;
2. That caveat dealing number 707 674 047 lodged on 28 April 2004 be removed;

3. That the first, second and third plaintiffs compensate the fourth and fifth defendants in the sum of \$2,170.30;
4. That the first, second and third plaintiffs jointly and severally by themselves, their servants and agents be restrained and an injunction granted restraining the first, second and third plaintiffs or any of them from lodging any dealing with the Registrar of Titles of the Department of Natural Resources and Mines with respect to the land described as Lot 17, Registered Plan 846050, County of Ward, Parish of Barrow, being the whole of the land contained in the Title Reference 18493233 and situated at 53 Gwydir Court, Helensvale in the State of Queensland, without the leave of this Court first obtained; and
5. The plaintiffs pay the first, second, third, fourth and fifth defendants' costs of and incidental to the proceeding, including this application, to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – judgment under r 293 *Uniform Civil Procedure Rules* – where ‘no real prospect of success’ – whether statement of claim discloses cause of action

Uniform Civil Procedure Rules 1999 (Qld), r 293

Bernstrom v National Australia Bank Ltd [2002] QCA 231; [2003] 1 Qd R 469, cited

Blair v Curran (1939) 62 CLR 464, cited

Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502, cited

Commissioner of Stamp Duties v Agenti Architects [2003] QCA 265, cited

Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited

Foodco Management Pty Ltd and Anor v Go My Travel Pty Ltd [2001] QSC 291; [2002] 2 Qd R 249, cited

Gray v Morris [2004] QCA 5, cited

Khatri v Wilson [2003] QCA 188, cited

National Australia Bank Limited v Troiani and Anor [2002] QCA 196, cited

Permanent Trustee Company Ltd v von Risefer [2000] QSC 164, considered

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, cited

Queensland University of Technology v Project Constructions (Aust) P/L (In Liq) and Anor [2002] QCA 224; [2003] 1 Qd R 259, cited

Raybos Australia Pty Ltd v Scitec NSW CA, CA No 146 of

1986, 16 June 1986, cited
Swain v Hillman [2001] 1 All ER 91, applied
Wentworth v Rogers (no 5) (1986) 6 NSWLR 534, cited

COUNSEL: The plaintiffs/respondents appeared on their own behalf
 MJ Drysdale for the first, second, third, fourth and fifth
 defendants/applicants
 R Hutchings (Crown Law) for the sixth defendant

SOLICITORS: The plaintiffs/respondents on their own behalf
 MacGillivrays for the first, second and third
 defendants/applicants
 Saunders Downing Hely for the fourth and fifth
 defendants/applicants
 The sixth defendant appeared on its own behalf

- [1] The first, second, third, fourth and fifth defendants have applied for judgment against the plaintiffs for all of the plaintiffs' claim pursuant to r 293 of the *Uniform Civil Procedure Rules* ("UCPR"). The nature of the plaintiffs' claim is for recovery of possession of land from the fourth and fifth defendants and damages in the sum of \$6,266,000 for loss of income.
- [2] The application was filed on 19 January 2004 and adjourned on three occasions at the request of the plaintiffs. On the last of these occasions, the plaintiffs were given the opportunity to replead and put their statement of claim into a form where it disclosed a cause of action. An amended statement of claim was filed on 4 May 2004 and then replaced by another amended statement of claim ("the statement of claim") on 6 May 2004.
- [3] The first to fifth defendants have submitted that the statement of claim contains allegations that are scandalous, vexatious and embarrassing; discloses no cause of action known to law; and contains matters that could and should have been raised in an action which has already been determined in this court.
- [4] The fourth and fifth defendants have also sought the removal of caveat no 707674047 lodged over the land and compensation of \$2,170.30. The first to fifth defendants have also applied for orders that the first, second and third plaintiffs jointly and severally by themselves, their servants and agents be restrained and an injunction restraining the first, second and third plaintiffs or any of them from lodging any dealing with the Registrar of Titles of the Department of Natural Resources and Mines with respect to the land without the leave of this court first obtained.

Background facts

- [5] The facts which are relevant to understanding this matter are that in action no S4257 of 1998, Permanent Trustee Company Pty Ltd ("Permanent Trustee"), the first defendant herein, sought recovery of possession of land, described as Lot 17, Registered Plan 846050, County of Ward, Parish of Barrow, being the whole of the land contained in Title Reference 18493233 and situated at 53 Gwydir Court, Helensvale, in the State of Queensland ("the land"), as mortgagee.

- [6] After many interlocutory steps, the matter was heard in a trial in this court lasting some 19 days. Judgment in favour of Permanent Trustee was delivered by the learned trial judge on 9 June 2000: see *Permanent Trustee Company Ltd v von Risefer* [2000] QSC 164. That matter has been the subject of applications and an appeal to the Court of Appeal and an application for special leave to the High Court with proceedings resolved in favour of Permanent Trustee. The application for special leave was refused on 12 September 2003. Permanent Trustee was held to be entitled to possession of the land as the mortgagee consequent upon Mr and Mrs von Risefer's default under the mortgage.
- [7] On 16 September 2000, the land was sold for \$300,000 following a public auction. The fourth and fifth defendants were the purchasers. The plaintiffs were not known to them.
- [8] Between 16 September 2000 and prior to the completion of the purchase, the first and second plaintiffs lodged three caveats over the property which were removed by orders of this court on 18 October 2000 and 20 October 2000. Subsequent to settlement on 20 October 2000, the plaintiffs lodged a further four caveats over the property. The plaintiffs have commenced an action for recovery of possession of the land and damages. On 28 April 2004, the plaintiffs lodged a further caveat over the land. If necessary, I would give leave to amend the application so that it covers any caveat lodged over the land by any of the plaintiffs.

Application for judgment

- [9] Rule 293 of the *UCPR* provides:

“(1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.

(2) If the court is satisfied –

- (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
- (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.”

- [10] If the court is satisfied of the circumstances set out in r 293(2)(a) and (b), then it has a discretion to give judgment for the defendants and make any other order considered appropriate. This rule has been adopted to give effect to the overriding purpose of the *UCPR* set out in r 5(1), which is “to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.” The goal of expeditious resolution, at a minimum of expense, is effected by the ability of the court to give summary judgment in the circumstances set out in the rules. The goal of just resolution of the real issues is protected by the necessity to satisfy the requirements of paragraphs (a) and (b): that the plaintiff has no real prospect of succeeding and there is no need for a trial. The court retains a discretion to refuse summary judgment even when paragraphs (a) and (b) are satisfied.

- [11] The test to be applied is that adopted by Lord Woolf MR in *Swain v Hillman*¹ in relation to r 24(4) of the *Civil Procedure Rules (UK)* which is in similar terms to r 293: that is, the court must consider whether there exists a real, as opposed to a fanciful, prospect of success.² The jurisdiction to dismiss the plaintiff's action should only be exercised where the plaintiff cannot improve its position by a proper amendment of the pleading.
- [12] It is necessary to examine the statement of claim to see whether it discloses a cause of action. It is difficult to summarise and it is therefore perhaps most illuminating and fair to both the plaintiffs and the defendants to set out the words of the statement of claim as pleaded. It can be seen at once that the pleading is incoherent in its expression. I have given anxious consideration as to whether there is any cause of action which could be said to lie behind the incoherence of expression. As Kirby P, with whom Hope and Samuels JJA agreed, said in *Wentworth v Rogers (No 5)*:³
- “Courts should approach the preemptory termination of the litigation with special care to ensure that, within the possibly ill expressed and unstructured statement of the legal claim sought to be ventilated, there is no viable cause of action which, with appropriate amendment of the pleading and a little assistance from the court, could be put into proper form.”
- [13] If there appears to be a viable cause of action, then the plaintiffs should have leave to replead. If not, the statement of claim should be struck out with no leave to replead. Where there is no viable cause of action, then there can be no issues that need to be investigated at trial.⁴ In an appropriate case, judgment should be entered under *UCPR* 293(2) or in the inherent jurisdiction of the court to prevent abuse of its process.

The statement of claim

- [14] After formal matters, in paragraph 3 of the statement of claim, the plaintiffs allege:

“3. The proceeding in the Supreme Court with Justice Byrnes never have been finished still are unfinished. On the 31st of May 2000 the Firstnamed and Secondnamed Plaintiffs they lodge a respond to the Amended Statement of Claim to the of the Firstnamed Defendant creating pleadings which have been untried by Justice Byrnes who deliver his decision before the 31st of May 2000 according to the index of the Supreme Court the documents have been filed as follow:

¹ [2001] 1 All ER 91 at 92; See also *Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513 at 541.

² See *Foodco Management Pty Ltd and Anor v Go My Travel Pty Ltd* [2001] QSC 291, [2002] 2 Qd R 249 at [8]; *National Australia Bank Limited v Troiani and Anor* [2002] QCA 196 at [11] – [12]; *Queensland University of Technology v Project Constructions (Aust) P/L (In Liq) and Anor* [2002] QCA 224 at [7], [2003] 1 Qd R 259; *Bernstrom v National Australia Bank Ltd* [2002] QCA 231 at [35] – [40], [2003] 1 Qd R 469; *Khatri v Wilson* [2003] QCA 188; *Commissioner of Stamp Duties v Agenti Architects* [2003] QCA 265.

³ (1986) 6 NSWLR 534 at 536-537.

⁴ *Gray v Morris* [2004] QCA 5 at [46].

- a) exhibit 116 Amended Statement of Claim dated 24-05-2000
- b) exhibit 117 Judgment dated 09-06-2000
- c) exhibit 118 Enforcement order dated 09-06-2000
- d) exhibit 119 Reasons for judgement dated 09-06-2000
- e) exhibit 120 draft order dated 09-06-2000
- f) exhibit 121 respond to Am. Statement of Claim dated 31-5-2000.

We have something impossible in reality the filed list is as follow:

- a) exhibit 116 Amended Statement of Claim dated 24-05-2000
- b) exhibit 121 respond to Am. Statement of Claim dated 31-5-2000
- c) exhibit 117 Judgment dated 09-06-2000
- d) exhibit 118 Enforcement order dated 09-06-2000
- e) exhibit 119 Reasons for judgement dated 09-06-2000
- f) exhibit 120 Draft order dated 09-06-2000

The Secondnamed Defendant [barrister] lied in the proceeding that the Supreme Court finished the hearing and again in the proceeding in the Court of Appeals were the Firstnamed and Secondnamed Plaintiff's Appeal dismissed ex-parte, he misled the Supreme Court once again on 22-10-2000 before Justice White he said the settlement was on 4:00 and not 2:30 according to Statement of settlement, as result of his actions another caveat removed by misleading the Supreme Court once again on the 18-10-2000 without transcripts and Affidavit, order was obtained. According to the index of the Supreme Court the Application exhibit 127 was filed after the order of Justice White on 22-10-2000. He lied in the High Court on 28-09-2000 stating that the property was not sold. Perjury against making false declaration he lied that he was not aware of the proceeding in the Federal Court and in High Court and he lied about the third plaintiff who was party ignoring the existence of the Thirdnamed Plaintiff.”

[15] This allegation is scandalous, embarrassing and fails to disclose a cause of action known to law. It is an attempt to reopen a matter which has been completed.⁵ To allow the plaintiffs to do so in these circumstances would be to offend against the finality of litigation.⁶ Further, the barrister in question is not a defendant as alleged and there is absolutely no evidence to support any allegation that he has lied, on oath or otherwise.

[16] Paragraph 4 of the statement of claim is in the following terms:

“4. At all material times the Firstnamed Defendant acted as an agent to unknown investors to use the Firstnamed Defendant 's

⁵ *Permanent Trustee Company Ltd v von Risefer* [2000] QSC 164.

⁶ *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589 at 602-603; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 512; *Blair v Curran* (1939) 62 CLR 464 at 531-533.

name to do investments. The Firstnamed Defendant without any provision of the consumers Credit Code to allow him to do so started action in the Court against the Firstnamed and Secondnamed Plaintiff s. The Firstnamed Defendant failed to provide disclosure of the source of the money.

PARTICULARS

- (a) Only the Credit provider allowed to start action from the Credit Code. Only on 6-12-1999 they produce the Deed that they were brokers for the Oversea Chinese Banking Corporation
- (b) Onus of proof the onus of proving that a Power of Sale was exercised in accordance with the division is on the Credit provider that exercised it.
- (c) Mr. Watson Senior Securitisation officer of the firstnamed Defendant Permanent Trustee under oath and cross examination stated that the Oversea Chinese Banking Corporation of Singapore are the real mortgagees acting on behalf of overseas customers investors.
- (d) The Firstnamed Defendant sold the Firstnamed and Secondnamed Plaintiffs mortgage on 26-2-97 to IBJ Morgan's and Oversea Chinese Banking Corporation of Singapore through the Clearing House Electronic Sub register System (CHESS) in the Australian Stock Exchange.
- (e) Since then the Firstnamed Defendant had no rights to the Plaintiffs property. Section 144(1) of Credit Code false or misleading representation on the earth of contract
- (f) The Firstnamed Defendant illegally did not registered the above transfer.
- (g) To the contrary removed the second page of the mortgage revelling the transferring
- (h) The Firstnamed Defendant claim that is the mortgagees. The Firstnamed Defendant breached the Bank Integration Act 1991 No. 210 of 1991 – SECT 24 by non registering their interests.
- (i) If the security transaction is a mortgage it has long been accepted that both mortgagor and mortgagee have property rights in the chattels the Firstnamed Defendants action was the recovery of possession the land while never issue a Notice of Default or a Notice of exercise of power to sale the transfer of the property never have been executed by the Firstnamed Defendant. Fourthnamed and Fifthnamed Defendant never paid the Stamp duty Land Tax to the Revenue Office.”

[17] This paragraph was also an attempt to re-open the litigation which was finalised and, as such, could not be sustained. The allegations against the fourth and fifth defendants in paragraph (i) of the particulars are not particulars of the allegation in paragraph 4 and will be dealt with later.

[18] Paragraph 5 of the statement of claim deals in the following terms with regard to the exercise of the power of sale:

“5. At all material times the Secondnamed Defendant exercised power of sale the Firstnamed and Secondnamed Plaintiffs propriety without to have the authority to do so.

PARTICULARS

The Secondnamed Defendant through his employee Barry Ashley O’Connel transfer the property of the Firstnamed and Secondnamed Plaintiffs without to prove or to produce the Duly authorisation from the Permanent Trustee which had the judgment The Secondnamed Defendant without to have the authority acted in that:Barry Ashley O’Connell on 12-10-2000 transfer the property of Firstnamed and Secondnamed Plaintiffs declaring under oath that he had the power to do the transfer without such power to do so.

- a) Caused formal notice to be given to the Firstnamed Defendant and the Secondnamed Defendant in exercise of the power of sale.
- b) Barry Ashley O’Connell on 12-10-2000 transfer the property of Firstnamed and Secondnamed Plaintiffs declaring under oath that he had the power to do the transfer without such power to do so.
- c) Failed to give 30 days According to the Consumers Credit Code Sec. 51 form 5A sec, 18 the credit provider with the judgment need togive 30 days of the owing amount to be paid or to be redeemed by the debtor.
- d) Caused the property to be sold.
- e) Caused all of the right, title and interest of the Firstnamed Plaintiff and the Secondnamed Plaintiff to be transferred to the Fourthnamed and Fifthnamed Defendants
- f) Determined the sale price of the property.
- g) Execution of the mortgage No 701836320 executed by the Secondnamed Defendant Latrobe Home Loans on 14-2-97 and 17-2-97 through their Solicitors Fiona Woods at Donald Dickie Solicitors. Latrobe Home Loans instructed their Solicitors to enter on their behalf on mortgage using Permanent Trustee to cover Latrobe’s customers without tax file number against the Tax Assessment Act.”

[19] Again the paragraph fails to disclose any cause of action known to law. An example of its inadequacy as a pleading is found in the alleged breach of s 51 of the Consumer Credit Code said to be that “the credit provider with the judgment need to give 30 days of the owing amount to be paid or to be redeemed by the debtor”. Section 51 has nothing to do with such an allegation. It deals with the disclosure duties of a credit provider to a prospective guarantor. No guarantee is pleaded. The

allegations regarding the identity of the mortgagee were dealt with in the litigation which has concluded.⁷

[20] Paragraph 6 of the statement of claim deals with matters that occurred during or at the end of the litigation before Byrne J. There is no warrant to re-open those matters. It pleads:

“6. The Thirdnamed Defendants brought an action in the Supreme Court without to be authorized either by the Firstnamed Defendant or the last known real mortgagee IBJ Australian Bank and a Singaporean bank the Overseas Chinese Banking Corporation. The Thirdnamed Defendants filed an affidavit in the Supreme Court on 9-6-00 stating under oath that the only occupants in the property were only the Firstnamed and Secondnamed Plaintiffs and not the Thirdnamed Plaintiff Sator Australia carrying business on the property.

PARTICULARS

- (a) The Thirdnamed Defendants never brought in the Supreme Court any authorization to act as Solicitors for the Firstnamed Defendant.
- (b) Mr. Drysdale from McGillivrays filed an affidavit in the Supreme Court on the 9th of June of 2000 stating under oath that the only occupants in the property of 53 Gwydir Court were the residents only the Eustace and Elizabeth von Risefer and not Sator Australia operating their aquaculture business The Thirdnamed Defendants caused the aquaculture business of the thirdnamed plaintiff to be sold for free.”

[21] Further, this paragraph contains allegations which are obviously absurd. The third defendants were the solicitors on the record for the first defendant in the trial which was concluded by judgment given on 9 June 2000. No affidavit was filed by Mr Drysdale on 9 June 2000.

[22] Paragraph 7 of the Statement of Claim makes allegations against the purchasers of the land. Paragraph 7 is in the following terms:

- “7. The The Fourthnamed and the Fifthnamed Defendants Robert Edwart Hall and Elizabeth Mary Hall they appear :
- a) On mortgage No 704607856 as morgagors on 13-10-2000 claim secured money item 5 of mortgage No 700218684.
 - b) Not parties
 - c) Not money
 - d) Not description of Lot, county, parish, Title reference
 - e) Dated on 9-9-1994 registered on 21-12-1994.

⁷ [2000] QSC 164 at [21].

- 7b. The Fourthnamed and the Fifthnamed Defendants on transfer executed on 12-10-2000 or 17-10-2000 as transferees are stating “the information contained in items 3 and 4 on the attached form 24 is true and correct
- a) “No form 24 ever been lodged or been disclosed
 - b) Item 3 : on 3-3-98 payment of \$1,500.00 and on 27-3-98 \$2,060.00 were received.
 - c) Item 4: Notice of default never issued either 30 days period without payment occur or power of sale was ever issued
 - d) Fourth named and the Fifth named Defendants never satisfied the payment of the said purchase of \$300,000

- [23] The purchasers of a property from a mortgagee enjoy statutory protections. Section 85(3) of the *Property Law Act* provides that:

“The title of the purchaser is not impeachable on the ground that the mortgagee has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.”

- [24] A purchaser is further protected by s 87(1) of the *Property Law Act* which provides:

“(1) Where a conveyance is made in exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground –

- (a) that no case had arisen to authorise the sale; or
- (b) that due notice was not given; or
- (c) that leave of the court, when so required, was not obtained; or
- (d) whether the mortgage was made before or after the commencement of this Act, that the power was otherwise improperly or irregularly exercised;

and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a cause has arisen to authorise the sale, or due notice has been given or the power is otherwise properly and regularly exercised, but any person damnified by an unauthorised, or improper, or irregular exercise of power shall have a remedy in damages against the person exercising the power.”

- [25] Further, s 79 of the *Land Title Act* provides that upon the registration of a transfer from a registered mortgagee in exercise of power of sale, that registration vests the mortgagor’s interest in the transferee. Such transfer is free of any liability under the mortgage. A mortgagor in default, as Mr and Mrs von Risefer were found to be,⁸ has no rights against the registered transferee in the circumstances pleaded.

- [26] Paragraph 8 of the statement of claim deals with alleged breaches of fiduciary duties:

⁸ [2000] QSC 164 at [30].

“8. First, Second, Third, sixth defendants are against their Fiduciary duty

PARTICULARS

- a) First named defendant in conflict of his interest with First and Second Plaintiff as Mortgagor of that time and the duty to beneficiary OCBC.
- b) Second named defendant the said Mortgage Mortgager with out Power of attorney acting as employee of the said Mortgagee while is prohibited as Manager to sale, received money, Transferring property, fiduciary relationship and interest.
- c) Third named defendant received money from the sale of the plaintiffs property with out power of attorney or been ever instructed by first named defendant in conflict against his interest and fiduciary duty to first named defendant, beneficiary.
- d) Sixth named defendant’s fiduciary duty between interest of the defendants and the plaintiffs in breach of their duty of care refusing to registered their caveats due to the equitable interest of both Mortgagee and Mortgagor’s and plaintiffs in this claim.
- e) Fourth and fifth named defendants intentional entered in contract with second named defendant with out the power of attorney at 11-00 and not 12-00 refusing the right of the first and second named plaintiffs (Mortgagor’s) to bead at the auction.
- f) First and second named defendants are in breach of the sec 78 Land title act 1994 the right to of the Mortgagor first and second named plaintiffs to redeem their property.
 - a) Sec 79 of land title 1994
 - b) Sec 75(1) of land title 1994
 - g) The sixth named defendant on 26/10/00 or 12/1/01 releasing an unregistered Mortgage
 - a) on 27-2-97 and 3-3-97 Registered the mortgage N-701836320 which had never been executed by the plaintiffs and first named defendant the mortgage was executed by solicitor Fiona Woods with out power of attorney on behalf of Permanent Trustee but fraudulent by Latrobe Home Loans instructions to lend money on residential property using Lenders the Permanent Trustee: Void mortgage unenforceable.”

[27] This paragraph fails to disclose any cause of action known to law. There is no conflict of interest, actual or potential, inhering in the mortgagee, as particularised by a). Issues relating to the power of attorney are irrelevant; nevertheless any such issues relating to the identity of the mortgagee were dealt with by Byrne J in the

earlier matter.⁹ As discussed below, there is no basis for a fiduciary duty owed by the sixth defendants. Particular e) is not a pleading; and, as discussed above, the purchasers are in any event protected by the *Land Title Act* and *Property Law Act*.

- [28] Section 75(1) of the *Land Title Act* relates to the creation of an equitable title by leaving a certificate of title with the mortgagee and is irrelevant to this matter. Section 78 of the *Land Title Act* relates to powers of a mortgagee; and by s 78(2)(c)(i), in the matter before Byrne J,¹⁰ the mortgagee has established its right to possession of the land.
- [29] Paragraph 9 of the statement of claim deals with an alleged failure to pay stamp duty in the following terms:

“9. Stamp duty never been paid. The transfer is void.

PARTICULARS

Investigation with the Bank of Queensland, who supposedly financed the Fourthnamed and the Fifthnamed Defendants as the new owner of the property, reveals no money transactions have taken place. Instead 1 minute mortgage appears.

- (a) 704 379 708 Lodged 20-10-2000
- (b) 704 379 709 lodged by bank of Qld on 20-10-2000 time 16:37
- (c) 700 218 684 was requested to be lodged registered on 20-10-2000 by Minter Ellison Morris Fletcher: Waterford place in 1 Eagle Str. Brisbane issue date 09-09-1994
- (d) 704 607 856 Bank of Queensland Bank cancel the mortgage 704 379 709 at 20-10-2000 time 16:38 one minute mortgage today the Bank of Queensland denies that they ever been involved in this transaction.
- (e) There are no records whatsoever within the Stamp Duty office showing that stamp duty pertaining to this matter has ever been paid by the fourthnamed and the fifthnamed Defendants. To be the Deed and the transfer of the property legal, the Deed must be stamped (Stamp Duty ACT 1897). Sec. 25 of Stamp Duty ACT 1897 ,the Deed is duly stamped only in 30 days where it was first executed and before the date of assent to the stamp duties.
- (f) The fourthnamed and the fifthnamed Defendants as genuine buyers should know who is the seller of the property. Paragraph 3 of the Conditions of the Contract annexure “A”
- (g) The Fourthnamed and the Fifthnamed Defendants 16-9-00 Contract of sale, states that the property is free Encumbrances, the property is sold free of all encumbrances other then the title encumbrances despite

⁹ (supra) at [21].

¹⁰ (supra) at [39].

the 3 caveats and a Notice of Action. Encumbrances includes unregistered encumbrances and Statutory encumbrances

- (h) Fourthnamed and Fifthnamed Defendants on their sworn affidavit on the 7th January 2004 they state on par 13: pensioners: “at the time our purchase the property was in a rundown partially constructed state it was rat-infested the roof leaked in numerous places which caused our purchase my wife and I have undertaken considerable and expensive renovations and improvements at an estimated cost of over \$300,000 “ pensioners with a total amount of \$600,000.
- (i) The Fourthnamed and Fifthnamed Defendants are related with appointed accountants Hall, Puddy and Walles auditors of theFirstnamed Defendant. The Court may interfere and set a side act which between borrower and lender alleged manager ,solicitor ,accountant , beneficiary ,trustee ,directors ,their interest are in conflict, therefore we have the transfer of the Firstnamed and Secondnamed Plaintiffs property disposed by the Fourthnamed and Fifthnamed Defendants on Unstamp and Void Transaction with the Secondnamed Defendant receiving the amounts of \$235,348.49 and \$8,319.89 and the Thirdnamed Defendant receiving the amount of \$17,228.01. (Settlement Statement)
- (j) Bank of Queensland and Hall ‘s on 13-10-2000 executed mortgage No 704379709 registered on 20-10-2000 at 16:37 through the Bank of Queensland ‘s Manager Mr. John Kenneth Buck under the Power of Attorney No 701906190.
- (k) Transfer cancelled the above mortgage 704379709 on 20-10-2000 at 16:38 after 1 minute, one minute mortgage, but was issued on 23-2-2001 with No 704607856 and lodged on 23-10-2000 and 23-2-2001.
- (l) Bank of Queensland executed the above on behalf of Hall ‘s through another Bank of Queensland ‘s Manager Mr. Paul Andrew Nicholson under the same Power of Attorney No 701906190 of Mr. Buck.
- (m) Bank of Queensland refused that the Hall’s were ever been their customers.”

[30] The evidence before the court¹¹ discloses that the stamp duty was paid. None of these allegations, even if true, as they are patently not, could be thought to invalidate the purchase of the land or its registration in the names of the fourth and fifth defendants.

[31] Paragraph 10 of the statement of claim contains the allegations made against the sixth defendant:

¹¹ Affidavit of Robert Hall filed 19 January 2004, Annexure RH2.

“10. The sixthnamed Defendant is in breach of the Duty of Care.

PARTICULARS

- (a) Failed to request the payment of the Stamp Duty.
- (b) The Sixthnamed Defendant obligation is not to register any Transfer of a Property unless the Stamp Duty it is paid.
- (c) The transfer of the property occurred with caveats and against the Land Title Act 1994 sec 124 sub. Sec. (c) An instrument of the mortgagee “Transfer never been executed or been registered in the title before the loadgment of the caveats on behalf of the Firstnamed and Secondnamed Plaintiffs. The sixthnamed Defendant acted against the Firstnamed and Secondnamed Plaintiffs interests by registering the Mortgage No 701836320 on 3-3-97 without Stamp duty to have been paid, the mortgage document never have been executed by the Firstnamed Defendant In the said contract of 16-09-2000 Encumbrances “the property is sold free of all encumbrances” despite the 3 caveats and notice of actions encumbrances are included unregistered and statutory encumbrances
- (d) The Sixthnamed Defendant failed to notify the Firstnamed and Secondnamed Plaintiffs as caveators his intension to cancel the caveats as owe 7 days before.
- (e) The Sixthnamed Defendant contrary to the Firstnamed and Secondnamed Plaintiffs protests and letters and contrary to his letter of 16-10-2000 assuring the Firstnamed and Secondnamed Plaintiffs that he will protect their interests he registered the transfer of the title.
- (f) The sixthnamed Defendant acted against the interests of the State Revenue by registering the Mortgage No 701836320 on 3-3-97 without Stamp duty to have been paid, the mortgage document never have been executed by the Firstnamed Defendant.
- (g) Sixthnamed Defendant failed to request the stamp duty payment from the Fourthnamed and Fifthnamed Defendants before the transfer of the Firstnamed and Secondnamed Plaintiffs property to them.”

[32] There is no basis to assert that the sixth defendant, the Department of Natural Resources and Mines, owed a duty of care in tort to the plaintiffs which would give rise to a cause of action in these circumstances. However it is unnecessary to deal with this allegation further as the sixth defendant, who Mrs von Risefer said in oral submissions refused to accept service of her claim, has not made an application for judgment in this matter.

[33] Paragraph 11 returns to allegations of breaches of the *Consumer Credit Code*:

- “11. The Firstnamed, Secondnamed, Thirdnamed, Forthnamed and Fifthnamed Defendants are in breach of the following sections of the Credit Code :
- a) Sec.79 (i) of Credit Code when a mortgagee is in contravene of Sec.78 (6) the mortgagee to obtain the best market value price.
 - b) Sec.144 (false or misleading representation on the entry of contract Sec.144 (3) Civil effect Firstnamed, Secondnamed and Thirdnamed Plaintiffs suffers loss as a result of the contravention of the Sec. 144 (i) will recover the loss against the respondents.
 - c) Sec.176 20 (a person) Permanent Trustee can not authorised another agent Latrobe Home Loans to enter in contract with the First, Second Plaintiffs Sec. 176 (3) (2) a credit provider mortgagee is guilty of an offence Sec. 176 20
 - d) Sec. 103 (1) (2) (3) the Court however impose a greater civil penalty on the mortgagor suffering loss and calculate future interest in the maximum civil penalty: a Court have not the discretion to award an amount less the amount of the loss.
 - e) Sec. 107 compensation of loss paid by credit provider Sec. 114 restitution or compensation by credit provider par 7. Permanent Trustees capacity as legal mortgagee sold their interest and securities portfolio on 26-02-1997 to IBJ Australian Bank through the Clearing House Electronic Subregister System (CHESS) in the Australian Stock Exchange”

[34] The first allegation pleads a breach of s 79(1) of the *Consumer Credit Code* which relates only to goods and not to land. Section 144 provides for a civil remedy for a loss suffered as a result of a false and misleading representation in relation to a matter that is material to the entry into a credit contract or a related transaction or in relation to attempting to induce another person to enter into a credit contract or a related transaction. If there were any such alleged misrepresentations, they were or could have been raised in the litigation which is finalised and cannot be raised again. The same applies to the allegation regarding s 176 of the *Consumer Credit Code* with regard to the conduct of agents. Sections 103, 107 and 114 are irrelevant to any matter that could be in contest in the present proceedings.

[35] Paragraphs 12 and 13 are in the following terms:

12. “The Firstnamed, Secondnamed, Thirdnamed, Forthnamed and Fifhename Defendants are in misstatement of the paragraph 7.4 of the Contract of Sale on 16-09-2000 Sellers warranties that the property is free of Writ 4387/00, Appeal in High Court 67/00 Court Federal Court Claim 101/00 and caveats over the title with notice of the abovementioned actions.
13. The 1st 2nd 3rd 4th 5th 6th Defendants they are in the bridge of their fiduciary duty acting for their personal interests.”

- [36] Even if the allegation in para 12 of the statement of claim could be proved, it would not affect the valid registration of the land. If, in paragraph 13, the plaintiffs mean that the purchasers of the land, the fourth and fifth defendants, owed the plaintiffs a fiduciary duty that is incorrect as a matter of law. There can be no possible fiduciary duty owed by arms-length purchasers to mortgagors whose property is being sold by a mortgagee in possession. There is no evidence which otherwise supports the allegations in para 12 or 13.
- [37] Finally, the plaintiffs have made reference to the valuation of the property in para 14 of the statement of claim.

“14. Justice Callinan of High Court on 28-09-2000 said for the undervalue the Firstnamed and Secondnamed Plaintiffs property of 70 squares three storey castle on nearly 3 acres waterfront land in the Gold Coast prestige area of Riversdowns Paragraph 20 line 9 Justice Callinan “all right I am just looking at the interior here marble floors a little Versalies almost in fact turrets marble floors big fenestration marble line bath room very big sitting room carved marble fireplace by the looks of it”

Valuator Hamilton on 31-01-1997 was satisfied by the completion of the property.

Valuator Hart value the property \$650,000.”

- [38] Remarks attributed to a judge in the course of hearing an application are not evidence of any concluded view. It is not expressed in this case as a finding of fact as to the value of the property in question but merely an observation.
- [39] One might presume that the reference to valuation evidence is perhaps part of a case sought to be pleaded that the mortgagee sold at an under-value. The relevant valuations were dealt with by Byrne J in *Permanent Trustee Company Ltd v von Risefer* where His Honour found the valuation sought by Mrs von Risefer in late 1997 was cancelled because the land was unlikely to be valued at the figure Mrs von Risefer hoped for.¹²
- [40] The relevant duty of a mortgagee in the exercise of a power of sale is found in s 85(1) of the *Property Law Act*:

“It is the duty of a mortgagee, in the exercise after the commencement of this Act of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.”

No breach of such a duty is pleaded. Nor, on the evidence before the court, could it be.

- [41] In this case not only is the pleading incoherent in content and expression, there is not a scintilla of evidence that those who sold the land, those who purchased the land or those who registered the transfer did anything other than comply with whatever legal and ethical duties applied to them in this difficult situation. There comes a point where disappointed litigants should not be able to impose “pointless

¹² (supra) at [37].

litigation”¹³ on others if they are unable to coherently articulate a cause of action against those other persons.

- [42] This statement of claim is entirely misconceived and groundless.¹⁴ The plaintiffs have no real prospect of succeeding on any part of their claims against the first, second, third, fourth and fifth defendants. There is no need for a trial of the claim against them. As there are no discretionary reasons to refuse the application, judgment should be entered in favour of the first, second, third, fourth and fifth defendants.

Caveats

- [43] It is appropriate to order the removal of caveat no 707674047 and any other caveats which have been placed on the title of the land by any of the plaintiffs pursuant to s127 of the *Land Title Act*. As each of the caveats lodged was lodged without reasonable cause the first and second plaintiffs should be ordered, pursuant to s 130, to pay the fourth and fifth defendants compensation for any loss or damage they have suffered as a result. The fourth and fifth defendants have claimed \$2,170.30, which are the legal fees incurred by them in removing caveat nos 704434271 and 704515905. There has been no claim for exemplary damages under s 130(2) so I shall not consider such an award, although this is a case where, if such a claim had been made, it would have warranted serious consideration.
- [44] In view of the number of caveats lodged and the complete lack of any caveatable interest shown, it is also appropriate to order that the first, second and third plaintiffs jointly and severally by themselves, their servants and agents, be restrained and an injunction granted restraining the first, second and third plaintiffs or any of them from lodging any dealing with the Registrar of Titles of the Department of Natural Resources and Mines with respect to the property without the leave of this Court first obtained.
- [45] If the plaintiffs or any of them are able to show any reasonable cause to lodge a caveat then the court may give leave to lodge another caveat. If not, the plaintiffs can not be allowed to continue to misuse the capacity to lodge caveats to vexatiously impede the fourth and fifth defendants’ lawful entitlement to registered title to their land unencumbered by any such caveats.

The Orders of the Court are:

1. That there be judgment for the first, second, third, fourth and fifth defendants against the plaintiffs for all of the plaintiffs’ claim;
2. That caveat dealing number 707 674 047 lodged on 28 April 2004 be removed;
3. That the first, second and third plaintiffs compensate the fourth and fifth defendants in the sum of \$2,170.30;

¹³ *Ley v R De W Kennedy (Finance) Pty Ltd* NSWCA, CA No 127 of 1978, 26 June 1978 as quoted in *Raybos Australia Pty Ltd v Scitec* NSW CA, CA No 146 of 1986, 16 June 1986; see also *Ivory v Telstra Corp Ltd* [2002] QCA 457 at [85]-[86] per Wilson J.

¹⁴ *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91.

4. That the first, second and third plaintiffs jointly and severally by themselves, their servants and agents be restrained and an injunction granted restraining the first, second and third plaintiffs or any of them from lodging any dealing with the Registrar of Titles of the Department of Natural Resources and Mines with respect to the land described as Lot 17, Registered Plan 846050, County of Ward, Parish of Barrow, being the whole of the land contained in the Title Reference 18493233 and situated at 53 Gwydir Court, Helensvale in the State of Queensland, without the leave of this Court first obtained; and
5. The plaintiffs pay the first, second, third, fourth and fifth defendants' costs of and incidental to the proceeding, including this application, to be assessed on the standard basis.