SUPREME COURT OF QUEENSLAND

CITATION:	*Bechara v Sotrip Pty Ltd (in liq)* [2013] QSC 100
PARTIES:	**BUDDY BECHARA** (Plaintiff) v **SOTRIP PTY LTD (IN LIQUIDATION)** **ACN 085 132 378** (First Defendant) and **RELIANCE FINANCIAL SERVICES PTY LTD** **ACN 003 478 966** (Second Defendant) and **SOTRIP NSW PTY LTD ACN 139 174 744** (Third Defendant) and **RELIANCE FINANCIAL SERVICES NSW PTY LTD** **ACN 131 889 766** (Fourth Defendant)
FILE NO/S:	BS 9372 of 2006
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22, 23 and 24 October 2013
JUDGE:	Philip McMurdo J
ORDER:	**The plaintiff's claim is dismissed.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – EVIDENCE – GENERALLY – where trusts alleged created – whether evidence established existence of each trust MORTGAGES – OTHER MATTERS – where plaintiff alleges he provided loans to person in control of first defendant – where plaintiff had mortgage agreement with first defendant over property held by first defendant as trustee – where plaintiff alleges mortgage secured repayment of loans to person in control of first defendant – where defendants allege that mortgage was created as security for funds which were never forthcoming from plaintiff – whether evidence supports existence of loans – whether mortgage

secured repayment of loans – whether mortgage was created as security for loans which were never forthcoming from plaintiff

Land Title Act 1994 (Qld), s 109

Bechara v Sotrip Pty Ltd [2011] NSWSC 252, discussed
Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd (2008) 74 NSWLR 550; [2008] NSWSC 1344, cited

COUNSEL: P A Hastie for the plaintiff
No appearance for the first and second defendants
D R Murphy SC, with J C Ashcroft for the third and fourth defendants

SOLICITORS: Patane Lawyers for the plaintiff
No appearance for the first and second defendants
Proctor & Associates for the third and fourth defendants

[1] This is a contest for what remains of the proceeds of sale of two lots of land at Railway Street, Mudgeeraba. They were sold in 2008 by the liquidator of the first defendant ("Sotrip"), which had been the registered owner since December 1998. There were no registered encumbrances and after payment of the expenses of sale and some of the costs of the liquidation of Sotrip, an amount of $660,000 was paid into court pending the determination of this dispute.

[2] There are effectively three distinct claims to all or some of the funds. The first is by the plaintiff, Mr Bechara, who was granted a mortgage over the lots in 2005. The mortgage was never registered. On its face it secured an amount of $450,000 to be paid by Sotrip to him.

[3] Secondly, there are the claims by the third and fourth defendants, which effectively constitute the same interest. They dispute Mr Bechara's claim, saying that there is and has been no debt which is secured by his mortgage. They say that the lands were held by Sotrip as a trustee of a trust of which the third defendant ("Sotrip NSW") is the present trustee. Therefore, subject to the claim by the fourth defendant ("Reliance NSW"), the funds in court belong to Sotrip NSW. Reliance NSW is also said to be a trustee as the replacement for the second defendant, which, it is claimed, held an equitable charge over the lands from 1998 to secure a loan which it made to Sotrip for its purchase of the lots. Alternatively, they say that if Mr Bechara's mortgage is otherwise enforceable, it ranks behind the charge to which Reliance NSW is now entitled.

[4] Thirdly, there is now a claim by the liquidator of Sotrip for some of the funds. Sotrip and the second defendant took no part in the trial and appeared to accept, consistently with judgments in New South Wales to which I will come, that their respective interests had passed to Sotrip NSW and Reliance NSW. But since the trial, the liquidator of Sotrip has applied to have some of the funds in court paid out to him, in order to discharge Sotrip's liability for capital gains tax arising from the sale of the lots. That application requires oral submissions and it is affected by the outcome between Mr Bechara, Sotrip NSW and Reliance NSW, as determined by this judgment.

Sotrip's purchase and its lender

[5] Sotrip purchased the lots from an unrelated party by a contract dated 3 December 1998, for a price of $350,000. The contract settled on 10 December 1998. Sotrip was a company controlled by Mr Salvatore (Sam) Cassaniti. He was an accountant, practising in Sydney, through his company Quest Enterprises (New South Wales) Pty Ltd, under the name Cassaniti & Associates. He was also a property investor and he controlled the second defendant, which was a money lender.

[6] According to the evidence of Mr Cassaniti, Sotrip was a company formed or acquired for the sole purpose of purchasing this land, as a trustee of a discretionary trust. That trust is said to have been according to a Deed of Settlement, establishing this so called Mudgeeraba Trust, dated 19 November 1998. The settlor was Sam Cassaniti's cousin, Mr David Cassaniti, who was also an accountant and was employed by Cassaniti & Associates.

[7] The Deed of Settlement was not stamped until 13 June 2001, which is still a date some years before the events which are relevant to Mr Bechara's claim. Mr Bechara does not concede that Sotrip purchased the lands as a trustee. There are other documents, also dated 19 November 1998, which apparently evidence the creation of this trust. But Mr Bechara raises the same question about them as he does with the Deed of Settlement. He points to the absence of any reference to Sotrip's acting as a trustee within the contract for the purchase of the lots or the transfer to Sotrip by which it became registered. A person may be registered as a trustee of an interest in the lot.[1] But there is no requirement for a trustee to be so registered. The absence of any reference in the register, or in the contract of sale to Sotrip, to a trust has some relevance, but it is not determinative.

[8] On Sam Cassaniti's evidence, the funds for Sotrip's purchase were lent to Sotrip by the second defendant.[2] That is apparently supported by a loan agreement between Sotrip and the second defendant which was dated 3 December 1998 and recorded an advance of a sum of $358,659, to be repaid in certain events but in any case by 3 December 2003. By cl 7 of that agreement, Sotrip granted a charge in favour of the second defendant over any real or personal property owned by it and, by cl 8, it agreed to grant to the second defendant a legal mortgage of any real property to secure payment of all moneys due under the loan. Clause 10 contained a general charging clause by which, if this loan agreement had effect, Sotrip gave a fixed charge over this land. The loan agreement was signed by Sam Cassaniti for both the lender and the borrower. This loan agreement made no reference to any trust. Again, counsel for Mr Bechara says that the absence of such a reference is telling.

[9] The funds used by Sotrip's solicitors to effect settlement of the purchase were transferred to their trust account from an account in the name of "Cassaniti & Assoc Trust/C," on 7 December 1998.[3] It is clear enough that Sotrip had no funds of its own, at least at that stage, and that the provision of funds from Sam Cassaniti's trust account is not inconsistent with his evidence that the funds were provided as a loan to Sotrip under that loan agreement.

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1 *Land Title Act 1994* (Qld), s 109.

2 Exhibit 54.

3 Exhibit 56.

[10] The points raised by Mr Bechara, being the late stamping of the trust deed and the absence of references to a trust in the purchase and loan contracts, as well as in the registered transfer, provide some basis for disputing Sotrip's trusteeship and, in turn, the entitlement of Sotrip NSW. Further, the evidence of Sam Cassaniti is affected by the fact that he has been convicted of a number of offences of dishonesty, in relation to accounting and taxation services which he provided to clients, for which he was sentenced to a period of imprisonment from 2005 to 2008. Nevertheless, upon the evidence here, I am persuaded that Sotrip did buy the lots as trustee of the Mudgeeraba Trust. Although the trust deed was not stamped until 2001, there is nothing in the evidence to suggest that by 2001 some circumstances had developed which provided a reason for Mr Cassaniti to create then the artifice of a trust. I accept that Sotrip was then replaced as trustee by another company called Australian Barter Currency Exchange Pty Ltd, which in turn was replaced by Sotrip NSW.

[11] My conclusion is consistent with that of Barrett J (as he then was) in a judgment given in April 2011,[4] which appears to have decided already some of the questions in the present case, although neither side here so submitted. In that case, Sotrip NSW and Reliance NSW successfully applied for declaratory relief. According to the judgment, the respondents to the application were Sotrip, Sotrip's liquidator, Mr Bechara and a Mr Rafidi. In the reasons for judgment, it appears that Mr Rafidi was the only respondent who contested the application. Barrett J made a declaration as follows:

> "The court declares that when the property known as 35 and 37 Railway Street, Mudgeeraba was sold by the first respondent, Sotrip Pty Ltd (in liq), it was required to account for the proceeds of sale to Australian Barter Currency Exchange Pty Limited as the then trustee of the trust known as the Mudgeeraba Trust and from 31 August 2009, it was required to account for the proceeds of sale to the first applicant, Sotrip NSW Pty Limited as new trustee of the Mudgeeraba Trust appointed on 31 August 2009."[5]

[12] Mr Rafidi has not featured at all in the proceedings before me. But in this New South Wales case, he contended that he had an interest in the Mudgeeraba properties by some oral arrangement to which he was a party at the time of their purchase. Mr Rafidi challenged the existence of the Mudgeeraba Trust upon similar arguments which are advanced by Mr Bechara here. Upon substantially the same evidence as was tendered in this trial, and for substantially the same reasons which I have given, Barrett J made findings which are reflected in that declaration. His Honour recorded that Sotrip and its liquidator had not participated in that hearing, the liquidator, at an earlier stage, having sought and being granted a direction that he would be justified in causing Sotrip not to take an active part in those proceedings.[6]

[13] Although Mr Bechara is shown as the respondent in those proceedings, he was not represented at the hearing. There was no consideration given in that case to the claim which Mr Bechara makes here, that is to say to his claim to be entitled to the proceeds of sale, or some of them, as the holder of an equitable mortgage.

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4 *Bechara v Sotrip Pty Ltd* [2011] NSWSC 252.
5 *Bechara v Sotrip Pty Ltd* [2011] NSWSC 252 at [35].
6 *Bechara v Sotrip Pty Ltd* [2011] NSWSC 252 at [9].

[14] In the present case, neither side sought any assistance from this 2011 judgment. In particular, it was not suggested that the 2011 judgment finally concluded between Mr Bechara, Sotrip NSW and Reliance NSW, any of the issues which were contested in this trial.

[15] As to the interest of Reliance NSW, on the evidence here of Sam Cassaniti and David Cassaniti, the second defendant was a trustee, according to the so-called Reliance Investment Services Trust Deed, dated 1 July 1994 ("1994 Deed").[7] In the loan agreement between Sotrip and the second defendant, the second defendant was not said to be a trustee. But again I accept their evidence that it carried on business as a trustee and in that capacity it made the loan to Sotrip.

[16] Their evidence is that the second defendant was replaced by Reliance NSW as the trustee, by the document in the form of a deed of appointment dated 26 June 2008.[8] The appointor was Sam Cassaniti. Clause 13 of the 1994 Deed empowered him to remove the trustee and appoint a new trustee. The date of this appointment was the date upon which the second defendant was wound up. Clause 26.2 of the 1994 Deed provided that the office of the trustee should be vacated if the trustee went into liquidation.

[17] For Mr Bechara it was submitted that the Court should reject the case that the second defendant acted as a trustee. It was submitted that this trust was a contrivance for meeting the circumstance of the winding up of the second defendant in 2008. Reference was made to Sam Cassaniti's letter of 9 November 2006,[9] addressed to the liquidator of Sotrip, that the present second defendant was the holder of a first mortgage but which made no reference to its being a trustee. However, prior to its liquidation of the second defendant, the second defendant applied to be joined as a defendant in these proceedings and its application was supported by an affidavit from its then solicitor, on information and belief from Sam Cassaniti, "that the money from the purchase of the properties was loaned to [Sotrip] by [the second defendant] in its capacity as trustee for the Reliance Trust." Counsel for Mr Bechara submitted that no evidence was offered at that time in support of the allegation of trusteeship. Reference was also made to the fact that having become a party, the second defendant did not prosecute its proposed counterclaim. But that could be explained by its own financial demise.

[18] I am persuaded that the second defendant carried on business as a trustee of the trust constituted by the 1994 Deed. I am further persuaded that it was the second defendant which provided the purchase moneys for the lots, by way of a loan to Sotrip pursuant to the loan agreement. I am satisfied also that Reliance NSW became the new trustee. I see no proper basis for rejecting the evidence that the 1994 Deed took effect according to its terms.

[19] Again it should be noted that there was no contest between the four defendants on these questions. In particular, Sotrip's liquidator did not contend that the property beneficially belonged to Sotrip and free of any charge in favour of the second defendant or Reliance NSW.

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7 Exhibit 55.
8 Exhibit 81.
9 Exhibit 57.

[20] It may be noted that similar findings were made in favour of Reliance NSW in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*,[10] in which the parties included the present second defendant and its liquidator as well as Reliance NSW.

[21] It follows from what I have said already that, apart from Mr Bechara's claim (and the more recent claim by Sotrip's liquidator in relation to the CGT liability), the moneys in court belong to Reliance NSW because the amount owing under the 1998 loan, with accrued interest, now well exceeds the amount in court.[11]

Loans by Mr Bechara?

[22] I go then to Mr Bechara's claim to enforce his mortgage. It was executed in registrable form although never registered. Sam Cassaniti signed on behalf of Sotrip. There is no question as to his authority to do so. David Cassaniti witnessed his signature which was dated 31 May 2005. Mr Bechara's signature as the mortgagee is dated 2 June 2005. His signature was purportedly witnessed by his solicitor, Mr Sattout, although Mr Bechara did not sign the mortgage in his presence.

[23] Mr Bechara says that the mortgage was granted in order to secure a debt or debts then owing by Sam Cassaniti to him. According to the statement of claim, there were certain payments which were made to or for the benefit of Mr Cassaniti in October 2003, March 2004 and September 2004, and there were some repayments. The alleged advances total $1,132,600 and the alleged payments to Mr Bechara total $682,000, a difference of $450,600. (There is no reference to accrued interest.) Mr Bechara says that this explains why the mortgage is expressed to secure a loan of $450,000.

[24] Mr Cassaniti disputes all of this. He says that none of these sums was borrowed by him from Mr Bechara. He explains the mortgage as something which he granted for the purposes of securing what was then a proposed loan by Mr Bechara to him, for the purpose of funding Sam Cassaniti's defence of the criminal proceedings in 2005 by which, after a trial, he was imprisoned. He says that the funds were not forthcoming from Mr Bechara and that he raised his legal fees from another source.

[25] During this trial a third possibility occurred to me, which was that Mr Bechara, or one of his companies, was owed some money by Mr Cassaniti or one of his companies at the time, and that this mortgage was intended to secure both that debt and a then proposed loan for Mr Cassaniti's legal expenses. But neither side pursued such a case and the question is which of the two rival contentions is the more probable.

[26] I go then to the alleged advances to Mr Cassaniti, the first of which involve two payments, each made on 7 October 2003, by a company called Davcon Projects Pty Ltd ("Davcon"). One was in the amount of $275,400 and was paid to a company called Peggys Rock Pty Ltd. The other was in an amount of $356,200 and was paid to a company called Balmoral Island Pty Ltd. Mr Bechara's case is that these payments were made from moneys which Davcon held on behalf of him (or at least one of his companies) and that they were paid by way of loans to Mr Cassaniti at his

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10 (2008) 74 NSWLR 550; [2008] NSWSC 1344.

11 Exhibit 86.

request "and/or Cassaniti's request on behalf of [Sotrip]."[12] It is clear that such payments were made. What is in question is whether they were loans by Mr Bechara and to Mr Cassaniti. Davcon was a company owned and under the control of a Mr Kertebani, who was a builder with whom Mr Bechara conducted property development. But Mr Bechara was not a director or shareholder of Davcon.

[27] There was a company called Gracelands Properties Pty Ltd ("Gracelands"), of which the directors at material times were Mr Bechara and Mr Kertebani. In 2003 and 2004, it was conducting property development and Davcon was its builder. Mr Bechara described the arrangement between Gracelands and Davcon as being that Davcon was performing the construction for Gracelands, upon the basis that it would be reimbursed for its costs but that any profit would be passed on to Gracelands, through which the respective interests of Mr Bechara and Mr Kertebani would be rewarded in the shares of 60 and 40 per cent.

[28] Mr Bechara had a company called Emerex Pty Ltd ("Emerex") which sometimes lent money to Davcon. Mr Bechara identified a cheque butt for an account of Emerex, recording a "loan to Davcon Projects" in the sum of $200,000, made on 9 May 2001.[13] There were also documents recording loans made by Mr Bechara to Gracelands. For example, there is the minute of a meeting of Mr Bechara and Mr Kertebani, apparently as the directors of Gracelands, resolving to accept a loan of $610,000 to be loaned by Mr Bechara to that company.[14]

[29] Mr Kertebani introduced Sam Cassaniti to Mr Bechara. Mr Cassaniti became the accountant for Gracelands and later, Mr Bechara's accountant. But Mr Bechara said that Sam Cassaniti was not Davcon's accountant.

[30] According to Mr Bechara, one day "out of the blue," Sam Cassaniti rang Mr Bechara and asked for some money. Mr Cassaniti came to the site office at an address where Gracelands was developing property. Mr Cassaniti told Mr Bechara that "I need some money. It's only for two, three weeks."[15] Mr Bechara subsequently discussed the request with Mr Kertebani. He says that Mr Kertebani agreed to these payments being made from Davcon because, said Mr Bechara, "when you put a progress claim through the bank it goes to Davcon."[16] (The apparent implication here is that the payments to those companies would be recorded as construction expenses for which Davcon would claim against Gracelands and which would be funded by a bank.)

[31] These payments were recorded by a note which was written and signed by Sam Cassaniti in these terms:

> "I Sam Cassaniti received from Davcon Projects P/L
>
> 2 cheques No
>
> | | |
> |---|---|
> | 000673 | $275,400 |
> | 000672 | $356,200 |

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12 Amended Statement of Claim, para 9(a), (b).
13 Exhibit 31.
14 Exhibit 33.
15 T 1-30, ll 21-2.
16 T 1-30, ll 37-9.

> These cheques are made payable to Peggys Rock P/L and Balmoral Island P/L. These monies are to be repaid in 2-3 week."[17]

[32] Clearly those two payments were made by Davcon. But there are two questions: were they made as loans to Mr Cassaniti and were they loans by Mr Bechara?

[33] Neither of the payee companies was apparently connected with Mr Cassaniti, save that from 15 October 2003 its registered office was at the Cassaniti & Associates premises at Liverpool. Mr Cassaniti says that the companies were controlled by the two individuals who were its directors, one of whom, Mr Rourke, was an excavating contractor. He says that Mr Rourke's company sometimes did business with Davcon and "we assisted [Mr Rourke] to buy the equipment at one stage … ."[18]

[34] Each of the payee companies was later wound up. The liquidators gave evidence in Mr Bechara's case. Each said that Mr Rourke was the only director of which he was aware, that Mr Rourke had not provided a report as to affairs or any books and records of the company and that this default had been referred to ASIC. No records of either company (if any) were in evidence here (save for the ASIC records).

[35] There is no evidentiary basis for concluding that Sam Cassaniti had an interest in either of these companies. The fact that he procured the payments does not mean that he had such an interest: he may have acted as an intermediary. I accept that he asked for those cheques to be paid to them and that they were loans. I am not persuaded that what occurred was that these funds were lent to Sam Cassaniti, who in turn paid them (by loan or otherwise) to the companies. In the pleaded case of Sotrip NSW and Reliance NSW, reference is made to invoices from Peggys Rock Pty Ltd and Balmoral Island Pty Ltd, in response to which these payments are said to have been made. But those invoices did not become part of the evidence. In any case, Mr Cassaniti's handwritten note did record that the moneys were to be repaid in two to three weeks, which is inconsistent with the notion that they were payments for work done.

[36] Further, I am not persuaded that the lender was Mr Bechara, rather than Davcon. The premise behind Mr Bechara's case here is that the cheques drawn by Davcon represented the payment of his moneys (that is to say moneys held by Davcon on his behalf) or moneys which Davcon was lending to him, to be lent by him to Mr Cassaniti. Neither of those possibilities seems to be probable. If they were not loans by Davcon, it is no less probable that they were loans by Gracelands than they were loans by Mr Bechara. Gracelands and Davcon had a relationship whereby funds passed between the two companies, whereas that apparently was not the case between Davcon and Mr Bechara personally.

[37] Davcon went under voluntary administration in August 2005 and was subsequently wound up. Its liquidator, Mr Farnsworth, gave evidence in Mr Bechara's case. His report to creditors shows, amongst other things, that Mr Kertebani and a company controlled by him were the only creditors of Davcon at the time that it went into liquidation in late August 2005. There is no reference in his report to any trust of money held by Davcon in favour of Mr Bechara.

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17 Exhibit 38.

18 T 2-40, l 4.

[38] In summary, I am not persuaded that these two cheques were loans by Mr Bechara to Mr Sam Cassaniti.

[39] The next of the advances which Mr Bechara claims to have made to Mr Cassaniti was by four payments, totalling $301,000, made in March 2004. Again, the fact of the payments is uncontroversial. On 29 March 2004, Mr Sattout drew four cheques, in the respective amounts of $120,000, $60,000, $57,000 and $64,000. On the same day those cheques were deposited to an account in the name of Cassaniti & Associates Trust Account.

[40] According to the evidence of Mr Sattout, and at least most of the evidence of Mr Bechara, these four amounts represented deposits which had been paid by prospective purchasers in a building which was being developed by Gracelands, and the purpose of these payments was to repay the deposits to them.

[41] Mr Bechara's evidence about this could be described as confusing. It began by his saying that Mr Cassaniti "asked for another amount of money and I think it was $300,000 and that money was [in] my solicitor's trust account and I instructed Patrick Sattout to give him that money as well."[19] That evidence, if taken alone, would suggest that it was Mr Bechara's money which was held for him by Mr Sattout. But then his evidence continued:

> "All right. Now, why was the money in the - in that trust account?-- It is for sales that never went through and money comes back to Sattout because he was the solicitor dealing with sales of properties.
>
> When you say sales that didn't go through, what do you mean?-- Okay, what it mean is sometimes you sell off the plan.
>
> Yes?-- And purchasers put a deposit and it stays with the accountant - it stays with the solicitors - sorry, not accountant, it stays with solicitors or stay with the real estate. So this particular time it stayed with the - with my solicitor trust account.
>
> So, who - so were they the purchaser's money or had the moneys been-----?-- Look, what happened was, there was a lot - I know a lot of people that wanted to buy into that development and they bought and when they changed their mind I promise them that I will give them the money back, basically. I will give them the money - I will guarantee them their money back. Where they end up getting the money back through other entities, but Cassaniti sometimes paid some money back as well. It goes from there to them."[20]

[42] In cross-examination, consistently with the passage just quoted, Mr Bechara said that these deposits had not been forfeited but that:

> "Agreement was that if the purchaser doesn't go ahead, the money will be returned and that's [what] the agreement was.
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> …

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19 T 1-34, ll 56-8.

20 T 1-35, ll 1-25.

> Well, it's my responsibility to return those money. Like, I give Sam Cassaniti, he's supposed to return the money. Those money, it is my responsibility to give it back."[21]

[43] Mr Sattout said that he held in his trust account deposits from prospective purchasers, for which he received instructions from Mr Bechara in about March 2004. He said that at this time he and Mr Bechara "had a number of conversations, one principally was in relation to making loan advances to Mr Cassaniti, his accountant … and the other conversations in relation to release of the balance of funds that I held."[22] He said that "some of the funds were released to Mr Bechara's family trust and the balance of those funds were released to - cheques were made payable to Cassaniti & Associates."[23]

[44] Extracts from the trust account ledger of Mr Sattout are in evidence, recording that these four sums were held by him as deposit moneys from certain named purchasers from Gracelands. They were recorded as deposited to Mr Sattout's trust account on 24 November 2002 and 17 January 2003. The trust ledgers record that they were paid to "Cassaniti & Associates" at "client's direction" on 29 March 2004.

[45] Therefore, from that evidence it would appear that these were not funds belonging to Gracelands, let alone to Mr Bechara, but were funds which Gracelands had always agreed would be repaid to these purchasers if they did not proceed to settle. Mr Bechara explained that the subject lots were sold to other purchasers. These were funds which Mr Bechara could not have lent, because they were other peoples' money.

[46] But Mr Cassaniti's evidence was that there were moneys paid from Mr Sattout's trust account to the Cassaniti & Associates Trust Account, which were paid by way of a loan. He said that they were "moneys advanced to the firm [meaning Quest Enterprises Pty Ltd] from Gracelands" and that "those moneys were repaid."[24] This is inconsistent with the notion that Mr Sattout was repaying prospective purchasers moneys to which they were entitled.

[47] Then at one stage in the cross-examination of Mr Bechara, it seemed to be suggested that these so called deposits paid by prospective purchasers were an artifice, being designed to give the impression that certain lots had been sold to and deposits paid by independent buyers, perhaps to assist Gracelands to obtain finance for this "off the plan" development. If that were the case, then Mr Bechara's contention that these were in truth his moneys to lend to Mr Cassaniti would be more credible. But Mr Bechara disavowed that suggestion.[25] Upon his case, I am to assume that these were moneys which belonged to the persons recorded in Mr Sattout's records. Upon that premise, these were not loans by Mr Bechara.

[48] Below I discuss the circumstances of a dishonoured cheque, drawn on the Cassaniti & Associates Trust Account in favour of the Bechara Family Trust in the amount of $101,000, which was dishonoured when presented on 5 April 2004. It was also put to Mr Bechara that these deposits had been paid by Mr Cassaniti to the Bechara

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21 T 1-77, ll 32-4, 36-9
22 T 2-3, ll 14-16, 18-19.
23 T 2-3, ll 21-4.
24 T 2-36, ll 17-19, 37.
25 T 1-80, ll 5-18.

Family Trust. If so, this would support the suggestion that these were not genuine deposits, but moneys always under Mr Bechara's control. But again, he denied the suggestion.

[49] I am therefore presented with two alternative versions. Upon Mr Cassaniti's version, the payments to his trust account were to be redirected to the Bechara Family Trust. On Mr Bechara's version they could not have been advances by him. The truth may be that Mr Cassaniti became liable for not redirecting all of the funds which Mr Sattout paid to his trust account. But that is speculation and I must act upon the evidence. Therefore I am not persuaded that these were loans by Mr Bechara (or Gracelands) to Mr Cassaniti (or some entity associated with him).

[50] Next there is an alleged loan made on or about 8 October 2004, in the sum of $200,000. There was a bank cheque, dated 3 September 2004, drawn in favour of Petar Bazdaric in that sum which, I accept, was paid from an account with that bank held by the Bechara Family Trust. Mr Cassaniti says that he had no knowledge of Mr Bazdaric. Mr Bechara's evidence is that Mr Cassaniti asked him to provide that bank cheque, saying that he owed Mr Bazdaric money which the cheque was to repay. The evidence is scant and this part of the case depends almost entirely upon the oral testimony of Mr Bechara. Neither party kept proper records, or if he did, ensured that they remained available. So as to this alleged third advance, I am asked to accept Mr Bechara's evidence which has practically no support. I am not persuaded to do so.

[51] Neither he nor Mr Sam Cassaniti were particularly impressive witnesses. I have mentioned Mr Cassaniti's convictions and imprisonment. Mr Bechara has also been convicted of offences of dishonesty, for which he was eventually given concurrent terms of imprisonment of three years, and for which he was in custody for a little over two years until he was released in August 2011.

[52] There was evidence from Mr Sattout who recalled speaking to Mr Cassaniti, at some point before the Sotrip mortgage was given, asking him to repay whatever was owed by him (or his interests) to Mr Bechara (or his interests). I accept that evidence. But just when this occurred was not established. From that and other evidence I infer that at some stage moneys were owing by Mr Cassaniti's side to Mr Bechara's side. There is also a handwritten note signed by Sam Cassaniti, on 19 October of a year which was written but illegibly, that he would "pay 125,000 tomorrow to Buddy Bechara." But it does not follow that anything, and more specifically an amount of about $450,000, was owed in late May 2005.

[53] Mr Bechara's case is made even less persuasive when the alleged repayments are considered. There is evidence of payments made by Mr Cassaniti, or at least attempted payments by him, by cheques which were dishonoured. That evidence gives further support for my finding that at some stage, some money was owing by the Cassaniti interests to the Bechara interests. But Mr Bechara has failed to prove that there were repayments as he has pleaded. Consequently, even for that reason alone, he has failed to prove that there was an outstanding debt of $450,000 at the time of this mortgage.

[54] The alleged repayments are not proved by documentary evidence. And the oral evidence extended only to this from Mr Bechara:

> "Now, did Mr Cassaniti repay any of these - the moneys?-- It's been a while and obviously there's not a good record keeping. There was some moneys paid back. I can't recall exactly how much it was. It was bookkeeping and some of that bookkeeping is in Gracelands' folders.
>
> All right. And where was the money paid into on occasions, do you recall?-- Some money was paid to, to the Bechara Family Trust. There was, I remember one lot of $30,000 was paid to, all the stamp duty, a purchase that we did, we didn't have funds. We asked Sam. We need 30,000. He paid into that. There's record keeping, but I don't have hold of that any more because of the administrator took possession of the company. I can't recall any other payment."[26]

[55] The evidence of the dishonoured cheques is as follows. On 9 December 2003, a cheque for $100,000, drawn upon the "Cassaniti & Associates … Disbursements Account" and payable to "Bechara Family Trust," was dishonoured. On the following day, another cheque in the same amount and drawn in the same way was deposited and dishonoured. Curiously Mr Bechara pleads, as the first of the alleged repayments, a payment of $100,000 on that day, 10 December 2003.[27] The further dishonoured cheque was deposited on 5 April 2004. It was drawn upon the Cassaniti & Associates Trust Account in favour of the Bechara Family Trust in the sum of $101,000. The bank statement for the account of the Bechara Family Trust shows that on 2 April 2004, there was another cheque deposited, in the sum of $100,000, which was not dishonoured. But Mr Bechara does not plead that there was any repayment which was made in April 2004. That extract from the account of the Bechara Family Trust might create some suspicion that the payments which Mr Sattout had made on 29 March 2004 to the Cassaniti & Associates Trust Account were being redirected to the Bechara Family Trust (save perhaps for the dishonoured cheque) over the next few days. But upon Mr Bechara's evidence that Mr Sattout was making repayments of deposits to purchasers who had not proceeded, that could not have been the case.

The Sotrip mortgage

[56] It follows that it is far from established that as at the end of May 2005, an amount of $450,000 or thereabouts was then due and owing by Mr Cassaniti to Mr Bechara. It is also notable that Mr Bechara's calculation of the amount then owing, as asserted in his statement of claim, makes no allowance for any interest. At least on one view of Mr Bechara's evidence, no interest had been agreed. But if so, that is a further unusual feature of Mr Bechara's case.

[57] The Sotrip mortgage did not record that $450,000, or indeed any amount, was then due and owing. Rather, the first page of the mortgage contained this:

> "Description of debt or liability secured
>
> Registered mortgage for $450,000 dated 31 May 2005 between Sotrip Pty Ltd and Buddy Bechara."[28]

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26 T 1-36, ll 21-34.

27 Amended Statement of Claim, para 11.

28 Exhibit 16, pg 1.

The annexed conditions to the mortgage included the following (with "I" being a reference to Sotrip):

> "I have entered into or intend to enter an agreement with Buddy Bechara for a loan of $450,000.00 (Four Hundred and Fifty Thousand Dollars) on the following terms:
>
> (a) the interest rate for the term of the loan is two per cent (2.00%) per month on the principle [sic] sum borrowed, that being $450,000. The borrower is expected to repay the loan within 12 weeks of the agreement date. The payment is payable in advance on the first day of each month. Irrespective of loan period the borrower must repay a minimum of $27,000;
>
> (b) the loan is to be paid interest only as per sub clause (a) above, for three months with the final payment due three months from drawdown to include the Principal repayment of $450,000;
>
> (c) the loan can be finalized at anytime prior to the maturity date, provided that interest accrued plus one months additional interest is paid;
>
> (d) The term of the loan does not exceed three (3) months from the date of first drawdown.
>
> I am giving Buddy Bechara My Mortgage to secure the payment of money I owe at any time, and my obligations, under or in connection with:
>
> (a) any agreement with or commitment to Buddy Bechara which I have agreed is to be secured by My Mortgage;
>
> (b) any present or future agreement with or commitment to Buddy Bechara which, in the future, I agree is to be secured by My Mortgage; and
>
> (c) My Mortgage."[29]

Remarkably the mortgage made no reference to advances which had been made and which were to be secured by the instrument. Rather, it referred to a loan which was yet to be made, for a term of three months from the date of the "first drawdown" or "within 12 weeks of the agreement date" (which was an apparent reference to 31 May 2005).

[58] Perhaps this document can be explained by poor drafting with the use of a precedent document that had little to do with the facts and circumstances of this transaction. In my view, that is relatively unlikely. On Mr Bechara's evidence, it was not prepared by his side of the transaction. But after it was signed by Mr Cassaniti, the document was taken by Mr Bechara to Mr Sattout. He told Mr Bechara that he could not provide advice in relation to the mortgage because it was over land in

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[29] Exhibit 16, pg 2-3.

Queensland. Nevertheless, it is remarkable that Mr Sattout did not read the terms and notice that they were inconsistent with the mortgage being to secure an existing debt, if that is what Mr Sattout was then instructed.

[59] Upon the evidence, the alternative is that this mortgage was intended to secure a loan yet to be made by Mr Bechara, which was for the purpose of funding Mr Cassaniti's defence of the criminal proceedings against him. These were to be tried within a matter of weeks of the execution of this mortgage. I note that Mr Cassaniti's period of imprisonment commenced on 30 September 2005. Mr Cassaniti said that his trial began on 2 August 2005 when he was then without legal representation until 15 August 2005.

[60] The evidence of Sam and David Cassaniti is that the costs of this legal representation were raised ultimately by the sale of a property near Bathurst. The vendor was a company called Sadagi Pty Ltd, which was controlled by the Cassaniti interests. A solicitor's letter of 21 July 2005 to the secretary of that company advised that contracts for the sale had been exchanged on 16 July 2005, with completion to occur by 19 August 2005. The price was $778,000.[30]

[61] It occurred to somebody to provide in this mortgage that the loan of $450,000 was to be repaid within three months of the end of May 2005. It is not unlikely that Sam Cassaniti had it in mind to repay a proposed loan from Mr Bechara from a source such as the Sadagi property.

[62] Sam Cassaniti wrote and signed this note, dated 1 June 2005, which he then gave to Mr Bechara:

> "I Sam Peter Cassaniti of 1/106 Moore Street, Liverpool NSW hereby agree not to change directorship (sic) of Sotrip P/L ACN 085 132 378 until I have signed and handed over the mortgage documents for Sotrip P/L to Buddy Bechara."[31]

This document anticipated that Mr Cassaniti would cease to be a director of Sotrip, an anticipation which could have been explained by the imminent criminal trial. According to the ASIC records, Mr Cassaniti ceased to be a director on 23 May 2005.[32] Possibly the notice of that change of directorship was lodged with ASIC after this note was signed. As I see it, the handwritten note might be explained consistently with either case and does not significantly advance one case over the other.

[63] The timing of the mortgage, relative to Mr Cassaniti's criminal trial, is significant. It would be remarkable if having been owed money for so long, Mr Bechara succeeded at this point in time in obtaining some security. Mr Cassaniti may have thought that he could hold Mr Bechara at bay for no longer without providing this mortgage in return for another three months to pay. In my view, it is more likely that the security was offered because in the circumstance of the imminent trial, it was required by Mr Bechara if he was to then advance funds, even on a short term basis.

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30 Exhibit 53.
31 Exhibit 47.
32 Exhibit 1, pg 3.

[64] Ultimately, I find the defendants' case, about the reason for the mortgage, to be the more persuasive one. The terms of the document itself strongly support that case. There is the unlikelihood that at that point in time the sum of $450,000 would have been considered by the parties to be the amount owing by the Cassaniti interests to the Bechara interests, as I have discussed above in relation to the supposed loans and repayments. I think that it is quite probable that Mr Cassaniti was prepared to provide a mortgage, intended to operate for some three months only, in order to obtain urgently required funding for his criminal case.

[65] As I have discussed, the express terms of the mortgage did not secure any debt other than one which was owed by Sotrip to Mr Bechara. On Mr Bechara's case, he must establish that Sotrip, through Mr Sam Cassaniti, agreed that the mortgage would secure something other than the (proposed) loan to which it referred. Mr Bechara has failed to prove such an agreement. In any event, he has not proved that Mr Cassaniti owed him any amount, according to which a certain part of the proceeds of the sale of these lands could be applied in his favour.

Conclusion

[66] Therefore I conclude that the mortgage given by Sotrip was to secure a loan which was never made. Mr Bechara had and has no entitlement to be paid from the proceeds of sale. His claim must therefore be dismissed.

[67] The plaintiff's claim will be dismissed. The disposition of the moneys in court will then depend upon the outcome of the recent application by the liquidator of Sotrip.