SUPREME COURT OF QUEENSLAND

CITATION:	*Leach v Commonwealth Bank of Australia* [2014] QSC 295
PARTIES:	**PHILIP DENIS LEACH** (plaintiff) **v** **COMMONWEALTH BANK OF AUSTRALIA** **ACN 123 123 124** (defendant)
FILE NO/S:	9113 of 2012
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	8 December 2014
DELIVERED AT:	Brisbane
HEARING DATES:	8, 9, 10 September 2014
JUDGE:	Dalton J
ORDER:	**Judgment for the defendant against the plaintiff**
CATCHWORDS:	PERSONAL PROPERTY – ALIENATION OF PERSONAL PROPERTY – ASSIGNMENT OF CHOSES IN ACTION GENERALLY – WHAT AMOUNTS TO AN ASSIGNMENT – where a deed purported to assign the assignor's right, title and interest in any claim for damages against the defendant – where the assignor's signature was not proved – whether the assignment was proved by the plaintiff DEEDS – FORM AND EXECUTION – where a deed was not regularly executed – whether *Property Law Act* 1974 (Qld) s 47 was complied with MORTGAGES – MORTGAGEE'S REMEDIES – SALE UNDER POWER – EXERCISE OF POWER – DUTIES AND LIABILITIES OF MORTGAGEE – GENERALLY – where the mortgagee obtained several valuations of the properties – where the mortgagee engaged real estate agent – where marketing of the properties was not criticised by the plaintiff – where the properties were put to public auction – whether the properties were sold at an undervalue – whether the defendant breached *Property Law Act* 1974 (Qld) s85 – whether defendant breached its duty of good faith – whether any tortious duty owed by mortgagee in possession

Property Law Act 1974 (Qld) s 47, s 85

400 George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 Qd R 302
Commercial & General Acceptance Ltd v Nixon (1982-1983) 152 CLR 491
Fortson Pty Ltd v Commonwealth Bank of Australia (2008) 100 SASR 162
Jovanovic v Commonwealth Bank of Australia (2004) 87 SASR 570
Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 13 CLR 676
Upton v Tasmanian Perpetual Trustees Ltd (2007) 158 FCR 118

COUNSEL: B Blond for the plaintiff
C Jennings for the defendant

SOLICITORS: Lillas and Loel for the plaintiff
Matthew J Farmer (Solicitor) for the defendant

[1] Li Jian Shen is apparently a Chinese National. In Australia he met Shaun Dobson, a builder. Mr Dobson built Mr Shen a home. At the end of the job Mr Shen owed Mr Dobson $125,000. Mr Shen persuaded Mr Dobson that he was unable to "get his money out of China". The solution he proposed was that Mr Dobson would pay him another $75,000 and for a combined consideration ($200,000) Mr Dobson would own 10 per cent of a property development or house-building project. A company was incorporated, Australian Prestigious Homes Pty Ltd (APH). Mr Shen and Mr Dobson were directors. The third director was the plaintiff. He knew Mr Shen because he is the de facto husband of Mr Shen's former wife, April Shen. Mr Leach was a solicitor at that time, but is no longer.

[2] There was a large block of land located between Waldo and Wendell Streets, Norman Park. Waldo Street is considerably higher than Wendell Street. Mr Bristow, a valuer called by the defendant, described that historically, "there was a poor quality house on Waldo Street and this land [running down to Wendell Street] was overgrown and forgotten because you couldn't do anything with it … it was so steep" – t 2-81. The steep block was subdivided to become 51, 53 and 55 Wendell Street. Mr Bristow described Wendell Street as a "trophy address".

[3] Pursuant to his property development plan, Mr Shen decided to buy 51, 53 and 55 Wendell Street and have Mr Dobson build homes on each lot. The defendant bank lent him the money to buy the land. Mr Dobson began building the first home. It was appropriate both to its trophy address and to the steep block: it had five storeys rising in steps up towards Waldo Street; the higher floors were accessed by a lift. It was never made clear how Mr Shen intended to fund the building of the homes in Wendell Street. The project was disastrous. Mr Dobson lost everything and said that he was of "no fixed abode" at the time of the trial. Mr Shen was said by Mr Dobson and Mr Leach to have returned to China, although there was no evidence of this. The bank sold the three[1] properties pursuant to its mortgages.

[1] Number 53 in conjunction with Mr Leach (for Mr Shen) and Mr Dobson, and numbers 51 and 55 as mortgagee in possession.

[4] The bank also sued Mr Leach for repayment of a debt he owed in his professional capacity – t 1-41. It obtained default judgment on 10 January 2012 in an amount of around $283,000. It issued a bankruptcy notice, with which Mr Leach failed to comply, and then filed a creditor's petition. Not desiring to be made bankrupt, Mr Leach drafted some documents which he hoped would effect an assignment of causes of action Mr Shen might have against the bank so that he could raise these rights as a set-off in the bankruptcy proceedings – t 1-41. This proceeding is the result.

[5] The further amended statement of claim (Court Document 36) appears on its face to have been drafted by the plaintiff himself. It alleges that 51 and 55 Wendell Street were sold by the bank "at an under value". It alleges a tortious duty on the part of the bank to take reasonable care to ensure that the lots were sold at market value and further alleges a duty of good faith on the part of the bank "in the sale of" numbers 51 and 55 Wendell Street. The pleading alleges a breach of both duties, the only particular is in relation to the bank's refusing to "accept the letter of offer" from a Dr Daoud for $2.5 million for number 55. Other than that, the only breach alleged is the general, "failing to act reasonably as a bank in effecting power of sale of the lots". Curiously, the plaintiff does not rely upon s 85 of the *Property Law Act* 1974 (Qld).

Sale of Properties by the Bank

[6] The bank accommodated attempts by Mr Leach, on behalf of Mr Shen, and Mr Dobson to refinance by delaying taking enforcement action – t 1-43. The bank issued notices of default pursuant to the Shen/Dobson mortgages on 4 April 2011. Well before that, somewhere around August 2010 (t 1-67), Mr Leach and April Shen engaged a real estate agent, Mr Vaisey, to sell the three properties.[2] He put signs on the properties and listed them on real estate websites and in newspapers. Numbers 51 and 53 were vacant lots, number 55 had a partly completed home on it. The house was to lock-up stage but the interior was completely bare – t 1-76. There was "a little bit" of earthwork done at 51 Wendell Street. Mr Vaisey received a contract on 12 July 2011 for $800,000 for number 51 Wendell Street – t 1-77. It was the first offer he had received after seven or eight months of marketing. That offer was subject to finance and did not proceed. Mr Vaisey organised an auction of the vacant land on numbers 51 and 53 on 25 June 2011. There were 150 people at the auction with 15 registered bidders – t 1-73. There was one bid received for number 53 in an amount of $550,000 which Mr Vaisey described as "silly", and no bids for number 51. In explaining the lack of bids at the auction Mr Vaisey gave his opinion that there was a stigma attached to the properties because they had been on the market for so long – t 1-74. Mr Vaisey followed up leads after the auction. He sold it on 30 July 2011 for $850,000. Mr Leach signed the contract to sell 53 Wendell Street, as Mr Shen's attorney – t 1-17. Number 53 recently sold for $1 million, in the same condition as it sold for in 2011 ie., vacant land – t 1-80.

[7] On 17 September 2011 a real estate agent, Mr Hackett, contacted Mr Vaisey. Mr Hackett acted on behalf of Dr Daoud, who wished to purchase the property at 55 Wendell Street. Mr Hackett sent a written offer signed by Dr Daoud in an

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[2] Although Mr Vaisey did not actually have instructions to sell the block at 55 Wendell Street during this period, he would have passed any offers on to the owners had he received them in the course of marketing numbers 51 and 53 – t 1-7. This was not just theoretical, Mr Vaisey thought he showed at least 25 people through the partially completed home on number 55.

amount of $2.5 million. The written offer was a one page document not in the form of a contract of sale. This offer was subject to "the vendor providing all certificates for the work completed to date, all plans and council approvals, copies of any written agreements with any other party that may affect the property" within seven days, and subject to a purchaser's due diligence period of 28 days commencing on receipt of the previously listed information. Mr Vaisey sent the offer to Mr Leach – see exhibit 5 – and Mr Leach rejected it, saying that the owners were hoping for a price "in the mid-$3ms", but indicating a willingness to negotiate – see exhibit 6. Additionally, Mr Hackett said that Mr Dobson verbally rejected the offer – t 2-4. Dr Daoud kept in contact but made no further offers – he was only prepared to pay $2.5 million – t 1-82.

[8] Mr Vaisey made efforts to obtain the certificates required to fulfil the conditions of the written offer. He could not recall whether he was able to do so – tt 1-87-88. Dr Daoud said he was not provided with the certificates for work completed or the plans and council approvals referred to in the offer – t 1-91. He said that, despite the terms of the offer, he did require finance from his bankers and the offer was also subject to finance – t 1-92.

[9] Ms Wendy Bell was the principal of LJ Hooker at Kangaroo Point. She was appointed by the bank to sell 51 and 55 Wendell Street. The appointments were in 2011 but she was not instructed to start marketing until February 2012. In the meantime, Mr Vaisey continued his efforts. As well as working on his own behalf, he tried to make a conjunction agreement with Ms Bell. Ms Bell's arrangements with the bank meant there was not sufficient commission in the sales to support a conjunction. In the course of his discussions with her, Mr Vaisey said he told Ms Bell that he had an offer "in the two millions" for number 55 – t 1-84 – at some stage before he received the written offer from Dr Daoud.

[10] Mr Vaisey also told a manager from the Commonwealth Bank, Ms Denker, that there was an offer on 55 Wendell Street but it was conditional. His evidence was equivocal as to whether he told her the figure $2.5 million, but I think it likely he did mention at least the figure two million, as an indication. Her response was that the bank was only interested in cash offers – tt 1-85-86. He understood her to mean unconditional offers – he said that is how the term "cash offer" is used in the real estate trade. Mr Vaisey continued to contact Ms Denker about the property. He found her easy to deal with and would pass on information as to any buyers in relation to all the Wendell Street properties – t 1-85.

[11] Mr Hackett gave evidence that he contacted Ms Bell once she began a marketing campaign to see if she would sell the property at number 55 Wendell Street to Dr Daoud in conjunction with him. His best memory was that he mentioned the figure of $2.5 million to her in the context of an offer which had been previously made by Dr Daoud but been rejected. Ms Bell told him she would not conjunct and Mr Hackett told Dr Daoud to contact Ms Bell directly. Mr Hackett thought he had told his own bank manager at the defendant bank of Dr Daoud's offer when he contacted him in an attempt to have the bank engage him to sell the 55 Wendell Street property.

[12] Ms Bell could not recall Mr Vaisey talking to her about a previous offer made for 55 Wendell Street. She met Dr Daoud and his wife because they approached her and asked to see the property. Ms Daoud told Ms Bell that she had put in a previous

offer and Ms Bell made no inquiry about it. Ms Bell recalled that Ms Daoud talked about making an offer prior to auction, but Ms Bell did not encourage it because this occurred very close to the auction. Had Ms Daoud made an offer Ms Bell would have accepted it, but she did not wish to encourage it, nor did she discuss price with Ms Daoud or any other potential purchaser. Her evidence was that it was an unusual property and she thought the best strategy was to have the potential purchasers come to the auction – tt 2-54-56. That the property was unusual is borne out by the evidence of Mr Bristow – he said he could not find a recorded sale of an unfinished house "approaching the scale and potential value" of number 55 Wendell Street – t 2-79. The reserve price at the auction was set at $2.1 million. Ms Bell's evidence was that before the auction no potential purchaser mentioned a figure over $2 million – t 2-55.

[13] Ms Bell had rubbish cleared from the abandoned building works on 55 Wendell Street and had safety barriers put up around the site so that people could progress to the top of the partly constructed building to see the views which were available. Signs were placed on both blocks of land and advertisements were placed on the internet and in newspapers. The newspapers and real estate websites she used were the same as those Mr Vaisey used. She conducted a four week campaign with auctions on the fifth week.

[14] Auctions were held for both properties on 10 March 2012. Number 51 Wendell Street was not sold at auction but was sold for $655,000 in May 2012. Number 55 Wendell Street was sold at auction to Dr Daoud for $2.2 million.

[15] Ms Bell prepared weekly property reports to the bank (via its agent). These reports indicate a relatively low level of interest in the properties. In the first week of the campaign Ms Bell received two phone calls in relation to number 51 and one party inspected the property. In that week she received nine phone calls and two emails in respect of number 55. One person inspected the property. In the second week there was one phone call about, but no inspections of, number 51. There were six phone calls, three emails and four inspections in relation to number 55. In the third week there were two phone calls but no inspections of number 51, and four phone calls, two emails and one inspection of number 55. In the fourth week of marketing there was one phone call but no inspections in relation to number 51 and five phone calls and four inspections in relation to number 55. At the end of the four week marketing campaign Ms Bell wrote to her client:

> "Following the four weeks of marketing this magnificent partly finished five level property there are several interested parties, three who have indicated they will be bidding at the Auction.
> One of the three can only bid if the conditions of the Auction can be changed to 90 days settlement and $100,000 Deposit.
> The price comments I have received have been between $1,200,000 and $1,500,000. I did have an inspection today where one buyer commented that he felt the property would sell under $2,000,000. This is the first time a buyer has mentioned a figure above the $1,500,000 in the whole of the marketing time.
> Comments have been that the property will require $1,000,000 to complete the work."[3]

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[3] Trial bundle, tab N, p 93.

[16] After the auction Ms Bell reported in relation to number 55 Wendell Street:

> "The opening bid was placed by bidders [first name] at $1,500,000.
> The two registered bidders [second name] and [third name] who arranged special terms – neither of these parties bid on Saturday.
> Bidder [fourth name] did not bid.
> Bidder [fifth name] did not bid.
> Bidder [sixth name] made multiple bids.
> Under bidder was [first name mentioned].
> Successful purchaser after multiple bids was Mark and Susan Daoud."[4]

[17] In relation to number 51 Wendell Street Ms Bell reported:

> "Bidder [third name] made a bid of $350,000. No further bids where [sic] received and the property was passed in.
> … The main interest prior to the Auction was for the House and Land at 55 Wendell Street. I did hope to have one serious bidder [seventh name], however on Saturday prior to the Auction [seventh name] advised that he would not be bidding and did not register.
> After the Auction I received an offer on Contract from [seventh name] for $550,000 subject to finance 21 business days, deposit $5,000 initial deposit $15,000 balance of deposit on finance approval and settlement 30 days.
> [Third name] has indicated he will offer $500,000 but has not signed a contract.
> Recommendations to sell the property (including recommended listing price):
> Recommended listing price $750,000
> …"[5]

[18] Ms Bell's documents show that nearly a month later the person I have described as seventh name made an increased offer of $580,000, which Ms Bell recommended the defendant bank consider seriously as it was the highest offer she had received over the marketing time and she had not received "any higher price feedback from any other buyers".[6]

Mr Leach's Credit

[19] I formed an adverse view of Mr Leach's credit. In order to prove a genuine commercial interest in the subject matter of the assigned causes of action he gave evidence about financial contributions he made to APH. In October 2010 $50,000 was paid into the APH bank account. Mr Leach gave evidence at first that "we got together an amount of money" to make this payment. I asked him to clarify who he meant and he said, "myself and April Shen gathered together the $50,000" – t 1-17. I asked whose money it was paid into the APH bank account, and his answer was, "the money was my money … because I deposited the amount into the bank account under my name". Concerned that the answer was still ambiguous I asked:

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4 Trial bundle, tab N, p 104.
5 Trial bundle, tab N, p 105.
6 Trial bundle, tab N, p 109.

> "Well, because you put your name on a deposit slip doesn't mean that it's your money. So – because – so do I say – is your evidence that it was your money?--- That's correct, your Honour.
>
> Alright. So all this business about April gathering together money has nothing to do with it?--- Not directly. No." – t 1-18.

[20] In cross-examination there was the following passage:

> "Okay. I have some questions about $50,000 that you say you got together with Mrs Shen and deposited into a bank account?--- Yes.
> Your evidence was that that was an account held by APH …?---Yes.
> … Alright. So was part of that money Mrs Shen's money?--- I think she had saved money – cash – that I'd paid to her over the years as housekeeping money, so to speak, and I was very surprised that she'd accumulated a very large amount of money, and she gave it to me.
> Sorry, did you say a very large amount of money?--- $50,000, yes.
> Right. So the money came from Mrs Shen?--- Most of that came from her, yes.
> Well you just said $50,000 came from her?--- Sorry, 50 – I can't remember the exact amount she gave me. She gave me a very large amount of money, and $50,000 was deposited. If I had some cash on me as well, I would have contributed to total it up to $50,000.
> Are you in the habit of carrying around large sums of money?--- No.
> Cash I mean?--- No.
> Alright. So we're really talking about whatever loose change you might have had in your pocket, to put it broadly, in order to bring it up to a round number. Is that right?--- Something like that.
> So by far, the bulk, if not all of it, came from Mrs Shen. This is April Shen?--- Ms April Shen gave it to me to go to the bank and deposit the money into the APH ANZ account, yes." – t 1-37.

[21] On 8 July 2012 Mr Leach sent an email to the banking ombudsman saying, "I had loaned approx $400 000 to LJ Shen ('Shen') and SG Dobson ('Dobson') to assist them with the development of residential property being 51, 53 and 55 Wendell Street, Norman Park in Queensland". In cross-examination the following passage occurred:

> "We've heard nothing today about a loan of $400,000 to Mr Shen and Dobson, have we?--- No.
> Because, in fact, no loan existed. Is that correct?--- Shen---
> It's a simple question, Mr Leach?--- Shen was to arrange an amount of $400,000 by way of funding in my name into the transaction. That was the starting point.
> Mr Leach, you never lent Mr Shen and Mr Dobson $400,000?--- There was to have been an arrangement by Mr Shen that $400,000 was to have been lent by me into the transaction.
> … That's untrue, isn't it?--- No. As I said, there was always going to be an amount of an allowance where – however you describe it – was going to cover the position of 400,000.
> … You didn't loan $400,000 to Mr Shen and Mr Dobson did you?--- I did not write out a loan agreement or a cheque for $400,000, no, but as I said to you, the explanation I give is that Mr Shen has always

> said he would cover me in a loan account of some type to the extent of the $400,000. Now as a matter of expression, I agree with your words, but had I loaned? Is there a loan account?" – tt 1-54-55.

Assignment of Choses in Action

[22] Mr Leach's evidence was that he attempted to take an assignment from Mr Shen of the causes of action connected with the sale of numbers 51 and 55 Wendell Street at an undervalue in an effort to avoid going bankrupt after being served with a creditor's petition by the Commonwealth Bank. He drafted a deed dated August 2012 (exhibit 3) but did not have any contact details for Mr Shen. He said he emailed the document he had drafted to April Shen. The point of that from Mr Leach's point of view seems to have been for April Shen to email it to Mr Shen, but objection was taken to his giving hearsay evidence about that, and Ms Shen was not called. The failure to call her was not explained – cf t 1-25. Exhibit 3 was not tendered as a deed signed by both parties, for no-one proved Mr Shen's signature on it. Mr Leach was not asked to identify the signature. Counsel for the plaintiff applied to have Mr Shen give evidence by telephone, he stated, from China. I refused leave for that to occur.[7] One might have thought that Ms Shen would have been able to identify the signature, but that course was not pursued by the plaintiff.

[23] The deed recites at E, "The Assignor [Mr Shen] acknowledges and agrees that the Assignee has earlier advanced the sum of $400,000 ('the Debt') to the Assignor and Dobson to assist with the development of the land". As detailed above that was untrue. At cl 4 the writing says that Mr Shen assigns to Mr Leach his right, title and interest in any claim for damages against the Commonwealth Bank arising from its selling 51 and 55 Wendell Street at a significant undervalue and in breach of the bank's obligations to Mr Shen to take reasonable care to obtain market value. Against one of the execution clauses on the deed appears a signature in cursive script and also some characters which may, or may not, be Chinese characters.

[24] Mr Leach apparently thought that he ought to supplement this first deed and prepared another one dated 21 February 2013. It was to assign any cause of action arising from "any breach of good faith obligation that may have been owed by CBA to [Shen]" – exhibit 4. At first Mr Leach swore that he emailed the February 2013 deed to Mr Shen and received a signed copy by return email. However, in cross-examination, by reference to an affidavit he had sworn in the course of an interlocutory matter, Mr Leach resiled from this evidence and said that in fact, as with the first deed, it was April Shen who apparently had the communication with Mr Shen. That is, he could not give evidence of what happened.

[25] Once again Mr Shen's signature was not proved and in any case the deed is not regularly executed: there is no signature against one of the execution clauses and instead two signatures in cursive script appear in the schedule to the document. One of those signatures bears a passing resemblance to the cursive script signature on the document dated August 2012, but neither looks to me as though it contains the word

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[7] See reasons at tt 2-17-18. Having now heard all the evidence and formed an unfavourable view as to the plaintiff's credit, it occurs to me that another reason for refusing to take a telephone call from someone purporting to be Mr Shen is that course assumes the plaintiff's honesty in instructing his legal representatives to make contact with the person who is in fact Mr Shen. That is not a course I would now feel confident about, without some objective proof that the voice on the end of the telephone line belonged to Mr Shen in fact.

"Shen". Of that signature on exhibit 4 Mr Leach was asked, "is that Mr Shen's signature" and replied, "it appears to be a copy of that" – t 1-28. However, counsel for the plaintiff did not tender it on that basis but only on the basis that it was signed by his client – t 1-29.

[26] The plaintiff failed to prove an assignment of any chose in action. The plaintiff did not prove that Mr Shen signed either the August 2012 or February 2013 deeds. To the extent that Mr Leach did say that the signature on the copy document, which is exhibit 4, appears to be Mr Shen's signature, I am not prepared to act on that evidence. It was expressed equivocally. He did not swear that he was familiar with Mr Shen's signature and recognised it. The signature is not readily legible. Counsel for the plaintiff did not tender the document on the basis that it was signed by Mr Shen. Mr Leach's evidence occurred in a passage where he gave evidence that he received the February 2013 deed by email from Mr Shen. He accepted in cross-examination that that evidence was not true. I have no confidence that the plaintiff was an honest or reliable witness. In any case, the 2013 deed is not signed as a duly executed deed, but is signed irregularly. It is unsupported by consideration. In the absence of execution expressed to constitute delivery, I do not consider that s 47 of the *Property Law Act* has been complied with.[8]

[27] As a result of the plaintiff's failure to prove an assignment of the causes of action relied upon, the claim must fail. The defendant contended that the plaintiff had failed to establish a genuine and commercial interest in the subject matter of the assigned cause of action and contended that any assignment was subject to the plaintiff accepting the burden of the debt Mr Shen owed to the bank. Because of my finding that there was no assignment, I do not need to determine these questions. Nor, strictly, do I need to address the substance of the claim for sale at an undervalue. However, as the matter occupied most of the trial, I will give my views on that case.

Breach of Duty in Exercising Power of Sale

[28] It is uncontroversial that while a mortgagee is not a trustee for the mortgagor in relation to the exercise of the power of sale, a mortgagee is obliged to act in good faith, and as part of that duty, not to act with calculated indifference to, or reckless disregard of, the rights of the mortgagee.[9] In *Pendlebury v Colonial Mutual Life Assurance Society Ltd* it was said:

> "It is very difficult to define exhaustively all that would be included in the words 'good faith' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.
>
> … In the case of a sale by a mortgagee, if he omits to take obvious precautions to ensure a fair price, and the facts show that he was absolutely careless whether a fair price was obtained or not, his conduct is reckless, and he does not act in good faith."[10]

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8 *400 George Street (Qld) Pty Ltd v BG International Ltd* [2012] 2 Qd R 302.

9 *Commercial & General Acceptance Ltd v Nixon* (1982-1983) 152 CLR 491, p 494 per Gibbs CJ and p 502 per Mason J; *Jovanovic v Commonwealth Bank of Australia* (2004) 87 SASR 570, 593.

10 (1912) 13 CLR 676, 680 per Griffith CJ.

[29] Section 85(1) of the *Property Law Act* provides that it is the duty of a mortgagee, in the exercise of a power of sale, to take reasonable care to ensure that the property is sold at market value. Section 85(3) gives a person damnified by a breach of that duty a remedy. As noted above, the plaintiff in this case disclaimed reliance on s 85 of the *Property Law Act.* The pleading was drawn by Mr Leach himself. He is, as noted, legally trained and practised for some time as a solicitor. However, his counsel also disclaimed reliance on the statute at trial – see tt 3.28-29 and paragraph 24 of the plaintiff's written submissions. Further, he disclaimed reliance on a tortious duty in submissions – t 3.30. This meant that the case rested only on the duty of good faith. I find this conduct on the part of the plaintiff and his counsel inexplicable. I go on to consider the substance of the claim made as if reliance had been placed on s 85, and the common law duty of good faith.

[30] As noted in *Commercial & General Acceptance Ltd v Nixon,*[11] the authorities as to whether or not a mortgagee owes a tortious duty to take reasonable care in exercising a power of sale is "one on which the authorities are conflicting, and indeed … irreconcilable", to quote Gibbs CJ in that case. The position has not been clarified since then, probably because in view of the statutory provision no-one sees a necessity to rely on a tortious duty. Nonetheless the question did come before the Full Court of the South Australian Supreme Court in two related cases.[12] The matter was raised in the first case because the statutory provision relied upon in that case was similar to s 85 of the Queensland *Property Law Act* but gave a right to statutory compensation rather than common law damages. Besanko J, with whom Gray J agreed, concluded that, "the weight of authority in this country is that a mortgagee exercising a power of sale does not owe a common law duty of care: *Pendlebury v Colonial Mutual Life Assurance Society Ltd; Citicorp Australia Ltd v McLoughney; Westpac Banking Corporation v Kingsland; GE Capital v Davis & Ors*." – [92]. The second Full Court in *Fortson* noted the majority conclusion in *Jovanovic* that the duty imposed by the Statute in that case did not sound in damages and the alternative basis for assessment as a consequent of that – [11].

[31] Even had the plaintiff relied upon s 85 of the *Property Law Act,* it seems to me that the plaintiff failed to prove any want of reasonable care to ensure that the Wendell Street properties were sold at market value. The Court in *Fortson* helpfully collected the authorities as to the meaning of market value at [26] ff. At [30] Debelle J said, "In the ordinary course, the sale price achieved on the open market is market value. The price paid by the prudent purchaser will be the price negotiated by voluntary bargaining between the vendor and purchaser, both willing to trade, but neither so anxious that either will overlook any ordinary business consideration. Alternatively, it will be the price paid at auction by a prudent purchaser."

[32] In this case the land was put to public auction. Number 55 sold at auction and number 51 sold subsequent to auction. Ms Bell's conduct of the advertising campaign before the auction was not criticised in the particulars pleaded or in cross-examination of her. The newspapers and real estate websites which she used were the same as those which Mr Vaisey used. Both Ms Bell and Mr Vaisey used signs on the land. Ms Bell went to the additional trouble of clearing rubbish from number 55 and making sure that potential purchasers could safely inspect the

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11 (Above), p 494 per Gibbs CJ, p 502 per Mason J, p 508 ff per Aickin J, p 519 per Wilson J.

12 *Jovanovic* (above), Court comprising Mullighan, Gray and Besanko JJ; *Fortson Pty Ltd v Commonwealth Bank of Australia* (2008) 100 SASR 162, Court comprising Doyle CJ, Debelle and Bleby JJ, see also *Upton v Tasmanian Perpetual Trustees Ltd* (2007) 158 FCR 118.

property from the top levels. I should say that Mr Vaisey's evidence was that he showed purchasers to the top levels without safety barriers and considered it was safe to do so.

[33] Mr Bristow described the ideal marketing conditions for a property as being "fully exposed to the market, promoted to all people who might be interested in it, and over a sufficient period of time to locate buyers suitable for the property" – t 2-69. He said that disadvantages of sales by mortgagees in possession included a property being on the market for a short time; a mortgagee's unwillingness to consider conditional offers, or allow purchasers to make investigations which may seem desirable to them – t 2-69. Ms Bell's campaign lasted five weeks and the bank would not accept conditional offers. However, in this case those factors can hardly be thought to have been of any causal significance given the marketing campaign which Mr Vaisey had undertaken since August 2010, and the lack of success he had in selling the land, or even attracting offers. There can be no doubt that the property was exposed to the market for a long time (too long according to Mr Vaisey) and for most of that time not marketed by a mortgagee in possession but by its owner, with the bank's agreement.

[34] The bank was concerned to value the two lots of land before selling and I will summarise the evidence as to that. First, in relation to number 51, the bank had the background that it had been purchased on 20 February 2009 at a price of $1,260,000 by Mr Shen and Mr Dobson. The bank had taken a valuation from Taylor Byrne Valuers at that time which put the value of the land at the contract price. The bank had Mr Peterson's valuation, commissioned by Mr Leach, which gave a value of $1,620,000 as at 16 March 2011. It had a valuation from LMW Hegney as at 14 April 2011 which put the market value at $700,000 and gave a market value range of $600,000 - $800,000. It had a further valuation from this firm as at 26 September 2011 which showed a slight increase, giving the market value at $800,000 in a range of market values of $750,000 - $850,000. Lastly it had a CB Richard Ellis valuation at 26 September 2011 which put the value of the land between $850,000 and $920,000.

[35] As to number 55, the bank had the background information that Mr Shen and Mr Dobson had bought the land for $1,428,000 on 20 February 2009 in circumstances where the bank had commissioned a valuation from Taylor Byrne putting the value at $1,430,000. The bank had Mr Peterson's valuation of 16 March 2011 which put the value of the land at $6.5 million. The bank had commissioned a valuation from LMW Hegney dated 14 April 2011 which put the market value at $2 million and a range of market values between $1.8 and $2.2 million. It had a further valuation from this firm at 24 November 2011 which gave a market value of $2,150,000 and a range of $2 million - $2.3 million. The bank had a third valuation from this firm at 17 February 2012 which gave a market value of $2.1 million and a market value range of $1.9 - $2.3 million. Lastly the bank had a valuation from Trivett and Associates as at 23 August 2011 which gave a market value of $2.4 million and a market value range of $2.2 - $2.6 million.

[36] There are comments in the valuations received by the bank as to the market. For example, the LMW Hegney valuations of 14 April 2011 describe a market of "weakening sales activity". Those valuers also comment, "The prestige vacant land market is currently depressed with high building costs contributing to the poor market conditions. As a general rule, in the current market, it is cheaper and easier

for a prestige buyer to purchase an existing high quality home rather than build." Similar comments are made, for example in the Trivett and Associates valuation, "Due to the effects of the GFC, fluctuating share market and recent increases in bank lending rates, the local residential market has slowed with evidence of further softening market values in the last six months especially in the upper value range properties".

[37] The plaintiff made no specific complaint about the defendant's selling of the properties except that it failed to deal appropriately with information relating to Dr Daoud and his willingness to buy the property. I accept Mr Vaisey's evidence that he specifically told Ms Bell of an offer of over $2 million. He did not tell her the name of the potential purchaser, for he was hoping to be involved himself as agent on a conjunction. Ms Bell could not recall this conversation. I accept that is an honest lack of recollection. It is by no means proven that had Ms Bell tried she could have obtained from Mr Vaisey, Mr Hackett or even Dr Daoud the written offer which Dr Daoud first made and which Mr Leach rejected. However, assuming that Ms Bell was able to obtain an offer in the same terms as exhibit 5, there is no evidence that the bank (even if it were inclined to do so) could have complied with the conditions on that offer. The evidence – from Mr Vaisey and Dr Daoud – is that the conditions remained unsatisfied when the offer was made, notwithstanding Mr Vaisey's attempts to obtain documentation which would at least satisfy the first series of conditions, allowing the due diligence period to commence. There is of course no evidence that, had due diligence been conducted by Dr Daoud, he would have been satisfied. Further, there is no evidence that the unconditional sale at $2.2 million to Dr Daoud at auction was of any less value than his conditional offer of $2.5 million before auction. Mr Bristow's evidence supported the idea that a purchaser would pay more once quantity surveying work was done and there was a reasonable opportunity to estimate the cost to complete the dwelling – t 2-75.

[38] There was a great deal of evidence as to the value of the two lots of land in this case. I have just outlined the valuations which the bank obtained prior to sale. These documents were tendered by consent and the valuers were not called or cross-examined.

[39] Mr Vaisey also made his own market appraisal of the three properties. All appraisals are dated 30 April 2011. He estimated a sale price of between $1.8 - $2.10 million for number 51; $1.7 - $1.9 million for number 53 and $6.5 - $7.1 million for number 55.[13] In explaining the failure of the blocks of land to sell for the amounts in his market appraisals Mr Vaisey agreed that the housing market at that time was "especially volatile" – t 1-77 – and he further agreed that from April 2011 through to the end of 2012 there was a "gradual decline" in the housing market – t 1-78. At another point Mr Vaisey agreed that "the market was in steep decline" – t 1-80.

[40] The plaintiff called Mr Peterson, a valuer of some 40 years experience, who provided a valuation report in March 2011 to the plaintiff. That report was in evidence.[14] He gave a valuation of 51 and 55 Wendell Street. As mentioned, he put a value of $1,620,000 on number 51 and $6.5 million on number 55. The valuation was expressed to be good for 90 days. Mr Peterson said, when asked in

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13 Tender bundle, tab H, pp 121-123.

14 Tender bundle, tab D, pp 20-42.

cross-examination, that he did not think that the market for "quality dwellings" was declining in 2011 and 2012 and in fact expressed the view that this part of the market did not decline "in any major financial circumstance" – t 2-24.

[41] I was left in some confusion as to the status of Mr Peterson's report. Counsel for the defendant objected that Mr Peterson was not called or put forward as an expert valuer in the proceeding and counsel for the plaintiff acceded to the proposition. That does not much assist in knowing what the purpose of Mr Peterson's opinion on value was. His report was tendered by consent and Mr Bristow, the defendant's expert valuer, criticised its substance in his report, and in evidence. Notwithstanding Mr Peterson was not cross-examined as an expert witness would normally be, it was clear that his report was not accepted by the defendant and the basis for that was articulated in Mr Bristow's report. I think I really have no alternative but to treat Mr Peterson's opinion as an expert opinion on the subject matter of value of the land. That it was almost one year out of date having regard to the sale of 55 Wendell Street and slightly more than that having regard to the date of the sale of number 51 Wendell Street, goes to reduce it weight and relevance.

[42] I found Mr Bristow's evidence as to value very impressive. He had lived in the relevant area for nearly 30 years, and had been aware of the properties for some time, having given advice to the original subdivider over a decade ago – t 2-67. Mr Bristow valued 51 Wendell Street at 8 June 2012 and 55 Wendell Street at 10 March 2012. That is, he valued the properties as at the dates they were sold. The date of his valuations was 9 August 2013. That is, his valuations were retrospective. He put the value of 51 Wendell Street at $800,000, some $145,000 less than the price received on sale by the bank. He valued number 55 at $2.2 million. He said that his original conclusion was that its value was $2 million, but he raised it having regard to the evidence of what Dr Daoud paid at auction – t 2-75. He qualified both his valuations as "cautionary" given "market and general economic uncertainty".[15]

[43] Of the Wendell Street properties Mr Bristow said:

> "… They were all three of them clearly of a value well above the median for the area. They were also physically extremely unusual in having what could only be described as very rugged topography. In the period up until their sale – sales in 2012 there was very little depth in the marketplace in which these properties were being promoted. If they were generic suburban blocks with, say, a value of 750,000 there would have been no difficulty in finding buyers for them in certainly a – probably a three month period of time and offering three at one time certainly wouldn't overload the market. I think what's happened with the three blocks in Wendell Street is that they were challenging from a buyer's perspective in every respect. The topography was very demanding, threw up questions of could construction be achieved at a reasonable price. And in the circumstances where number 55 was an unfinished house, 51 and 53 share their access – a very narrow easement access – that threw up another set of difficulties to my mind which made a speedy sale in mortgagee circumstances very much harder. So I think everything was against the properties having to be sold at the one time or a very

[15] Trial bundle, tab 0, p 3.

> quick succession of each other from when – mid 2011 for number 53, wasn't it?
> Yes?--- So we've actually got three sales occurring in a 12 month period that exceeded the market activity not just for Norman Park but also for the Brisbane City Council Shire of Balmoral. There simply wasn't the depth in the market.
> And in your critique of Mr Peterson's report, that's one of the things that you say is a failing in his report, isn't it, because he moves [indistinct] suburbs to try and get comparable sales further than what you believe he should?--- I do. I think there were sales at the relevant time that would support the valuation. Naturally, because of the nature of the sites the degree adjustment necessary is greater than ideal because we're not talking about a generic vanilla suburban block. We're talking about a very unusual product that throws up a lot of problems. And it's probably pertinent to reflect on the fact that in the 10 years since the land was subdivided it's still not fully developed. The last house is only just coming out of the ground now. Now, five blocks in a regular suburban location in Norman Park if they had sold 10 years ago the houses would be nine years old. There would be no issue." – tt 2-69-70.

[44] Mr Bristow described the market of comparable sales as "very thin" – t 2-71 – and said that he thought the top end of the market was "quite badly affected after the GFC" – t 2-71.

[45] In valuing number 55 Wendell Street Mr Bristow assumed a cost to complete the house, which he took from a report provided by Mr Thompson, a quantity surveyor. Mr Thompson, on instructions from Mr Bristow, gave a price to complete the house with a prestige level of finish. That was challenged by the plaintiff as being inappropriate but in my view it clearly was not. The house which had been partly built by Mr Dobson was a grand one and it would be unusual, if not absurd, to think that it would be completed and fitted out at any level less than a prestige level. Further, Mr Bristow's evidence was that a fit out at less than this level of finish would have been economically unwise in that location – t 2-82. There was no evidence to the contrary of this. All the valuers, including Mr Peterson, use words such as "prestige residential" and "luxury" to describe the land. In his valuation Mr Peterson says he has "been informed of an estimate of around $350,000 to complete the dwelling. However I feel that potential buyers are likely to err on the high side when estimating the value to complete." There was no evidence as to how Mr Peterson, or more properly his source, for this is hearsay, came to estimate this value to complete. I prefer the evidence of Mr Thompson, a quantity surveyor who set out to approach the matter in a logical and detailed way.

[46] Mr Bristow thought that Mr Peterson's report differed from his because it was, firstly, earlier in time but, secondly, because Mr Peterson used too many comparators and too many of the comparators had little or no relevance to Wendell Street – t 2-76. Mr Peterson does seem to use an unusually high number of comparative sales in his report and, from the descriptions and photographs provided, they do not seem particularly comparable to the Wendell Street property. As well, Mr Peterson assumed too low a cost to complete the house on number 55. It is true that Mr Bristow's valuation was retrospective and he acknowledged that there are some disadvantages to a retrospective valuation, when cross-examined as

to this topic. However, he pointed out, and I think it is true in this case, that he also had the advantage of the sales evidence of the properties themselves and a much more complete view of the market well after these sales. Mr Peterson's valuations, especially of number 55, are out of line with all the other opinion evidence as to value. For all these reasons I prefer the opinion of Mr Bristow as to market value as at the relevant dates.

[47] The plaintiff's claim that number 55 was sold at undervalue must fail. On Mr Bristow's evidence it sold at market value. On Mr Bristow's opinion of market value, number 51 sold for slightly under its market value. One conclusion on all the available evidence might well be that this shows Mr Bristow's opinion of market value was too high. Given that the property had been marketed since August 2010, had attracted little interest from the market during all this time, and sold for the highest price any potential purchaser was willing to offer, it is difficult to see that it did not sell for its market price. Even if it did not, I cannot find that that is due to the bank failing to take reasonable care to ensure that the sale was at market price.

[48] In relation to both properties the bank obtained several valuations. It engaged a real estate agent. She was not said to be incompetent in any way. Her marketing and auction campaign were not criticised in any way. The marketing campaign lasted a month, with the auction in the fifth week. If any question is raised over the five weeks being too short, it can hardly be argued that more time in the market would have assisted, given the prolonged period over which Mr Vaisey had been trying to sell the land before this. As to number 55, it is not shown that the conditional offer made by Dr Daoud would have been made again had Ms Bell invited it. It is not shown that that offer was more valuable than the price paid at auction. It is not shown that Ms Bell was wrong in adopting a strategy to discourage potential purchasers making offers prior to auction. In circumstances where the property was highly unusual, she adopted a strategy that an auction would be the best way to test the market and she was not criticised for that either in the plaintiff's pleading or in cross-examination.

[49] In short, there is no evidence that either property sold below market value or that the bank failed to take reasonable steps to ensure that the properties were sold at market value. There is certainly no evidence that the bank breached its duty of good faith to Mr Shen and Mr Dobson. There were no particulars of this allegation. All the matters just discussed are relevant to it. As well, the bank was more than tolerant in allowing Mr Shen and Mr Dobson time to refinance, and then time to sell, the properties themselves. Even once Ms Bell was appointed, the bank allowed Mr Vaisey to continue his efforts and indeed co-operated, to some extent, with him – see his discussions with Ms Denker. The substance of the claim which the plaintiff wished to agitate must fail on its merits.

[50] I give judgment for the defendant against the plaintiff. I will hear the parties as to costs.