

# SUPREME COURT OF QUEENSLAND

CITATION: *Asset Core Pty Ltd & Anor v Jarrett 1 Enterprises Pty Ltd & Anor* [2015] QSC 270

PARTIES: **ASSET CORE PTY LTD ATF CORE HYBRID ASSET TRUST**  
ACN 143 278 068  
(first applicant)  
**CORE (QLD) PTY LTD ATF THE BATALEUR DISCRETIONARY TRUST**  
ACN 140 344 510  
(second applicant)  
v  
**JARRETT 1 ENTERPRISES PTY LTD ATF THE ZEDRICK NUMBER 1 TRUST**  
ACN 602 779 608  
(first respondent)  
**PERMANENT MORTGAGES PTY LTD**  
ACN 097 176 362  
(second respondent)

FILE NO: SC No 8832 of 2015

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 September 2015

DELIVERED AT: Brisbane

HEARING DATES: 9 September 2015; 11 September 2015

JUDGE: Flanagan J

ORDERS: **1. Application for interlocutory or interim injunction refused.**  
**2. I will hear the parties as to costs.**

CATCHWORDS: MORTGAGES – JUDICIAL SALE – where the first applicant entered into a contract of sale to purchase real property from the first respondent – where the second respondent was the first mortgagee over the property and the second applicant was the second mortgagee over the property – where the first respondent had defaulted under both mortgages – where the second applicant as second mortgagee had obtained default judgment and the second respondent as first mortgagee had commenced proceedings – where the first

respondent failed to settle the sale of the property to the first applicant— where the first applicant applied for specific performance and the second applicant as second mortgagee applied for judicial sale of the property pursuant to s 99(2) of the *Property Law Act 1974* (Qld) – where the second applicant sought an interim or interlocutory injunction restraining the second respondent as first mortgagee from exercising any of its rights under the mortgage – whether s 99(2) of the *Property Law Act 1974* (Qld) creates an equity in favour of the second mortgagee as against the first mortgagee so as to restrain the first mortgagee from exercising its rights

EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – where the first applicant entered into a contract of sale to purchase real property from the first respondent – where the second respondent was the first mortgagee over the property and the second applicant was the second mortgagee over the property – where the first respondent had defaulted under both mortgages – where the second applicant as second mortgagee had obtained default judgment and the second respondent as first mortgagee had commenced proceedings – where the first respondent failed to settle the sale of the property to the first applicant— where the first applicant applied for specific performance and the second applicant as second mortgagee applied for judicial sale of the property pursuant to s 99(2) of the *Property Law Act 1974* (Qld) – where the second applicant sought an interim or interlocutory injunction restraining the second respondent as first mortgagee from exercising any of its rights under the mortgage – whether s 99(2) of the *Property Law Act 1974* (Qld) creates an equity in favour of the second mortgagee as against the first mortgagee so as to restrain the first mortgagee from exercising its rights – whether there is a serious question to be tried

*Property Law Act 1974* (Qld), s 99(2)

*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, applied  
*Cheltenham and Gloucester Plc v Krausz* [1997] 1 WLR 1558, considered

*Merchant Banking Co of London v London and Hanseatic Bank* (1886) 55 L J Ch 479, cited

*Palk v Mortgage Services Funding Plc* [1993] Ch 330, considered

COUNSEL: M P Amerena for the applicants  
P A Kronberg for the respondents

SOLICITORS: OMB Solicitors for the applicants  
Dunstan Hardcastle for the respondents

- [1] The first respondent, Jarrett 1 Enterprises Pty Ltd, is the owner of a residential unit at Newstead. The property is subject to a first and second mortgage. The first mortgagee of the property is the second respondent, Permanent Mortgages Pty Ltd. The holder of the second mortgage is the second applicant, Core (Qld) Pty Ltd. The second mortgage supports a loan agreement entered into between the second applicant and the first respondent on 9 March 2015. The first respondent has defaulted in payment of this loan. The second applicant obtained judgment by default against the first respondent on 19 August 2015.<sup>1</sup>
- [2] The first respondent has also defaulted in respect of the first mortgage. Accordingly the second respondent as first mortgagee is presently seeking default judgment against the first respondent for recovery of possession of the mortgage property in proceedings in the District Court of Queensland.<sup>2</sup>
- [3] On 30 July 2015 the first applicant, a related entity of the second applicant, entered into a contract of sale with the first respondent. By this contract of sale the first applicant agreed to buy and the first respondent agreed to sell the Newstead unit for the sum of \$1,450,000 inclusive of GST.<sup>3</sup> An independent valuation values the property at \$1,300,000.<sup>4</sup>
- [4] Pursuant to the terms of the contract of sale, settlement was to occur on 31 August 2015.<sup>5</sup> On 6 August 2015, Casey Wade Jarrett, the sole director and member of the first respondent, executed the transfer document necessary to effect settlement of the contract of sale.<sup>6</sup>
- [5] Settlement was to occur at the National Australia Bank on 31 August 2015 at 2.00pm. As events transpired the first respondent failed to settle.
- [6] By paragraph 1 of the originating application filed 3 September 2015 the first applicant seeks to have the first respondent specifically perform the contract of sale dated 30 July 2015.
- [7] By paragraph 2 of the originating application the second applicant (as second mortgagee) is applying to the Court for orders pursuant to s 78(2)(c) of the *Land Title Act* 1994 (Qld) effectively seeking foreclosure of the right of the first respondent to redeem the relevant property and an order of the Court for the sale of the property in accordance with the contract of sale. The second applicant also seeks a Court directed sale of the property on the same terms as the contract of sale, pursuant to s 99(2) of the

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<sup>1</sup> District Court of Queensland Proceedings: *Core (Qld) Pty Ltd v Jarrett 1 Enterprises Pty Ltd & Ors* (182/15); exhibit "PDVDS-8" to the affidavit of Peter David van der Schyff sworn 4 September 2015.

<sup>2</sup> District Court of Queensland Proceedings: *Permanent Mortgages Pty Limited v Jarrett 1 Enterprises Pty Ltd* (2912/15); exhibit "PDVDS-11" to the affidavit of Peter David van der Schyff sworn 4 September 2015.

<sup>3</sup> Exhibit "SGB1" to the affidavit of Simon Gordon Bennett affirmed 4 September 2015.

<sup>4</sup> Exhibit "PDVDS-9" to the affidavit of Peter David van der Schyff sworn 4 September 2015.

<sup>5</sup> Affidavit of Simon Gordon Bennett affirmed 4 September 2015, [25]-[26].

<sup>6</sup> Affidavit of Luke Mackenzie sworn 4 September 2015, [42]-[47].

*Property Law Act 1974 (Qld)*. The applicants accept that the orders sought in paragraphs 1 and 2 of the originating application may involve disputes of fact and cannot be determined summarily. The second respondent as first mortgagee does not oppose orders for specific performance or for the sale of the property.<sup>7</sup> This is because if the property is sold in accordance with the contract of sale dated 30 July 2015 there would be sufficient funds to pay out the first registered mortgage and some of the second mortgage.

- [8] The present application which is to be determined is that contained in paragraph 3 of the originating application whereby the first and second applicants seek an interim or interlocutory injunction against the second respondent seeking to restrain the second respondent from exercising any of its rights as first mortgagee to sell, or to cause to be sold or offered for sale, the mortgaged property or to appoint a receiver in respect of the property or otherwise take steps to dispose of the property as mortgagee exercising power of sale.
- [9] Mr Amerena, who appears for the first and second applicants, concedes that the first applicant has no standing to seek such interim or interlocutory relief. Paragraph 3 of the originating application should therefore be read as constituting an application brought only by the second applicant as the second mortgagee.
- [10] The second respondent opposes any interim or interlocutory injunction restraining it from exercising its power under the first mortgage.<sup>8</sup>
- [11] The issue for determination is whether the second applicant's application pursuant to s 99(2) of the *Property Law Act* creates an equity in favour of the second applicant as against the second respondent which would justify the granting of an interlocutory injunction. Mr Kronberg, who appeared for the second respondent, identified the issue as being whether the second applicant can show that there is a triable claim as against the second respondent to justify the making of an interim or interlocutory injunction.<sup>9</sup>
- [12] As stated by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*:<sup>10</sup>
- “When a plaintiff applies to a court for an interlocutory injunction, the first question counsel may be asked is: what is your equity? If a plaintiff, who has commenced an action seeking a permanent injunction, cannot demonstrate that, if the facts alleged are shown to be true, there will be a sufficiently plausible ground for the granting of final relief, then that may mean there is no basis for interlocutory relief.”
- [13] In *Equity Doctrines and Remedies*, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* is cited for the following proposition:<sup>11</sup>

<sup>7</sup> Respondents' outline of argument undated, [2.2], [3.1].

<sup>8</sup> Respondents' outline of argument undated, [3.2].

<sup>9</sup> Respondents' outline of argument undated, [4.1].

<sup>10</sup> (2001) 208 CLR 199, 216 [8].

<sup>11</sup> R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2002) 776 [21-350].

“... a plaintiff must in all cases, demonstrate a prima facie case. If one ‘asks a prima facie case of what?’ the answer must be a prima facie case of the existence of an underlying cause of action.”

[14] The second applicant has not identified the existence of any cause of action against the second respondent.

[15] Mr Amerena, however, submits that given that the statutory power under s 99(2) of the *Property Law Act* can affect the rights of the first mortgagee then it is “just and convenient” to restrain the first mortgagee to maintain the status quo. This is in circumstances where the first mortgagee may be properly joined as a party to an application for a judicial order of sale pursuant to s 99(2).

[16] Mr Amerena referred to s 9(3) of the *Civil Proceedings Act 2011* (Qld) which provides:

“The court may also, at any stage of a proceeding, grant an interlocutory injunction if it considers it just or convenient.”

[17] Section 9(3) is in similar terms to the opening words of s 11(12) of the *Supreme Court Civil Procedure Act 1932* (Tas) which was considered in *Australian Broadcasting Corporation v Lenah Game Meats*. The mere fact that the Court has the power to grant an interlocutory injunction if it considers it just or convenient does not create a “free-standing” right to injunctive relief. As observed by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats*:<sup>12</sup>

“In a context such as the present, a proposition that the respondent has a ‘free-standing’ right to interlocutory relief is a contradiction in terms. ... If there is no serious question to be tried because, upon examination, it appears that the facts alleged by the respondent cannot, as a matter of law, sustain such a right, then there is no subject matter to be preserved. There is then no justice in maintaining the status quo, because that depends upon restraining the appellant from doing something which, by hypothesis, the respondent has no right to prevent.”

[18] It is necessary to consider s 99(2) of the *Property Law Act* and its operation. It provides:

“(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, even though—

(a) any other person dissents; or

(b) the mortgagee or any person so interested does not appear in the action;

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<sup>12</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 218 [16].

and without allowing any time for redemption or for payment of any mortgaged money, may direct a sale of the mortgaged property, on such terms, subject to subsection (3), as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.”

[19] The Court’s power to direct a sale pursuant to s 99(2) is discretionary. The request for such an exercise of discretion may be made by the mortgagee or any person interested either in the mortgage money or in the right of redemption. In the present case the second applicant as second mortgagee has standing to make such a request of the Court. The Court’s discretion to direct a sale of the mortgaged property may be exercised even where the mortgagee does not appear in the action. It follows that whilst the second respondent as first mortgagee is undoubtedly an interested party for the purposes of an application made pursuant to s 99(2), it is not a necessary party to the application for the purposes of the Court being able to exercise the discretion to direct a sale.

[20] Section 99(2) was considered by Mullins J in *Phillips v Hogg*.<sup>13</sup> Her Honour identified that s 99(2) has its origin in s 25 of the *Conveyancing Act* 1881 (UK) and equivalent provisions have been enacted in the various Australian States.<sup>14</sup>

[21] Mr Amerena relied on *Palk v Mortgage Services Funding Plc*.<sup>15</sup> The English Court of Appeal there considered s 91(2) of the *Law of Property Act* 1925 (UK), which in all material respects is in the same terms as s 99(2) of the *Property Law Act* and s 25(2) of the *Conveyancing Act* 1881 (Eng). In *Palk’s* case the plaintiffs, who were unable to pay the instalments under a mortgage of their house to a finance company, negotiated a sale of the house for an amount less than the amount needed to redeem the mortgage. The finance company refused to consent to the sale and obtained an order for possession with a view to letting the house and postponing the sale to achieve a better price. That order was suspended pending the plaintiffs’ application for an order for sale under s 91(2). The judge at first instance refused the application for sale. In allowing the appeal Sir Donald Nicholls V-C stated:<sup>16</sup>

“Section 91(2) gives the court a discretion in wide terms. The discretion is unfettered. It can be exercised at any time. Self-evidently in exercising that power the court will have due regard to the interests of all concerned. The court will act judicially.”

[22] His Lordship continued:<sup>17</sup>

“For the court to direct a sale even though the mortgagee may not be in breach of its duties to the mortgagor, does not mean the court is interfering without justification in the relationship agreed between this mortgagor and this mortgagee. Under the *Law of Property Act* 1925 a mortgagee has powers of sale. He also has other powers, including power to let the property and power to appoint a receiver. These statutory powers are

<sup>13</sup> [2001] QSC 390.

<sup>14</sup> *Phillips v Hogg* [2001] QSC 390, [13].

<sup>15</sup> [1993] Ch 330.

<sup>16</sup> *Palk v Mortgage Services Funding Plc* [1993] Ch 330, 340.

<sup>17</sup> *Palk v Mortgage Services Funding Plc* [1993] Ch 330, 340-341.

impliedly incorporated, with some amendments, into Mortgage Services' standard form mortgage conditions. In the same Act, and superimposed on these powers conferred on mortgagees, is a power Parliament has given to the court to direct a sale notwithstanding the dissent of any person. That is an overriding statutory power, and is to have effect as such."

[23] Sir Michael Kerr identified the issue in the appeal as follows:<sup>18</sup>

"The issue relates solely to the question whether it is an appropriate, or perhaps even a permissible, exercise of the court's discretion to direct a sale against the wishes of the first mortgagee when the circumstances make it clear that this will leave a large part of the debt unsecured and outstanding. But in this connection it is of the greatest significance that the subsection not only places no restriction on the exercise of the court's powers, but that it confers these expressly even when 'any other person dissents', or when the mortgagee does not appear at all. The position is therefore that section 91(2) deliberately places no restrictions on the power of the court other than the inherent and necessarily implied obligation to exercise the power judicially. Thus, the judicial availability of the power does not depend on whether the mortgagee has taken some step to exercise his rights over the mortgaged property, such as seeking an order for possession, as happened here, although in practice an application for a sale at the request of a mortgagor would no doubt only arise in cases where the mortgagee has taken some such step. Nor does it matter whether the mortgagee's dissent and objection are based on express contractual rights, or on the statutory rights provided by sections 99 to 101 of the Law of Property Act 1925, or on their express incorporation with variations into the mortgage deed, as in the present case."

[24] Sir Michael Kerr referred to the decision in *Merchant Banking Co of London v London and Hanseatic Bank*<sup>19</sup> where the Court gave preference to the wishes of the first mortgagee over those of the second mortgagee by making an immediate foreclosure order in preference to a postponed speculative sale. As to the *Merchant Banking* case, Sir Michael Kerr identified that the second mortgagee had no contractual right to prevent the first mortgagee from exercising his right of foreclosure. Further, that in all cases in which the Court has directed a sale at the request of a mortgagor against opposition by a mortgagee, the Court was able to protect the latter against the loss of his right to repayment of the loan with interest either by ordering the mortgagor to put up sufficient security to ensure full repayment of the mortgage debt, or by imposing a sufficiently high reserve price on the property so as to preclude a sale unless it achieved this result.<sup>20</sup>

[25] In my view the mere fact that a statute gives a wide discretion to the Court to order a sale which may directly affect a first mortgagee's rights and interest does not create an equity in the party requesting the sale which would support an interlocutory injunction. All that s 99(2) of the *Property Law Act* gives to the second respondent is the right to

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<sup>18</sup> *Palk v Mortgage Services Funding Plc* [1993] Ch 330, 341-342.

<sup>19</sup> (1886) 55 L J Ch 479.

<sup>20</sup> *Palk v Mortgage Services Funding Plc* [1993] Ch 330, 342.

request an exercise of discretion by the Court to direct a sale of the mortgaged property on such terms as the Court thinks fit. Section 99(2) does not create any rights in favour of the second applicant as against the second respondent.

- [26] *Palk's* case was considered by the English Court of Appeal in *Cheltenham and Gloucester Plc v Krausz*.<sup>21</sup> Phillips LJ accepted that *Palk's* case established, for the first time, that the Court has power under s 91(2) *Law of Property Act* 1925 (UK) (the equivalent to s 99(2) of the *Property Law Act*) to make an order for sale on the application of a mortgagor, notwithstanding that the proceeds of sale will be insufficient to discharge the mortgage debt.<sup>22</sup> His Lordship considered the effect of s 36 of the *Administration of Justice Act* 1970 (UK), which specifically gave the Court a power to suspend possession (that is the mortgagee's rights) in order to enable an application for sale under s 91 to be made. This, however, was only in circumstances where the sale proceeds would be sufficient to fully discharge the mortgage. His Lordship in considering *Palk's* case stated:<sup>23</sup>

“A mortgagor seeking relief in the circumstances of *Palk's* case is thus unable to invoke any statutory power to suspend the mortgagee's right to enter into possession.”

- [27] There is no equivalent to s 36 of the *Administration of Justice Act* 1970 (UK) in Queensland. In the present case, whilst the sale proceeds will be sufficient to discharge the first mortgage, they will not be sufficient to fully discharge the second mortgage.

- [28] The source of power to suspend the rights of a mortgagee in England only arose pursuant to the provisions of s 36 of the *Administration of Justice Act* 1970. In the absence of such a specific provision His Lordship did not accept that a mortgagee's rights could otherwise be interfered with:<sup>24</sup>

“Even if one assumes that the Chancery court has power to order sale of mortgaged property on terms that displace the mortgagee's right to possession, I do not consider that it follows from this that the county court, as part of its inherent jurisdiction, can properly suspend an order or warrant for possession in order to enable a mortgagor to apply to the High Court for an order under section 91. It seems to me incumbent on the mortgagor to seek from the High Court any relief which that court is empowered to give before the possession warrant takes effect.”

- [29] Millett LJ in agreeing with Phillips LJ further observed:<sup>25</sup>

“It [s 91] does not support the making of such an order where the mortgagee is taking active steps to obtain possession and enforce its security by sale. Still less does it support the giving of the conduct of the sale to the mortgagor in a case where there is a negative equity, so that it is the

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<sup>21</sup> [1997] 1 WLR 1558.

<sup>22</sup> *Cheltenham and Gloucester Plc v Krausz* [1997] 1 WLR 1558, 1562.

<sup>23</sup> *Cheltenham and Gloucester Plc v Krausz* [1997] 1 WLR 1558, 1566.

<sup>24</sup> *Cheltenham and Gloucester Plc v Krausz* [1997] 1 WLR 1558, 1567.

<sup>25</sup> *Cheltenham and Gloucester Plc v Krausz* [1997] 1 WLR 1558, 1567-1568.

mortgagee who is likely to have the greater incentive to obtain the best price and the quickest sale.”

- [30] In the present case the first mortgagee has already taken steps in the exercise of its powers under the mortgage.
- [31] I have a further difficulty with the interlocutory relief sought. The judicial sale is sought on the same terms and conditions as the contract of sale dated 30 July 2015. If a decree of specific performance is granted, any application under s 99(2) of the *Property Law Act* would be rendered unnecessary. If, however, a decree of specific performance is not granted, given the wide and unfettered discretion of the Court under s 99(2), it is not at all certain that a sale would be directed on the same terms as the contract of sale dated 30 July 2015.
- [32] Mr Kronberg submits that what the second applicant seeks to protect by way of interlocutory injunction is any monetary loss it may suffer due to the increase in the amount owing under the first mortgage.<sup>26</sup> He submits that if the second respondent exercises its rights under the first mortgage and delays or prevents the property being sold, it is manifest that the second applicant will suffer monetary loss by reason of an increased potential liability that its judgment debt will not be satisfied due to the increased costs, interest and expenses in respect of the second respondent’s exercise of any powers under its mortgage.<sup>27</sup> This consequence arises in my view simply because the second applicant is in the position of being a second mortgagee rather than a first mortgagee. Further, this consequence does not establish any right to an interlocutory or interim injunction.
- [33] The second applicant does not seek to impugn the enforceability or validity of the first mortgage. Nor is there any suggestion that the second respondent is otherwise either at law or in equity estopped from enforcing its rights under the first mortgage. There is no conduct on the part of the second respondent that affected the failure on the part of the first respondent to settle the contract of sale on the relevant date.
- [34] In the absence of any challenge to the enforceability or validity of the first mortgage, the mere fact that the second applicant has requested the Court to direct a sale of the mortgaged property pursuant to s 99(2) does not create any equity capable of being protected by the granting of an interlocutory injunction.
- [35] Even if I am wrong in this conclusion I would not otherwise have granted the interlocutory injunction having regard to balance of convenience considerations. What is sought to be protected by the second respondent is not only the position of its related entity as purchaser but also its ability to recover the amount owed under the relevant loan agreement supported by the second mortgage. If the second respondent exercises its rights and powers under the first mortgage this will no doubt affect the amount which the second applicant will be able to recover. This, however, is a consequence of the position of the second applicant as second rather than first mortgagee.

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<sup>26</sup> Respondents’ outline of argument undated, [5.1].

<sup>27</sup> Respondents’ outline of argument undated, [5.2].

[36] I would therefore refuse the second applicant's application for an interlocutory or interim injunction restraining the second respondent from exercising its rights and powers under the first mortgage.

[37] I will hear the parties as to costs.