SUPREME COURT OF QUEENSLAND

CITATION:	*Upton v Westpac Banking Corporation* [2016] QCA 220
PARTIES:	**JAMES SYDNEY UPTON** (appellant/applicant) **v** **WESTPAC BANKING CORPORATION** ABN 33 007 457 141 (respondent)
FILE NO/S:	Appeal No 12768 of 2015 DC No 1244 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURTS:	District Court at Brisbane – [2015] QDC 278 District Court at Brisbane – Unreported, 10 December 2015
DELIVERED ON:	2 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2016
JUDGES:	Holmes CJ and Fraser and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeal.** **2. Refuse the amended application filed in this court on 15 June 2016.** **3. Refuse the application filed 9 August 2016.** **4. Order the appellant to pay the costs of the appeal, the amended application filed 15 June and the application filed 9 August 2016.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant guaranteed a loan facility provided to a third party company by the respondent bank – where the company was placed into liquidation in 2013, constituting an event of default under the loan facility and the applicant's guarantee – where the respondent commenced proceedings in the District Court for a debt owing in the applicant's capacity as guarantor – where on 10 November 2015 the learned primary judge gave summary judgment against the applicant – where on 30 May 2016 the applicant filed an application for leave to appeal against the summary judgment

– where the application is out of time – whether the explanation for delay and merit of the proposed appeal warrant an extension of time

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – GENERALLY – where the respondent bank took a mortgage over property owned by the third party company – where, upon the event of default, the respondent appointed receivers who took some steps towards, but did not complete, a sale of the property – where the appellant counterclaimed against the respondent contending that by failing to sell the property the respondent had breached its duty under ss 85 and 89 *Property Law Act* 1974 (Qld) – where the learned primary judge struck out the counterclaim with liberty to replead – where the appellant filed an amended counterclaim and applied for a stay of the summary judgment pending the determination of the counterclaim on the basis that damages for the counterclaim would set off or substantially reduce the debt to the respondent – where the application was dismissed – where the appellant contends the primary judge erred in refusing the application – whether the appellant's claim against the respondent warrant's execution of the summary judgment to be stayed

Property Law Act 1974 (Qld), s 85, s 85(1), s85(3), s 89(1)

China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan) [1990] 1 AC 536, cited
Commonwealth Bank of Australia v Muirhead [1997] 1 Qd R 567; [1996] QCA 241, cited
Higton Enterprises Pty Ltd v BFC Finance Ltd [1997] 1 Qd R 168; [1994] QCA 558, considered
Omlaw Pty Ltd v Delahunty [1995] 2 Qd R 389; [1993] QCA 420, cited
Re: Dowson and Jenkins's Contract [1904] 2 Ch 219, cited
Westpac Banking Corporation v Upton [2015] QDC 278, cited

COUNSEL: The appellant/applicant appeared on his own behalf
M J Luchich for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Henry Davis York for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philip McMurdo JA and the orders he proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Philip McMurdo JA and the orders proposed by his Honour.

[3] **PHILIP McMURDO JA:** The appellant, Mr Upton, was sued in the District Court by the respondent bank for money claimed to be owing under a guarantee. Last

November, the bank was given summary judgment against Mr Upton for an amount of $617,440.17, which was most of its claim.[1]

[4] Mr Upton had counterclaimed against the bank and two individuals whom the bank had appointed as receivers and managers of a real property at Dugandan which had been mortgaged by the borrower. In the same judgment, the counterclaim against those individuals was summarily dismissed.[2] The counterclaim against the bank was struck out but with liberty to replead.

[5] Mr Upton did not appeal against the judgment on the bank's claim, as he was entitled to do within 28 days of the date of the judgment, 10 November 2015. But he filed an amended counterclaim and on 10 December 2015, applied to the same judge (McGill SC DCJ) for a stay of the judgment until the determination of that counterclaim. His Honour dismissed the application and the present appeal is against that dismissal. I will call this the December judgment. On 9 March 2016, a judge of this court stayed the enforcement of the bank's judgment pending the determination of the appeal.

[6] Until 30 May 2016, the only matter for determination in this court was that appeal against the December judgment. But Mr Upton then filed an application seeking further orders, including an order that the bank's judgment be set aside. And on 15 June 2016 he filed an amended application in this court seeking similar orders. That amended application, including what was effectively an application for an extension of time in which to appeal against the bank's judgment, was argued with the appeal against the December judgment.

The bank's judgment

[7] The relevant facts for the bank's claim, which for the most part are now undisputed, were as follows. Mr Upton was sued as the guarantor of a loan or loans by the bank to a company called Cambridge Pacific Investments Pty Ltd of which he was the director and which was the trustee of a trust under which he was a beneficiary. In May 2013 he caused the company to be removed as trustee immediately before placing it into liquidation. He was its sole director from August 2007 until 10 August 2014 when the company was deregistered.

[8] Part of the bank's security was a registered mortgage over the Dugandan property. When that property was transferred to the replacement trustee, CPAC Residential Pty Ltd, it became bound by the mortgage.[3] In January 2014 the bank appointed the receivers to the property pursuant to a power conferred by the mortgage. As I will discuss, the receivers took some steps towards selling the property but no sale was made.

[9] The Dugandan property was purchased in September 2007, financed by the bank's loan to Cambridge Pacific Investments. The borrower's liability was capped at $539,000 (plus 20 per cent to cover certain fees, costs, expenses and interest). Mr Upton guaranteed the borrower's performance. In December 2008 the bank made a further loan to Cambridge Pacific Investments, this time for the purchase of a house at Norman Park. Mr Upton also guaranteed the repayment of this loan, which was capped at $396,000 (plus 20 per cent for fees, etc.).

---

1 *Westpac Banking Corporation v Upton* [2015] QDC 278. The Court was not satisfied that the bank had proved its claim for relatively small amounts for certain costs and expenses, leaving those items for a trial.

2 Under r 293 of the *Uniform Civil Procedure Rules*.

3 *Land Title Act* 1994 (Qld) s 63.

[10] In August 2010 the original loan of $539,000 was increased by a further advance of $30,000. Mr Upton as a guarantor agreed to this increase. Between December 2010 and September 2012 there was a series of further variations to the terms of that loan of 2007 and each was agreed by Mr Upton as a guarantor.

[11] In February 2013 Cambridge Pacific Investments sold the Norman Park property and an amount of approximately $500,000 was paid from the sale proceeds to the bank.

[12] The liquidation of Cambridge Pacific Investments in May 2013 constituted an event of default for the purposes of its borrowing and Mr Upton's guarantee. At first the bank agreed to Mr Upton's request that the bank accept payments of interest, as Mr Upton proposed in an email to an officer of the bank in May 2013, to "allow us to sell the [Dugandan] property in a more orderly fashion." But the property was not sold and the receivers were appointed in January 2014.

[13] In the meantime, of course, interest had continued to accrue and in April 2015, when the bank commenced its proceeding against Mr Upton, it claimed a total of $665,742.13, comprised of $560,723.53 for principal, $56,716.64 for interest and $48,301.96 for enforcement costs and expenses. The bank was given judgment for that principal and interest.

[14] There were very many arguments advanced by Mr Upton, who was then as he now is without legal representation, to defend the bank's claim. But in his proposed appeal against the bank's judgment, Mr Upton would advance but a few grounds, some of which were not put to the primary judge. In an application for an extension of time within which to appeal, it is relevant to consider the explanation, if any, for the appeal being out of time. It is also relevant to consider the apparent merit of the proposed appeal and it is convenient to discuss first the grounds of appeal.

[15] The first of them, as they appeared in his outline of argument for this application, was that the bank "has ignored the common law principle of tort which required that reasonable steps are taken to mitigate [its] losses before seeking damages from [Mr Upton] under their … guarantee". What was said to have been the bank's refusals and failures to sell the Dugandan property constituted "significant failures" by the bank to mitigate its losses.

[16] But the bank's claim was for a debt owing and not for damages. No question of causation of loss arose and therefore there was no occasion to consider whether the bank had failed to act reasonably to mitigate a compensable loss. This proposed ground misunderstands the bank's claim.

[17] Next there were the grounds set out in Mr Upton's outline under the heading "Insufficient weight given to Contract Law". Mr Upton referred to the transaction in August 2010 when the loan made for the Dugandan property was temporarily increased by $30,000. He wrote that the bank requested him to "raise his liability under the Guarantee from $379,000 to $965,000 in order to grant a $30,000 temporary increase to the loan facility over the Property" and that "[t]his guarantee also carried another obligation of $396,000 over [the Norman Park property]". The primary judge's description of the transaction was as follows:

> "[7] On 20 August 2010 there was a further offer made by the plaintiff to CPI, of a temporary increase in the limit of the existing business loan of $539,000 by $30,000 … The securities sought

> were a limited guarantee and indemnity from the defendant, involving an increase in the limit of the existing guarantee from $396,000 by $569,000, in return for which the limited guarantee and indemnity for $539,000 was to be released."

In other words what had been the two guarantees (one for the Dugandan loan and the other for the Norman Park loan) were to be merged into the one guarantee, limited in amount to the aggregate of those two loans.[4]

[18] Under a subheading "Consideration", Mr Upton's written submission then referred to a "subsequent variation to the Guarantee dated 20 May 2011 [which] lowered the Appellant's liability … back to $396,000." This contention may not matter for his ultimate argument, but should it matter, I will consider it. Mr Upton relies upon a letter from the bank to him of 29 April 2011, which sought his agreement to the variation of the obligations of the *borrower*, as set out in an attached letter from the bank of the same date. There was no reference in either of those letters to a change in the limit of Mr Upton's liability as a guarantor. Mr Upton appears to rely upon a statement in the letter to him that "the limit of your liability is $396,000" (plus a further amount of 20 per cent). The letter described Mr Upton being a guarantor under the instrument dated 27 November 2008. This was an obvious misdescription of the limit of his liability which, as Mr Upton submits and the primary judge found in the passage which I have just set out, had been fixed by the parties' agreement in August 2010 at $965,000. The correspondence of 29 April 2011, objectively viewed, evinced no intention to reduce Mr Upton's potential liability and Mr Upton pointed to no evidence of any negotiations with the bank or any other circumstance which might indicate such an intention.

[19] Ultimately this argument as to "consideration" was as follows. The temporary advance of $30,000 was repaid, as subsequently was the loan of $396,000 for the Norman Park property when it was sold in 2013. The total of those two amounts ($426,000) should have reduced his maximum liability from approximately $975,000[5] to $549,422, an amount approximately $68,000 less than that for which the bank obtained judgment. This argument does not appear to have been put to the primary judge, who recorded that Mr Upton "disputed the quantum of the plaintiff's claim, though the argument was confined to an argument in relation to the claim about enforcement expenses."[6] The short answer to the argument is that the borrower's repayments of $30,000 and $396,000, whilst reducing the principal debt, did not reduce the cap on the guarantor's liability. The amount of the outstanding principal and interest for which the bank was given judgment was within that limit and there is still no submission that the calculation of that principal and interest was incorrect.

[20] Next there was a written submission that "the contracts did not comply with formalities", in that "[n]either the cover letter nor the letter of variation for the Guarantee or the Loan document identified any loan(s) to which the agreement related". This was said to offend a principle that "[a] contract must identify clearly the consideration and what the consideration is for". The submission was not developed in Mr Upton's oral argument in this court and therefore the particular letters and document to which it refers were not identified. As the primary judge noted,[7] there were many variations

---

4 $366,000 plus $30,000 plus $569,000.
5 The difference between $965,000 (as the judge found) and $975,000 being unexplained.
6 [2015] QDC 278 at [42].
7 [2015] QDC 278 at [10].

of the terms of the subject loan, each accompanied by the written agreement of Mr Upton as a guarantor. The evidence does not reveal any basis for considering that Mr Upton's guarantee was at any stage unenforceable for a lack of consideration or an uncertainty in the terms of any relevant document.

[21] The other arguments advanced to challenge the bank's judgment concerned the so-called Forbearance Deed. In his written argument, Mr Upton submitted that the deed had no effect upon him because although he had executed it, the deed was not executed by the borrower. A different argument to challenge the enforceability of the deed was then sought to be raised after the hearing in this court. On 9 August 2016, Mr Upton filed an application seeking leave to adduce further evidence and make further submissions. The evidence is within a further affidavit by him and it covers a number of subjects. One relates to the circumstances in which he executed the deed. The events predate the judgments of November and December 2015 and there is no explanation of why this evidence, if relevant, was not then tendered. In any event the deed was not an essential element of the reasoning by which the bank obtained judgment and it could not assist Mr Upton in his proposed appeal.

[22] Before the primary judge Mr Upton submitted that the bank had not accelerated the date for repayment of the principal by the borrower, so that Mr Upton had not become liable to pay the entire debt. The primary judge concluded that from the terms of the guarantee, the bank was entitled, at least from the date of deregistration of the borrower, to make demand upon Mr Upton to pay the whole of the outstanding loan, interest, and other monies in relation to that loan although it had not made such demand upon the borrower.[8] It is unnecessary to set out the reasons given for that conclusion, because there is no suggested error in them. It was only after reaching that conclusion that the primary judge turned to the deed of forbearance, saying that if he was wrong in his reasoning to that point, he would reach the same conclusion on the basis of the effect of the deed.[9] Consequently Mr Upton's submissions and proposed further evidence as to the forbearance deed could have no consequence for the outcome of his proposed appeal.

[23] For these reasons, that proposed appeal has no serious prospect of success and his application for an extension of time in which to appeal should be refused. But in any case, Mr Upton has failed to satisfactorily explain why he did not appeal against that judgment within the permitted period and why he did not seek an extension of time in which to do so before the end of May 2016. In his oral submissions to this court, he claimed that he did not know whether he had "enough information to appeal". But he did have the clear and detailed reasons for that judgment. His further explanation was to the effect that he thought his position overall would be protected by his counterclaim and that it was not until successive versions of the counterclaim were struck out in 2016 (by a series of orders by other judges of the District Court) that he thought that he should challenge the bank's judgment. That does not provide a satisfactory explanation for not challenging a final judgment in such a sum for more than six months.

The December judgment

[24] The application to stay the bank's judgment was made on the basis of a counterclaim against the bank for damages for breach of the duty imposed by s 85 of the *Property Law Act* 1974 (Qld). The applicant argued to the primary judge that his counterclaim

---

8 [2015] QDC 278 at [24].
9 [2015] QDC 278 at [25].

could be expected to produce an award of damages which would be sufficient to extinguish "or at least to make a substantial hole in" the bank's judgment. He argued that if the bank's judgment was not stayed, the pursuit of his counterclaim and his attempts to refinance the Dugandan property would be rendered nugatory. On that last point, the primary judge remarked that "it seems that from the subsequent events the attempts to refinance the property are not going to be successful anyway."

[25] The primary judge noted, as he had discussed in his reasons for judgment on the bank's claim, that it was a term of Mr Upton's guarantee that money owing under the guarantee was to be paid without deducting amounts claimed to be owed by the lender and that such a provision was effective to prevent a set off being raised against the bank.[10] But his Honour also said that if the counterclaim resulted in a judgment in Mr Upton's favour, there would then be a right to set off one judgment debt against the other. And his Honour accepted that he was empowered to grant a stay of the enforcement of the bank's judgment pending the hearing and determination of the counterclaim, although the existence of the "no setoff" clause in the guarantee was a discretionary factor tending against the grant of such a stay.[11]

[26] The primary judge then turned to consider the apparent merit of the counterclaim. His Honour discussed that subject by incorporating some of his analysis of the (preceding) counterclaim within his previous judgment. He concluded as follows:

> "[T]he counterclaim, although not so weak as to justify giving summary judgment [in favour of the bank], is nevertheless unpromising and what is particularly unpromising is the notion that the damages if the counterclaim succeeded might be anything like enough to overcome or to extinguish the amount owing under the [the bank's] judgment, let alone the total amount owing which may ultimately be found to be owing by the defendant to the plaintiff on the guarantee."

[27] After noting that this was not a case where a party entitled to the judgment, namely the bank, would be unable to refund the judgment sum or to pay an award of damages on the counterclaim, his Honour concluded that there should not be a stay of the bank's judgment and dismissed Mr Upton's application with costs.

The counterclaim

[28] Section 85 of the *Property Law Act* relevantly provides as follows:

> "(1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.
>
> (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse –
>
> (a) adequately advertise the sale; and

---

10 [2015] QDC 278 at [47].

11 Citing *Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd* [2000] QSC 50.

> (b) obtain reliable evidence of the property's value; and
>
> (c) maintain the property, including by undertaking any reasonable repairs; and
>
> (d) sell the property by auction, unless it is appropriate to sell it another way; and
>
> (e) do anything else prescribed under a regulation.
>
> …
>
> (3) The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale."

The mortgage was not a "prescribed mortgage" so as to engage s 85(1A) and nor did Mr Upton suggest that it was.[12]

[29] The conduct of which Mr Upton complained was that of the receivers. He pleaded that their appointment was itself an act in the exercise of the bank's power of sale, a proposition which cannot be accepted. He pleaded that the receivers' conduct was attributable to the plaintiff, not by s 85(1) and (3), but instead by s 89(1) which provides as follows:

> "The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money."

Section 89(1) was modelled on s 106 of the English *Law of Property Act* 1925. That provision was a re-enactment of s 21(4) of the *Conveyancing and Law of Property Act* 1881 as interpreted by the English Court of Appeal in *Re: Dowson and Jenkins's Contract*.[13] It was there held that an agent who had been appointed by a mortgagee to sell mortgaged property, under a power of attorney granted by the mortgagee which expressly authorised the agent to receive and give a discharge for any monies owing to the mortgagee, was not empowered by the statute to exercise the mortgagee's power of sale. Vaughan Williams LJ said that:[14]

> "The sub-section does not include a person who has that power merely as an agent, but is intended to apply only to those persons who are either mortgagees or have vested in them the property of the mortgagees, such as the executors."[15]

[30] The receivers and managers were not authorised to sell pursuant to s 89(1): their authority to sell came from the terms of the mortgage. According to those terms, the receivers and managers were to be in all respects the agents of the mortgagor and not the bank's agents. Until an amendment to s 85 in 2008, the duty imposed by s 85 did

---

12 By s 85(10) a prescribed mortgage is one of a kind prescribed under a regulation. Section 3 of the *Property Law Regulation* 2013 (Qld) provides that a mortgage is a prescribed mortgage if it is a mortgage over residential land and the mortgagor's home is on the land.

13 [1904] 2 Ch 219.

14 [1904] 2 Ch 219, 223.

15 This interpretation is endorsed by the authors of the Third Australian Edition of *Fisher and Lightwood's Law of Mortgage* at [20.9].

not extend to the circumstance of a receiver's sale.[16] But the effect of the amendments to s 85, as reflected in the extracts from the section which are set out above, is that a mortgagee will be liable for damages under s 85(3) where the exercise of a power of sale is by a receiver "acting under a power delegated to the receiver by a mortgagee". Whilst that might not precisely describe the source of a receiver's power of sale under instruments such as the present, the evident intent of s 85 in such a case is to impose the same duty upon a receiver as would be imposed upon the mortgagee exercising the power of sale and to make the mortgagee liable for any breach by the receiver.

[31] Mr Upton pleaded that the receivers had breach their duty of care under s 85(1) as follows:

> "a The property has not been sold at its market value
>
> b On or about March 2014 [certain real estate agents] were appointed … to market and sell the Property.
>
> c The property was passed in at auction in November 2014 and has not yet been sold.
>
> d The receivers and managers failed to follow up [a] formal offer to purchase the property when they were provided with this information in January 2014;
>
> …
>
> e The receivers and managers took the property to auction rather than marketing it [through] an Expression of Interest and Negotiation … process
>
> …
>
> f The receivers and managers did not [advertise] the property with due care …
>
> …
>
> g The receivers and managers failed to manage the property with due care;
>
> …
>
> h The receivers and managers have been unable to sell the property at or near its valuation since taking possession of the property in January 2014, a period of nearly two years …"

[32] He pleaded that the property had been valued in 2008 at $880,000 and had been appraised by real estate agents in July 2011 as having a value of $1,200,000. On the basis of that suggested evidence of the market value in 2014, Mr Upton alleged that the property should have been sold in an amount which would have at least discharged the principal debt and that he had suffered damage to the extent of his liability to the bank.

[33] As a guarantor of the mortgagor's obligations to the mortgagee, Mr Upton was capable of being a "person damnified" in the sense of s 85(3) by a breach of the duty imposed by s 85(1), as this court held in *Higton Enterprises Pty Ltd v BFC Finance Ltd*.[17] In the same case, it was held that a mortgagee had exercised its power of sale, by entering into a contract of sale of the mortgaged property, although that sale was not completed.

---

16 As this court held in *Commonwealth Bank of Australia v Muirhead* [1997] 1 Qd R 567; [1996] QCA 241.

17 [1997] 1 Qd R 168; [1994] QCA 558.

That was a contract at a price less than market value and the particular effect of that contract was that whilst it remained on foot, the property could not be sold for its then market value and before a subsequent fall in that value.

[34] However Mr Upton's case was not a complaint that the power of sale was exercised wrongly (in breach of the duty under s 85) but rather that the power was not exercised at all. He pleaded that the property could have been sold and at a certain price but that the receivers did not sell it because they were negligent. In the December judgment the primary judge remarked that "there are doubts as to whether there can be a breach of duty under s 85 in circumstances where there has been no sale" and referred to his discussion of this question in his reasons for the judgment on the bank's claim. The primary judge there said:[18]

> "[58] The mere fact that the property has not been sold does not demonstrate that the statutory duty has been breached. In *Higton* there was a finding by the trial judge that, but for the contract that did not proceed having been entered into, the property probably would have been sold for a particular sum which would have been enough to discharge the mortgage debt: p 173. Whether a mere failure to sell could amount to a breach of duty is perhaps debatable. In *Higton (supra)* there was some language in the judgment of Fitzgerald P at p 173 to suggest that a mere failure to enter into a satisfactory contract could amount to a breach of the mortgagee's duty. On the other hand, the language of McPherson JA at p 182 suggests that there will be a breach of duty only if the mortgagee is actually "exercising the power of sale". Pincus JA at p 184 merely said that a mortgagee "may commit a breach of the duty imposed by the section … by steps taken with a view to sale of the mortgaged property even if the sale is never completed". I would not be prepared to conclude for the purposes of a summary judgment application that a breach of s 85 could not be constituted by a mere omission to sell."

[35] The passage from the judgment of Fitzgerald P in *Higton* to which the primary judge referred was as follows:[19]

> "It was argued by the respondent that it was not under a duty to sell the … property at any particular time, even though it was known that the property could be sold for more than the mortgage debt and that there would be a fall in the market, with a resultant drop in the price for which the property could be sold. Reliance was placed on *Omlaw Pty Ltd v Delahunty* [1995] 2 Qd R 389. However, it was not merely the respondent's failure to enter into a satisfactory contract, but its entry into an improvident contract, for the sale of the … property which constituted a respondent's breach of duty. *The entry into the Jenhut contract was a breach of the respondent's duty* to take reasonable care to ensure that the property was sold at the market value not only because of the unsuitability of that contract but because, while it subsisted, it prevented the sale of the property at market value until after the market had fallen heavily."
>
> (emphasis added)

---

18 [2014] QDC 278 at [58].

19 [1997] 1 Qd R 168, 173.

Unlike the primary judge, I do not discern any suggestion in that passage that an omission to enter into a satisfactory contract of itself could constitute a breach of the mortgagee's duty.

[36] In his judgment in *Higton*, McPherson JA said:[20]

> "There can be no doubt that, *in contracting to sell the land* … in November 1988, BFC was, within the meaning of s 85(1), exercising the power of sale conferred by the Act, even if, in the end, the sale was not carried through to completion. In doing so BFC committed a breach of its duty to take reasonable care under s 85(1)."
>
> (emphasis added)

[37] The duty imposed by s 85(1) is imposed upon a mortgagee or receiver "acting … in the exercise of a power of sale …". But it is not a duty which requires that power to be exercised. The duty conditions the exercise of the power of sale, if and when the power is exercised. The entry into a contract of sale, as was held in *Higton*, is an act in the exercise of the power. Very often such a breach of the duty will result from a preceding omission by the mortgagee (or receiver), such as a failure to advertise the property or to have it valued. But such an omission is not itself the exercise of a power. It is the sale which is the exercise of the power and the act by which, in the circumstances of the mortgagee's omission, duty is breached.

[38] Under the general law it is long established that a mortgagee is not obliged to exercise its power of sale, either at all or at a certain time. In *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)*,[21] Lord Templeman, delivering the judgment of the Privy Council, said:[22]

> "The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All those remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety …".

That reasoning has been consistently applied in Australia: see for example *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd*;[23] *Mailman v Challenge Bank Ltd*;[24] *Graham Webb Investments Pty Ltd v St George Partnership Banking Ltd*;[25] and, in this court, *Omlaw Pty Ltd v Delahunty*.[26]

[39] In *Omlaw*, Davies and Pincus JJA referred to the principle, as stated by Dixon J in *Williams v Frayne*,[27] that a surety can complain if a "creditor sacrifices or impairs a

---

20 [1997] 1 Qd R 168, 182.
21 [1990] 1 AC 536.
22 [1990] 1 AC 536, 545.
23 [2000] HCA 20 at [61] (Callinan J); (2000) 170 ALR 579.
24 (1991) 5 BPR 11721, 11727/8 (Sheller JA, Gleeson CJ and Handley JA agreeing).
25 (2001) 38 ACSR 282, 304-305 [92]-[93] (Fitzgerald JA, Sheller JA and Ipp AJA agreeing); [2001] NSWCA 93.
26 [1995] 2 Qd R 389; [1993] QCA 420.
27 (1937) 58 CLR 710, 738.

security, or by his neglect or default allows it to be lost or diminished, and in that case the surety is entitled in equity to be credited with the deficiency in reduction of his liability".[28] Citing, amongst other cases, *China and South Sea Bank Ltd v Tan Soon Gin*, Davies and Pincus JJ A said:[29]

> "The law appears to have put into a special category a mere omission on the part of a creditor to exercise rights under a … security even if doing so causes the security to be 'lost or diminished', to use the expression of Dixon J in *Williams v Frayne* ... [i]t appears that the guarantor cannot then complain, even if the result is that the creditor's indolence foreseeably causes the guarantor grievous loss."

[40] Those authorities explain the position under the general law which, of course, could be altered by legislation. But that has not been done by s 85, which is not the source of a duty to sell.

[41] It follows that the counterclaim which was considered in the December judgment did not plead a case which could have succeeded. But the primary judge did not refuse a stay on that basis. Rather he was influenced by what he regarded as the factual unlikelihood of Mr Upton's case.

[42] In the reasons for judgment on the bank's claim, the primary judge said:[30]

> "It is not to the point to say that the defendant at one time obtained a valuation of the property at $880,000, because what really matters is what the plaintiff would probably have actually realised on a sale had the duty been complied with. … Given the defendant's lack of success in marketing the property himself, and the failure to obtain an offer of anything like the amount claimed by the plaintiff in this proceeding, the assertion … that no amount would be owing to the plaintiff had it not been for its breach of duty seems fanciful."

[43] The primary judge recognised in that judgment, as he did in the December judgment, that there was some basis for criticism of the conduct of the real estate agents in advertising the property for sale and some "mismanagement of the sale process" but added that:[31]

> "[I]t is difficult to see how this could be related to any loss suffered, because it is clear enough that the defendant has been himself seeking purchasers for this property throughout this period, and he has not been able to obtain a purchaser willing to pay anything like the figure at which the property was allegedly at some stage valued."

[44] The nature of the application which was decided by the December judgment must be kept in mind. This was not the trial of the counterclaim. The primary judge was not obliged to conduct an enquiry in order to make final conclusions of fact on the merits of Mr Upton's case. But it was open to the primary judge to make an assessment of the likelihood of Mr Upton's claim succeeding and to the extent that his award would be as much as the bank's judgment. There is no apparent error in the assessment or in its being a substantial reason for refusing the stay.

---

28 Cited in *Omlaw* at [1995] 2 Qd R 389, 392.
29 [1995] 2 Qd R 389, 394.
30 [2015] QDC 278 at [60].
31 [2015] QDC 278 at [57].

[45] For those reasons I would dismiss the appeal against the December judgment.

[46] In his affidavit of 9 August 2016, Mr Upton appears to suggest that the Dugandan property has now been sold (since the hearing in this court). He suggests there that his cause of action under s 85 is now complete. But the question for this court is not whether Mr Upton now has some right of action and whether the bank's judgment should be stayed whilst it is litigated. The question here is whether the primary judge erred in refusing this application for a stay in the December judgment. Therefore this evidence suggesting a recent sale is irrelevant.

Another matter

[47] As Mr Upton disclosed in this court, since the December judgment he has again repleaded his counterclaim and several iterations have been struck out by orders of the District Court. Most recently, on 26 May, Burnett DCJ struck out his counterclaim and ordered that it not be repleaded. In his amended application filed in this court, Mr Upton sought an order that those orders of 26 May be set aside. But there has been no appeal against them and the reasons for those orders were not before this court.

Conclusion and orders

[48] I would order as follows:

(1) Dismiss the appeal.

(2) Refuse the amended application filed in this court on 15 June 2016.

(3) Refuse the application filed 9 August 2016.

(4) Order the appellant to pay the costs of the appeal, the amended application filed 15 June 2016 and the application filed 9 August 2016.