SUPREME COURT OF QUEENSLAND

CITATION:	*QNI Resources Pty Ltd & Anor v Vannin Capital Operations Limited & Ors* [2023] QCA 216
PARTIES:	**QNI RESOURCES PTY LTD** ACN 054 117 921 (first appellant) **QNI METALS PTY LTD** ACN 066 656 175 (second appellant) **v** **VANNIN CAPITAL OPERATIONS LIMITED** (first respondent) **PALMER AVIATION PTY LTD** ACN 158 870 789 (second respondent) **QUEENSLAND NICKEL PTY LTD** ACN 009 842 068 (third respondent)
FILE NO/S:	Appeal No 1332 of 2023 SC No 13947 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2023] QSC 1 (Burns J)
DELIVERED ON:	3 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2023
JUDGES:	Mullins P and Boddice JA and Applegarth J
ORDERS:	**1. The appeal be dismissed.** **2. The parties have leave to file and serve written submissions as to costs, limited to three pages, within 14 days.** **3. The costs of the appeal be determined on the papers.**
CATCHWORDS:	MORTGAGES – ESTATE, RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE – OTHER MATTERS – where a predecessor in right to the first respondent funded the purchase of an aircraft by the second respondent pursuant to a loan facility and associated documents – where repayment of the loan was secured by a mortgage over the aircraft – where the repayment obligations of the second respondent under the loan was the subject of a

guarantee and indemnity provided by the third respondent – where the third respondent was the general manager of a joint venture in which the first and second appellants were participants – where the second and third respondents were placed into voluntary administration, constituting an event of default under the loan facility – where the second and third respondents failed to comply with demands for payment of the loan amount – where the debt was subsequently assigned to the first respondent – where the first respondent issued a certificate of indebtedness ("the certificate") – where the first respondent commenced proceedings against the appellants and second and third respondents, claiming recovery of the amount outstanding under the loan facility – where judgment was entered in favour of the first respondent – whether there was proof of the debt by the certificate or at all – whether the facility agreement required the certificate to be issued by an officer holding a particular qualification – whether the right to issue a certificate was capable of assignment

MORTGAGES – MORTGAGEE'S REMEDIES – SALE UNDER POWER – EXERCISE OF POWER – DUTIES AND LIABILITIES OF MORTGAGEE – GENERALLY – where the aircraft was sold by the liquidators of the second respondent – where there was a significant shortfall between the sale proceeds and the outstanding balance of the loan facility – where the primary judge found the duty owed by a mortgagee exercising a power of sale did not require the mortgage "to sell for the best price obtainable or to act in such a way as to advance the interests of the mortgagor" – where that reference must be read in context – whether the primary judge erred in concluding the mortgagee's duty did not apply to the sale process as the aircraft was sold by liquidators of the second respondent – whether the primary judge erred in framing the duty owed by a mortgagee

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – RAISING NEW MATTER – where, in closing written submissions, the first and second appellants and the third respondent submitted *inter alia* that the predecessor in right to the first respondent permitted the liquidators to sell the aircraft, but kept them "out of the loop in relation to critical negotiations that would have resulted in a much higher return" – where the primary judge found those submissions went well beyond what was pleaded in the amended counterclaim – where leave to further amend that counterclaim to include such allegations was refused – whether the primary judge erred in the requirement for, and refusal of, the appellants' application for leave to amend

Beefeater Sales International Pty Ltd v MIS Funding No 1 Pty Ltd [2016] NSWCA 217, considered

Forsyth v Blundell (1973) 129 CLR 477; [1973] HCA 20, considered
Lucantonio v Benscrape Pty Ltd [2020] NSWSC 579, considered
Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 13 CLR 676; [1912] HCA 9, cited
Shomat Pty Ltd v Rubinstein (1995) 124 FLR 284, considered

COUNSEL: P J Dunning KC, with M Karam and K S Byrne, for the appellants
D G Clothier KC, with A O'Brien, for the first respondent
No appearance for the second respondent
No appearance for the third respondent

SOLICITORS: Robinson Nielsen Legal for the appellants
Ashurst Australia for the first respondent
No appearance for the second respondent
No appearance for the third respondent

[1] **MULLINS P:** I agree with Boddice JA.

[2] **BODDICE JA:** On 1 February 2023, the first and second appellants were found to be jointly and severally liable, as guarantors, for a sum owing pursuant to a loan facility agreement dated 28 June 2012. Judgment was entered in favour of the first respondent. The appellants' counterclaim was dismissed.

[3] Both appellants appeal against those orders and judgment.

[4] Central to the appeal are two questions, enunciated by the appellants:

"(a) First, whether a clause empowering a conclusive evidence certificate is assignable generally, or as matters of context might apply, and, if so, can it be given by an assignee representative with no personal knowledge of the assignor's record keeping?

(b) Second, what is the content and scope of the duty of a mortgagee when exercising a power of sale, or involved in it; including whether the duty only requires a mortgagee to act conscionably; and what does conscionability entail, in particular, does it extend to the obligation to achieve the best obtainable price consistent with the mortgagee's right to realise the security?"

Background

[5] In June 2012, GE Commercial Australasia Pty Ltd (**GEC**) loaned money to the second respondent, to finance the purchase of an aircraft.

[6] At the relevant time, the first and second appellants were participants in a joint venture agreement (**JVA**), conducting a nickel refinery in Townsville. The third respondent was the general manager of the JVA and was owned by the first and second appellants. Clive Palmer (**Palmer**) was a director of each appellant company and of the second and third respondents.

[7] One of the transaction documents was a written facility agreement between GEC, as lender, and the second respondent, as borrower.

[8] The facility agreement was entitled "US$ Aircraft Loan Facility Agreement". Palmer executed the agreement on 28 June 2012, on behalf of the second and third respondents.[1]

[9] The facility agreement was secured by a mortgage over the aircraft and guaranteed by the third respondent, on terms set out in a guarantee and indemnity contained in a schedule to the facility agreement.

[10] Clause 1.1 of the facility agreement defined various terms "unless a contrary intention appears". Relevantly:

(a) "Obligor" was defined to mean "individually or collectively, as the context may require, or permit [the second and third respondents] and any other person (if any) who gives, grants, enters into or otherwise provides any Security in connection with the Facility and/or any Transaction Document (each in any capacity)"; and

(b) "Transaction Documents" was defined to include, in addition to the facility agreement, a document described as a "Joint Venturer Letter".

[11] On the same day, a joint venturer letter, in the form of a deed, was given by the first and second appellants, in favour of GEC. It was signed by Palmer, along with the secretary of each company.

[12] Relevantly, the joint venturer letter contained the following acknowledgements:

> "1. Acknowledgements
>
> Each of [first appellant] and [second appellant] (**Joint Venturers**) confirm, agree and acknowledge that:
>
> (a) the Joint Venturers have appointed [third respondent] as the 'General Manager' of the Joint Venture under the [JVA], and such appointment includes the appointment of [third respondent] as manager for all purposes of the Joint Venture, inter alia, including in connection with the Transaction Documents;
>
> (b) [Third respondent] is and remains the 'General Manager' of the Joint Venture and has not been removed as 'General Manager';
>
> (c) [Third respondent] enters into the Transaction Documents in its personal capacity, as nominee and agent of the Joint Venturers under the [JVA] and as General Manager;
>
> (d) the Secured Property does not constitute Joint Venture Property;
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> (e) all approvals required under the terms of [the JVA] for each of [third respondent] and Joint Venturer's entry into, delivery and performance of the Transaction Documents to which it is a party and for its carrying out

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[1] The second respondent had been incorporated on 7 June 2012 as a special purpose vehicle to borrow money to purchase the aircraft.

the transactions contemplated by those Transaction Documents have been obtained and remain in full force and effect;

(f) the entry by [third respondent] into, delivery and performance of the Transaction Documents to which it is a party and its carrying out of the transactions contemplated by those Transaction Documents are actions taken by it in the performance of its duties and responsibilities as General Manager;

(g) the costs, liabilities and expenses under or in connection with the Transaction Documents incurred by [third respondent] under this Agreement are:

(i) costs, liabilities and expenses properly incurred by it in performing its obligations under the [JVA], and

(ii) under the terms of the [JVA], required to be met by, and are, liabilities of the Joint Venturers; and

(h) the copy of the [JVA] provided by [third respondent] to [GEC] is a true and complete copy of the [JVA], and the [JVA] remains in full force and effect and has not been terminated; and

(i) the Joint Venturers have received a copy of the Facility Agreement." (emphasis in original)

[13] Clause 3.4 of the facility agreement required a "verification certificate". That was provided by the third respondent on the same day the facility agreement was executed. Relevantly, it certified that the third respondent "enters into the Transaction Documents in its own capacity as nominee and agent for the joint venturers of the Queensland Nickel Joint Venture, and as General Manager of that Joint Venture". Again, it was signed on behalf of the third respondent by Palmer and its secretary.

[14] Clause 16 provided that on execution and delivery of the facility agreement, the third respondent agreed to be bound by the provisions of the guarantee and indemnity set out in the schedule, in consideration of GEC providing the facility.

[15] Once the various documents had been executed, loan monies were advanced by GEC to the second respondent, pursuant to the loan facility. The aircraft was acquired using those monies.

[16] On 18 January 2016, both the second and third respondents were placed into voluntary administration. That circumstance constituted an event of default, under the loan facility. Demands for payment of the loan amount were not satisfied and both the second and third respondents were wound up in February 2016 and April 2016 respectively.

[17] In 2016, the liquidators of the second respondent took steps to market the sale of the aircraft. It was ultimately sold on 23 February 2018. There was a significant shortfall between the sale proceeds and the outstanding balance of the loan facility.

[18] Shortly after the liquidation of both the second and third respondents, GEC changed its name to Harrenvale Australasia Pty Ltd (**Harrenvale**).

[19] On 16 October 2018, Harrenvale "absolutely and unconditionally" assigned to the first respondent "all of its rights, title, interest and benefits in respect of" the loan facility agreement and the aircraft mortgage. Notices of the assignment were given, in writing, to each of the second and third respondents.

Proceedings

[20] In late 2018, the first respondent commenced a proceeding against the appellants and the second and third respondents, claiming recovery of the amount outstanding under the loan facility. The proceeding was defended and there was a counterclaim. Each appellant obtained leave to defend the claims made against the third respondent.

Trial

[21] Although the appellants and third respondent raised a number of grounds of defence, a central issue at the trial was whether Harrenvale breached a duty owed to achieve the "best price obtainable" on the sale of the aircraft. It was contended that Palmer, or a third party controlled by him, would have paid a much higher price, to Harrenvale's knowledge. This contention was the foundation for the counterclaim.

[22] Relevant to the issues in dispute on appeal, evidence was led at trial that after the second and third respondents were placed into voluntary administration:

(a) Harrenvale sent a letter to the second respondent dated 28 January 2016, notifying of its default by reason of that voluntary administration and declaring, pursuant to cl 13.2 of the facility agreement, the total then outstanding by way of principal and interest and demanding payment of that sum by 5 February 2016;

(b) The second respondent failed to pay that sum by the due date;

(c) On 8 February 2016, another letter was forwarded to the second respondent demanding, pursuant to cl 15.1 of the facility agreement, payment of interest on a higher rate of interest;

(d) On the same date, letters were forwarded to the second and third respondents and the first and second appellants, notifying each of the default; declaring the amount owing to be immediately due for payment; and demanding the recipient pay the amount owing under the guarantee and indemnity;

(e) None of those entities complied with the demand.

[23] Evidence was also led that on 16 October 2018, Harrenvale issued to the second and third respondents and the first and second appellants, a certificate pursuant to cl 18.13 of the facility agreement, certifying the amount then due and payable by each of them jointly and severally under the guarantee and indemnity.

[24] Clause 18.13 of the facility agreement provided that the lender (as well as its successors and permitted assigns) had the right to give an obligor a certificate about an amount payable under the facility agreement and, in that event, such a certificate

would constitute conclusive evidence of the amount payable in the absence of manifest error.

[25] On the same date, Harrenvale assigned absolutely and unconditionally, all its rights, title, interest and benefits in respect of the facility agreement and the aircraft mortgage to the first respondent.

[26] Evidence was led that subsequent to that assignment, the first respondent issued a certificate of indebtedness, dated 27 April 2021, pursuant to cl 18.13 of the facility agreement, to the appellants and the second and third respondents. That certificate, issued by the regional managing director of the first respondent, Thomas McDonald, was relied upon at trial to prove the debt owing by the second and third respondents and the first and second appellants.

[27] Finally, evidence was led that:

(a) On 19 May 2016, Palmer or a third party associated with him, made an offer of AUD$20 million to purchase the aircraft and the debt owing under the loan facility, conditional on releases being given and that entity obtaining a favourable judgment in court proceedings in Western Australia;

(b) That offer was the subject of a counteroffer dated 25 May 2016, from the first respondent, offering to sell the aircraft alone for US$20 million, subject to conditions relating to time for payment;

(c) That counteroffer was not accepted and no further negotiations were undertaken at that time;

(d) In November 2017, the third party associated with the Palmer entities had obtained a judgment in the proceedings in Western Australia in its favour, as a consequence of which that entity had over US$278 million available to it.

[28] Further, Palmer swore an affidavit stating that since that judgment, and to the time of the sale of the aircraft in April 2018,[2] he and the third party remained ready, willing and able to purchase the aircraft for US$20 million after "commercial negotiations".

[29] At trial, the appellants argued that the certificate issued by Harrenvale pursuant to cl 18.13 was invalid. It was argued there had been no agreement between the parties that an assignee could issue such a certificate. Rather, the agreement defined the lender by an individual in a particular position such that only such an individual, with actual knowledge of the indebtedness, was able to provide such certification. There was cross-examination at trial as to the actual knowledge of the indebtedness of McDonald who issued the relevant certificate.

[30] It was also submitted at trial, that the best price attainable was the offer made by Palmer and the third party and that Harrenvale breached its duty to achieve the best price attainable in selling the aircraft for US$5.6 million.

Primary decision

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2 As noted at [17] above, the aircraft was sold on 23 February 2018.

[31] The primary judge found that although the term "Lender" was defined in cl 1.1 of the facility agreement as "the person described as such in the Details section", and that in that section there was recorded:

> Lender: Name: GE Commercial Australasia Pty Ltd
>
> ABN: 98 096 876 292
>
> Address: Level 13, 255 George Street
>
> SYDNEY NSW 2000
>
> Facsimile: (02) 8249 3784
>
> Attention: Corporate Aviation, Director-Underwriting

the certificate issued by the first respondent, pursuant to cl 18.13, on 27 April 2021, was a valid certificate on a proper construction of the facility agreement.

[32] In coming to that conclusion, the primary judge held that the facility agreement specifically provided that a reference to "a party to any document" includes "that party's successors and permitted assigns" and that the right on the part of the lender to assign the whole of its rights under the agreement was expressly preserved, including the right to issue a certificate of indebtedness.

[33] The primary judge further found there was no suggestion the relevant certificate was affected by "manifest error", or even that it was incorrect in some respect. Accordingly, it afforded at least prima facie evidence of the fact of the indebtedness and of its quantum at the date of issue. Further, that amount was supported by spreadsheets containing detailed calculations of the overall debt. Those spreadsheets formed the basis for the certificate. Accordingly, the first respondent had proved the debt in the amount certified on 27 April 2021.

[34] The primary judge found that the duty owed by a mortgagee exercising a power of sale did not require the mortgagee "to sell for the best price obtainable or to act in such a way as to advance the interests of the mortgagor". The exercise of that power was subject only to the qualification that the mortgagee must act in good faith and not unconscionably, or in a way which sacrificed the interests of the first and second appellants and/or the third respondent by acting in a wilful or reckless way.

[35] The primary judge found that the counterclaim was misconceived in alleging a breach of duty by Harrenvale. Harrenvale did not sell the aircraft; it was sold by the liquidators in accordance with their power under the *Corporations Act 2001* (Cth). Giving its consent to the sale and agreeing to release its security did not mean Harrenvale was exercising its power of sale under the aircraft mortgage. In reaching this conclusion, the primary judge found that nothing in the evidence supported the contention that the liquidators acted as agents for Harrenvale in the marketing and sale of the aircraft.

[36] The primary judge further found that the offer made on 19 May 2016 was an offer to buy the aircraft and the debt. In rejecting that offer, Harrenvale expressly described it as "both unconstructive and unilaterally favourable to Mr Palmer" and said it was unable to accept such a position. It was in that context that the

counteroffer was made for a substantially larger sum, restricted to the sale of the aircraft and not conditional upon the result of proceedings in Western Australia. However, no agreement was ever reached as to price and there was no evidence of negotiations thereafter.

[37] The primary judge found that although Palmer, in his affidavit, stated that he and the third party remained "ready, willing, and able" to negotiate the purchase of the aircraft and would have been prepared to pay "up to" the amount of the counteroffer made on 25 May 2016, there was no evidence to suggest the liquidators knew that he had undergone such a change of heart. The liquidators' representative confirmed in evidence he was unaware of any such development.

[38] In any event, the primary judge found the readiness to pay such an amount was only after "commercial negotiations" and it would be "rank speculation on the limited evidence" to conclude that a sum, much greater than the price actually obtained on the sale, would have been achieved. At best, the evidence established there was a second attempt, in 2018, to purchase the aircraft and the debt in the sum of US$7.5 million. No offer was made at that time to purchase just the aircraft.

[39] The primary judge also recorded that in closing written submissions, the first and second appellants and the third respondent had submitted that Harrenvale permitted the liquidators to sell the aircraft, but kept them "out of the loop in relation to critical negotiations that would have resulted in a much higher return" and that instructions had been provided to the selling agent not to deal with Palmer, with selective information being given to the liquidators. The primary judge found those submissions went well beyond what was pleaded in the amended counterclaim. Leave to further amend that counterclaim to include such allegations was refused by the primary judge.

[40] The primary judge found there had been ample time to formulate such a case in advance of trial; the amendments would constitute a radical alteration to the case the first respondent was required to meet at trial, necessitating a reopening of its case to adduce further evidence; there was little, if any, support on the evidence already adduced for the drawing of the inference then contended; and, in any event, making good such allegations would not overcome the conclusion of an absence of any duty on the part of the lender, in connection with the sale of the aircraft, as such allegations added nothing to the case already run, in an attempt to establish a relationship of agency between the lender and the liquidators.

Appeal

[41] The appellants rely on three grounds that:

(a) There was no proof of the debt by a contractual certificate or at all;

(b) There was a duty owed by the mortgagee in selling the aircraft; and

(c) There was error in the primary judge's conclusion with respect to the requirement for, and refusal of, the appellants' application for leave to amend their defence and counterclaim to encompass allegations sought to be pursued at trial.

Consideration

Ground 1

[42] The appellants submit that the primary judge erroneously concluded that the first respondent, as assignee, could issue a certificate under cl 18.13. Further, even if it could, the certificate issued was not one that met the necessary criteria, in that it was not signed by a person with personal knowledge of the alleged debt, or by a person who came within the class of persons authorised to sign such a certificate.

[43] In support of those submissions, the appellants rely on observations by Young J (as his Honour then was) in *Shomat Pty Ltd v Rubinstein*,[3] in relation to a clause in a contract which specified that a statement of certificate be "issued by a 'Solicitor, Conveyancer, Manager or Accountant'". Young J found that having regard to that specification, "the statement/certificate which was required was one to be prepared by a properly qualified official on due investigation …".[4]

[44] The appellants also rely on observations by Ward CJ in Equity (as her Honour then was) in *Lucantonio v Benscrape Pty Ltd*,[5] and Bathurst CJ (with whom Gleeson and Payne JJA agreed) in *Beefeater Sales International Pty Ltd v MIS Funding No 1 Pty Ltd*,[6] in support of the principle that clauses providing for conclusive evidence certificates are to be strictly construed.

[45] Whilst each of those decisions support a strict construction of clauses of that nature, each makes it clear that the construction of such clauses is best approached by having regard to the parties' actual intentions by that clause.[7]

[46] Accordingly, whether the right under cl 18.13 was capable of assignment and whether it required the issuing of a certificate by an officer holding a particular qualification, requires a consideration of the construction of the loan facility agreement.

[47] Whilst the appellants submit that the proper construction of the facility agreement was that the definition of "lender" operated to limit the "person" who could issue a certificate to a certain officer, namely, "Corporate Aviation, Director-Underwriting", a consideration of the completed details for lender in the details section supports a conclusion that the reference to the designated officer is part of the address details, nominating the person within the lender organisation to whom any notice is to be directed. The reference to that position does not designate a particular officer level as a condition precedent to the issuance of an efficacious certificate.

[48] That conclusion is supported by the terms of cl 17.1, which provide that a certificate is to be signed by an Authorised Officer. In the case of the lender, that term is defined under cl 1.1 to include a director, or a person nominated by the lender in a notice to the borrower.

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3 (1995) 124 FLR 284 (***Shomat***).
4 *Shomat* at 289.
5 [2020] NSWSC 579 at [77] (***Lucantonio***).
6 [2016] NSWCA 217 (***Beefeater***).
7 *Lucantonio* at [77], per Ward CJ in Equity; *Beefeater* at [98], per Bathurst CJ (with whom Gleeson and Payne JJA agreed).

[49] The use of the qualification in cl 1.1 that the defined terms have their specified meaning "unless a contrary intention appears" does not alter the conclusion that "lender" in the loan facility agreement was GEC, not a particular officer level of that entity. The clauses in the loan facility agreement provide no such contrary intention.

[50] Once it is concluded that a proper reading of the facility agreement, having regard to those provisions, supports a conclusion that the lender may give a relevant certificate under cl 18.13 by its being signed by a director or a person nominated by the lender in a notice to the borrower, the proper interpretation of the facility agreement supports a conclusion that it was open to the lender to assign its right to issue such a certificate under the facility agreement.

[51] The assignment clause, cl 18.11, was broad ranging, allowing assignment of "the whole or any part of its rights under the Transaction Documents in any way it sees fit". A right under the transaction document was the issuing of certificates under cl 18.13. Nothing in the facility agreement restricts the assignment of that right.

[52] In that respect, the observations of Bathurst CJ in *Beefeater* are apposite:[8]

> "Although cl 14 states that 'You may give a certificate', 'You' being defined as WFIN, senior counsel for the appellants accepted correctly, in my view, that that did not prevent the right under cl 8, which used a similar expression, from being capable of assignment. He submitted, however, that the assignment could not change the identity of the person giving the certificate. That may be so when a particular person is nominated, but that is not the present case, where no particular person, as distinct from the lender, is nominated."

[53] There was no error in the primary judge's conclusion that the relevant certificate issued by the first respondent was a valid certificate issued under cl 18.13 of the agreement. The certificate was given by its authorised officer.

[54] It is further submitted by the appellants that even if the certificate was validly issued, the first respondent had not proved the amount of the debt. That submission cannot be accepted having regard to the findings of the primary judge.

[55] The primary judge accepted the 2021 certificate was issued after McDonald had personal regard to the spreadsheets prepared by Harrenvale, around the time of the assignment, together with a corrected spreadsheet prepared by the first respondent.

[56] Having regard to McDonald's evidence as a whole, that finding was consistent with the evidence. Further, there was no basis upon which to conclude that McDonald did not have the requisite knowledge to have issued the certificate.

[57] In any event, the primary judge found that the first respondent had produced evidence supportive of the amount of the debt. That conclusion was consistent with the evidence that the first respondent had taken possession of the running account balance sheet on the assignment and incorporated it into its own records; the spreadsheet provided at the time of assignment had been checked by the first respondent, including reference to supporting documents, as a result of which there

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8 *Beefeater* at [100].

were minor adjustments; and that the adjusted spreadsheet was thereafter maintained by the first respondent in the course of conducting its business.

Ground 2

[58] The appellants submit that the primary judge erred in framing the duty owed by a mortgagee and in concluding that the mortgagee's duty did not apply to the sale process as the aircraft was sold by the liquidators.

[59] Whilst the primary judge's reference to the duty owed by a mortgagee as to not require "the mortgagee to sell for the best price obtainable or to act in such a way as to advance the interests of the mortgagor" may be thought to frame that duty too narrowly, that reference must be viewed in the context of the submissions being addressed by the primary judge.

[60] The primary judge expressly recognised that a mortgagee exercising a power of sale "owes a duty to exercise the power in good faith", and that to act in good faith, the mortgagee "must not wilfully and recklessly deal with the mortgaged property in such a manner that the interests of the mortgagor are sacrificed".[9] The primary judge further went on to expressly recognise that in order to show a breach of that duty, there must be a departure from reasonable standards, so serious as to be properly characterised as unconscionable.

[61] It was only after specific reference to those conventional principles, that the primary judge stated:

> "Contrary to the defendants' pleading and submissions, the duty does not require the mortgagee to sell for the best price obtainable or to act in such a way as to advance the interests of the mortgagor. The power is given to the mortgagee for its own benefit to enable realisation of the debt. Its exercise is subject only to the qualification that the mortgagee must act in good faith in the sense I have just explained. That has been the position in this country for over a century and caution is required before mistaking conclusions of fact for statements of principle regarding the scope of the duty, especially where those conclusions concern duties which are imposed by statute. It may be in a particular case that a 'failure to follow up the prospect of obtaining a higher price when it was known that a prospective purchaser was prepared to pay more' might amount to such a 'serious departure from accepted standards' as to amount to a breach of duty to act in good faith but, in the end, if a duty was owed by GEC/Harrenvale, the relevant enquiry is whether it acted in good faith or whether it sacrificed the interests of [the first appellant, the second appellant and/or the third respondent] by acting in a wilful or reckless way." (footnotes omitted)

[62] Viewed in that context, there was no error by the primary judge in enunciating the relevant duty owed by a mortgagee.

[63] There was also no error in the primary judge's conclusion that the first respondent did not sell the aircraft; it was sold by the liquidators. That conclusion was entirely consistent with the evidence.

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9 Citing *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676, 680.

[64] Further, nothing in the 2016 correspondence relating to the offer and counteroffer supports a conclusion that Harrenvale undertook the process of the sale of the aircraft, or that the liquidators acted as agent of Harrenvale. Those communications were in relation to purchasing the debt, the subject of the facility agreement, a condition of which would be acquiring the aircraft. The offer was specifically conditioned on the giving of releases in relation to that debt.

[65] That process was entirely different to the process undertaken by the liquidators in marketing, and ultimately selling, the aircraft itself. Nothing in that correspondence supports a conclusion that there was ever an offer to Harrenvale (or indeed the liquidators), to the effect that Palmer or his associated entity were prepared to purchase the aircraft alone for any sum.

[66] The appellants submit that there was evidence which established that Harrenvale's ultimate owner was involved in the sale process in respect of the aircraft.[10] That submission is premised on the correspondence in May 2016 where Harrenvale's ultimate owner, on behalf of Harrenvale, indicated there would be no agreement "until entry into formal documentation in terms acceptable to Harrenvale, which holds security over the Aircraft".

[67] The difficulty with this contention is that all negotiations undertaken at that time, were for the purchase of the debt and the aircraft. The process undertaken by the liquidators was solely in respect of the sale of the aircraft.

[68] Against that background, there was no error on the part of the primary judge in concluding that the sale of the aircraft was undertaken by the liquidators, not by Harrenvale and/or its ultimate owner.

[69] There was also no error on the part of the primary judge in concluding that the allegation that the best price obtainable for the aircraft, when it was sold, was in the order of AUD$20 million, had not been proved. Whilst it is correct that Palmer's affidavit evidence that he was prepared to "pay up to USD$20,000,000" was unchallenged, the primary judge was correct in concluding that the May 2016 offer was subject to conditions which included a release of the debt; was an offer to buy the aircraft and the debt; and that there was never any agreement as to price in 2016, or thereafter.

[70] Similarly, there was no error in the primary judge concluding that Palmer's affidavit evidence to the effect that he or his related entity remained "ready, willing, and able" to negotiate the purchase of the aircraft, did not contain any evidence to suggest the liquidators (or Harrenvale or its ultimate owner) knew he had changed his position in respect of the offer now being solely for the aircraft.

[71] Further, any willingness on his part in respect of a price up to US$20 million was "if that figure was arrived at as a result of commercial negotiations with Harrenvale". No details were provided in respect of the "commercial negotiations". Against that background, there was no error in the primary judge's conclusion that it was "rank speculation" that a sum much greater than the price actually obtained by the liquidators would have been achieved for the purchase of the aircraft itself from Palmer or the third party. As the primary judge properly observed, the only

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[10] Harrenvale's ultimate owner is a reference to Bain Capital Ltd, who acquired GEC/Harrenvale on 9 November 2015.

evidence of any offers, subsequent to the 2016 negotiations, was an attempt in 2018 to offer the sum of US$7.5 million for the aircraft and the debt. No offer was made at that time, or subsequently, to purchase the aircraft alone. Accordingly, there was no offer to be followed up.[11]

Ground 3

[72] The appellants submit the primary judge erred in concluding it was necessary for the appellants to seek leave to amend their pleadings, in order to pursue an allegation that Harrenvale permitted the liquidators to sell the aircraft, but kept them "out of the loop" as to critical negotiations that would have resulted in a much higher return.

[73] The appellants submit that the offers being made by an entity related to Palmer had been the subject of a pleading in the counterclaim since 2019. Accordingly, that entity's involvement in negotiations with Harrenvale had been a long-standing issue on the pleadings, sufficient that it was raised without the need for leave to amend. Further, as the pleading had raised the issue of the sale process, it was proper for the appellants to make the relevant allegations in closing submissions and the primary judge erred in refusing leave to amend.

[74] Whilst it is correct that the pleadings did contain allegations consistent with Palmer and/or the third party being involved in the making of offers in respect of the aircraft, those allegations were made in the context of contentions that the liquidators, acting as agents for Harrenvale, failed to take reasonable steps to follow up a known prospect of sale of the aircraft to Palmer and/or a third party.

[75] Nothing in the pleadings supported an allegation that Harrenvale had deliberately kept the liquidators "out of the loop" as to critical negotiations with Palmer and/or the third party and had instructed the liquidators' appointed agent not to deal with Palmer. That was an allegation of specific conduct. It was required to be the subject of pleading. The fact that it was raised, for the first time, in closing submissions, amply supported the primary judge's conclusion that there was a need for the appellants to seek leave to amend their pleadings.

[76] Once that amendment was sought, it was a matter for the discretion of the primary judge as to whether leave ought to be granted, in respect of an allegation first raised in closing submissions, after a trial in which evidence had been given and which had been the subject of cross-examination.

[77] In refusing leave, the primary judge correctly noted that it was a managed case in which the appellants had ample time to formulate their case and advance to trial. Further, the allegation did involve an assertion of deliberate, wrongful conduct which would necessitate a re-opening of the first respondent's case. It was also correct to observe that there was little in the current evidence to support the drawing of the inference contended for by the appellants in closing submissions.

[78] Each of those matters were relevant to the exercise of discretion. The appellants have not established any basis to conclude that the exercise of that discretion was other than in accordance with the established principles. The refusal of leave, in

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11 Cf *Forsyth v Blundells Ltd v Blundell* (1973) 129 CLR 477, 508.

such circumstances, fell within the proper exercise of that discretion. No error is shown.

Conclusions

[79] The appellants have not established any ground of appeal, warranting the setting aside of the orders and judgment entered below.

[80] The appeal should be dismissed.

[81] Accordingly, it is unnecessary to consider the alternative grounds advanced by the first respondent's Notice of Contention in support of affirming the decision below.

[82] As the appellants have failed, costs would normally follow the event. However, the parties expressly sought leave to make further submissions in respect of costs. Such submissions, limited to three pages, ought to be filed within 14 days.

Orders

[83] I would order:

1. The appeal be dismissed.
2. The parties have leave to file and serve written submissions as to costs, limited to three pages, within 14 days.
3. The costs of the appeal be determined on the papers.

[84] **APPLEGARTH J:** I agree with Boddice JA.