SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: S 4811 of 1999

Before Justice Wilson

[Cameron v Brisbane Fleet Sales Pty Ltd]

Plaintiff: **IAN MILNE DIXON CAMERON**

AND

Defendant: **BRISBANE FLEET SALES PTY LTD**

REASONS FOR JUDGMENT : WILSON J

Delivered: 11 February 2000

CATCHWORDS: **MORTGAGES – REMEDIES OF MORTGAGEE – SALE UNDER POWER – mode of exercise of power – duty to mortgagor – whether duty of good faith independent of duty in s 85 of *Property Law Act 1974* – remedies**

Valuation of undivided half share as tenant-in-common – relevance of other tenant-in-common's interest in acquiring outstanding interest

Breach of statutory duty – failure to exercise reasonable care in setting reserve

***Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64, applied**
***Emerson v Custom Credit Corporation Ltd* [1994] 1 Qd R 516 at 520-21, applied**
***Spencer v Commonwealth* (1907) 5 CLR 418 at 432, applied**
***McDonald v Deputy Federal Commissioner of Land Tax* (1915) 20 CLR 231 at 239, applied**
***Goold v Commonwealth* (1992-933) 79 LGERA 407 at 415-6, considered**
***Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 at 312, applied**
***Public Trustee for NSW v Commissioner of Inland Revenue* [1966] NZLR 257 at 261, considered**
***Chuah Say Hai & Ors v Collector Of Land Revenue, Kuala Lumpur* [1967] 2 MLJ 99, considered**

Ringer V.P., 'Value of an Undivided Interest' (1966) July *The Appraisal Journal* 413 at 418
Nelson R.D., 'Discounting Fractional Interests' (1969) October *The Appraisal Journal* 522 at 528
Snyder E.A., 'Appraising Fractional Interests – A Short Reprise' (1975) October *The Valuer* 618
***Oayda v Mercantile Mutual Insurance Co Ltd* [1994] Fed Ct No NG 779 of 1994; 18 November 1994, considered**
***Barns v Queensland National Bank Ltd* (1906) 3 CLR 925 at 942-3, considered**
***Pendlebury v The Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676 at 679-680, 694-5, 699-701, considered**
***Forsyth v Blundell* (1973) 129 CLR 477 at 493, 506, 481, considered**
***The Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 139 CLR 195, distinguished**
***Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, considered**
***Citicorp Australia Ltd v McLoughney* (1984) 35 SASR 375 at 381, considered**
***Westpac Banking Corporation Ltd v Kingland* (1991) 26 NSWLR 700 at 707-709, considered**
***Brutan Investments Pty Ltd v Underwriting and Insurance Ltd* (1981-82) 58 FLR 289 at 298, considered**
***CAGA Ltd v Nixon* (1982) 152 CLR 491 at 502-3, 517-18, 525, followed**
***Mortgage Express Ltd v Bowerman and Partners* [1995] QB 375 at 428-31, considered**

Beach Protection Act 1968
***Property Law Act 1974* ss 85, 87**

Counsel: **Mr MD Hinson, SC for the plaintiff**
Mr PA Keane, QC and Mr RIM Lilley for the defendant

Solicitors: **Dunhill Madden Butler for the plaintiff**
Deacons Graham & Jones for the defendant

Hearing dates: **19, 20, 21 July 1999**

[1] This proceeding concerns alleged breaches of duty by a mortgagee in exercising its power of sale over an undivided half share as tenant in common in a parcel of land having a gross area of 32.375 hectares (80 acres) on the Noosa North Shore.

[2] The plaintiff, Mr Cameron, held an undivided half share as tenant-in-common. The other undivided half share was held by Mr and Mrs Upton who were joint tenants *inter se*. The Uptons acquired their interest from Mr Girle in July 1998. At the same time the defendant company (then called Vicvale Pty Ltd) in which they were the only shareholders and directors took a transfer of a mortgage over Mr Cameron's interest from Halls Knob Pty Ltd, a company controlled by Mr Girle. The Uptons purchased their undivided half share from Mr Girle for $550,000. The mortgage was transferred for $200,000.

[3] The mortgage secured three advances originally made by Mr Girle to Mr Cameron. (The mortgage had originally been in favour of Mr Girle, but subsequently transferred from him to Halls Knob Pty Ltd.) The advances were as follows:-

Date	Amount	Interest	Principal
13.06.95	$50,000	10% per annum payable on 13 June each year	repayable on 13 June 1998
21.09.95	$50,000	12.5% per annum payable on 13 June each year	repayable on 13 June 1998
17.05.96	$100,000	2.5% per annum	principal and interest repayable on 31 December 1996.

[4] At the time the defendant took the transfer of the mortgage Mr Cameron was in default. He had not paid any principal or interest on either of the first two advances. With respect to the third advance he had repaid $12,000 on 17 March 1998 and $92,000 on 27 March 1998. The balance of principal and interest was outstanding. Mr Upton

was not concerned about the defaults at the time he and his wife acquired their interest in the land and the company took the transfer of the mortgage.

[5] Mr Upton was a motor dealer. In December 1998 his car yard was hit by a bad hailstorm. The vehicles in it were uninsured. Hence he had an immediate call for funds which resulted in a decision to enforce Mr Cameron's obligations under the mortgage.

[6] On 26 February 1999 a notice of exercise of power of sale was served. It specified that as at 23 February 1999, $182,169 was due and owing. In a letter which accompanied the notice, Mr Cameron was told that he would need to pay that amount as well as outstanding rates, legal expenses and costs of sale in order to discharge his obligations. An auction was arranged for 11 May 1999. On 30 April 1999 Mr Cameron paid the sum of $182,169. However the mortgagee refused to release the mortgage alleging that $62,022.47 was still owing.

[7] On 11 May 1999 the plaintiff's undivided half share in the land was sold at auction to the Uptons for $300,000. Two days later the defendant company paid out the second mortgage over the plaintiff's interest (in the sum of $169,727.82). On 17 May 1999 the plaintiff lodged a caveat alleging an improper exercise of the power of sale.

[8] In these proceedings Mr Cameron seeks a declaration that the sale was improper, an order setting aside the sale and the transfer, or alternatively damages. The defendant company seeks removal of the caveat.

[9] The parcel of land is approximately six kilometres north of Tewantin. It is a near rectangular block of vacant land having approximately 460 metres of absolute beach frontage. Hall's Knob, a local landmark approximately 30 metres high, is located within the subject parcel. There are restrictions on the use of the land. It is zoned "Rural Preservation Zone" under the planning scheme for the Noosa Shire. In consequence it cannot be subdivided because the minimum lot area in that zone is 40 hectares, and the only permitted developments are a single dwelling house or a park. Further, the area in which the land is situated is subject to a Development Control Plan, which is part of the planning scheme. One of the aims of the plan is to implement a strategy of maximizing conservation and minimizing development. For example, there is no sealed road access and there are preferred development design guidelines. The land is also subject to a Coastal Management Plan under the *Beach Protection Act 1968*. Under that plan, a 150 metre wide strip above the high water mark is designated as a preservation area which cannot be built on.

[10] The test of market value is what would a person desiring to buy the land have had to pay for it on the day to a vendor willing to sell it for a fair price but not desirous to sell.[1] Counsel for the defendant submitted that the sum paid by the Uptons to Mr Girle ($550,000) exceeded the market value at the time, and that they made an "imprudent purchase" as they were not "knowledgeable purchasers."

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1 *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64; *Emerson v Custom Credit Corporation Ltd* [1994] 1 Qd R 516 at 520-21; *Spencer v Commonwealth* (1907) 5 CLR 418 at 432.

[11] For the reasons I am about to outline, I reject that contention. In my view the amount they paid for Girle's undivided half share in the land ($550,000) was the market value of that interest as at July 1998.

[12] Despite Mr Upton's evidence that he and his wife purchased their undivided half share in the land from Mr Girle without knowledge of the restrictions on the use and subdivision of the land, I am not prepared to find that they were not "knowledgeable purchasers" in the relevant sense.

[13] Mr Upton was a successful and experienced motor dealer. He always understood that the land in its entirety was worth at least $1 million. The contract with Mr Girle was the culmination of at least four months' interest in the property. In March 1998 he had attended an auction arranged on behalf of Mr Girle as mortgagee exercising power of sale over Mr Cameron's undivided half share. He intended buying the whole, believing that Mr Girle would offer his half interest immediately after the sale of Mr Cameron's half interest. The advertising for the auction had informed potential purchasers that the land was situated in a coastal management area and a tree

preservation area, that it was zoned "Rural Preservation," and that it was not a contaminated site. On arrival at the auction he found that it had been restrained by court order.

[14] Subsequently, Mr Upton made offers to the plaintiff and to Mr Girle. A day or two after the auction he offered $500,000 for the plaintiff's interest but received no reply.

In April 1998 he offered the plaintiff and Mr Girle $550,000 each for their respective interests. The plaintiff told him he had been offered $600,000, to which Mr Upton replied that the most he could pay was $620,000.

[15] In May 1998, Mr Girle indicated he was prepared to sell his undivided half share for $550,000 if the Uptons also bought the mortgage. He was selling in order to finalize a matrimonial property settlement. The sale from Mr Girle to the Uptons was pursuant to a contract dated 27 July 1998. The purchase price was $550,000. Walters & Co., solicitors, were named as acting for the Uptons. By cl 2 of the contract the seller disclosed that there was a beach protection precinct along the full length of the eastern boundary, that the land was included in an area subject to a native title claim, and that it was in the Rural Preservation Zone.

[16] Mr Upton gave evidence that at the time of the purchase he thought one of two things would happen – either he would buy Mr Cameron's interest at a later date, or he would split the property into two. He clearly intended it as a passive investment. The former was a realistic expectation in the circumstances: the company controlled by the Uptons was acquiring the mortgage under which Mr Cameron was in default, and he was not concerned. The latter was not realistic, and it emerged in cross-examination that Mr Upton had no more than a hope that he might be able to subdivide the land. He said in his affidavit that he was unaware of the restrictions arising from the North Shore Development Control Plan or the repercussions of the Rural Preservation Zone. However the Development Control Plan did not impose additional restrictions

impacting on the value of the land, and as I have said, he had no more than a hope that the land would have subdivisional potential.

[17] The Uptons were clearly desirous of purchasing Mr Girle's interest in the land. They dealt with him at arm's length. There was no compulsion involved. In my view they knew enough about the land to be described as knowledgeable purchasers.

[18] At the auction in May 1999 the Uptons purchased Mr Cameron's undivided half share for $300,000. Mr Cameron alleges that that was an undervalue, and that the true value of his undivided half share as at May 1999 was $550,000.

[19] *Prima facie* the best evidence of the market value of Mr Cameron's interest is the amount paid by the Uptons to Mr Girle for the other undivided half share, namely $550,000, given that the market remained fairly steady over the intervening period.

[20] There are practical constraints on the use of land held by two or more persons as tenants-in-common. The desire of one tenant-in-common to use it for a particular purpose or in a particular way can be satisfied only with the consent of the other or others. The difficulties inherent in obtaining such consent are sometimes greater where the tenants-in-common are strangers than where they are related. For this reason Mr Cameron's interest in the land was unlikely to be attractive to many potential purchasers. On the other hand, the very fact that the Uptons had acquired a similar interest less than a year before demonstrated that the possibility of there being such purchasers could not be dismissed out of hand. The Uptons' position was

special in more than one sense. They were the shareholders and directors of the defendant company holding the mortgage under which Mr Cameron had defaulted. Further, the acquisition of Mr Cameron's interest would complete their acquisition of the fee simple in the entirety, something they had wanted at least from March 1998. They demonstrated their continuing desire to do so by making an offer pre-auction to purchase Mr Cameron's interest for $500,000 coupled with an offer by the company to forgive the remaining debt (approximately $62,000).

[21] Offers are not evidence of value,[2] but they may be evidence of demand for the land or an interest in it. They may show that there was someone prepared to pay more than the ordinary market value. There is then the question of what weight should be assigned to that particular factor.[3]

[22] The market value of Mr Cameron's interest in the land must be assessed in light of the Uptons' particular interest in acquiring it given its potentiality peculiar to them.[4] The question of what allowance to make for this factor is a difficult one.

[23] The plaintiff led evidence from two valuers, Mr Ellevsen and Mr Carrick, and the defendant led evidence from a valuer, Mr Waghorn.

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2 *McDonald v Deputy Federal Commissioner of Land Tax* (1915) 20 CLR 231 at 239

3 See *Goold v Commonwealth* (1992-93) 79 LGERA 407 at 415-6 per Wilcox J.

4 *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 at 312

[24] It would be wrong in principle to value the undivided half share simply by dividing the value of the entirety into two. I accept the evidence of Mr Ellevsen that it would be proper to value the undivided half share by applying some discount to the figure which is 50 per cent of the value of the whole.[5] He said in cross examination that the ascertainment of the discount was a matter of opinion, possibly based on a percentage. In this case he had relied on the actual sale by Girle to the Uptons for $550,000.

[25] The evidence of the market value of the whole ranged between $1 million and $1.3 million (Waghorn $1 million, Carrick $1.1 million, Ellevsen $1.2 million - $1.3 million). Adopting $1.2 million, and applying a discount of 10 per cent to half that figure, a value of $540,000 is derived. It would not be unreasonable to add $10,000 as an allowance for the special potentiality of Mr Cameron's interest to the Uptons.

[26] Mr Waghorn's valuation report dated 25 March 1999 was put into evidence and he was cross examined by counsel for the plaintiff. The conclusion reached in his report was as follows:

> "VALUATION
>
> In accordance with our instructions and any qualifications detailed herein, we assess the Market Value of 312 Teewah Beach Road, North Shore, Noosa, Qld 4565 as at 17 March 1999 to be:
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> | | | |
> |---|---|---|
> | 1. | The property as a whole, freehold and unencumbered | $1,000,000 (One Million Dollars) |
> | 2. | The Cameron ½ interest | $250,000 |

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[5] This accords with the approach in *Public Trustee for NSW v Commissioner of Inland Revenue* [1966] NZLR 257 at 261 and *Chuah Say Hai & Ors v Collector of Land Revenue, Kuala Lumpur* [1967] 2 MLJ 99. See also Ringer V.P., 'Value of an Undivided Interest' (1966) July *The Appraisal Journal* 413 at 418, Nelson R.D., 'Discounting Fractional Interests' (1969) October *The Appraisal Journal* 522 at 528, Snyder E.A., 'Appraising Fractional Interests – A Short Reprise' (1975) October *The Valuer* 618.

freehold and unencumbered (Two Hundred and Fifty Thousand Dollars)

He had earlier explained how he had reached the figure of $250,000.

[27] It was possible that the highest bid for Mr Cameron's undivided half share would be made by the Uptons and comprise –

"Hope value"	$ 50,000
Co-owner's premium	$ 50,000
Balance ($1 million minus $850,000)	$150,000
	$250,000

[28] The "hope" value was what an informed purchaser (ie one apprised of the various restrictions on the use of the land, and with knowledge that the owner of the other undivided half share did not wish to sell) would pay. He considered that there was no hope attaching to the development potential of the land. He based his valuation on his assessment of the hope that, on the death of Mrs Upton (who was younger than her husband), their interest would pass to their children who would want to sell it. Mrs Upton had a life expectancy of 34 years. He assumed the entirety would still be worth $1 million in 34 years' time, and applied a discounting factor of 7 per cent per annum (on account of holding costs) to arrive at the "hope" value of the entirety as $100,219. The "hope" value of a half interest was accordingly $50,110, which he rounded down to $50,000.

[29] He considered that the maximum premium the Uptons should pay to acquire the other undivided half share on account of their particular co-ownership interest was 10 per cent of half of the value of the whole, ie –

($1 million ÷ 2) x 10% = $50,000.

[30] They had spent approximately $850,000 to date, comprised of what they had paid Mr Girle for his individual half share ($550,000), what had been paid to acquire the mortgage (ignoring the corporate veil, $200,000), as well as stamp duty and costs associated with the acquisition, rates and taxes, and costs and expenses of the mortgagee's sale. The third component was the difference between the value of the entirety ($1 million) and what they had spent.

[31] In cross examination Mr Waghorn acknowledged that if the Uptons had been informed purchasers of Mr Girle's interest, the price they had paid would have been the best evidence of the market value of an undivided half share in the land. But in his opinion they had not been informed purchasers. The market value was the "hope" value ($50,000), which was what an informed purchaser would pay. The Uptons should pay no more than $250,000 to acquire the other undivided half share. He acknowledged that in calculating the maximum amount the Uptons should pay the further $182,000 paid off the mortgage should be taken into account, thus increasing the figure from $250,000 to $432,000.

[32] A number of criticisms can validly be levelled at Mr Waghorn's "hope" value. It assumed the entirety would still be worth $1 million in 34 years' time. It adopted the

Upton's unwillingness to sell as a continued certainty, something contrary to human experience. The discount rate was too low to reflect holding costs, but if a higher rate were adopted the present value would come close to nil, which he acknowledged would be a silly result. Further it made no allowance for the fact that a knowledgeable potential purchaser would appreciate that the Uptons would pay a premium and so be prepared to pay such a premium himself or herself in order to acquire Mr Cameron's interest.

[33] In all the circumstances I reject Mr Waghorn's opinion of the market value of Mr Cameron's undivided half share in the land. I find that its market value in May 1999 was $550,000.

[34] Sections 85 and 87 of the *Property Law Act 1974* provide (so far as relevant) –

> **"Duty of mortgagee as to sale price**
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> **85.(1)** It is the duty of a mortgagee, in the exercise after the commencement of this Act 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.
>
> **…**
>
> **(3)** The title of the purchaser is not impeachable on the ground that the mortgagee 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.
>
> **Protection of purchasers**
>
> **87.(1)** Where a conveyance is made in exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground –
>
> (a) that no case had arisen to authorise the sale; or
> (b) that due notice was not given; or

> (c) that leave of the court, when so required, was not obtained; or
> (d) whether the mortgage was made before or after the commencement of this Act, that the power was otherwise improperly or irregularly exercised;
>
> and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given or the power is otherwise properly and regularly exercised, but any person damnified by an unauthorised, or improper, or irregular exercise of power shall have a remedy in damages against the person exercising the power."

[35] The plaintiff's counsel submitted that a mortgagee has an independent duty to act in good faith, breach of which would entitle the mortgagor to have the sale set aside.

[36] Under the general law a mortgagee is not in the position of a trustee or fiduciary. It is entitled to exercise the power of sale entirely in its own interests, when it chooses and without delay, subject to the constraint that it act in good faith. There is debate in the authorities[6] as to whether the duty of the mortgagee is simply one not to act wilfully or recklessly thereby sacrificing the mortgagor's interest, or whether it is a more onerous duty to take reasonable care to obtain what has variously been described as the "best possible price" or "the best price reasonably available" or "the true market value" or "a proper price."[7]

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6 The parameters of the debate were succinctly expressed in *Oayda v Mercantile Mutual Insurance Co Ltd* [1994] Fed Ct No NG 779 of 1994; 18 November 1994.

7 See *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925 at 942-3; *Pendlebury v The Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676 at 679-680 per Griffith CJ, 694-5 per Barton J, 699-701 per Isaacs J; *Forsyth v Blundell* (1973) 129 CLR 477 at 493 per Walsh J, 506 per Mason J, 481 per Menzies J dissenting; *The Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1977-78) 139 CLR 195 at 222-225 per Aickin J; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949; *Citicorp Australia Ltd v McLoughney* (1984) 35 SASR 375 at 381; *Westpac Banking Corporation Ltd v Kingland* (1991) 26 NSWLR 700 at 707-709; *Brutan Investments Pty Ltd v Underwriting and Insurance Ltd* (1981-82) 58 FLR 289 at 298.

[37] In *CAGA Ltd v Nixon*[8] Mason J considered that the controversy had been resolved for Queensland by s 85 of the *Property Law Act*, which imposes the higher duty. See also the judgments of Wilson J[9] and Brennan J.[10] In the words of Brennan J:-

> "The statutory formulation, taking the sale at market value as the object to which the performance of the duty is directed, strikes a different balance between the interests of mortgagor and mortgagee from that which flows from the test of good faith."

(His Honour was clearly referring to the lesser duty not to sacrifice the mortgagor's interest.) I respectfully agree with Their Honours. The Queensland provision has adopted the more onerous duty, but it has restricted the remedy to damages.

[38] I note the concession by counsel for the mortgagee that s 85 does not deal with fraud in the sense of genuine impropriety or moral turpitude (deliberately setting out to defeat the interests of another) in which the purchaser was complicit. In such a case "fraud would unravel all" and the sale could be set aside.

[39] However, this was not put forward as a case of such genuine impropriety or moral turpitude that s 85 would not apply. The breaches of the duty of good faith relied upon by the plaintiff were as follows:–

(a) that the sale was not an independent bargain; and

(b) that there was a reckless sacrificing of the interests of the mortgagor in offering the property for sale at auction at a

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8 (1982) 152 CLR 491 at 502-3

9 (1982) 152 CLR 491 at 517-18

10 (1982) 152 CLR 491 at 525

> reserve price substantially below the market value in circumstances where it was known that the likely purchaser was the co-owner who offered substantially in excess of the reserve prior to the auction.

[40] Counsel for the plaintiff relied heavily on *Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* [11] where a sale by a mortgagee company to a related company was set aside for lack of good faith. The case was decided under the general law rather than a statutory provision such as s 85 of the *Property Law Act*. There the mortgagee acquired the mortgage by transfer from the first mortgagee at a time when, to its knowledge, the mortgagor was already in default under the mortgage and was in serious financial difficulties, its parent company being in receivership. In that respect the facts were not unlike those in the present case. From the start the mortgagee had an expectation and perhaps the firm intention of almost immediately having recourse to its power of sale. This was not so in the present case. Very soon after acquiring the first mortgage the mortgagee fixed as the reserve the sum of $250,000, some $30,000 less than it had just paid for the mortgage. Here, the reserve was more than the defendant had paid for the mortgage, but $250,000 less than the Uptons had paid for the other undivided half share. However, unlike the facts in *Bangadilly*, the mortgagee did not set itself the reserve. The Uptons did not actually know the reserve, although they had obviously given consideration to what it might be.

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[11] (1977-78) 139 CLR 195

[41] In *Bangadilly*, the mortgagee failed to ensure that those entrusted with arrangements for the auction so timed and advertised it as to best attract interest on the part of the potential buyers. There was no such failing in the present case. However, the present case is similar to *Bangadilly* in that there was only one bidder – related parties to whom the property was sold for less than its market value.

[42] In *Bangadilly* the court had no hesitation in setting aside the sale. Jacobs J acknowledged that in principle a sale by a mortgagee to a closely related company might be allowed to stand, provided there was no shortcoming in the course adopted by the mortgagee and those acting on its behalf. He went on to say that lack of *bona fides* could be established without establishing conscious planning, deceptiveness or collusion to prefer the close associate. In Aickin J's view, this was not an independent bargain. As controllers of the vendor, Mr and Mrs Hall knew that a prospective purchaser was prepared to pay $303,000 and as controllers of the purchaser they knew the reserve. In such a situation a purchase at or close to the reserve could not be an independent bargain.

[43] *Bangadilly* is distinguishable on the facts. Moreover, in Queensland the duty of good faith is subsumed in the statutory duty and by statute the mortgagor is restricted to a remedy in damages.

[44] The duty in s 85 of the *Property Law Act* is not absolute. It is a duty to take reasonable care to ensure that the sale is at market value.

[45] Mr Walters consulted Mr Bailey of Knight Frank, real estate agents and auctioneers. Mr Bailey conferred with both Mr Upton and Mr Walters.

[46] There was no criticism of the choice of auction as the preferred mode of sale. Various modes were canvassed by Knight Frank and the choice of auction was in accordance with their recommendation. There was no criticism of the advertising.

[47] There was concern that Mr Cameron might attempt to disrupt the sale by bidding at auction and then not completing the purchase. Mr Bailey discussed the deposit with Mr Upton and Mr Walters, and on his suggestion it was fixed in the amount of $30,000 payable by bank cheque so as to deter non-genuine buyers.

[48] Mr Walters engaged Mr Waghorn to value Mr Cameron's interest. Although Mr Waghorn conferred with Mr Upton, I accept that he did not disclose his valuation to him or to Mrs Upton. He produced a written report dated 25 March 1999 which he forwarded to Mr Walters. Mr Walters did not provide Mr and Mrs Upton with a copy of the report; nor did he discuss its contents with them.

[49] I accept the evidence of Mr Walters that he did not fix the reserve until about 10 minutes before the auction began. He fixed it by reference to Mr Waghorn's valuation of $250,000 and allowed a "safety margin" of $50,000. He set it at $300,000 knowing that the Uptons had paid $550,000 for the other undivided half share less than a year before, and knowing that before the auction they had been prepared to pay $560,000 (strictly $500,000 for Mr Cameron's interest coupled with the defendant's

forgiving the debt of $62,000), but not knowing whether the Uptons would bid $560,000 at the auction if there were no other bidders. He regarded the offer of $560,000 as an offer made to avoid an auction. I accept his evidence that he did not discuss the reserve with the Uptons.

[50] A mortgagee exercising its power of sale by way of auction must exercise reasonable care in fixing the reserve. Its duty goes beyond simply commissioning a report from an expert valuer and fixing as the reserve the figure in the bottom line of the report (or, as in this case, adding an amount to that figure as a safety margin). It is obliged to consider the whole report, to seek clarification as necessary and not to adopt the valuation in the absence of a reasoned case in support of it.[12]

[51] Neither my rejection of Mr Waghorn's opinion nor my finding that the market value of Mr Cameron's interest exceeded the price for which it was sold at auction is determinative of whether the duty was breached.

[52] Mr Walters acted as the agent of the defendant in obtaining the valuation, arranging the auction and setting the reserve. There is no evidence that he paid any heed to the way in which Mr Waghorn had arrived at a market value of $250,000. A careful reading of the report would have at least raised a doubt whether that was his assessment of what the Uptons should or might pay rather than his assessment of what an informed, "arm's length" purchaser could be expected to pay. There is nothing to suggest that Mr Walters had regard to the three components of the $250,000. Before the auction

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12 cf. *Mortgage Express Ltd v Bowerman and Partners* [1995] QB 375 at 428-31 on the duty of a solicitor to advise a mortgagee client in relation to the accuracy of a valuation.

he did not tell Mr Waghorn that a further $182,000 had been paid off the mortgage, and he neither sought advice on whether the third component should be adjusted on account of that payment nor made any adjustment himself. In all the circumstances I consider that he failed to take reasonable care in setting the reserve.

[53] Counsel for the plaintiff argued that the reserve was disclosed before the auction by the distribution of the Property Report specifying the deposit in the sum of $30,000 and

by disclosure in the conditions of sale in the auction room that the deposit was to be in that amount. The first of these "disclosures" was made before Mr Walters received Mr Waghorn's report and both were made before the reserve was set. Further, while the deposit required on the sale of an interest in land is often 10 per cent of the purchase price, this is not an invariable rule. It is unlikely to exceed 10 per cent because if it does the legislative provisions relating to instalment contracts are activated. I do not accept that setting a fixed amount for the deposit disclosed that the reserve was or was likely to be $300,000.

[54] Counsel for the plaintiff contended further that bidding was inhibited by the requirement that the deposit be paid by way of bank cheque. That stipulation was clearly made in the advertising material which preceded the sale styled "Property Report." In the auction room a copy of the standard conditions of sale was on display before the auction commenced. It stipulated a deposit of $30,0000 but did not mention the bank cheque requirement. However, I accept that the auctioneer (Mr Rouse) stated the requirement clearly at the commencement of the auction before

bidding began. It was an unusual requirement, but not an unprecedented one, and I consider that it was adequately publicized so as not to inhibit bidding. If Mr Cameron was unaware of it (as he claimed), his ignorance could not be attributed to any impropriety or failure to take reasonable care in the conduct of the auction.

[55] Mr Cameron purported to make the first bid in the sum of $600,000. The auctioneer rejected the bid when he was unable to produce a bank cheque which he would use to pay the deposit if the successful bidder. In fact Mr Cameron's financial position was such that there must be some doubt whether he could have raised the necessary funds to complete a sale at $600,000. It is not necessary for me to determine that question since it is clear from the answers he gave in cross-examination that he had no intention of completing such a sale. He was prepared to bid beyond that amount if necessary. He believed that he could effectively stop a sale by paying the amount of the deposit, and that the total amount he would have to find was that still owing under the mortgage, which was alleged to be about $64,000.

[56] Mr Upton bid $250,000 and was able to produce a bank cheque. The auctioneer called for further bids in rises of $50,000 but received none. He called for further bids in rises of $25,000 but received none. He spoke to Messrs Walters and Bailey. Mr Bailey spoke to Mr Upton. Mrs Upton bid $300,000 and the auctioneer announced that the property was "on the market." There was nothing unusual, improper or careless about such an announcement, even though it may well have signalled to astute bidders that the reserve had been reached. There were no more bids and the property was knocked down to the Uptons.

[57] I conclude that while there was nothing untoward in the actual conduct of the auction, by failing to take reasonable care in setting the reserve for which Mr Cameron's interest was sold, the defendant breached its statutory duty to him.

[58] I invite further submissions on the assessment of damages, and on costs.