

SUPREME COURT OF QUEENSLAND

CITATION: *Rockett v Moneycorp Securities P/L & Anor* [2007] QSC 389

PARTIES: **LYNETTE JOY ROCKETT**
(plaintiff)

v

MONEYCORP SECURITIES PTY LTD ACN 115 414
803

(first defendant)

ZORZAN – 0003 PTY LTD ACN 107 476 004
(second defendant)

FILE NO: BS9525/06

DIVISION: Trial

PROCEEDING: Trial

DELIVERED ON: 20 December 2007

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 17, 18, 19, 20, 23 July 2007

JUDGE: Wilson J

ORDER: **1. It is declared that the Contracts between the plaintiff and the first defendant, dated 5 July 2006, for the sale of units situated at:**

(a) Unit 301, The Sands, 40 The Esplanade, Surfers Paradise and more particularly described as Lot 46, Building Unit Plan 82, County of Ward, Parish of Gilston (“Lot 46”); and

(b) Unit 216, The Sands, 40 The Esplanade, Surfers Paradise and more particularly described as Lot 15, Building Unit Plan 82, County of Ward, Parish of Gilston (“Lot 15”);

are enforceable against the first and second defendants and that they ought to be specifically performed and carried into execution by 4.00pm on Friday 1 February 2008 unless otherwise agreed between the plaintiff and the first defendant.

2. The Caveat no. 709811116 lodged by the second defendant on or about 28 July 2006 and registered on title reference 13929215 in respect of Lot 15 on Building Unit Plan 82, County of Ward, Parish of

Gilston be removed forthwith.

- 3. It is directed that the plaintiff and the first defendant have liberty to apply, on 2 days written notice, for detailed orders for specific performance and any further directions, inquiries or other orders relating to specific performance of either contract.**
- 4. The purchase prices paid by the plaintiff on settlement of those Contracts referred to in Order 1 be applied firstly to the discharge of the first registered mortgage over Lot 46 and Lot 15, with the balance to be held by the first defendant's solicitors, Gladstones, in trust pending the assessment or earlier agreement of the amount of costs payable to the plaintiff pursuant to the following orders.**
- 5. The first defendant pay the plaintiff's costs of the proceedings between the plaintiff and the first defendant up to and including the first day of the trial, such costs to be assessed on the indemnity basis.**
- 6. The first defendant pay the plaintiff's costs thereafter on the standard basis.**
- 7. The second defendant's counterclaim against the plaintiff and the first defendant is dismissed.**
- 8. The second defendant pay the plaintiff's and first defendant's costs of and incidental to that counterclaim, such costs to be assessed on the standard basis.**
- 9. The first defendant pay the plaintiff's costs of and incidental to the application for summary judgment heard 12 March 2007, such costs to be assessed on the standard basis.**
- 10. The second defendant pay the plaintiff's costs of and incidental to the application for summary judgment heard 8 May 2007, such costs to be assessed on the standard basis.**
- 11. The total amount of the plaintiff's costs be a first charge in favour of the plaintiff on each of the balances of the purchase prices paid by the plaintiff to the first defendant at settlement of each contract and held on trust by Gladstones in accordance with Order 4 herein.**

12. The second defendant indemnify the first defendant against costs it is ordered to pay the plaintiff.

13. The second defendant pay the first defendant's costs.

14. The first defendant be at liberty to make an application for costs against Borrugurra Pty Ltd.

CATCHWORDS: MORTGAGES – MORTGAGES AND CHARGES GENERALLY – REMEDIES OF THE MORTGAGEE – SALE UNDER POWER – MODE OF EXERCISE OF POWER – PRICE – the first defendant held a second registered mortgage over two units owned by the second defendant – the second defendant defaulted on the loan, and the first defendant sold the units to the plaintiff in exercise of its power of sale – there was a potential purchaser who would have been willing to pay a premium for the units – conflicting valuation evidence – method of calculation of market value – whether the first defendant breached its duty to the second defendant

MORTGAGES – MORTGAGES AND CHARGES GENERALLY – REMEDIES OF THE MORTGAGOR – REDEMPTION – RIGHT TO REDEEM – TIME FOR – the second defendant paid out the debt owed to the first defendant before completion of the sale of the units to the plaintiff – whether the second defendant still held an equity of redemption

CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL – DUTIES AND LIABILITIES ARISING OUT OF FIDUCIARY CHARACTER OF RELATIONSHIP – the plaintiff was the second defendant's letting agent in relation to the units – the plaintiff held the keys for the units – the plaintiff used the keys to allow the first defendant's agent to inspect the units – in the course of the inspection, the plaintiff discovered the units were for sale and made offers to purchase them – whether the purchase was in breach of the plaintiff's fiduciary duty to the second defendant

PROCEDURE – COSTS – RECOVERY OF COSTS – purchase prices paid by the plaintiff on settlement of contracts to be applied firstly to discharge the first registered mortgage, with balance to be held in trust pending assessment or agreement of amount of costs payable to the plaintiff – the first defendant made concessions in relation to the plaintiff's claim on the first day of the trial – the second defendant's financial position is uncertain – orders as to costs, including an order that the plaintiff hold a charge over the balance of the purchase prices to secure costs payable to her

Property Law Act 1974 (Qld) s 85, s 86

Baypoint Pty Ltd v Baker (1994) 6 BPR 13,687, cited
Birtchnell v Equity Trustees Executors and Agency Co Ltd
 (1929) 42 CLR 384, cited
Boland v Yates Property Corp Pty Ltd (1999) 74 ALJR 209,
 followed
Chan v Zacharia (1983) 154 CLR 178, cited
Chia v Rennie (1997) 8 BPR 15,601, cited
Consul Development Pty Ltd v D P C Estates Pty Ltd (1975)
 132 CLR 373, cited
Dally v Wonham (1863) 33 Beav 154; 55 ER 326, cited
Forsyth v Blundell (1973) 129 CLR 477, cited
Hilton v Barker Booth and Eastwood [2005] 1 All ER 651,
 cited
Hospital Products Limited v United States Surgical
Corporation (1984) 156 CLR 41, cited
Jones v Bouffier (1911) 12 CLR 579, cited
Kelly v Cooper [1993] AC 205, cited
Kentucky Fried Chicken (Kedron) Pty Ltd v Leybourne
 [1972] QWN 21, cited
McKean v Maloney [1988] 1 Qd R 628, cited
R v Registrar of Titles; ex parte Watson [1952] VLR 470,
 cited
Spencer v The Commonwealth (1907) 5 CLR 418, cited
Strother v 3464920 Canada Inc [2007] SCC 24, cited

COUNSEL: H B Fraser QC and A James for the plaintiff
 J W Lee for the first defendant
 J C Faulkner for the second defendant

SOLICITORS: ffrench.commercial lawyers for the plaintiff
 Gladstones for the first defendant
 HW Litigation for the second defendant

- [1] **Wilson J:** The second defendant is registered as the owner of two home units in The Sands, a 40 year old complex of 99 units at Surfers Paradise. The first defendant, as registered second mortgagee of the properties, entered into contracts to sell them to the plaintiff.
- [2] In this proceeding the plaintiff claims against the first defendant specific performance of the contracts and other relief, and against the second defendant an order for removal of a caveat over one of the properties. Shortly before the trial commenced, the first defendant conceded that the contracts are valid and ought be specifically performed.¹ The second defendant counterclaims against the plaintiff for a declaration that it validly redeemed the mortgage, an injunction restraining completion of the contracts, an order that the plaintiff account for rental receipts, and damages pursuant to s 130 of the *Land Title Act 1994 (Qld)* for the lodgement

¹ The plaintiff's claim against the second defendant for damages for inducing breach of contract was not pursued in view of the first defendant's concession.

and/or maintenance of caveats, and against the second defendant damages for breach of duties in exercising its power of sale.²

The facts

- [3] At all material times Mr Pavi Uchino has been the sole director of the second defendant. He (or entities in which he held interests) held investments in a number of properties. In 2005 and 2006 he was in financial difficulties and endeavouring to cope with the emotional and financial consequences of the breakdown of his longstanding de facto relationship with Tracy Evans.
- [4] The second defendant was registered as owner of units 301 and 216 in The Sands (lots 46 and 15 in BUP 82 in the County of Ward Parish of Gilston). There was a first registered mortgage over the properties in favour of Wide Bay Australia Ltd. Unit 301 (a two bedroom apartment) was a holiday rental property and unit 216 (a one bedroom apartment) was permanently let. The plaintiff held the management rights to the building; she lived in the manager's unit and occupied adjoining office space.³ She was also the second defendant's letting agent in respect of units 301 and 216.⁴ She had an interest in 13 units in the complex.⁵
- [5] Wayne Sultan was a finance broker who introduced Mr Uchino to Gary Fabian, one of the directors of the first defendant. On 23 March 2006 the second defendant executed a second mortgage over the properties in favour of the first defendant.⁶ It secured the principal sum of \$100,000 which was repayable two months from the date of the mortgage. Interest was payable at the rate of 6 per cent per month, or 10 per cent per month in the event of default. Time was expressed to be of the essence "[w]ith regard to the payment of any moneys or the doing of any act or thing".
- [6] The second defendant defaulted in repayment of the principal sum on 23 May 2006. On 29 May 2006 –
- (a) the first defendant faxed Mr Uchino a notice of default;⁷
- (b) the first defendant's solicitors wrote to Mr Uchino in these terms –

“We advise that Zorzan Pty Ltd has defaulted under the terms of the mortgage in that it has failed to pay the sum of \$100,000.00 as required under the Bill of Mortgage on 23rd May 2006 and the additional interest.

We enclose a copy of the Notice of Exercise of Power of Sale dated 29 May 2006.

Our client now calls on you to make good the default of Zorzan Pty Ltd by paying them the sum of \$100,000 within 30 days together

² Before trial the first defendant wished to join Ms Tracy Evans and Mr Pavi Uchino as third parties. It failed to obtain the necessary leave of the Court, and so those claims were not litigated. See transcript of the trial, pp 67-74.

³ Transcript of the trial, p 327.

⁴ Second defendant's counterclaim, [2]; plaintiff's amended answer, [1].

⁵ Exhibit 68; transcript of the trial, p 328.

⁶ Exhibit 3 (at p 505 of the trial bundle).

⁷ Exhibit 9.

with all interest due to the date of payment accruing at the rate of \$328.77 each day from 23 May 2006 plus the mortgagee's additional legal costs.

Should you require further information, please do not hesitate to contact us.”⁸

- (c) the first defendant's solicitors issued a Notice of Exercise of Power of Sale to the second defendant stating that there had been default under the mortgage in that –

- “(a) the scheduled loan payout for the principal sum of \$100,000.00 then due and owing was not paid by 23 May 2006;
- (b) pursuant to clause 7(b)(ii) of the mortgage which requires you to pay the interest on the loan in advance for two months calculated at the higher interest rate specified for the period from the date of the advance to the date [of] repayment of all monies due and payable under the loan agreement has not been observed or performed”

and continuing –

“AND further take notice that, unless within 30 days of service upon you of this notice the default is remedied, the mortgagee may proceed to sell the land and exercise all or any of the other powers conferred by the mortgage and by the *Property Law Act 1974*.”⁹

- [7] The first defendant maintained the pressure on the second defendant. Meanwhile Mr Ucchino was trying to reach a property settlement with Ms Evans – a matter to which I shall return shortly. Early on the morning of 28 June 2006 Mr Ucchino emailed Mr Fabian essentially wanting more time to arrange his affairs. Mr Fabian replied –

“As of today the payout figure for the second mortgage is \$112,715.72 with interest accruing at the rate of \$328.77 per day.

The notice to rectify expires tomorrow Thursday 29th June and I will have no choice at that stage but to put the units up for sale as mortgagee-in-possession.

You must understand that my position is second behind Wide Bay and that doesn't give me any other choice.

In the meantime, you can still refinance and pay us out prior to a sale being secured.

⁸ Exhibit 49 (at p 17 of the trial bundle).

⁹ Exhibit 50 (at pp 18-19 of the trial bundle) (emphasis in original).

I will talk with Chris today and give him whatever info he requires and will not discuss this matter with Wayne as you've requested.

If you want to talk about this matter feel free to call me on [mobile phone number]."¹⁰

- [8] In the week leading up to Friday 30 June 2006 Mr Fabian had a meeting with Patrick Jones, a real estate agent employed by PRD Realty, Surfers Paradise who specialised in marketing and selling high rise units in the Main Beach to Broadbeach area.¹¹ He told Mr Jones that he was the mortgagee in possession of the units; that he wished to obtain an appraisal and to put the units on the market.
- [9] On Friday 30 June 2006 Mr Fabian faxed Mr Jones signed forms appointing PRD Realty Pty Ltd as agent to sell the properties. They were open listings. The covering message reminded Mr Jones "to fax or email a market sales estimation for both units after you have inspected."¹²
- [10] That afternoon Mr Jones went to The Sands unannounced. He met the plaintiff at the reception and told her he was there to do an appraisal of units 301 and 216 for the mortgagee in possession. At some stage during the inspection of the units, Mr Jones made a phone call to Mr Fabian. I infer that he told Mr Fabian at what sums he appraised the units. Mr Jones then told the plaintiff that the units were on the market. The plaintiff made an oral offer to purchase the units for \$550,000 (\$360,000 for unit 301 and \$190,000 for unit 216). There was a further telephone conversation between Mr Jones and Mr Fabian. Mr Fabian would not accept the offer because it was less than the appraisals.¹³ When Mr Jones told the plaintiff that the offer was rejected, she increased it to \$556,000 by way of a written letter of offer (in a form which Mr Jones had had faxed from his office), subject to finance.¹⁴
- [11] Mr Jones returned to his office. He had letters of appraisal prepared that afternoon, in which he said that unit 301 "should sell in the range of \$360,000 - \$370,000" and that unit 216 "should sell in the range of \$190,000 - \$200,000".¹⁵ The letters were faxed to Mr Fabian on Monday 3 July 2006. He also sent Mr Fabian letters dated 3 July 2006 acknowledging PRD's appointment to market the properties under open listing.¹⁶
- [12] By contracts dated 5 July 2006 the first defendant and plaintiff agreed to the sale and purchase of the units for a total of \$560,000 (\$360,000 for unit 301 and \$200,000 for unit 216).¹⁷ Those are the contracts of which the plaintiff seeks specific performance.
- [13] When he became aware of the contracts, Mr Uchino disputed their validity – a matter to which I shall return.¹⁸

¹⁰ Exhibit 34 (at p 33 of the trial bundle).

¹¹ Transcript of the trial, pp 304, 306.

¹² Exhibit 63 (at pp 35-56 of the trial bundle).

¹³ Transcript of the trial, p 229.

¹⁴ Exhibit 56 (at p 59 of the trial bundle); transcript of the trial, pp 229, 278, 309-310, 333-337.

¹⁵ Exhibits 51, 52 (at pp 57-58 of the trial bundle).

¹⁶ Exhibits 54, 55 (at pp 60-61 of the trial bundle).

¹⁷ Exhibits 5, 4 (at pp 206-228, 230-248 of the trial bundle).

¹⁸ Exhibit 38 (at pp 89-91 of the trial bundle).

- [14] On 28 July 2006 the second defendant lodged a caveat against dealings with unit 216.¹⁹
- [15] On 18 August 2006 Mr Uchino and the second defendant borrowed \$160,000 from Rajan Bros Pty Ltd, and paid the first defendant the amount then owing to it.²⁰ The first defendant gave the second defendant a Release of Mortgage,²¹ which has not been registered.
- [16] On 28 August 2006 the plaintiff lodged caveats against dealings with both units.²²

Market value?

- [17] Section 85(1) of the *Property Law Act 1974* provides –

“85 Duty of mortgagee as to sale price

- (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.”

- [18] The second defendant alleges that “the reasonable market value” of the two units was \$1,000,000 or alternatively \$725,000,²³ and that in agreeing to sell them for \$560,000 the first defendant breached its duty under s 85 (inter alia).
- [19] In *Boland v Yates Property Corp Pty Ltd*²⁴ the High Court said –

“It was common ground that the starting point for the determination of the value of land was the principle stated in *Spencer v The Commonwealth*,²⁵ that is to say, to consider, from the point of view of persons conversant with the subject at the relevant time, what, according to then current opinion of land values, a willing but not anxious purchaser would have to offer to induce a not unwilling vendor to sell the land. That is the market value.”

- [20] When Mr Uchino approached the first defendant for finance in March 2006, he produced appraisals of the properties by Malcolm Catchpole of Surfers International Realty.²⁶ They were in these terms –

Unit 216: “We would suggest an asking price of \$245,000 for your unit 216 The Sands. This allows some room for negotiation”

Unit 301: “We confirm we have inspected the above unit and in our opinion we would suggest an asking price of \$459,000

¹⁹ Exhibit 2 (at p 547 of the trial bundle).

²⁰ Transcript of the trial, p 75; exhibits 22, 26 (at pp 293-295, 514-530 of the trial bundle).

²¹ Exhibit 64 (at p 513 of the trial bundle).

²² Exhibits 1, 2 (at pp 546-547 of the trial bundle).

²³ Second defendant’s counterclaim, [13.4].

²⁴ (1999) 74 ALJR 209, [15].

²⁵ (1907) 5 CLR 418 at 432.

²⁶ Exhibits 44, 45 (at pp 4, 5 of the trial bundle).

On the current market a fair selling price would be between \$430,000 and \$450,000.”

Mr Fabian and Jack Sykes (the co-director of the first defendant) were both licensed real estate agents and experienced players in the Gold Coast property market, who were in the business of providing fast bridging finance at high interest rates. They decided to lend Mr Uchino the \$100,000 for two months after making their own inquiries about the value of the units offered as security.²⁷ I am satisfied that they did not lend on the basis of Surfers International Realty’s assessments, which they believed to be in excess of the market value.

- [21] The first defendant had the benefit of Mr Jones’ appraisals and the collective experience of Mr Fabian and Mr Sykes in assessing the risks it faced in exercising its power of sale. Mr Fabian said he had “a vested interest” in ensuring that the first mortgagee and the first defendant were paid out and that “Paul Uchino got some money back that was commensurate with the value of the properties”²⁸ – which I take to mean that he was cognisant of the first defendant’s duty under s 85 of the *Property Law Act*. He did not seek the opinion of a valuer as to the market value of the units. The units had not been advertised for sale or marketed in any other way. An auction would take some weeks to organise; there would be associated costs, and the risk of not achieving prices as high as the plaintiff was prepared to pay. Meanwhile default interest was accruing on the first defendant’s mortgage at \$10,000 per month.²⁹ The first defendant could properly be described as “a not unwilling vendor”.
- [22] The plaintiff was herself knowledgeable and experienced in the sale of units at Surfers Paradise, and in particular The Sands.³⁰ I accept that she was interested in acquiring more units as long term investments for her children.³¹ And I accept that she was not prepared to pay more than \$560,000, because she did not believe the units were worth any more than that.³² She was the archetypal willing but not anxious purchaser.
- [23] When Mr Uchino became aware of the contracts between the first defendant and the plaintiff, he challenged their validity, asserting that there were earlier contracts to sell the units to Ms Evans, and that the units (or at least unit 216) had been sold at an undervalue.³³ As I am about to explain, I am satisfied –
- (a) that the only earlier contract was one made on 10 March 2006 for the sale of unit 216 for \$245,000; and
 - (b) that the purchase price under that contract did not reflect the market value of unit 216.

²⁷ Transcript of the trial, pp 264, 267-269, 285; exhibit 48 (at p 7 of the trial bundle).

²⁸ Transcript of the trial, p 284.

²⁹ Transcript of the trial, pp 227, 232.

³⁰ Transcript of the trial, pp 346-347.

³¹ Transcript of the trial, p 349.

³² Transcript of the trial, pp 337, 346.

³³ Exhibits 38 (at pp 89-91 of the trial bundle), 43.

[24] In March 2006 Mr Ucchino was under considerable financial and emotional pressure. He gave evidence of three contracts between him and Ms Evans having been made on 10 March 2006 –

- (a) a contract for the sale of unit 216 for \$245,000;³⁴
- (b) a contract for the sale of unit 216 for \$350,000;³⁵
- (c) a contract for the sale of unit 301 for \$375,000.³⁶

He said that they had discussions in the morning about their property settlement. They resulted in the execution of the contract to sell unit 216 for \$245,000. Later that day they had a big argument, and in order to satisfy Ms Evans the further contracts for the sale of unit 216 for \$350,000 and unit 301 for \$375,000 (which he said was worth \$450,000 to \$460,000) were executed.³⁷

[25] On the contract to sell unit 216 for \$245,000 Andrew Carroll of Frank Carroll Solicitors was shown as both the seller's solicitor and the buyer's solicitor. On the other two contracts Reardon & Associates were shown as the seller's solicitors and Davis Lawyers were shown as the buyer's solicitors. There is evidence that Frank Carroll Solicitors acted for Mr Ucchino in his endeavours to transfer lot 216 to Ms Evans at least until the end of May.³⁸ Apart from Mr Ucchino's assertions³⁹ there is no evidence that Reardon & Associates commenced to act for him in relation to these units before 7 July 2006, and the contracts to sell unit 216 for \$350,000 and unit 301 for \$375,000 were not on Reardon & Associates' file.⁴⁰ On 22 July 2006 Mr Ucchino faxed a copy of the contract to sell unit 216 for \$245,000 to Reardon & Associates.⁴¹

[26] There was another contract purportedly made on 16 June 2006 by which the first defendant sold unit 301 to Ms Evans for \$380,000.⁴² On it, too, Reardon & Associates were shown as the seller's solicitors and Davis Lawyers as the buyer's solicitors. But Mr Ucchino did not fax that to Reardon & Associates until 10 July 2006.⁴³

[27] Mr Ucchino was an unreliable, indeed dishonest, witness in other respects. For example, he signed a loan application, which was witnessed by Mr Fabian.⁴⁴ I accept the evidence of Mr Fabian that Mr Ucchino and Mr Sultan attended a meeting, that Mr Ucchino produced various documents including rates notices and the appraisals from Surfers International Realty, and that Mr Fabian asked him a series of questions and used his responses to fill out the form before giving it to Mr Ucchino to sign.⁴⁵ In the section headed "Security Property" the value of unit 216

³⁴ Exhibit 19 (at pp 185-186 of the trial bundle).

³⁵ Exhibit 18 (at pp 183-184 of the trial bundle).

³⁶ Exhibit 17 (at pp 176-182 of the trial bundle).

³⁷ Transcript of the trial, pp 51-53.

³⁸ See exhibit 33 (an email dated 25 May 2006); exhibit 41 (a settlement notice dated 31 May 2006); transcript of the trial, pp 115-117.

³⁹ Transcript of the trial, pp 117, 128-131.

⁴⁰ Exhibit 40; transcript of the trial, p 295.

⁴¹ Exhibit 43; transcript of the trial, p 135.

⁴² Exhibit 20 (at pp 199-201 of the trial bundle).

⁴³ Transcript of the trial, pp 119-120.

⁴⁴ Exhibit 7 (at pp 8-12 of the trial bundle).

⁴⁵ Transcript of the trial, pp 108-109, 203-208, 254.

(lot 15) was shown as “\$245K” and the value of unit 301 (lot 46) as “\$440K”. In cross examination Mr Uchino denied supplying these figures based on the Surfers International Realty appraisals.⁴⁶ His evidence was inherently improbable. Mr Fabian, by contrast, impressed me as tough but honest, and I accept his version.

- [28] There was conflict, too, between evidence of Mr Uchino and that of the plaintiff. He claimed to have informed her of his personal and financial problems on several occasions in the period from November 2005 to 10 March 2006,⁴⁷ but she denied this.⁴⁸ I prefer the plaintiff’s evidence.
- [29] In short, I do not accept Mr Uchino’s evidence about the existence of other contracts apart from the one to sell unit 216 for \$245,000. Given that it was executed in the course of protracted negotiations to reach a property settlement with Ms Evans, it cannot be described as one made between a willing but not anxious purchaser and a not unwilling vendor. It is not evidence of the market value of the unit.
- [30] Three valuers gave evidence at trial. Their opinions of the market value of the units can be summarised as follows –

VALUER	CALLED BY	DATE AT WHICH VALUED	UNIT 216	UNIT 301
L J Hamilton (Taylor Byrne)	Plaintiff	5 July 2006	\$225,000	\$400,000 ⁴⁹
R C Zaplin (VPC United)	First Defendant	13 July 2006	\$199,500	\$359,500 ⁵⁰
B Conroy (Bevan Conroy & Associates)	Second Defendant	10 July 2006	\$350,000	\$375,000 ⁵¹

- [31] On 28 June 2006 Mr Conroy was retained by Mr Uchino on behalf of the second defendant and Ms Evans to value the units for mortgage security purposes.⁵² He said he inspected the units,⁵³ obtained information from the Building Units Plan, and had reference to what he regarded to be comparable sales. He was unimpressive as a witness and I reject his evidence for several reasons. There were serious errors in his description of unit 216, which was a one bedroom unit. He took the floor area from the plan, and multiplied it by a rate per square metre. In one place he described unit 216 as a two bedroom unit while in another he described it as having one bedroom. The value he assigned to that unit was calculated at the rate he considered applicable to a two bedroom unit (which was higher than that he considered applicable to a one bedroom unit). His listings of PC items and fixtures

⁴⁶ Transcript of the trial, pp 89-90.

⁴⁷ Transcript of the trial, pp 55, 137.

⁴⁸ Transcript of the trial, pp 331.

⁴⁹ Exhibit 67.

⁵⁰ Exhibits 58, 59 (at pp 493-504 of the trial bundle).

⁵¹ Exhibits 23, 24, 25 (at pp 421-492 of the trial bundle).

⁵² Exhibit 25 (at pp 488-492 of the trial bundle); transcript of the trial, pp 185-186, 188.

⁵³ Transcript of the trial, p 163.

and fittings in the units and improvements to the common areas were wrong in several respects.⁵⁴ Other sales he relied on were not truly comparable, and did not include any in The Sands because he perceived lenders to prefer valuers not to use sales within the same complex if others were available.⁵⁵ He clearly regarded a valuation for mortgage security purposes as requiring less work and as less remunerative than a valuation prepared for use in Court.⁵⁶ Before he did the valuations, he was supplied with copies of contracts between the second defendant as vendor and Ms Evans as purchaser of unit 216 for \$350,000 and unit 301 for \$375,000.⁵⁷ His valuations matched those in the contracts, and I found his explanation that he would have valued unit 301 at a higher figure, possibly around \$425,000, but for the lender's standing instruction to write a valuation at the contract price where he considered the value to be in excess of that price disingenuous.⁵⁸

- [32] The first defendant instructed Mr Zaplin to assess the market value of the units for mortgage purposes.⁵⁹ I accept his evidence that although he had access to the contracts between the first defendant and the plaintiff,⁶⁰ his valuations were in fact based on comparable sales. Mr Hamilton was instructed to assess their market value for the purpose of the litigation,⁶¹ and he, too, proceeded to do so on the basis of comparable sales.
- [33] In cross-examination it was put to both Mr Zaplin and Mr Hamilton that they had erred in not taking into account the potential interest of a company, Borrugurra Pty Ltd, in purchasing the units. Over the preceding three years Borrugurra had acquired about 30 units in the complex, and was interested in acquiring more with a view to amalgamating the site and redeveloping it.⁶²
- [34] Kevin John White gave evidence of having owned unit 314, a one bedroom unit in the same Orchid Avenue wing of The Sands as unit 216, which he sold to Borrugurra for \$250,000 in November 2006. A couple of years before that, he had told the plaintiff that he was thinking of selling; she had shown some interest, but after he had named his price as \$180,000 she had not shown any more interest.⁶³
- [35] William Hammond ("Billy") James on behalf of Borrugurra had outbid the plaintiff at an auction of unit 801 in May 2005.⁶⁴
- [36] I am satisfied by the evidence of Mr James, an experienced real estate agent who acted for Borrugurra as an agent to purchase various investment properties,⁶⁵ that had the company been aware units 216 and 301 were available for sale, it would have been keen to acquire them, and while it would have paid a premium if

⁵⁴ Exhibit 23 (at pp 421-453 of the trial bundle), pp 6-7; exhibit 24 (at pp 454-487 of the trial bundle), pp 6-7; exhibit 72 (admissions by the second defendant).

⁵⁵ Transcript of the trial, pp 168-169.

⁵⁶ Transcript of the trial, p 173.

⁵⁷ Transcript of the trial, p 186; exhibit 25 (at pp 488-492 of the trial bundle).

⁵⁸ Transcript of the trial, p 187.

⁵⁹ Exhibits 58, 59 (at pp 493-504 of the trial bundle).

⁶⁰ Transcript of the trial, pp 237, 245.

⁶¹ Exhibit 67.

⁶² Transcript of the trial, p 141.

⁶³ Transcript of the trial, pp 315-316.

⁶⁴ Transcript of the trial, pp 141-142, 343.

⁶⁵ Transcript of the trial, p 139.

necessary,⁶⁶ it would not have paid any more than it had to.⁶⁷ In January 2007 Borrugurra entered into contracts with the second defendant for the acquisition of the units on terms in excess of their market value because it wanted to amalgamate the site.⁶⁸ By those contracts it agreed to pay \$185,200 for a half interest in unit 216 and \$483,172.50 for a half interest in unit 301, with the other half interests being the subject of buyer's call options not expiring until 2019 followed by seller's put options.⁶⁹ There was no evidence of the present net value of the put and call options.

[37] Mr Hamilton and Mr Zaplin both considered that Borrugurra's special interest in acquiring units in the building was not relevant to the assessment of market value.⁷⁰ Their valuations were based on sales of comparable units in the general area, not just in The Sands. Mr Zaplin described Borrugurra as being at the end of the day in a market of its own,⁷¹ and Mr Hamilton described is as distorting values in The Sands.⁷² In my view senior counsel for the plaintiff's description of Borrugurra as an anxious purchaser, and not just a willing one,⁷³ is correct, and for that reason the valuations of Mr Zaplin and Mr Hamilton are not flawed by their failure to take Borrugurra's interest into account.

[38] Although the plaintiff knew of Borrugurra's interest in acquiring more units in the complex, she did not reveal it.⁷⁴ The first defendant was not alleged to have had actual or constructive knowledge of Borrugurra's interest.⁷⁵

[39] In all the circumstances I conclude that the first defendant took reasonable care to ensure that the units were sold at market value and that the contracts made between the plaintiff and the first defendant reflected their market value.

No evidence that the first defendant acted in bad faith

[40] There is no evidence that in exercising its power of sale the first defendant acted in bad faith or in collusion with the plaintiff.

Did the plaintiff act in breach of fiduciary duty owed to second defendant?

[41] The second defendant contended that the plaintiff owed it a fiduciary duty by virtue of the letting agreement,⁷⁶ which she breached by entering into the contracts without its fully informed consent.⁷⁷ It did not articulate the scope of the duty. The plaintiff admitted that she owed the second defendant a fiduciary duty, but contended that it was limited in its scope to matters pertaining to the letting of the units.⁷⁸

⁶⁶ Transcript of the trial, p 151.

⁶⁷ Transcript of the trial, p 152.

⁶⁸ Transcript of the trial, pp 153, 156.

⁶⁹ Exhibits 28-31.

⁷⁰ Transcript of the trial, pp 319 et seq, 240 et seq.

⁷¹ Transcript of the trial, p 241.

⁷² Transcript of the trial, pp 319-320.

⁷³ Transcript of the trial, p 371.

⁷⁴ Transcript of the trial, pp 140, 328.

⁷⁵ Transcript of the trial, pp 44-45, 418-419.

⁷⁶ Second defendant's counterclaim, [3].

⁷⁷ Second defendant's counterclaim, [10.2]; second defendant's written submissions, [34]-[37], [41].

⁷⁸ Plaintiff's amended answer, [2], [12].

- [42] The plaintiff admitted that she was the second defendant's letting agent,⁷⁹ although the written letting agreements which went into evidence were actually made with a company controlled by her, The Sands Gold Coast Pty Ltd.⁸⁰ No point was taken about this, and the argument proceeded on the basis that the letting agreements were in terms of the documents.
- [43] The scope of the fiduciary duty depends on the nature of the relationship between the plaintiff and the second defendant and the course of dealing between them.⁸¹ The plaintiff's obligations related only to the letting of the units: she was not engaged to sell them.⁸² Her obligations in relation to unit 301 involved accounting for rent collected; inspecting the property (at least every six months); and changing the linen and cleaning. In relation to unit 216 she was obliged to account for all moneys received; and notify the second defendant of certain repairs and of the unit becoming vacant. Her contractual obligations were expressly limited to those in the written agreements. She held keys for the units, and was responsible for providing access to them.⁸³
- [44] There are three possibly relevant formulations of the fiduciary duty –
- (a) disclosure: that the principal should have the benefit of all the fiduciary's knowledge of the property;⁸⁴
 - (b) confidence: that a fiduciary may not use, for his or her own advantage, information or knowledge about the property acquired as a result of confidential dealing with it for the principal's benefit;⁸⁵
 - (c) opportunity: that a fiduciary is liable to account for personal benefit or profit gained through an opportunity which arose because of the fiduciary relationship.⁸⁶

⁷⁹ Second defendant's counterclaim, [2]; plaintiff's amended answer, [1].

⁸⁰ Exhibits 11 and 12 (at pp 156-175 of the trial bundle).

⁸¹ *Birchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384, 409; *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, 102 (Mason J). See also 156 CLR 41, 97 ("The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them."). See also *Chan v Zacharia* (1983) 154 CLR 178, 195 (Deane J); *Kelly v Cooper* [1993] AC 205, 215; *Hilton v Barker Booth and Eastwood* [2005] 1 All ER 651, 661; R Meagher, D Heydon & M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, 2002) [5-010], [5-070], [5-075], [5-180], [5-205] and citations; P D Finn, 'The Fiduciary Principle' in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989) 5, 31. See also *Strother v 3464920 Canada Inc* [2007] SCC 24, [39], [141], and discussion of the case by Ross Buckley, 'Solicitors' Conflicts of Interest and the Wider Fiduciary Question' (2007) 81 ALJ 722 and Keith Fletcher, 'Partnership: Breach of Fiduciary Duty and Remedies' (2007) 81 ALJ 740. If this were not the case, the court would be free to effectively rewrite the parties' agreement, by implying duties far beyond those agreed between them: see (2007) 81 ALJ 722, 724.

⁸² Transcript of the trial, pp 136, 329; exhibits 11 and 12 (at pp 156-175 of the trial bundle). Note that although exhibit 11 purports to appoint the plaintiff as agent for sale as well as management, it was common ground that the plaintiff was never appointed as agent for sale: transcript of the trial, p 375.

⁸³ Transcript of the trial, pp 354-356.

⁸⁴ *Dally v Wonham* (1863) 33 Beav 154; 55 ER 326, 328. See also P D Finn, *Fiduciary Obligations* (1977) [405].

⁸⁵ *Jones v Bouffier* (1911) 12 CLR 579, 613-615 (Isaacs J). See also P D Finn, *Fiduciary Obligations* (1977) [392].

⁸⁶ *Chan v Zacharia* (1983) 154 CLR 178, 198, 204; R Meagher, D Heydon & M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, 2002) [5-045], [5-105].

The rationale of the duty is to maintain the utility and integrity of relationships based on loyalty and trust.⁸⁷ In commercial arrangements such as these, the fiduciary will be permitted to act in his or her own self-interest in some circumstances.⁸⁸

- [45] Even if it was in the course her duties as letting agent that the plaintiff learnt of the opportunity to purchase the units, in my view the fiduciary duty she owed the second defendant did not preclude her from purchasing the units without the second defendant's consent. Her contractual duties were limited, and scarcely enlarged by the course of conduct. Nor were those duties relevantly enlarged by provisions of the *Property Agents and Motor Dealers (Restricted Letting Agency Practice Code of Conduct) Regulation 2001* (Qld). I am unpersuaded that she had any relevant superior knowledge of the properties or that she was in a position of ascendancy over Mr Uchino. He was an active member of the body corporate having recently been its chairman.⁸⁹ He conceded that he had had to relinquish that position because of non-payment of arrears of body corporate dues. Otherwise I accept that the plaintiff had no knowledge that he was in financial difficulties.
- [46] In any event, I am satisfied that she did not take advantage of any knowledge she had acquired as letting agent to purchase the units for less than their market value. While she knew of Borrugurra's interest in purchasing more units in the complex, the prices she paid were in accordance with the market value of the units.
- [47] Counsel for the second defendant submitted that when Mr Jones entered the units, the first defendant was not in possession of them as mortgagee, and that the plaintiff breached the letting agreements in letting him in, so aggravating her conduct.⁹⁰ It was not until 15 July 2006 that the second defendant had any contact with Mr Fabian,⁹¹ and on 19 July 2006 she received a fax from the first defendant confirming that it was the mortgagee in possession, that it had been so since 29 June 2006 and directing her to pay rents into a bank account in its name.⁹²
- [48] I accept the submission of counsel for the plaintiff that it is irrelevant whether or not the first defendant had taken possession, as it was entitled to exercise its power of sale without doing so.⁹³ Be that as it may, in requiring the second defendant, by its agent the plaintiff, to let Mr Jones into the units, the first defendant took possession. See s 78 of the *Land Title Act*, as to the ways in which possession may be obtained.

Equity of redemption

- [49] Counsel for the second defendant submitted –
- (a) that the second defendant had rectified any default under the mortgage by its payment to the first defendant on 18 August 2006;

⁸⁷ *Chan v Zacharia* (1983) 154 CLR 178, 198 (Deane J); *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, 103 (Mason J); *Consul Development Pty Ltd v D P C Estates Pty Ltd* (1975) 132 CLR 373, 393 (Gibbs J). See also P D Finn, 'The Fiduciary Principle' in T G Youden (ed), *Equity, Fiduciaries and Trusts* (1989) 27.

⁸⁸ *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, 102 (Mason J).

⁸⁹ Transcript of the trial, p 49.

⁹⁰ Second defendant's written submissions, [44]-[49].

⁹¹ Transcript of the trial, pp 339-340.

⁹² Exhibit 60 (at p 77 of the trial bundle).

⁹³ Plaintiff's written submissions, [79]; transcript of the trial, p 376.

- (b) that the second defendant had thereby exercised its right to redeem – that is, to have the properties freed from the mortgage; and
- (c) that the first defendant could no longer complete the contracts with the plaintiff.⁹⁴

[50] There are several reasons why I think this submission is wrong in law and must be rejected.

[51] The second defendant has paid out the debt it owed the first defendant, but the properties have not been released from the mortgage, as the release has not been registered.⁹⁵

[52] A contract made by a mortgagee in exercise of its power of sale is binding on the mortgagor unless it is made in bad faith.⁹⁶ Once a valid contract of sale is entered into by the mortgagee, the mortgagor's right to redeem is extinguished.⁹⁷ The mortgagee has power to transfer the land (subject to any prior registered encumbrance).⁹⁸

[53] Neither the first defendant nor the plaintiff acted in bad faith, and there was no collusion between them.⁹⁹

Specific performance

[54] The plaintiff is entitled to an order that the first defendant specifically perform the contracts.

Removal of caveat

[55] The plaintiff is entitled to an order against the second defendant for the removal of its caveat against dealings with unit 216.

Second defendant's counterclaim against the plaintiff and the first defendant for an injunction

[56] The second defendant's claim for an injunction to restrain completion of the contracts should be dismissed.

Second defendant's counterclaim for rent

[57] The second defendant counterclaims against the plaintiff for rent received between September and November 2006 as damages for breach of the letting agreements.¹⁰⁰

[58] This claim is without foundation for several reasons. First, because the first defendant validly exercised its power of sale on 5 July 2006, the second defendant has no right to receive the rents. Further, the first defendant became entitled to the

⁹⁴ Second defendant's written submissions, [12], [20]-[33].

⁹⁵ *Land Title Act*, s 81(3).

⁹⁶ *Forsyth v Blundell* (1973) 129 CLR 477, 499; *McKean v Maloney* [1988] 1 Qd R 628, 636.

⁹⁷ *R v Registrar of Titles; ex parte Watson* [1952] VLR 470, 476-477; *Baypoint Pty Ltd v Baker* (1994) 6 BPR 13,687; *Chia v Rennie* (1997) 8 BPR 15,601.

⁹⁸ *Property Law Act 1974*, s 86.

⁹⁹ cf *Forsyth v Blundell* (1973) 129 CLR 477.

¹⁰⁰ Second defendant's counterclaim, [2]-[4].

rents when it went into possession – which was either on 30 June 2006 or at the latest on 19 July 2006 when the first defendant directed the plaintiff to pay the rents into a bank account in its name.

Second defendant’s counterclaim against plaintiff for wrongful lodgement of caveats

- [59] The second defendant alleges that the plaintiff lodged her caveats and/or continued them without reasonable cause, and seeks damages pursuant to s 130 of the *Land Title Act*.
- [60] There is no evidence that the plaintiff lodged the caveats without reasonable cause. This claim should be dismissed.

Second defendant’s counterclaim against first defendant for damages

- [61] The second defendant’s claim against the first defendant for damages for breach of duty as mortgagee in possession should be dismissed.

Costs

- [62] The plaintiff and the first defendant agreed that the plaintiff should have her costs against the first defendant on the indemnity basis until the first defendant conceded that there should be an order for specific performance on the first day of trial.¹⁰¹ There should be an order to that effect.
- [63] The plaintiff sought her costs thereafter on the standard basis. She sought those costs against the first defendant, but the first defendant contended that they should be paid by the second defendant.¹⁰² I agree with the plaintiff’s submission.
- [64] The first defendant contended that the second defendant should be ordered –
- (a) to indemnify the first defendant against costs it is ordered to pay the plaintiff; and
 - (b) to pay the first defendant’s costs.

I agree.

- [65] Counsel for the plaintiff submitted that, given the parlous financial position of the second defendant, the purchase moneys should be paid into the trust account of the first defendant’s solicitors, and that, after the first mortgagee is paid out, she should be entitled to have her costs paid out of that fund.¹⁰³ I agree, and there should be an order to that effect.
- [66] Further, counsel for the first defendant foreshadowed an application against Borrugurra (which funded the second defendant in the litigation¹⁰⁴) that it pay these

¹⁰¹ Transcript of the trial, pp 363-364.

¹⁰² Transcript of the trial, p 364.

¹⁰³ See *Kentucky Fried Chicken (Kedron) Pty Ltd v Leybourne* [1972] QWN 21 and the transcript of the trial, pp 379-380.

¹⁰⁴ Transcript of the trial, p 125.

costs to the extent they are not recovered from the second defendant.¹⁰⁵ Borrugurra would have to be given an opportunity to be heard on such an application.

[67] I shall ask counsel to try to reach agreement on the form of the orders.

Orders

[68] After hearing counsel, I order that –

1. It is declared that the Contracts between the plaintiff and the first defendant, dated 5 July 2006, for the sale of units situated at:

- (a) Unit 301, The Sands, 40 The Esplanade, Surfers Paradise and more particularly described as Lot 46, Building Unit Plan 82, County of Ward, Parish of Gilston (“Lot 46”); and
- (b) Unit 216, The Sands, 40 The Esplanade, Surfers Paradise and more particularly described as Lot 15, Building Unit Plan 82, County of Ward, Parish of Gilston (“Lot 15”);

are enforceable against the first and second defendants and that they ought to be specifically performed and carried into execution by 4.00pm on Friday 1 February 2008 unless otherwise agreed between the plaintiff and the first defendant.

- 2. The Caveat no. 709811116 lodged by the second defendant on or about 28 July 2006 and registered on title reference 13929215 in respect of Lot 15 on Building Unit Plan 82, County of Ward, Parish of Gilston be removed forthwith.
- 3. It is directed that the plaintiff and the first defendant have liberty to apply, on 2 days written notice, for detailed orders for specific performance and any further directions, inquiries or other orders relating to specific performance of either contract.
- 4. The purchase prices paid by the plaintiff on settlement of those Contracts referred to in Order 1 be applied firstly to the discharge of the first registered mortgage over Lot 46 and Lot 15, with the balance to be held by the first defendant’s solicitors, Gladstones, in trust pending the assessment or earlier agreement of the amount of costs payable to the plaintiff pursuant to the following orders.
- 5. The first defendant pay the plaintiff’s costs of the proceedings between the plaintiff and the first defendant up to and including the first day of the trial, such costs to be assessed on the indemnity basis.
- 6. The first defendant pay the plaintiff’s costs thereafter on the standard basis.
- 7. The second defendant’s counterclaim against the plaintiff and the first defendant is dismissed.

¹⁰⁵ Transcript of the trial, p 389.

8. The second defendant pay the plaintiff's and first defendant's costs of and incidental to that counterclaim, such costs to be assessed on the standard basis.
9. The first defendant pay the plaintiff's costs of and incidental to the application for summary judgment heard 12 March 2007, such costs to be assessed on the standard basis.
10. The second defendant pay the plaintiff's costs of and incidental to the application for summary judgment heard 8 May 2007, such costs to be assessed on the standard basis.
11. The total amount of the plaintiff's costs be a first charge in favour of the plaintiff on each of the balances of the purchase prices paid by the plaintiff to the first defendant at settlement of each contract and held on trust by Gladstones in accordance with Order 4 herein.
12. The second defendant indemnify the first defendant against costs it is ordered to pay the plaintiff.
13. The second defendant pay the first defendant's costs.
14. The first defendant be at liberty to make an application for costs against Borrugurra Pty Ltd.