# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Swanbank Industrial Park Pty Ltd & Anor v RD Catelan Investments Pty Ltd as trustee for RDC Trust & Anor* [2010] QSC 354 |
| PARTIES: | **SWANBANK INDUSTRIAL PARK PTY LTD ACN 123 286 290**<br>First plaintiff<br>and<br>**TDC (QLD) PTY LTD ACN 090 798 977 AS TRUSTEE FOR NORTH BROTHERS NO. 2 UNIT TRUST**<br>Second plaintiff<br>and<br>**NORTHROW (QLD) PTY LTD ACN 109 391 522 AS TRUSTEE FOR NORTH-STAR (SWANBANK) NO. 2 INVESTMENT TRUST**<br>Third plaintiff<br>and<br>**RD CATELAN INVESTMENTS PTY LTD ACN 110 631 500 AS TRUSTEE FOR RDC TRUST**<br>First defendant<br>and<br>**RAYMOND DAVID CATELAN**<br>Second defendant |
| FILE NO/S: | 9711 of 2010 |
| DIVISION: | Trial Division |
| DELIVERED ON: | 17 September 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 September 2010 |
| JUDGE: | Ann Lyons J |
| ORDER: | **The application is refused.** |
| | P Morrison QC and M Jones for the plaintiffs<br>B O'Donnell QC and P Ahern for the defendants |
| SOLICITORS: | Nicholsons Solicitors for the plaintiffs<br>McInnes Wilson Lawyers for the defendants |

**Ann LYONS J:**

[1] On 12 August 2010, the first defendant (RDC) served a Notice of Exercise of Power of Sale on the first plaintiff (Swanbank), relying on the failure to pay the third

instalment on the due date which they say is 7 August 2010. Time under that notice was to expire at midnight on Monday, 13 September 2010.[1]

[2] On 1 September 2010, RDC demanded possession of the property the subject of the mortgage by Swanbank, by no later than midday on 9 September 2010.[2]

[3] On 9 September 2010 the plaintiff as mortgagor, obtained an interim injunction restraining the first defendant from taking possession of certain land as mortgagee until 4.00 pm on Monday, 13 September 2010.

[4] The plaintiffs now seek an interlocutory injunction, restraining the first defendant from seeking to enforce that mortgage until trial or further order. The plaintiffs argue that there is a serious question to be tried as to the entitlement of the mortgagee to enforce the mortgage. In the substantive proceedings, the plaintiffs seek relief pursuant to s 87 of the *Trade Practices Act* 1974 (Cth) *(*TPA), declaring the mortgage and the Security Sale Agreements be rescinded *ab initio*, or rectification so that the due date for the payment is extended.

[5] The plaintiffs argue that the cause of action attacks the foundation of the mortgage and the right to take possession, and to sell in reliance on the breach. Accordingly, the plaintiffs submit that there is a serious question to be tried as to the entitlement of the mortgagee to enforce the mortgage.

[6] The matter was reached in the applications list late on 13 September 2010. Later that evening after the matter had been argued, I granted an injunction further restraining the first respondent until the delivery of my decision and these reasons.

**The relevant test for an interlocutory injunction**

[7] The relevant principles for an interlocutory injunction were set out in *Australian Broadcasting Corporation v O'Neill*[3] as follows:

> "The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued;
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> > 'The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'
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> By using the phrase 'prima facie case', their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the

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1. Page 190 of Exhibit "TMN1" to the affidavit of Mr North.
2. Page 193 of Exhibit "TMN1" to the affidavit of Mr North.
3. (2006) 227 CLR 57 at 82

> sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument . With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:
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> > 'How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.'" (footnotes omitted)

[8] Accordingly there are two essential questions which need to be answered.

(a) Have the plaintiffs made out a prima facie case?

and

(b) Where does the balance of convenience lie?

[9] A factual examination of the plaintiffs' claim is, therefore, required in order to address these questions.

**Background facts**

[10] Swanbank is the registered proprietor of two lots of land which is approximately 77 hectares in size. The property was previously owned by the second plaintiff (TDC) and the third plaintiff (Northrow). TDC is controlled by three brothers Tyler, Dustyn and Chaye North. Northrow is controlled by the boys father John North and his partner Joy Rowston.

[11] Prior to 11 August 2009 the shares in Swanbank were held as to 25 per cent by the second plaintiff (TDC), as to 25 per cent the third plaintiff (Northrow), and as to 50 per cent by the first defendant (RDC).

[12] The first defendant is controlled by Ray Catelan (Catelan), who is a director and the sole shareholder. Catelan and the North family have a long friendship and there is a history of generosity towards the North family by Catelan.

[13] The purpose of Swanbank's incorporation was to act as the joint venture vehicle by which TDC, Northrow and RDC would jointly develop the property. The property is leased to Wood Mulching Pty Ltd which is a family company of the North family. The business occupies the majority of the site.

[14] Between April 2009 and 11 August 2009, TDC and Northrow on one part, and RDC and Catelan on the other, were involved in negotiations concerning the sale by RDC of the shares it held in Swanbank. Those negotiations were prompted by the fact that Catelan was seriously ill and he wanted to organise his financial affairs. Those negotiations were conducted on the part of the first defendant by Catelan, his son-in-law Matthew Moore (Moore), and his personal assistant Sharyn Williams. The negotiations on behalf of the second and third plaintiff were conducted by Tyler North (North), who is a director of the first and second plaintiff.

**The documentation**

[15] TDC, Northrow and RDC executed a number of documents necessary to effect the sale of RDC's shares in Swanbank, including:

(a) Security Sale Agreements between RDC, and each of Northrow and TDC dated 7 August 2009. Clause 3.2 provided that the Buyer must provide each instalment on the appropriate Instalment Date "in immediately available funds". The Schedule set out the Total Purchase Price, the Settlement Date of 7 August 2009, 3 Instalment amounts and 3 Instalment Dates. The first Instalment Date was the Settlement Date of 7 August 2009, the second Instalment Date was 7 February 2009 and the third Instalment Date was 7 August 2010;

(b) A mortgage over the property by Swanbank in favour of RDC, securing payment under the Security Sale Agreements;

(c) A Fixed Charge by Swanbank in favour of RDC, securing payment under the Security Sale Agreements.

[16] In general terms, therefore, the sale price was $5 million and the settlement date was 7 August 2009. In terms of that purchase price, $1 million was payable six months from the settlement date on 7 February 2010 and the balance of $4 million was payable 12 months from the settlement date on 7 August 2010. The charge and the mortgage required the secured money to be paid in full and on time. A failure to do so is an event of default under both the charge and the mortgage and triggered immediate rights of enforcement in the mortgagee. There is no mechanism for requesting or granting an extension of time in the documents.

**The plaintiffs' claim**

[17] Essentially, the plaintiffs seek to set aside the transaction on the basis of the oral representations made by the first defendant, that a six month extension would be allowed to the settlement date, were misleading and deceptive in breach of the TPA. Alternatively, the plaintiffs seek to have the terms of the transaction documents varied to reflect what they contend is the correct date for the final payment, namely 7 February 2011, some 18 months after the settlement date.

[18] The plaintiffs' statement of claim filed on 9 September 2010 seeks:

(a) A declaration that certain conduct of the first defendant was misleading or deceptive, or likely to mislead or deceive, within the meaning of s 52 of the TPA;

(b) A declaration that the second defendant was knowingly involved in the contravention;

(c) Relief pursuant to s 87 of the TPA, either declaring the transaction documents sought to be enforced void *ad ibinitio* or varying their terms to reflect the representations made by the first defendant; and

(d) Alternatively, rectification of the transaction documents.

[19] The basis of the claim that the first defendant was involved in deceptive and misleading conduct is that there were four oral representations made to the applicants, which were relied on by them as follows:

(a) The "first representation" made in April 2009 by the defendants' agent, Matthew Moore, that it would be acceptable for the plaintiffs

to have further time to pay at the end of the 12 month period, but they would have to pay interest;[4]

(b) The "second representation" made in late April or early May 2009 by Catelan that it would be "alright" for the plaintiffs to have extra time to pay the purchase price but they would need to pay interest;[5]

(c) The "third representation" made on 15 May 2009 by the defendants' agent Moore, in the presence of two solicitors of McCullough Robertson lawyers, that extra time to pay beyond the 12 month due date for payment would be ok, but the plaintiffs would have to pay interest at two per cent above the bank rate;[6] and

(d) A "fourth representation" made on 11 August 2009 by Catelan to the effect that it would be ok for the plaintiffs to take longer than 12 months to pay, but if they did, they would be required to pay interest.

[20] The plaintiffs contend that in reliance on those statements TDC and Northrow did not insist on a time period in excess of 18 months to make the final payment. It is also contended that:

(a) Catelan and RDC represented that RDC and Catelan had the then intention of extending time if TDC and Northrow were unable to make payments under the Security Sale Agreements or mortgage on the due date, on the basis that interest was paid;

(b) The conduct of RDC in making the representations was misleading or deceptive conduct under the TPA;

(c) The documents were executed in reliance on that conduct.

[21] Alternatively, it is contended that:

(a) The statements were of promissory effect and they were accepted by the purchasers' not insisting on the 18 month period and agreeing to interest at 10 per cent instead of two per cent above the bank rate;

(b) RDC, TDC and Northrow agreed that the Security Sale Agreement should include a term to the effect that if TDC and Northrow needed extra time at the end of the 12 month period specified in the Security Sale Agreements to make payment of any instalment, the due date for payment of that instalment would be extended to a date up to six months from the date specified in the Security Sale Agreements;

(c) By error, the term referred to above was not recorded in the Security Sale Agreements;

(d) The Security Sale Agreements ought to be rectified to insert in Item 9 of the schedule to each Security Sale Agreement the words "Notwithstanding any other terms herein, if the payment for Instalment 3 is not made on 7 August 2010, the time for that payment shall be extended until 7 February 2011 and the Instalment shall not be due until that date".

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4 Paragraph 15 of the statement of claim and paragraph 20 of the affidavit of North.
5 Paragraph 16 of the statement of claim and paragraph 26 of the affidavit of North.
6 Paragraph 17 of the statement of claim and paragraph 27(d) of the affidavit of North.

**Is there a Prima Facie Case?**

[22] The plaintiffs argue that each of the representations and the repeated representations, were misleading or deceptive or likely to mislead or deceive, within the meaning of s 52 of the TPA, in that:

(a) Neither RDC nor Catelan intended to extend time to TDC or Northrow in the event that they were unable to make payments under the Security Sale Agreements on the due date;

(b) On 13 August 2010 Catelan told North that RDC and Catelan could have taken immediate action upon breach in respect of the second instalment due under the Security Sale Agreements, occurring on 7 February 2010;[7]

(c) On the basis of that 13 August 2010 statement it should be inferred that neither RDC nor Catelan held the intention at any time to grant an extension of time to TDC or Northrow in the event that they were not able to meet a payment on a due date.

[23] The plaintiffs also argue that by reason of the contraventions of the TPA each of the plaintiffs has sustained loss and damage in that:

(a) Swanbank granted the mortgage and Fixed Charge to RDC;

(b) TDC and Northrow entered into the Security Sale Agreements;

(c) TDC and Northrow secured a loan from NAB to make the second instalment of $999,500, and incurred the costs of the loan arrangement with the National Australia Bank.[8]

[24] The plaintiffs argue that there is evidence supporting the version of events for which they contend and, as such, there is sufficient evidence of a prima facie case. The plaintiffs contend that Catelan knew that the plaintiffs were seeking a period of 18 months in order to make the final payment of $4 million. Furthermore, it is argued that Catelan knew that the plaintiffs were relying upon the successful outcome of a compensation claim against the Main Roads Department in order to generate funds to complete the final payment. Catelan, it is argued, was also aware that funds could be obtained from a possible development agreement with a third party, Peter Dawson.

[25] It is clear from the affidavit material that TDC and Northrow were late in making the first instalment of $1 million within the six months required in the Security Sale Agreement and that RDC and Catelan allowed them further time to pay. It would also seem from the affidavit material that TDC and Northrow contacted RDC (through Catelan's agents) on a number of occasions to inform them of the progress in their attempts to obtain funds to make the payments. Tyler North states that on those occasions there was no indication that the date of 7 August 2010 would need strict compliance.[9]

[26] The plaintiff argues that in reliance on repeated representations, TDC and Northrow continued to pursue their proposed arrangements with Peter Dawson, and the

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[7] Paragraph 62 of the affidavit of North.
[8] Paragraphs 46 & 47 of the affidavit of North.
[9] Paragraphs 38 to 49 of the affidavit of North.

compensation claim from the Main Roads Department. They also continued to proceed upon the basis that time would be extended if they could not meet payments on the due date, subject to the payment of interest.

[27] There are however a number of difficulties with the plaintiffs' case. Notably there are no contemporaneous documents supporting the plaintiffs' version of events. It is clear that the security sale agreement signed on 7 August 2009 indicates in the schedule that instalment one is the settlement date, which was 7 August 2009, instalment two was to be 7 February 2010 and instalment three, where the balance funds were to be paid, was 7 August 2010.

[28] Furthermore, the express terms of the signed documents are contrary to the representations alleged to have been made. In particular, I note that all the signed documents contain a term which provides that the document embodies the entire agreement between the parties and that they supersede all previous agreements or representations made about the subject matter. The relevant clause in the Security Sale Agreement provides as follows:

> "8.5-Entire Agreement
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> (a) This document supersedes all previous agreements about its subject matter and embodies the entire agreement between the parties.
>
> (b) To the extent permitted by law, any statement, representation or promise made in any negotiation or discussion, has any effect except to the extent expressly set out or incorporated by reference to this document."

[29] No evidence is currently before me from the solicitors who drew the agreements, and in front of whom the 15 May 2009 representations were allegedly made. It would also be difficult to accept that such a clause as set out above would have been included if the solicitors were aware of those representations. There are also a number of witnesses who have denied on oath the representations alleged by North. I also note that North alone gives the evidence as to the representations about the extra time for the final payment. In particular Don Shewring, who North swears was present at the significant 10 August 2009 meeting, has sworn an affidavit in which he states, "There was no mention by North of the second and third plaintiffs requiring a further three to six months after the twelve month deadline to pay the final $4,000,000".[10] Whilst Moore, Catelan and Catelan's nephew Richard also deny the representations, it is significant that Shewring, who has no particular allegiance, has confirmed that no such representation was made on the occasion where he was alleged to be present.

[30] There is, however, some substantiation about the allegations of a higher interest rate in exchange for additional time. The figure of 3.2 per cent in the Security Sale Agreement has been deleted and replaced with a figure of 10 per cent. That alteration has been initialled by the signing parties, Catelan and North. Whilst those facts might substantiate an assertion that a later date might have been contemplated, it does not support a contention that a date of 18 months was foreshadowed as North alleges. Significantly as Catelan was ill and as he wanted to organise his financial affairs uncertainty and delay would not have been desirable.

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[10] Paragraph 4 of the affidavit of Shewring.

[31] Furthermore, whilst Catelan might have known of the plaintiffs' need to obtain additional funding and their dependence on the successful outcome of a compensation claim, that knowledge without more is not necessarily a strong argument in support of the actual representations alleged. The final Instalment Date was in fact deferred for 12 months after the Settlement Date presumably for those very reasons.

[32] It is also clear that Catelan allowed extra time for the first payment, which may have led North to believe he would be given extra time. That extra time however must also be considered in the context that, by letter dated 15 February 2010, the defendant's solicitors demanded payment of the amount which had been due for payment on 7 February 2010. On 16 July, payment was demanded of an outstanding balance plus interest.

[33] Accordingly, whilst there is some evidence in support of the plaintiffs' case, there are some inherent difficulties which must be overcome. There is of course the possibility that at trial those difficulties may be overcome. I am concerned however that there is not sufficient evidence to justify the preservation of the status quo pending trial. This leads to a consideration of the second consideration, which is the balance of convenience. The question I must answer is whether the inconvenience or injury which the plaintiffs are likely to suffer if the injunction is refused is outweighed by the injury the defendant is likely to suffer if an injunction is granted.

**Balance of convenience**

[34] In June 2007, TDC and Northrow entered into a lease agreement with Wood Mulching Industries Pty Ltd as lessee in relation to two lots. The term of three years commenced on 1 April 2007 and expired on 31 March 2010. A business is conducted on the land and Wood Mulching remains in possession of the land. The plaintiff argues that taking of possession would adversely affect the lease granted by Swanbank to Wood Mulching, interrupt the conduct of that business which employs many people, and alter the status quo. The plaintiffs argue that taking possession of the property would harm the plaintiffs and third parties; but not taking possession will not harm RDC. Accordingly, it is argued that the balance of convenience favours preserving the status quo in the short term. The second defendant on behalf of the first defendant gave an undertaking dated 13 September 2010 not to take any steps to recover possession of the property without first giving 30 clear days notice to Wood Mulching Industries and each plaintiff.

[35] I also note that the evidence shows that the rent payable under this lease to the first plaintiff is $18,000 (plus GST) per month.[11] Rent from the property, however, is not being directed to the first respondent.

[36] The plaintiffs also indicate that the mortgagor is presently in the process of arranging finance which would pay out the mortgage. Initially North deposed to the likelihood of being able to raise those funds within four weeks.[12] In his most recent affidavit, North states that he has been advised that he has received notice from his finance broker that "the First Plaintiff's application for a loan for $6.5 million has been approved subject to valuation of the properties to be offered as security."[13]

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11 Lease schedule, items 4 and 5 (affidavit of North, p 21).

12 Paragraph 66 of the affidavit of North.

13 Paragraph 3 Affidavit of North sworn 13 September 2010

The properties offered as security include residential properties, as well as the subject property.

[37] Whilst North has sworn that he expects to receive a loan approval shortly, it is clear that there is no evidence from the bank to support this assertion. In particular, it is clear that such a loan is subject to a valuation. There is no recent valuation of the security property. Whilst I note that the valuation from Herron Todd White Valuers, dated 1 August 2007, values the property at $7.4 million, it is clear that this valuation is now somewhat dated. Furthermore whilst North has sworn that in his opinion the property is worth in excess of $10 million, there is currently no independent support for this view. In particular, Mr Brian Schech has sworn that on 12 September 2010 he spoke to a registered valuer and a director of Herron Todd White, who indicated that whilst his investigations are continuing, on the basis of his investigations so far, he is of the opinion that "other en globo parcels of property in the region have sold for up to 50 per cent to 60 per cent less".

[38] I also note that all the plaintiffs have now offered undertakings as to damages. Whilst this was initially only from the first plaintiff, it now covers all plaintiffs. However, it is clear that there is no evidence currently before me to indicate that any of the plaintiffs have any assets or that the undertakings are worthwhile. It is clear, in particular, that there is no evidence as to the value of the first plaintiff's undertaking. In particular, the first ASIC company search for the first plaintiff shows two fixed and floating charges registered over the company; the first to the National Australia Bank and the second to the first defendant. As the defendants argue, the undertaking offered does not offer the first defendant anything in addition to the secured interest it already has under its charge.

[39] Significantly, however, the plaintiffs do not propose to pay the amount owed under the mortgage into court, pursuant to the rule in *Inglis v Commonwealth Trading Bank of Australia*,[14] or to pay the interest owed to the respondents.[15]

[40] In *Inglis v Commonwealth Trading Bank of Australia*[16] the High Court held:

> "A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale that such an injunction will not be granted unless the amount of the mortgage debt if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court.
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> …
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> In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgage to be due.

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14 (1971) 126 CLR 161.

15 *Glandore Pty Ltd & Ors v Elders Finance and Investment Co Ltd* (1984) 4 FCR 130.

16 (1971) 126 CLR 161 at p164 ( Walsh J's decision affirmed.)

> The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.
>
> In my opinion the fact that such claims have been brought provides no valid reason for the granting of an injunction to restrain, until they have been determined the exercise by a mortgagee of the remedies given to him by the mortgage."

[41] The plaintiffs argue, however, that the principle in *Inglis v Commonwealth Trading Bank of Australia* that the price of the injunction is that the mortgagor must pay the disputed sum into court, is not on the case mounted by the plaintiffs a bar to the interlocutory relief sought. That argument by the plaintiffs is that they challenge the entitlement of the first defendant to enforce the mortgage at all and that brings this case within a recognised exception to *Inglis.*[17] The plaintiffs rely on the approach of Morling J in *Glandore Pty Ltd v Elders Finance & Investment Co Ltd.*[18] In *Glandore*, the mortgagor alleged that the mortgagee had made numerous representations to the effect that it would provide further advances in the future, but did not ultimately do so. When the mortgagee took steps to enforce the mortgage, the mortgagor sought relief under s 87 of the TPA. Morling J found that an exception to the *Inglis* principle applied, and rather than requiring the amount claimed to be paid into court, moulded the relief to suit the facts of the case. The injunction was granted on the condition that Glandore pay all outstanding interest as well as ongoing interest, but it was granted one month to bring the arrears up to date.

[42] On the plaintiffs' case, an extension of time was promised on condition that the plaintiffs paid interest due under the Security Sale Agreements. Pursuant to the terms of these agreements, the second and third plaintiffs are required to pay interest on the third instalments on 25 September 2010.[19] The second and third plaintiffs however do not have any apparent means to pay the interest due. The plaintiffs do not swear to any ability to meet ongoing interest payments until the date of trial. North only swears that he expects that the respondents will receive loan approval from a bank to pay the third instalment, plus interest.[20] No other independent source of finance is identified and it would appear that the approval is subject to a valuation which could take some time. Beyond the undertakings, no arrangements have been proposed to better secure the respondents' interest pending trial.

[43] In *Mainbanner Pty Ltd & Ors v Dadincroft Pty Ltd & Ors*[21] Pincus J dealt with an application for interlocutory relief restraining the exercise, by the respondents, of their rights under a bill of sale. The applicants had instituted proceedings against the respondents, claiming oral representations were misleading and deceptive in breach of the *Trade Practices Act.* Declarations were sought that the contracts were void. The applicants were unable to pay the moneys due into court but there was some evidence that the respondents would have adequate security up to trial. His

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[17] *Clarke v Japan Machines (Australia) Pty Ltd (No 2)* [1984] 1 Qd R 421.
[18] [1985] ATPR 40-517.
[19] Clause 3.3 (p 55 affidavit of North) and clauses 10 and 11 of the schedule (p 61).
[20] Paragraph 67 affidavit of North.
[21] (1988) ATPR 40-896,

Honour described the allegations of oral misrepresentations as "not overwhelmingly strong, but one could certainly not deny the possibility of their succeeding". In refusing the interlocutory relief his Honour held as follows:

> "In my opinion, it would, in general, not be correct to exercise that discretion in favour of an applicant in a case such as this, merely on its being shown that there is a prospect, however modest, of success on an allegation of oral misrepresentation. If that were so, the rule would be, in effect, reversed, and would be that where misrepresentation is alleged in such a way that one could not deny the seriousness of the question to be tried, any the applicant claims rescission, prima facie the contract the mortgagor and mortgagee have made must be suspended.
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> It seems to me that the adoption of any such principle would be, in the long run, pernicious, because it would tend to destroy or weaken people's confidence in such bargains and in the rights of holders of security.
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> ...
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> Looking at the matter as one of principle, it appears to me that the essential elements of it are this:
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> 1. there is some evidence that the mortgagee may have adequate security, and I am inclined to think it will;
> 2. there is a serious question to be tried;
> 3. the allegations of misleading conduct are not overwhelmingly strong, but one could certainly not deny the possibility of their succeeding.
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> The principal debt fell due last December, not by any process of acceleration, but simply under the parties' agreement; the applicants have no prospect, in the immediately foreseeable future, of paying the debt. I can see that it might be convenient if the courts had a freely exercised a general jurisdiction temporarily to reform the parties' bargain in such cases as these, but the general principle set out in *Inglis & Anor v Commonwealth Trading Bank of Australia* (1972) 126 C.L.R. 161 must be respected, until it is changed by a court whose decisions are binding on me, or by the legislature. It seems clear enough that there is no sufficient strength in the present circumstances to justify departure from that principle. Since the applicants are unable to offer the performance of the condition which the principle requires, viz. payment into court, the application for interlocutory relief must be refused."

[44] This statement was approved by Jerrard JA in *Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd*[22] as follows:

> "Pincus J( as his Honour then was) considered there may have been some tendency to relax the requirements of the rule described in *Inglis* and was prepared to assume the correctness of the contention that he had a discretion; his Honour considered it would be generally incorrect to exercise that discretion in favour of an applicant relying

22 [2007] 2 Qd R 501 at 514

> on prospects of success on alleged oral misrepresentation. To do otherwise would tend to destroy or weaken people's confidence in securities they had taken."

The other members of the court also agreed that the rule in *Inglis's* case should be applied.

[45] In the circumstances of this case I consider that, as was the case in *Mainbanner*, there is not sufficient strength in the plaintiffs' case to justify a departure from the principle and as the plaintiffs are unable to offer the performance of the condition which the principle requires, the application for interlocutory relief must be refused.