

SUPREME COURT OF QUEENSLAND

CITATION: *St George Bank Ltd v Perpetual Nominees Limited & Anor*
[2010] QSC 57

PARTIES: **ST GEORGE BANK LIMITED** ACN 055 513 070
(applicant)
v
PERPETUAL NOMINEES LIMITED ACN 000 733 700
(first respondent)
and
LJK NOMINEES PTY LTD ACN 001 325 944
(second respondent)

FILE NO/S: BS 13715 of 2009

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 March 2010

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 12 February 2010

JUDGE: Margaret Wilson J

ORDER: **The Court orders that:**
1. Westpac Banking Corporation ABN 33 007 457 141 be substituted for St George Bank Limited ACN 055 513 070 as the applicant in the proceeding.
The Court declares that:
2. upon the conveyance by the applicant of the property and undertaking of SP Hotel Investments Pty Ltd ACN 117 673 775 ('SP Hotel') to Pearls Australasia Mirage 1 Pty Ltd ACN 140 177 395 ('Pearls') pursuant to:
 (a) a contract for the sale of commercial land and buildings dated 23 November 2009;
 (b) a hotel and villa management services business sale agreement dated 23 November 2009,
and in the exercise by the applicant of its power of sale under:
 (c) the fixed and floating charge granted by SP Hotel to the applicant which is dated 27 June 2006 and notice of which was lodged with the Australian Securities and

Investments Commission ('ASIC') pursuant to s 263 of the *Corporations Act* 2001 (Cth) at 4.38 pm on 29 June 2006 ('St George Charge');

(d) registered mortgages 709744123 and 709744156 granted by SP Hotel to the applicant ('St George Mortgages'),

Pearls will take the property and undertaking so conveyed to it by the applicant free of any interest of:

(e) the first respondent ('Perpetual') under:

(i) a fixed and floating charge granted by SP Hotel to Perpetual which is dated 28 June 2006 and notice of which was lodged with ASIC pursuant to s 263 of the *Corporations Act* on 3 July 2006 ('Perpetual Charge');

(ii) registered mortgages 709744204 and 709744211 granted by SP Hotel to Perpetual ('Perpetual Mortgages');

(f) the second respondent under:

(i) a fixed and floating charge granted by SP Hotel to the second respondent which is dated 28 March 2007 and notice of which was lodged with ASIC pursuant to s 263 of the *Corporations Act* on 17 May 2007 ('LJK Charge');

(ii) registered mortgages 710582941 and 710582933 granted by SP Hotel to LJK ('LJK Mortgages').

And the Court orders that:

3. the respondents pay the applicant's costs of the proceeding to be assessed.

CATCHWORDS: MORTGAGES – MORTGAGEE'S REMEDIES – SALE UNDER POWER – EXERCISE OF POWER – GENERALLY – where applicant lent \$78m to Desmarest Pty Ltd ("Desmarest") to enable it to purchase and refurbish a hotel on the Gold Coast – where purchase was completed with SP Hotel Investments Pty Ltd ("SP Hotel") becoming owner and operator of the hotel – where respondents subsequently lent SP Hotel further funds which were secured by mortgages and charges – where applicant and respondents all hold mortgages over land on which hotel stands and fixed and floating charges over the assets and undertaking of SP Hotel – where Desmarest and SP Hotel defaulted under applicant's facility and securities by failing to pay interest since August 2008 – where as at 3 February 2010 amount owing to applicant was \$68,862,227.86 – where applicant has appointed receivers and managers to SP Hotel – where applicant has entered into contracts to sell the hotel

(comprising the land and the assets and undertaking of the hotel) to Pearls Australasia Mirage 1 Pty Ltd (“Pearls”) in purported exercise of power of sale – where statutory provisions regulate mortgagee’s power of sale over land providing that purchaser takes land free of mortgagor’s interest and free of subsequent encumbrances – where no similar statutory provisions relating to mortgagee’s sale of personal property – effect under general law of mortgagee’s sale of personal property – where subsequent mortgagee’s interest in property is “over-reached” – whether Pearls will take land free of any interest of respondents under their securities – whether Pearls will take assets and undertaking of SP Hotel free of any interest of respondents under their securities

MORTGAGES – MORTGAGEE’S REMEDIES – SALE UNDER POWER – EXERCISE OF POWER – GENERALLY – where sale by private contract – where hotel situated on land under the *Land Act* 1994 (Qld) – where that Act requires Minister’s written approval of sale – where respondents submit Minister’s written approval must be obtained before mortgagee enters into private contract – where applicant submits it would be sufficient to have that approval at the settlement of the sale relying on s 57A(2) *Property Law Act* 1974 (Qld) as rendering compliance at settlement sufficient – whether s 57A(2) applicable – whether sufficient to have the Minister’s approval at time of settlement

MORTGAGES – MORTGAGEE’S REMEDIES – SALE UNDER POWER – CONDITIONS PRECEDENT FOR EXERCISE OF POWER – STATUTORY NOTICE TO MORTGAGOR – where s 84 *Property Law Act* 1974 (Qld) requires mortgagee to serve notice of exercise of power of sale – where mortgagee served notice of exercise of power of sale on SP Hotel – where notice identified the securities under which SP Hotel had defaulted – where it contained a full description of the land and no description of the other property (including the assets and undertaking of the hotel) secured by the charge – where respondents submit notice ought to have contained a description of all the property to be sold – whether notice required to contain a description of all the property to be sold – whether notice served satisfied requirements of s 84

MORTGAGES – MORTGAGEE’S REMEDIES – SALE UNDER POWER – CONDITIONS PRECEDENT FOR EXERCISE OF POWER – STATUTORY NOTICE TO MORTGAGOR – where contracts made before notice of exercise of power of sale given – where contracts subsequently varied to be subject to the power of sale becoming exercisable – where respondents submit a contract which was not conditional upon power of sale being

exercisable at end of requisite period cannot be subsequently varied in way that would satisfy s 84 – whether there is any relevant distinction between a contract originally subject to such a condition and one that is varied so that it becomes subject to such a condition – whether requirements of s 84 have been fulfilled

Acts Interpretation Act 1954 (Qld), s 36
Conveyancing and Law of Property Act 1881 (UK), s 21(1)
Corporations Act 2001 (Cth), s 263
Land Act 1994 (Qld), s 345, s 346, s 350
Land Act (Ministerial) Delegation (No 1) 2009 (Qld)
Land Title Act 1994 (Qld), s 79
Law of Property Act 1925 (UK), s 104
Powers of Trustees, Mortgagees, etc Act 1860 (UK) (*Lord Cranworth's Act*), s 15
Property Law Act 1974 (Qld), s 5(1)(d)(ii), s 5(2), s 55(2), s 57A(2), s 77A(1)(b)(ii), s 83(1)(a), s 83(4)(a), s 83(5), s 84, s 86, s 99
Baypoint Pty Ltd v Baker (1994) 6 BPR 13,687, cited
Boston Peak Pty Ltd v Houghton [1999] QSC 48, cited
Charles v Jones (1887) 35 Ch D 544, cited
Chia v Rennie (1997) 8 BPR 15,607, cited
Cholmondeley v Clinton (1820) 2 Jac&W 1; 37 ER 527, cited
Clarke v Japan Machines (Aust) Pty Ltd [1984] 1 Qd R 404, cited
Coroneo v Australian Provincial Assurances Association Ltd (1935) 35 SR (NSW) 391, considered
Farrar v Farrars Ltd (1888) 40 Ch D 395, cited
JB Davies Enterprises Pty Ltd (in liquidation) [1990] 2 Qd R 129, cited
Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965) 113 CLR 265, cited
Lloyds Bank NZA Ltd v National Safety Council of Australia Victorian Division (in liquidation) (1993) 115 ALR 93, cited
Lord Waring v London & Manchester Assurance Co Ltd [1935] Ch 310, cited
Property & Bloodstock Ltd v Emerton [1968] Ch 94, cited
Re Hodson and Howes' Contract (1887) 35 Cd D 669, considered
Re Solomon and Meagher's Contract (1889) 40 Ch D 508, considered
South Eastern Railway Company v Jortin (1857) 6 HL Cas 425; 10 ER 1360, applied
Talbot v Frere (1878) 9 Ch D 568, cited
Thornborough v Baker (1675) 1 Cas in Ch 283; 36 ER 1000, cited

COUNSEL:

D J S Jackson QC, with J I Otto, for the applicant
 P L O'Shea SC, with M G Lyons, for the respondents

SOLICITORS: McCullough Robertson Lawyers for the applicant
Mary Ann Greaves for the respondents

- [1] **MARGARET WILSON J:** The Sheraton Mirage Resort and Spa at Main Beach on the Gold Coast (“the hotel”) is owned and operated by SP Hotel Investments Pty Ltd (“SP Hotel”).
- [2] The applicant (“St George”) and the respondents (“Perpetual” and “LJK”) all hold securities over the land on which the hotel stands and the assets and undertaking of SP Hotel.
- [3] St George has entered contracts to sell the land and the business in purported exercise of its power of sale. It seeks:
 - (a) a declaration that upon completion of the contracts the purchaser Pearls Australasia Mirage 1 Pty Ltd (“Pearls”) will take the property and undertaking of SP Hotel free of any interest of Perpetual and LJK under their securities; and
 - (b) further or alternatively an order for the judicial sale of the property and undertaking of SP Hotel pursuant to s 99 of the *Property Law Act* 1974 or the court’s inherent jurisdiction.

St George securities

- [4] On 27 June 2006 St George agreed to lend \$78m to Desmarest Pty Ltd (“Desmarest”) to enable it to purchase and refurbish the hotel (“the St George Facility”). The purchase was completed with SP Hotel becoming the owner and operator of the hotel.
- [5] The hotel is situated on land under the *Land Act* 1994:
 - (a) lot 239 on Crown Plan WD6317, in which SP Hotel holds a leasehold interest granted under the *Land Act*;
 - (b) part of lot 318 on Crown Plan WD800475: the Gold Coast City Council holds lot 318 under a deed of grant in trust under the *Land Act*, and SP Hotel has a lease over part of it from the Gold Coast City Council, being registered lease 708362381
 (together “the land”).
- [6] The St George Facility was relevantly secured by:
 - (a) an unlimited guarantee and indemnity given by SP Hotel (“SP guarantee”);
 - (b) first registered mortgages given by SP Hotel over its interest in the land (“St George mortgages”);
 - (c) a first registered fixed and floating charge over the assets and undertaking of SP Hotel (“St George charge”);

- (d) a deed of cross-collateralisation between St George, Desmarest and the guarantors (including SP Hotel) (“collateralisation deed”)

(together the “St George securities”).

Perpetual securities

- [7] On 28 June 2006 Perpetual, as custodian of the MFS Premium Income Fund, agreed to lend SP Hotel \$20m. It was secured by:

- (a) second registered mortgages over SP Hotel’s interest in the land (“Perpetual mortgages”); and
- (b) a second registered fixed and floating charge over the assets and undertaking of SP Hotel (“Perpetual charge”)

(together the “Perpetual securities”).

- [8] On 29 June 2006 St George and Perpetual entered into a priority deed, confirming the priority of the St George securities up to \$78m.

LJK Securities

- [9] On 28 March 2007 SP Hotel gave LJK:

- (a) third registered mortgages over its interest in the land (“LJK mortgages”); and
- (b) a third registered fixed and floating charge over the assets and undertaking of SP Hotel (“LJK charge”)

(together the “LJK securities”).

Default

- [10] Desmarest and SP Hotel have defaulted under the St George Facility and the St George securities by failing to pay interest since August 2008. As at 3 February 2010, the amount owing to St George was \$68,862,227.86, including interest and enforcement charges.
- [11] On 19 March 2009 St George appointed receivers and managers to SP Hotel. On 6 November 2009 the receivers entered into contracts to sell the hotel (comprising the land and the assets and undertaking of the hotel) to Pearls. Those contracts were rescinded on 23 November 2009 when St George entered into contracts with Pearls on relevantly the same terms. There are two contracts: a land sale contract and a business sale contract. The purchase price under the contracts is \$62.5m.
- [12] Presumably the first contracts were rescinded because the sales by the receivers were sales by SP Hotel, and thus subject to all outstanding charges, including those of Perpetual and LSP¹ while sales by St George in exercise of its power of sale were perceived not to be subject to the Perpetual and LSP securities.

¹ Lightman and Moss, *The Law of Receivers and Administrators of Companies*, (third edition, 2000), p. 280; O’Donovan *Company Receivers and Administrators*, [10.2250].

- [13] On 9 December 2009 St George served notice of exercise of power of sale on SP Hotel.
- [14] On 23 December 2009 the two contracts were varied by the insertion into each of a clause making it subject to the power of sale being exercisable.
- [15] On 11 February 2010 a delegate of the Minister for Natural Resources, Mines and Energy and Minister for Trade consented to St George “as mortgagee in possession” selling the land “via private contract as opposed to public auction in accordance with s 346(1) of the *Land Act* 1994”.

The question for determination

- [16] The respective priorities of St George, Perpetual and LJK are not in issue. The question for determination is whether, upon St George’s power of sale being exercisable under its mortgages and charges, and upon completion of the contracts, Pearls will take the property and undertaking of SP Hotel free of any of the interest of Perpetual and LJK under their respective securities.

The mortgages of the land

- [17] In the event of default under its mortgages, St George:
 - (a) may do anything a receiver could do, including selling SP Hotel’s interest in the land: clauses 25.2(c) and 26.4(c) of the mortgages; and
 - (b) has the power of sale implied into the mortgages by s 83(1)(a) of the *Property Law Act* 1974: see *Property Law Act* s 77A(1)(b)(ii) and s 83(5).
- [18] Sections 345, 346 and 350 of the *Land Act* 1994 provide:

“345 Mortgagee in possession may sell

(1) A mortgagee is entitled to sell a lease if—

- (a) the lessee defaults under a mortgage; and
- (b) the mortgagee has entered into possession of the mortgaged lease or is exercising a power of sale under the mortgage; and
- (c) the mortgagee complies with this division.

(2) The mortgagee must notify the Minister within 28 days of entering into possession of the mortgaged lease.

Maximum penalty—5 penalty units.

346 Sale of mortgaged lease

(1) The mortgagee must first offer the lease for sale by public auction or with the Minister’s written approval may sell the lease by private contract.

(2) The lease must not be offered for sale by public auction or a contract of sale entered into until at least 28 days after the mortgagee has published a notice, in a newspaper circulating generally in the locality of the lease, that the lease is for sale.

(3) A sale by a mortgagee must be to a person qualified under this Act to hold the lease.

(4) The lodgment of the transfer must be accompanied by a statutory declaration signed by the incoming lessee stating the incoming lessee is aware of—

- (a) the condition of the land; and
- (b) the level of compliance with the conditions of the lease and any land management agreement for the lease; and
- (c) any current property vegetation management plan affecting the lease; and
- (d) any current agreement under an Act affecting the lease including any land management agreement.

350 Effect of transfer after sale by mortgagee

If a transfer executed by a registered mortgagee after the exercise of the power of sale under the mortgage is registered, registration of the document vests the mortgagor's interest that is transferred in the transferee, free from liability under the mortgage and any other mortgage registered after it."

- [19] Despite the heading of s 345, it is clear from the wording of subsection (1)(b) that it is not only where a mortgagee has entered into possession that it may sell. It may sell pursuant to a power of sale in a mortgage. A power of sale implied into a mortgage by s 83(1)(a) of the *Property Law Act* is a "power of sale under a mortgage" for the purposes of s 345 of the *Land Act*.²
- [20] In the circumstances of this case there is one matter requiring consideration: the time when the Minister gave his written approval of sale by private contract.
- [21] Counsel for the respondents submitted that the Minister's written approval must be obtained before the mortgagee enters into a private contract. Counsel for the applicant submitted that it would be sufficient to have that approval at the settlement of the sale: that the Minister's approval is not required before the contract is made, because "first" modifies "offer" and not "or with the Minister's written approval". Be that as it may, they relied on s 57A(2) of the *Property Law Act* as rendering compliance at settlement sufficient. That provides:

"57A(2) Where an Act or statutory instrument requires that a certificate, consent or approval relating to any contract or dealing with property (by sale, lease, mortgage or otherwise) be obtained or

² Boge *Property Law and Practice Queensland: Land Act*. Thomson: Lawbook Co. Para L345.3.

tendered before or at the time the contract is entered into or the time of the dealing, then, in the absence of greater particularity as to that time in the Act or instrument, it shall be sufficient compliance with that requirement if the certificate, consent or approval is obtained or tendered as required at or immediately before—

- (a) in the case of a sale—settlement; and
- (b) in the case of a lease—the lessee’s entry into possession under the lease; and
- (c) in the case of a mortgage—the mortgagor’s accepting liability under the mortgage; and
- (d) in the case of any other dealing—its finalisation.”

It applies to land under the *Land Act: Property Law Act* s 5(1)(d)(ii). Its application turns on whether there is any “greater particularity as to that time” in the *Land Act*.

- [22] Counsel for the respondents submitted that there is greater particularity in s 346. They submitted that the section is dealing with the mode of sale, which must be established when the process commences. They submitted that the approval must be obtained at the start because in its absence the sale must be by public auction.³
- [23] But, as counsel for the applicant submitted, “that time” in s 57A(2) refers to “the time the contract is entered into or the time of the dealing”. There is no greater particularity about that time.
- [24] Thus, I am satisfied that s 57A(2) is applicable, and that it would be sufficient to have the Minister’s written approval at the time of settlement.
- [25] On 11 February 2010 Ms Giuliana Williams, an acting senior land officer, as a duly authorised delegate of the Minister under *Land Act (Ministerial) Delegation (No 1)* 2009, consented to:
 “the mortgagee in possession, St George Bank Limited selling NCL 2508/B and Trustee Lease 708632381 via private contract as opposed to public auction in accordance with section 346(1) of the *Land Act* 1994”.
- [26] No point was taken about the words “as mortgagee in possession” in the approval. Those words may have been copied from the heading to s 345. In any event, there is no issue as to St George’s exercise of the power of sale of the land.
- [27] In the circumstances I find that the requirement to obtain the Minister’s written approval of the sale by private contract has been satisfied.

The Charges

- [28] The parties’ charges have been registered under s 263 of the *Corporations Act* 2001. They would ordinarily rank in priority according to the order of their registration – St George, followed by Perpetual, followed by LJK. Further, as between St George and Perpetual, the priority deed confirms St George’s priority so far as presently

³ See Transcript page 1–84.

relevant, and as between St George and LJK, the LJK charge is expressly subject to the St George charge.

- [29] Under the general law, a mortgagee may enforce its security by foreclosure. It may be given a power of sale by agreement or by statute. A chargee may enforce its security by appointment of a receiver or by judicial sale.
- [30] The charge in favour of St George provides that in the event of default it may do anything the law allows it to do as mortgagee or chargee, and anything that a receiver could do, including selling the charged property. See cl 18.2 and cl 19.5(c).
- [31] The St George charge is a “mortgage” within the meaning of the *Property Law Act*.⁴ It is a fixed and floating charge over the “charged property” – all of SP Hotel’s rights, property and undertaking of whatever kind and wherever situated and whether present or future.
- [32] I accept the submission of counsel for St George that it is an “instrument of mortgage” within the meaning of s 83(4)(a) of the *Property Law Act*, and that the power of sale under s 83(1)(a) of the Act is implied into it. In my view this is so because of s 5(2) of the *Property Law Act* which provides:

“5(2) Where by this Act, including this section, a provision is expressed to apply to land or interests in land under the provisions of a particular Act, such expression shall not be construed to mean that the provision—

(a) applies exclusively to such land; or

(b) does not apply to property other than land.”⁵

- [33] Two questions arise:
 - (a) the effect of the exercise of this power of sale under the business sale contract: whether the purchaser Pearls would take the assets and undertaking of the hotel free of the interests of Perpetual and LJK; and
 - (b) whether s 84 of the *Property Law Act* has been complied with.

Effect of exercise of power of sale

- [34] Where a mortgagee exercises its power of sale over land, the purchaser takes the land free of the mortgagor’s interest and free of subsequent encumbrances: *Property Law Act* s 86 (unregistered land); *Land Title Act* 1994 s 79 (registered land); *Land Act* s 350 (Land Act land). In Queensland there is no similar statutory provision relating to a mortgagee’s sale of personal property. By contrast, in England a mortgagee may sell any property free from subsequent interests: see *Law of Property Act* 1925 (UK) s 104. Thus it is necessary to consider the position under the general law, apart from statute.

⁴ See the definition of “mortgage” in schedule 6 to the *Property Law Act* and the definition of “property” in s 36 of the *Acts Interpretation Act* 1954.

⁵ Note however the decision in *JB Davies Enterprises Pty Ltd (in liquidation)* [1990] 2 Qd R 129 at 130 – 131.

- [35] Under the general law a mortgagee did not have a power of sale. A mortgage took effect as a conveyance of the mortgagor's legal title to the mortgagee, subject to the mortgagor's right of redemption on the discharge of its obligations under the mortgage. The mortgagee's remedy if the mortgagor defaulted was foreclosure – extinguishment of the equity of redemption.
- [36] By the early 19th century it had become the usual practice to insert an express power of sale in mortgage deeds, empowering the mortgagee to sell the property out of court, free of the equity of redemption.⁶ In the case of an equitable mortgage, the mortgagee did not have a legal interest in the property which it could convey to a purchaser in exercise of a power of sale. Its power was over the equity of redemption. Two conveyancing mechanisms were used to overcome the equitable mortgagee's inability to convey the legal interest in the mortgaged property – the insertion in the mortgage instrument of a power of attorney empowering the mortgagee to convey the legal estate and the insertion of a clause whereby the mortgagor declared it held the legal estate on trust for the mortgagee and empowering the mortgagee to appoint itself or its nominee as trustee in place of the mortgagor.
- [37] The exercise of the power of sale was supervised by equity. In *Coroneo v Australian Provincial Assurances Association Ltd*⁷ Jordan CJ said:

“The power of sale, where it occurs in a legal mortgage, is not a common law power. It is an equitable power which is inserted to enable the mortgagee to convey a title which is not only good at common law but good in equity to defeat the equitable rights of the mortgagor. The purpose of this equitable power is to cut down the jealously guarded equity of redemption. Such powers do not appear to have been recognised as valid by the Court of Chancery until the end of the 18th century; and it was only then that the practice of inserting them in mortgages began...The operation of the equitable power of sale is simply this, that if it is exercised in a way that a Court of Equity regards as unexceptional, that Court will not treat the title of the purchaser as being encumbered by any equity of redemption in the mortgagor.”

Equity would restrain or set aside a sale made in the fraudulent exercise of the power, and, upon the mortgagor offering to redeem or account, it would entertain a suit by it litigating any equitable delinquencies on the part of the mortgagee⁸. It impressed a trust on surplus monies received from the sale of the mortgaged property, whether land or chattels, for the persons beneficially interested⁹.

- [38] When a mortgagee entered a contract to sell in exercise of its power of sale, the mortgagor's equity of redemption was suspended while the contract subsisted. The

⁶ Megarry & Wade's *Law of Real Property* 7th Edition p 1102 [25-013].

⁷ (1935) 35 SR (NSW) 391 at 394.

⁸ *Coroneo v Australian Provincial Assurances Association Ltd* at 395.

⁹ *Thornborough v Baker* (1675) 1 Cas in Ch 283 at 268; 36 ER 1000; *Cholmondeley v Clinton* (1820) 2 Jac&W1 at 185 – 186; 37 ER 527; *Talbot v Frere* (1878) 9 Ch D 568 at 572 – 574; *Charles v Jones* (1887) 35 Ch D 544; *Lloyds Bank NZA Ltd v National Safety Council of Australia Victorian Division (in liquidation)* (1993) 115 ALR 93 at 98 - 99.

mortgagor could not stop the sale by tendering the money due¹⁰. If a mortgagee abused its power of sale, and if the purchaser knew of that abuse, equity would refuse to recognise the sale as having destroyed the equity of redemption: it would treat the purchaser as having taken only a transfer of the mortgage: that is, it would recognise that the mortgagor was entitled to redeem as against the purchaser.¹¹

- [39] The first statute of general application by which a mortgagee was given a power of sale was the *Powers of Trustees, Mortgagees, etc Act* 1860 (UK) (*Lord Cranworth's Act*). It conferred a power of sale where any principal money was secured or charged by deed, and provided in s 15, that:

“The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of.”

- [40] In *Re Solomon and Meagher's Contract*¹² North J held that the effect of s 15 of *Lord Cranworth's Act* was that an equitable mortgagee from a mortgagor who had the legal interest could convey the equitable estate, without resort to a conveyancing mechanism or power. Section 86 of the *Property Law Act* and s 350 of the *Land Act* have the same effect where they apply.

- [41] *Lord Cranworth's Act* was repealed by the *Conveyancing and Law of Property Act* 1881 (UK), which conferred a power of sale where the mortgage was made by deed, but provided, by s 21(1):

“A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage...”

- [42] In *Re Hodson and Howes' Contract*,¹³ North J held by reference to the words underlined, that an equitable mortgagee in the exercise of the power of sale conferred on it by the Act “can convey all the estate and interest that was conveyed to [it]; but not the legal estate outstanding in another person”. An appeal to the Court of Appeal was dismissed. The result was that, once again, in order to convey a legal interest, an equitable mortgagee had to resort to one of the conveyancing mechanisms or powers referred to above.¹⁴

¹⁰ Megarry & Wade's *Law of Real Property* 7th Edition par 25-017; *Lord Waring v London & Manchester Assurance Co Ltd* [1935] Ch 310 at 317 – 318; *Property & Bloodstock Ltd v Emerton* [1968] Ch 94 at 114 – 115; *Baypoint Pty Ltd v Baker* (1994) 6 BPR 13, 687; *Chia v Rennie* (1997) 8 BPR 15,607.

¹¹ *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 274 – 275.

¹² (1889) 40 Ch D 508.

¹³ (1887) 35 Ch D 669 at 671.

¹⁴ Written Submissions on Behalf of the Applicant, para [58] – [60]; Megarry & Wade's *Law of Real Property*, pp 1125-1126 [25-043]-[25-044].

[43] Section 104(1) of the *Law of Property Act* 1925 (UK) provides:

“A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage.”

[44] As I have said, the statutory provisions in Queensland by which a purchaser from a mortgagee exercising power of sale takes free of subsequent encumbrances do not extend to a mortgagee’s sale of personal property.

[45] What was the position under the general law?

[46] *Jortin’s Case (South Eastern Railway Company v Jortin)*¹⁵ was decided three years before *Lord Cranworth’s Act* was passed.

- (a) The Folkestone Harbour Company (the mortgagor) raised £4500 by mortgaging its harbour and buildings to a number of lenders, whom I shall call collectively “the first mortgagees”. Ann Jortin was the residuary beneficiary of an assignee of one of the first mortgagees.
- (b) The mortgagor borrowed £10,000 from the Exchequer Loan Commissioners, who effectively became the second mortgagee.
- (c) There was a priority agreement between the Loan Commissioners and the first mortgagees, who ceded some priority. That priority was confirmed by subsequent statutes, which gave the Loan Commissioners power of sale.
- (d) The priorities so determined were: first, the Loan Commissioners’ interest, second, the prior lenders’ interest, and third, the Loan Commissioner’s £10,000 principal.
- (e) The Loan Commissioners’ exercised their power of sale, selling to trustees for the South Eastern Railway Company. After the amount of interest owing to them had been paid from the proceeds, there remained a surplus.

The House of Lords had to determine the effect of the priority agreement and the statutes confirming the priorities. Their Lordships held that under the statutes:

- (i) after the Commissioners’ claim for interest had been satisfied, the interest due to the prior lenders was payable out of the surplus;
- (ii) liability for the prior lenders’ interest could be enforced against the Commissioners, but not against the purchasers. In other words, the purchasers took free of what was, by force of the statutes, an encumbrance ranking in priority after that pursuant to which the Commissioners had exercised power of sale.

¹⁵ (1857) 6 HL Cas 425; 10 ER 1360.

- [47] While the decision in *Jortin's Case* turned on the priority agreement and the application of particular statutes, it is significant that the Lord Chancellor made this general observation in the introductory part of his speech:

“Now when a mortgage[e] sells under a power, that sale defeats the rights of all subsequent incumbrancers, whose remedy then is only against the money in the hands of the vendors...”¹⁶

- [48] What his Lordship said was consistent with a mortgagee who exercises its power of sale holding the surplus proceeds on trust for subsequent mortgagees according to their priorities, and ultimately for the mortgagor. Disputes about priorities and the amounts owing to those with an interest in the proceeds could be determined by equity, by way of orders for accounts and inquires.
- [49] In this way the subsequent mortgagee's interest in the property was “over-reached”: the exercise of the power of sale defeated the subsequent mortgagees' interest in the property, at the same time giving them a beneficial interest in the surplus proceeds of sale.
- [50] In principle, the sequelae of the exercise of power of sale by an equitable chargee are no different from those of the exercise of power of sale by equitable mortgagee. So long as the charge gives the chargee the necessary powers or conveyancing mechanisms, the chargee may convey the legal interest in the charged property, free of the interests of subsequent chargees in that property. Upon its doing so the subsequent chargees can take interest in the surplus proceeds of sale (if any).
- [51] Accordingly, so long as the requirements of s 84 of the *Property Law Act* have been fulfilled, upon completion of the business sale contract, Pearls would take the assets and undertaking of the hotel free from the interests of Perpetual and LJK.

Notice of exercise of power of sale

- [52] Section 84 of the *Property Law Act* provides (so far as presently relevant):

“84 Regulation of exercise of power of sale

(1) A mortgagee shall not exercise the power of sale conferred by this Act or otherwise unless and until—

(a) default has been made in payment of the principal money or interest or any part of it secured by the instrument of mortgage, and notice requiring payment of the amount the failure to pay which constituted the default under such instrument of mortgage has been served on the mortgagor and such default has continued for a space of 30 days from service of the notice; or

(b) default has been made in the observance or fulfilment of some provision contained in the instrument of mortgage or implied by this or any other Act and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed and performed, and notice

¹⁶ (1857) 6 HL Cas 425 at 435; 10 ER 1360 at 1365.

requiring the default to be remedied has been served on the mortgagor, and such default has continued for the space of 30 days from service of the notice.

(2) A notice under this section may be in the approved form.

...

(5) Nothing in this section applies to the exercise by a mortgagee of the power of sale conferred on a mortgagee under the Land Act or Mineral Resources Act.”

[53] On 9 December 2009 St George served notice of exercise of power of sale on SP Hotel. The notice was in terms:

“1. DEFAULT has been made under:

- (i) fixed and floating charge registered no. 1319326 (**Charge**) and registered mortgages dealing no. 709744123 and 709744156 (**Mortgages**) in respect of the property including that described as:-

Description	County	Parish	Title Reference
Lot 239 on CP WD6317	Ward	Gilston	17660067
Lease 708362381 on Lot 318 on CP WD 800475	Ward	Gilston	49011376

(**Property**); and

- (ii) Facility Agreement between St George Bank Limited ACN 055 513 070 (**Mortgagee**) and Desmarest Pty Ltd ACN 113 225 031 dated 23 June 2006 as varied from time to time (**Facility Agreement**).

2. You are in default under the Facility Agreement, Charge and the Mortgages (**the Securities**) in that the total amount owing was not paid when due following demand made on Desmarest Pty Ltd ACN 113 225 031 on 3 December 2009 and on You on 4 December 2009 and other events of default including those specified in those demands including your insolvency and that of other guarantors have not been remedied.

3. If the Default is not remedied within 30 days of service of this notice upon You by:

- (a) paying the Mortgagee at its offices at Level 5, 345 Queen Street, Brisbane, Queensland, the amount of \$66,275,348.59 and any other instalment of principal and interest normally due and payable during this 30 day notice period, as well as interest that accrues, charges and enforcement expenses that are incurred by the Mortgagee, until the Mortgagee receives payment in full; and
- (b) remedying all other events of default under the Securities including the insolvency of the guarantors and You.

The Mortgagee will, without further notice to You, be entitled to exercise all or any of the powers conferred by the Securities, and any guarantee and indemnity given by You including that dated 27 June 2006 (**Guarantee**) and other security granted in favour of the Mortgagee and by the *Property Law Act* 1974 or otherwise conferred by law and commence enforcement proceedings including but not limited to:

- (i) bring enforcement proceedings against You in relation to the Securities and the Guarantee;
- (ii) bring enforcement proceedings against You in relation to a subsequent default of the same kind as specified above, which occurs during the period for remedy of the Default as set out in this notice; and/or
- (iii) sell the Property or exercise all or any of the other powers conferred by the Securities, the Guarantee, or by the *Property Law Act 1974* or otherwise conferred by law.

4. If any further default of the same kind occurs during the period allowed under this notice for remedying the default and such default is not remedied within the given period, it may be the subject of enforcement proceedings without further notice being given.

5. This notice supersedes any prior request the Mortgagee has made to You for payment. Nothing in this notice, shall prejudice or affect the Mortgagee's rights to exercise any of the powers lawfully permitted to be exercised by the Mortgagee at anytime."

- [54] The contracts were executed on 23 November 2009. It was not until 23 December 2009 that they were varied to make them subject to the power of sale becoming exercisable.
- [55] The notice of exercise of power of sale identified the securities under which SP Hotel had defaulted. While it contains a full description of the land, it does not contain any description of the other property (including the assets and undertaking of the hotel) secured by the charge. It specifies the default and what must be done to remedy it, and goes on to give notice that if the default is not remedied St George will be entitled to exercise all or any of the powers conferred by the securities, including the power of sale.
- [56] Counsel for the respondents submitted that the notice ought to have contained a description of all the property to be sold.
- [57] The notice is clumsily drafted. It refers to the Charge and Mortgages "in respect of the property including that described as [the land] (Property)." It gives notice that St George may "sell the Property" or exercise all or any of its other powers. "Property" may mean only the land or it may mean "property including the land". But even if it means only the land, notice that the other property may be sold is sufficiently given by the words "or exercise all or any of the other powers conferred by the Securities...or by the *Property Law Act 1974*...." in paragraph 3(iii).
- [58] In any event, I am not persuaded that the notice needed to contain a description of the property to be sold. Section 84 of the *Property Law Act* is clear as to what is required: a notice "requiring payment of the amount failure to pay which constituted default" or "requiring the default to be remedied", depending on the nature of the default. Its purpose is to enable the recipient to understand with reasonable certainty what it is required to do.¹⁷
- [59] In short, the notice served on 9 December 2009 satisfied the requirements of s 84.

¹⁷ *Clarke v Japan Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 at 413.

- [60] Counsel for St George submitted that is clear that a mortgagee may take steps to exercise its power of sale by entering into a contract prior to obtaining the right to sell, provided the contract is conditional upon the power of sale being exercisable at the end of the requisite default period.¹⁸ Counsel for the respondents accepted that principle, but submitted that contracts which were not subject to such a condition when they were made could not subsequently be varied in a way which would satisfy s 84.
- [61] As I observed in the course of this oral submissions, I do not consider that there is any relevant distinction between a contract originally subject to such a condition and one that is varied so that it becomes subject to such a condition, so long as the variation takes place sufficiently in advance of the completion of the contract. Here the date for completion was fixed by reference to the fulfilment of a number of conditions, and it has not been suggested that the variation on 23 December 2009 was not sufficiently in advance of the date for completion to allow the 30 day period under the notice of exercise of power of sale to run.
- [62] I record that during oral submissions on this question senior counsel for the respondents referred to s 57A of the *Property Law Act*. However, I consider that is not applicable to the present circumstances.
- [63] I am satisfied then that the requirements of s 84 of the *Property Law Act* have been fulfilled.

Conclusion

- [64] In all the circumstances I am satisfied that the applicant St George is entitled to the primary relief it has sought. It is not necessary for me to consider the submissions in relation to an order for judicial sale which was sought by way of alternative relief.
- [65] I make a declaration as proposed in a draft furnished by counsel for St George as follows:

THE COURT DECLARES THAT:

1. upon the conveyance by the applicant of the property and undertaking of SP Hotel Investments Pty Ltd ACN 117 673 775 ('SP Hotel') to Pearls Australasia Mirage 1 Pty Ltd ACN 140 177 395 ('Pearls') pursuant to:
 - (a) a contract for the sale of commercial land and buildings dated 23 November 2009;
 - (b) a hotel and villa management services business sale agreement dated 23 November 2009,
 and in the exercise by the applicant of its power of sale under:

¹⁸ *Farrar v Farrars Ltd* (1888) 40 Ch D 395 at 412 – 413; *Boston Peak Pty Ltd v Houghton* [1999] QSC 48 at [20].

- (c) the fixed and floating charge granted by SP Hotel to the applicant which is dated 27 June 2006 and notice of which was lodged with the Australian Securities and Investments Commission ('ASIC') pursuant to s 263 of the *Corporations Act* 2001 (Cth) at 4.38 pm on 29 June 2006 ('St George Charge');
- (d) registered mortgages 709744123 and 709744156 granted by SP Hotel to the applicant ('St George Mortgages'),

Pearls will take the property and undertaking so conveyed to it by the applicant free of any interest of:

- (e) the first respondent ('Perpetual') under:
 - (i) a fixed and floating charge granted by SP Hotel to Perpetual which is dated 28 June 2006 and notice of which was lodged with ASIC pursuant to s 263 of the *Corporations Act* on 3 July 2006 ('Perpetual Charge');
 - (ii) registered mortgages 709744204 and 709744211 granted by SP Hotel to Perpetual ('Perpetual Mortgages');
- (f) the second respondent under:
 - (i) a fixed and floating charge granted by SP Hotel to the second respondent which is dated 28 March 2007 and notice of which was lodged with ASIC pursuant to s 263 of the *Corporations Act* on 17 May 2007 ('LJK Charge');
 - (ii) registered mortgages 710582941 and 710582933 granted by SP Hotel to LJK ('LJK Mortgages').

Addendum

- [66] As from 12:01 am on 1 March 2010, by the effect of a statement made in accordance with s 20(2) of the *Financial Sector (Business Transfer and Group Restructure) Act* 1999 (C'th), the rights and obligations of St George Bank Limited (the applicant in the proceeding) were transferred to Westpac Banking Corporation, and Westpac Banking Corporation was substituted for St George Bank Limited as a party to the proceeding.
- [67] Accordingly, the following further order should be made – that Westpac Banking Corporation ABN 33 007 457 141 be substituted for St George Bank Limited ACN 055 513 070 as the applicant in the proceeding.

Costs

- [68] Having heard submissions on costs, I order that the respondents pay the applicant's costs of the proceeding to be assessed.