SUPREME COURT OF QUEENSLAND

CITATION:	*HSBC Bank Australia Ltd v Wang & Ors* [2021] QSC 58
PARTIES:	**HSBC BANK AUSTRALIA LIMITED** (applicant) **v** **JIANYI WANG** **CHUYUE WANG** **HUIFEN XIE** (first respondents) **CRAIG MAX SCUTELLA** **IRYNA MULLIGAN** (second respondents)
FILE NO:	BS 2251 of 2021
DIVISION:	Trial Division
DELIVERED ON:	25 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2021
JUDGE:	Holmes CJ
ORDERS:	**1. The caveat lodged by the first respondents over Lot 6 SP105007 be removed.** **2. The first respondents pay the costs of the applicant and the second respondents on the standard basis.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – PARTICULAR CASES – where the first respondents purchased a property on Hope Island ("the property") for an amount which was financed by a loan facility provided by the applicant and secured by a first registered mortgage over the property – where the first respondents fell into arrears on the loan and the applicant obtained default judgment for recovery of possession of the property – where the applicant contracted to sell the property to the second respondents – where, prior to settlement of the contract, the first respondents lodged a caveat claiming an equitable interest in the property on the ground that the applicant had failed to act in good faith in exercising its power of sale as mortgagee – where the marketing of the Property was made more difficult by government restrictions imposed during the COVID-19 pandemic and economic uncertainty – where the first respondents contend that the applicant sold the property too rapidly and at a significant undervalue – where the first respondents contend that the applicant should have waited for conditions to improve and continued to market the property –

whether the claim that the applicant breached its duty to act in good faith in exercising the power of sale constitutes a serious question to be tried – whether the balance of convenience favours the removal of the caveat

Land Title Act 1994 (Qld), s 122(1)(c), s 127

Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd (2011) 279 ALR 166; [2011] NSWCA 39, considered
Clarke v Japan Machines (Australia) Pty. Ltd. (No. 2) [1984] 1 Qd R 421, cited
Eng Mee Yong v Letchumanan [1980] AC 331, cited
Harvey v McWatters (1948) 49 SR (NSW) 173, cited
Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161; [1972] HCA 74, considered
Macedonian Society of Western Australia (Inc) (Receiver and Manager appointed) v St George Bank Ltd [2003] WASC 17, cited
Maviglia Investments Pty Ltd v BKSL Investments Pty Ltd (in liq) & Ors [2017] NSWSC 490, cited
Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 13 CLR 676; [1912] HCA 9, applied

COUNSEL: T Ritchie for the applicant
S Monks for the first respondents
G Coveney for the second respondents

SOLICITORS: DLA Piper for the applicant
David Kam & Co for the first respondents
Hickey Lawyers for the second respondents

[1] The applicant, with the support of the second respondents, seeks the removal of a caveat lodged by the first respondents on a property at Hope Island of which the latter are, as joint tenants, the registered proprietors. The first respondents (husband, wife and daughter) had purchased the property in 2009 for an amount of $9,000,000, partly financed by a loan facility for the amount of $4,500,000 provided by the applicant and secured by a first registered mortgage over the property.

[2] By early 2019, the first respondents had fallen into arrears on the loan. When they did not respond to a default notice by repaying those arrears, the applicant issued an acceleration notice, demanding the entire amount owed. No payments having been made, it proceeded to obtain default judgment for recovery of possession of the property and took possession pursuant to an enforcement warrant on 1 December 2019.

[3] The marketing and sale of the property took place in the second and third quarters of 2020, at a time when, because of the COVID-19 pandemic, international and state borders were closed to most entrants. After an unsuccessful attempt at auction, the applicant entered a contract to sell the property to the second respondents for $5,510,000. The contract was due to settle on 18 December 2020, but on 17 December the first respondents lodged a caveat claiming

> "…an equitable interest in the estate in fee simple, as registered proprietors"

on the ground the applicant had

> "…failed to act in good faith in the exercise of its power of sale by failing to properly market the property for sale, and by selling the property at a significant under value."

That caveat is the subject of the present application.

Removal of caveats

[4] Section 122(1)(c) of the *Land Title Act* 1994 permits the registered owner of a lot to lodge a caveat, while s 127 of the Act permits others with an interest in the lot to apply to this court for the caveat's removal. A caveat operates in a way analogous to an injunction restraining sale of a property.[1] It is well-established that the tests for removal of a caveat are similar to those applicable on an application for an interim injunction: whether there is a serious question to be tried (in this case, as to the claim that the applicant failed to meet its duty to act in good faith as mortgagee exercising the power of sale) and whether the balance of convenience favours removal of the caveat.[2] And, as for an injunction, the onus lies on the caveator to satisfy the court of those matters.[3]

The applicant's exercise of the power of sale

[5] In November 2019, the applicant engaged property consultants to act on its behalf in relation to the sale of the property. In January 2020, those consultants obtained a valuation, undertaken by a Mr Moore, which put its market value in the range of $5,500,000 to $7,200,000 and fixed on a current market value of $6,800,000. (The valuation seems, however, to include in the improvements valued a pontoon associated with the property, which was in fact separately owned.) Mr Moore observed that in recent years there had been a number of Chinese purchasers buying Hope Island property, which had resulted in prices above local market values. The property would require an extended sales and promotion period of "up to six to 12 months" and, since it was to be marketed "within a shortened timeframe or under forced sales conditions", the sale price might be severely reduced. The property had been purchased for $9,000,000 in 2009 at "the peak of the market"; but it had been poorly maintained and the market had seen declines in capital value since then.

[6] A further valuation by the same valuer, obtained at the end of July 2020, put the range somewhat lower, as between $5,000,000 and $6,750,000, with the current market value estimated as $6,500,000. The lower valuation appears to have been influenced by concern about the economic uncertainty caused by the COVID-19 pandemic, which, Mr Moore noted, was expected to continue well into the following year. Given that uncertainty, the applicant should, he advised, exercise some caution in relying on the valuation. Because of the poor sales conditions, the effects of the pandemic, the restrictions in interstate and international travel and limited opportunity for exposure of the property to wealthier parties, together with

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1 *Eng Mee Yong v Letchumanan* [1980] AC 331 at 335.
2 *Re Burman's Caveat* [1994] 1 Qd R 123.
3 *Re Jorss' Caveat* [1982] Qd R 458.

the very substantial body corporate contribution, which was more than $40,000, it was likely "a greatly reduced figure towards the lower end of the market range" would be achieved with a marketing period under six months. Mr Moore reiterated that a "likely selling period" for the property of six to 12 months was "appropriate", assuming a professional marketing campaign by experienced real estate agents.

[7] Meanwhile, the consultants invited tenders from real estate agents for the sale of the property. Mr Carew of the Professionals Real Estate Group performed an appraisal of it in May 2020, providing a preliminary figure for it of between $7,000,000 and $7,700,000 in its current condition. According to Mr Carew, his appraisal identified some problems with maintenance, including water damage to ceilings and carpets, exposed electrical wiring in the living areas, lack of a fence for the pool and spa and a need for repairs and repainting of the exterior and fences. Some of those matters were remedied, including cleaning the house, fencing the pool and rectifying the electrical and wiring problems.

[8] On 4 June 2020, Mr Carew was engaged to sell the property. He set about marketing it in late June, with an auction date set for 8 August 2020. It was: listed for sale on a real estate website; marketed on social media platforms; included in the real estate agency's physical and digital displays; featured, with an accompanying article, on the front page of the local tabloid's real estate section as house of the week; and advertised by way of 3,000 four-page hand-outs provided at house inspections and delivered to residents in the locality. Almost $19,000 was spent marketing it, and a number of "open house" events and private inspections took place between 4 July and the auction date. Mr Carew deposes that he obtained feedback from people inspecting the property, which included some concerns about the prospect of its needing redecoration and maintenance and also extended to estimates of its price. That feedback suggested to him a steady drop in what purchasers were prepared to pay over the period between the week ending 5 July 2020, when the "open house" program began, and the week ending 17 August 2020.

[9] On 7 August, Mr Scutella, one of the second respondents (the other is his wife), made an inquiry about price expectations, but he took no part in the auction the following day. The applicant set a reserve price for the auction of $6,750,000 with a "fall back price" (presumably a price at which the agent was authorised to negotiate) of $6,500,000. The highest bid at auction on 8 August was $4,500,000, well below the reserve price, and it was passed in. However, later in August, Mr Carew contacted Mr Scutella (who lived in Sydney) about the property and gave him a virtual tour of it. A friend of Mr Scutella also inspected the property on his behalf. On 19 August, the second respondents made an offer of $5,500,000, subsequently increased to $5,750,000. That offer, however, incorporated the pontoon. After deduction of the amount to be paid elsewhere for the pontoon, the net result was that the applicant entered a contract on 17 September 2020 to sell the property to the second respondents for $5,510,000.

[10] Mr Rodrigo, a collections manager for the applicant, deposes in an affidavit that the applicant accepted the second respondents' offer for a number of reasons. It was the best offer received, notwithstanding the substantial marketing campaign, and was a significant improvement on the highest bid at auction. There was no guarantee that a better offer would eventuate, the auction having been a failure and the many inspections having produced no real interest from prospective buyers and a good

deal of negative feedback about some aspects of the property. As at August 2020, there was uncertainty about the future for the economy, and the prestige property market in particular, with the prospect of a prolonged downturn as Government stimulus payments and mortgage repayment deferrals came to an end. Added to that was uncertainty about when international borders would reopen.

[11] The first respondents put on their own valuation evidence to demonstrate that the sale price for the property was substantially below its market value. They relied on the affidavit of a valuer, Mr Campbell, who inspected the property in December 2020 and provided his valuation for dates in January, June, September and December 2020. Mr Campbell noted that he had been unable to inspect the interior of the property. He reported prices on 2019 sales of three properties in the area and sale prices for three properties sold, respectively, in February, June and November 2020. The June sale was of a vacant block for $4,580,000 and the November sale of a large dwelling for $4,900,000. However, he said, the property being unique and, in his view, of superior value to the sales he had reviewed, he preferred a valuation method of determining the unimproved value of the land and adding the depreciated value of the improvements on it.

[12] Mr Campbell determined the unimproved value by estimating the value of improvements involved in five of the six sales already referred to and extrapolating from the resulting land value in each case to arrive at an estimate for the value of the property here. Using that approach, he concluded that as at June 2020, the land value was $5,300,000, while in September and December 2020, it was $6,000,000. He assessed the replacement cost of improvements on the property using evidence from recent building contracts in the locality and a current construction cost guide. He arrived at a figure of $4,537,500 for the main living area by reference to a value of floor area per square metre, then added in the estimated value (the basis of estimation is not clear) of other site improvements such as pavilions, a swimming pool and a tennis court, at $1,000,000. Mr Campbell depreciated the resulting figure at 15%, giving a value for the property as at 30 June 2020 of $10,000,000 and, in September and December 2020, $10,700,000.

[13] The second deponent on whose evidence the first respondents relied was Mr Hickey, a real estate agent who, like Mr Carew, took part in the property consultants' tender process, performing an appraisal and making submissions on marketing. He inspected the property in December 2019 and arrived at a valuation of between $7,000,000 and $8,000,000. Giving his opinion as to the sale result, he described the sale price of $5,750,000 (including the pontoon) as "significantly below market value". He expressed the view that the property should have been sold by auction rather than private treaty (apparently being unaware of the attempt at auction).

Right to relief – the rule in Inglis

[14] The first respondents relied on the alleged breach of the mortgagee's duty to act in good faith as giving rise to a right to equitable relief. The applicant contended that they were barred from seeking such relief because they had not paid the arrears of the mortgage debt into court, as the rule in *Inglis*[4] required. (Mr Rodrigo deposes from a review of the applicant's records that, as at 24 February 2021, arrears of

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4 *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161 at 164.

approximately $553,000 remain outstanding on the first respondents' loan, the balance of which (including legal costs) sits at approximately $4,400,000.) The general rule which Walsh J described in *Inglis* (in a judgment upheld on appeal) is that an injunction to restrain a mortgagee's exercise of the power of sale will not be granted unless the amount of the mortgage debt is paid, or, if it is disputed, the amount claimed is paid into court. The rule is not absolute; in setting it out, his Honour made it clear that he was not dealing with an instance in which the mortgagee was purporting to exercise his rights under the mortgage in an improper way, infringing the rights of the mortgagor.[5]

[15] In *Harvey v McWatters,*[6] Sugerman J distinguished between two classes of case. The first, to which the "ordinary rule" applied, was where there was no question about whether there was default, and the power of sale was exercisable, so that the only dispute was about the amount owed or

> "…the mortgagor decides to challenge the mode in which the mortgagee proposes to exercise his power."[7]

It was different where there was a dispute as to whether the power of sale was exercisable at all; for example, where (as in the case before him) the plaintiff contended that there was no default. In such a case, since the underlying principle was that the mortgagee was to be protected against the risk of loss, it was open to the court to require payment only of so much as was necessary to achieve that purpose, having regard to the value of the security and the possible loss which could be incurred.[8]

[16] G. N. Williams A-J applied that more flexible approach in *Clarke v Japan Machines (Australia) Pty. Ltd. (No. 2)*,[9] in which an injunction was sought restraining a mortgagee from exercising powers under a bill of encumbrance over land, which secured a chattel lease. His Honour concluded that it was not appropriate to require payment into court of the arrears on the loan, because the mortgagee had repossessed the leased goods; and the bill of encumbrance was merely a collateral security for a loss in respect of the lease which had yet to be established. The first respondents argued that the present case was similar, and it was equally inappropriate to require payment of the arrears here. The applicant was in possession of property which was worth substantially more than the secured debt; that was evidenced by its ability to achieve a sale at a price which exceeded the amount owed by more than $1,000,000.

[17] Judges at first instance have since expressed varying views as to the extent to which the rule in *Inglis* permits of exceptions. The applicant relied on a decision of Barker J, then of the Supreme Court of Western Australia, in *Macedonian Society of Western Australia (Inc.) (Receiver and Manager appointed) v St George Bank Ltd.*[10] In that case, Barker J discussed the decision in *Harvey v McWatters* and noted that the flexibility of which Sugerman J spoke arose where the dispute was whether the power of sale was exercisable at all. That did not give rise to the wider proposition

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5 At 166.
6 (1949) 49 S R (NSW) 173.
7 At 174.
8 At 178.
9 [1984] 1 Qd.R. 421.
10 [2003] WASC 17.

that wherever the good faith of the mortgagee in exercising the power of sale was challenged it was unnecessary to make any payment in. A plaintiff invoking the equitable jurisdiction to obtain an injunction was first required to do equity by paying the money into court and seeking redemption of the mortgage. Thus, even if there were a serious issue to be tried on the merits, in a case where neither the existence nor the availability of the power of sale were in question, no injunction should be granted to prevent the exercise of the power of sale unless there were a payment in or other adequate security offered.

[18] The first respondents pointed to *obiter dicta* to contrary effect in *Maviglia Investments Pty Ltd (As Trustee to the Maviglia Family Trust) v BKSL Investments Pty Ltd (in liq) & Ors*.[11] Slattery J (in the New South Wales Supreme Court) expressed the second part of the exception described in *Harvey v McWatters* more broadly:

> "If the mortgagor is alleging that the power of sale has not arisen or is alleging a lack of good faith there may be no need for any payment into court…"[12]

In *Swann Road Pty Ltd v Sterling and Freeman Advisory Pty Ltd*,[13] Macaulay J (in the Victorian Supreme Court) accepted Slattery J's proposition as correct and applied it in a situation where a lack of good faith on the part of the mortgagee was alleged in relation to the circumstances leading to the mortgagor's default.

[19] The uncertainty as to the compass and application of the *Inglis* rule has been the subject of comment at appellate level. In *Bayblu v Capital Finance Australia Ltd,*[14] the New South Wales Court of Appeal noted a lack of clarity as to whether the expression "general rule" in *Inglis* meant that it was universally applicable or usually applicable. If the latter, it would follow that the failure to pay the outstanding money into court would appropriately be regarded as a factor in determining the balance of convenience. It was unnecessary in that case to reach any conclusion about the precise limits of the rule because the judge at first instance had in fact treated the failure to bring money into court as a balance of convenience consideration.

[20] It is worth mentioning that there were some similarities in the facts of *Bayblu* to those in the present case. The applicant there sought leave to appeal against orders requiring the removal of caveats, contending that the mortgagee had unduly rushed the sale, which had taken place at an unfavourable time; had taken inadequate steps to secure a proper price; and had achieved a price well below valuations which the caveator had obtained. The court noted that the sole dispute was about the manner in which the power of sale was exercised; the caveator did not contend that the facts fell within any of the previously recognised exceptions to the rule in *Inglis*. Of mild significance in the present circumstances is that the court appears to have considered that concession unremarkable.

[21] As this short review of decisions shows, view diverge as to the flexibility of the *Inglis* rule and whether the exceptions extend to the circumstance where it is alleged the power of sale is not being exercised in good faith. However, I have decided

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11 [2017] NSWSC 490.
12 At [58].
13 [2019] VSC 136.
14 (2011) 279 ALR 166.

against reaching a final view on the issue, because I have concluded against the first respondents for other reasons. I will, however, return to the lack of payment in, in expressing some views about the balance of convenience.

The contended breach of the mortgagee's duty of good faith

[22] In *Pendlebury v Colonial Mutual Life Assurance Society Ltd,*[15] Griffith CJ described the duty of good faith as meaning that the mortgagee must not

> "…recklessly or wilfully sacrifice the interests of the mortgagor".

Recklessness would be demonstrated by a mortgagee who failed to take

> "…obvious precautions to ensure a fair price"

and was careless as to whether one was obtained.[16] Adopting that language in *Forsyth v Blundell*,[17] Walsh J observed that wilful or reckless disregard or sacrificing of the mortgagor's interests did not necessarily involve any actual intention to defraud or collusion with the purchaser.[18]

[23] The first respondents argued that the applicant had breached the duty of good faith, sacrificing their interests by taking the best offer made in the immediate post-auction period. The market value of a property was the price that a willing, but not anxious, seller and a willing, but not anxious, buyer would agree in an arm's length transaction. In the present case, the applicant, as a very anxious seller, had recklessly disregarded the first respondents' interests by rushing to a sale. Assuming that the second respondents' offer was accepted when made, on 21 August 2020, the property had spent only 70 days on the market since Mr Carew's engagement to sell it on 4 June. The applicant had not moved swiftly between obtaining the enforcement warrant for possession in September 2019 and putting the property on the market; it should have exercised similar restraint in relation to the sale.

[24] At the time the applicant sold to the second respondents, it was aware that the property was originally bought for $9,000,000, with a loan to valuation ratio of almost 60%, from which it could be inferred that the applicant had valued it at that time at around $7,400,000. Its own valuers had predicted better prices for the property at, respectively, between $7,000,000 and $7,700,000 and $6,500,000. Mr Moore had started his range in his second valuation at $5,000,000, but there was no explanation of why it should go as low as that when his estimate of the current market price was $6,500,000. Those valuations were supported by the opinions of Mr Hickey and Mr Campbell.

[25] Mr Moore had warned that selling in a shortened time frame would result in a materially reduced price. The applicant should, the first respondents submitted, have continued to market the property over the 12 month period to which Mr Moore had alluded. It should have anticipated that it would do better if it waited, given what was said in submissions to be the "notorious fact" that Queensland's borders would reopen within weeks; potential buyers would then be able to inspect in

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15 (1912) 13 CLR 676.
16 At 680.
17 (1973) 129 CLR 477.
18 At 497.

person. In the meantime, it should have undertaken further advertising interstate and overseas, and possibly gone to a second auction. Its prospects of being repaid were not at risk. As at February 2021, the first respondents owed $4,400,000; assuming interest at 5%, a year later they would owe something in the order of $4,625,000. The applicant could afford to wait for a better offer, and to sell as it did was such a sacrificing of the first respondents' interests as to breach the duty of good faith.

[26] The applicant contended that the mere fact that valuation evidence indicated a higher market value than that achieved could not of itself establish that there was a serious question to be tried as to a breach of the duty of good faith. Even if it could be shown that it had failed to market the property adequately and sold it at an undervalue, that, at the highest, might amount to a breach of s 85(1) of the *Property Law Act* 1974.[19] In fact, it had obtained valuations and market feedback and its agent had vigorously marketed the property, ultimately accepting an offer substantially better than achieved at auction for the reasons to which Mr Rodrigo had sworn without challenge.

Serious question to be tried?

[27] I do not think that any criticism can be made of the actual steps which the applicant took in obtaining valuations and marketing the property, or in the holding of the unsuccessful auction. The first respondents' essential complaint was that the marketing period was truncated, because the applicant accepted the second respondents' offer within weeks of the auction. But I do not consider that there is an arguable case that, in doing so, it breached its duty of good faith.

[28] There were valuations which suggested a much higher market value, but, as Mr Moore said of his own valuation, given the uncertainty generated by the effect of the pandemic on the market, they must be regarded with some caution. Mr Campbell's valuation has particular limitations: he was not able to inspect the interior of the property; the approach of estimating land and improvement values for other properties in order to arrive at a valuation for the subject property, was, to say the least, broad-brush; and, importantly, four of the five sales of property on which he relied for that purpose occurred pre-pandemic. The same point can be made of Mr Moore's valuations: of the 14 properties on whose sale prices he relied as evidence to arrive at values and ranges of value, only two were sold after the pandemic had taken hold. Similarly, Mr Hickey's appraisal was made in December 2019, in undoubtedly more normal market conditions than those obtaining nine months later, when the sale took place. Consequently, this seems to me an instance in which, given the extensive advertising and marketing of the property prior to the auction, the sale price which the applicant was able to achieve is a better guide to market value than the valuation evidence.[20]

[29] Even if Mr Hickey and Mr Campbell are correct in their conclusion that the sale price was significantly below market value, the mere fact of a sale at an inadequate

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19 Section 85(1) of the *Property Law Act* imposes on a mortgagee exercising a power of sale a duty to take reasonable care to ensure that the property is sold at market value. However, it seems that the mortgagor's only remedy for a breach of the provision lies in damages, because s 85(3) renders the title of a purchaser unimpeachable; and it has been held that "title" in this context extends beyond legal or registered title: *McKean v Maloney* [1988] 1 Qd R 628 at 635.

20 *Stockl v Rigura* [2004] NSWCA 73 at [31] – [34].

price does not demonstrate a lack of good faith. It is necessary to show that the mortgagee's failure to take reasonable steps to obtain a proper price was so serious as to be characterised as unconscionable conduct.[21] The applicant accepted the second respondents' offer of $5,510,000 in a context in which its own valuer had originally put the lower end of the possible range for a sale price slightly lower, at $5,500,000, (with the erroneous inclusion of the pontoon) and then had revised that shortly prior to the auction to $5,000,000.

[30] That valuer, Mr Moore, had suggested a longer marketing period would achieve a better price in the usual course of things. But a mortgagee is

> "…entitled to sell at the time of his choice and without waiting for a time which a selling owner might consider more propitious". [22]

And, indeed, there was no reason to suppose that a more propitious time was pending.

[31] The first respondents offered no evidence to support the "notorious fact" suggested in submissions that the opening of Queensland's borders was imminent. They put before the court 13 border restrictions directions given by the Chief Health Officer for Queensland between April and October 2020. What emerges from a review of that material is that between 3 April and 10 July, only interstate travellers who were deemed "exempt" were allowed to enter Queensland, undergoing quarantine for the purpose, while between 10 July and 30 October 2020, only those who had not been in a COVID-19 "hotspot" could enter. There was no evidence about the extent of the hotspots or what happened after 30 October 2020, but I think that I can take judicial notice of the fact that "hotspots" at times included parts, if not the whole of, New South Wales and Victoria and continued to lead to border closures well after 30 October 2020.

[32] There is no evidence to suggest that as at September 2020, when the property was sold, the applicant should have contemplated any comprehensive or continuous reopening of Queensland's borders within the balance of the year. Nor is there any evidence about the impact or likely duration of border closures in other States. The applicant sold at a time when, with international borders closed and state borders being closed to different regions at different times, there was no reason to suppose that any improvement in the market was imminent. Indeed, the feedback which Mr Carew obtained suggested that buyer sentiment was becoming more unfavourable. As to the proposition that the applicant should have undertaken international marketing of the property, Mr Hickey, the first respondent's own expert, does not seem to have proposed that course of action in his pitch to the applicant's consultants. There is no evidence that, allowing for the impossibility of inspection of the property by overseas buyers, any such marketing was likely to achieve any better result.

[33] Essentially, the first respondents' submission, that the applicant should have waited for a better outcome, is made in a complete absence of any evidence that as at August or September 2020, there was any reason to suppose that a higher price

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21 *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 at 653.

22 *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 at 313. See also *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676 per Barton J at 695.

would be forthcoming within any reasonable time period. Against that, Mr Rodrigo has deposed to the reasons that the applicant accepted the second respondents' offer, all of which are credible and uncontradicted. In the context of the applicant's efforts to sell and the uncertainty of conditions, neither the low price achieved nor the failure to wait can conceivably justify an inference that the applicant acted other than in good faith. The applicant may have been precipitate; there might be an argument as to whether its conduct was reasonable in s 85 terms; but there is nothing to support the contention that it was not acting in a genuine belief that accepting the second respondents' offer was in the best interests of all concerned, including the first respondents.

Balance of convenience

[34] Because I have concluded that there is not an arguable question of breach of good faith in this case, it is not strictly necessary for me to reach a conclusion on the balance of convenience. I am, however, satisfied that the balance of convenience tips against allowing the caveat to remain in place.

[35] Firstly, there is not a great deal to suggest that damages would not be an adequate remedy. The first respondents are presently in China. Their solicitor deposed that Mr Wang had told her that his wife and a daughter had lived in the property between 2009 and 2019, so it is known, at least, that it was one of the family's residences. He also expressed an intention to return to Australia to live at the property with his wife and children. But there is no indication of any particular attachment to the property. Indeed, as the applicant pointed out, when the first respondents' solicitors first advised that the caveat had been lodged, they proposed consent orders setting the sale aside so as to allow further attempts at marketing it. Nor (understandably) is there evidence that there is any realistic short-term prospect of the first respondents' being able to return to Australia and reside in it. Their counsel submitted that they might receive a better outcome if an actual sale took place, rather than the court's arriving at an amount for damages on the basis of a notional market value, but that seems speculative. And should they be left to recover any loss by way of damages, there is no reason to doubt that the applicant would be able to meet any award.

[36] On the other side of the balance, the first respondents did not pay into court the arrears of mortgage so as to provide the applicant with certainty of recovery. It seems probable that the applicant would, had it to re-sell now, achieve at least a price which would meet the amount secured, but there must be some risk that it will encounter difficulty finding another buyer within any reasonable time frame. The first respondents' solicitor has deposed that she has explained the concept of the usual undertaking as to damages to them and that they have agreed to give such an undertaking. However, they are not in Australia and there is no evidence at all as to their means of meeting such an undertaking. Indeed, it would seem to follow that if they had means available in this country they would have taken steps to negotiate some arrangement with the applicant concerning the arrears of the debt so as to prevent the property's sale; but nothing of the sort has occurred.

[37] And there is the position of the second respondents. Mr Scutella has sworn an affidavit in which he says that he and his wife, having entered the contract, took various steps towards moving from their home in Sydney to the property, and

enrolled their son in a school, which he now attends, in its vicinity. Mr Scutella remains in Sydney with possessions still packed and waiting to be transported, while his wife and son are living in temporary accommodation at the Gold Coast. They remain ready and willing to complete the contract. Mr Scutella also deposed that he and his wife had entered a contract to purchase the adjoining pontoon. I would not take that into account, however: the relevant contract made the purchase conditional on the principal contract for the purchase of the property, but the second respondents decided to complete it on 8 January 2021, after the lodgement of the caveat was known. Notwithstanding, I accept that the second respondents face considerable inconvenience should their purchase not proceed.

[38] Weighing those considerations, the balance falls in favour of removing the caveat; but in any case, for the more fundamental reason that the first respondents cannot demonstrate a serious question to be tried on the issue of a breach of good faith by the applicant, the application must be allowed.

Costs of the application

[39] The applicant sought costs, should it succeed, on the indemnity basis because, firstly, the mortgage provided for them and, secondly, because, it submitted, the caveat had been lodged and maintained in disregard of clearly established law. It contended that the first respondents had been made aware of that fact by the applicant's solicitors email, sent once they were notified of the lodgement of the caveat, asserting that the first respondents had no caveatable interest or any proper basis to support the lodging of the caveat. However, that proposition seems to me at odds with s 122(1)(c), which puts it beyond doubt that a registered proprietor may lodge a caveat. The first respondents' opposition to its removal was not, as it seems to me, so completely unfounded that costs ought to be awarded on that basis; the applicant may, of course, have recourse to its contractual rights of recovery.

The orders

[40] I order:

1. That the caveat lodged by the first respondents over Lot 6 SP105007 be removed.

2. That the first respondents pay the costs of the applicant and second respondents on the standard basis.