SUPREME COURT OF QUEENSLAND

CITATION:	*The Trust Company (PTAL) Limited & Anor v Amos* [2018] QSC 92
PARTIES:	**THE TRUST COMPANY (PTAL) LIMITED ACN 008 412 913** (first plaintiff) **AND** **FIDANTE PARTNERS LIMITED ACN 002 835 592** (second plaintiff) **v** **EDWARD AMOS** (defendant)
FILE NO/S:	BS No 11375 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2017
JUDGE:	Brown J
ORDER:	**I order that:** **1. Leave be given for the matter to proceed pursuant to r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld);** **2. Pursuant to rule 69(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld), Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 be substituted for the second plaintiff;** **3. The defendant's further amended application filed 28 June 2017 be dismissed;** **4. Pursuant to section 127 of the *Land Title Act* 1994**

(Qld), Caveat No. 714019412, lodged by the defendant on 19 August 2011 over the Title to the Property, be removed from Queensland Title Reference 11885013; and

Upon hearing the parties' further submissions, I order that:

5. **Pursuant to rule 658 of the *Uniform Civil Procedure Rules* 1999 (Qld):**

    a. **The defendant pay Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 the sum of $513, 053.85; and that**

    b. **Pursuant to section 78 of the *Land Title Act* 1994 (Qld) Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 have possession of the property at 247 Lancaster Road, Ascot, Queensland, described in the Queensland Land Registry as Lot 25 on RP 33643, Title Reference 11885013.**

6. **The defendant pay:**

    a. **The plaintiffs' costs of an incidental to the application filed on 15 March 2017; and**

    b. **The plaintiffs' costs of and incidental to the applications filed by the defendant on 16 March 2017, 10 April 2017 and 28 June 2017; and**

    c. **Any further legal costs incurred by the plaintiffs as a consequence of the defendant's default under the Deed of Settlement between the parties dated 30 May 2014 pursuant to clauses 4.2(2) and 4.2(4) of that Deed, but excluding the costs in relation to the application of 19 April 2017 and any reserved costs to be assessed on the indemnity basis.**

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – FRAUDULENT AND INNOCENT MISREPRESENTATION – THE

REPRESENTATION – GENERALLY – where the plaintiffs and the defendant were to go to trial to determine whether the defendant was in default of a loan in respect of two properties – where the defendant made a counterclaim against the plaintiffs claiming that the mortgages and loans be declared void ab initio – where the parties entered into a Deed of Settlement before the trial – where the Deed made provision for the plaintiffs to enter a consent judgment and take possession of the relevant properties in the event of the defendant's default – whether Deed was ineffective for want of parties – where the defendant claims he was induced by the plaintiffs' misrepresentation to enter into the Deed of Settlement – whether a misrepresentation was made to the defendant by the plaintiffs – whether the Deed of Settlement should be set aside – whether judgment should be entered for the plaintiffs in accordance with the terms of the Deed of Settlement

REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – PARTICULAR CASES – where the defendant lodged a caveat over the property the subject of the Deed of Settlement – where the plaintiffs seek the removal of the caveat pursuant to s 127 of the *Land Title Act* 1994 (Qld) – whether there is a serious question to be tried in relation to the land – whether the balance of convenience favours the maintaining of the caveat

Land Title Act 1994 (Qld) s 78, s 127
Property Law Act 1974 (Qld) s 55, s 83, s 96, s 199
Trusts Act 1973 (Qld) s 19
Uniform Civil Procedure Rules 1999 (Qld) r 69(1)(b), r 389(2), r 658

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304
Dietz v Lennig Chemicals Ltd [1969] 1 AC 170
Kern Consulting Group Pty Ltd & Ors v Opus Capital Limited [2014] 2 Qd R 379
Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357
Public Trustee (Qld) v *Opus Capital Limited* (2013) 96 ACSR 493

COUNSEL: C Conway for the plaintiffs
L Harrison QC with P Jeffery for the defendant

SOLICITORS: Norton Rose Fulbright for the plaintiffs
Keller Nall and Brown for the defendant

[1] In June 2014 the plaintiffs and defendant were to go to trial to determine whether the defendant, Mr Amos, was in default of a loan provided by Challenger Managed Investments (which subsequently became Fidante Partners Ltd) ("**Fidante**") in respect of two properties, one at Ascot and one at Clayfield, each of which were the subject of a mortgage to The Trust Company (PTAL) Limited ("**PTAL**") which was formerly Permanent Trustee Australia Limited. Mr Amos had made a counterclaim against the plaintiffs seeking, *inter alia*, declarations that the mortgages and the loans be void *ab initio*. Just prior to the trial the parties settled the matter and entered into a Deed of Settlement dated 30 May 2014 (although executed by the parties on 1 and 2 June 2014). It provided for terms of settlement including that Mr Amos was to pay $620,000 together with interest by 1 October 2014. If Mr Amos defaulted on his obligations the Deed of Settlement made provision for the plaintiffs to enter a consent judgment and take possession of the properties the subject of the mortgage.

[2] It is not in dispute that Mr Amos did not repay the sum of $620,000 plus interest by 1 October 2014, although Mr Amos did make a partial payment following the sale of the Clayfield property. Judgment is sought against Mr Amos for the unpaid settlement sum and recovery of possession of the land at Ascot as provided for under the terms of the Deed of Settlement. An order is also sought to remove a caveat lodged over the Ascot property by Mr Amos in 2011.

[3] An application is also made to substitute Perpetual Trustee Company Limited ("**Perpetual**") as trustee of the Argyle Capital Management Trust No. 1 on the basis that it was assigned the debt, the subject of the Deed of Settlement. While Mr Amos did not consent to the application, counsel for Mr Amos did not contend that Perpetual was not a proper party to the dispute.[1]

[4] As no step in the proceeding had been taken for more than three years, leave was sought for the matter to proceed pursuant to r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld). That was not opposed.[2]

[5] Mr Amos opposes judgment being given on the basis that the Deed of Settlement was invalid as it was compromised by the wrong parties. His counsel contends that following Perpetual being appointed as custodian of the Howard Mortgage Fund by Challenger Managed Investments in 2005 in place of PTAL and a notice being given to Mr Amos there was a legal assignment of the debt to Perpetual and as such PTAL was unable to compromise the debt. That is rejected by the plaintiffs on the basis that there was no assignment following the 2005 Custody Agreement and that Fidante, who was the responsible entity of the Fund from which the loan was made and the lender and PTAL as the legal mortgagee were the property parties to the deed and Perpetual was

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1 T1-7/16-24.

2 T1-26/13-14.

not required to be a party to the Deed of Settlement in order for the debt to be compromised.

[6] Mr Amos also contends that the Deed of Settlement be set aside on the basis he that had been induced to enter into the Deed by a misrepresentation by Fidante and PTAL that the debt which he owed as at 30 May 2014 was $718,640.80. He contends that if the Deed of Settlement is set aside, the matter should be set down for trial.

[7] Aside from the relatively non-contentious issues of leave to proceed and the substitution of Perpetual, the issues that must be determined are:

(a) Was the debt the subject of the Deed of Settlement assigned to Perpetual prior to the entry into the Deed of Settlement;

(b) If Perpetual was assigned the debt, was the Deed ineffective because Perpetual was not a party to the Deed;

(c) Was a misrepresentation made to Mr Amos by the plaintiffs that the debt he owed the plaintiff as at 30 May 2014 was $718,640.80;

(d) If so, did the misrepresentation induce Mr Amos to enter into the Deed of Settlement;

(e) If the answer to (d) is yes, should the Deed of Settlement be set aside;

(f) If the answer to (e) is yes, should the original proceedings be set down for trial;

(g) If the Deed of Settlement is not set aside, should judgment be entered for the plaintiffs;

(h) Should the caveat on the Ascot Property be removed.

Leave to proceed

[8] As stated above, this issue was not contentious between the parties. The plaintiffs sought leave to proceed in respect of the application to substitute Perpetual in place of Fidante as the second plaintiff and seeking judgment pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[9] The last step in the proceeding was the adjournment of the trial on 2 June 2014 to allow the terms of the Deed of Settlement to be carried out. The plaintiffs' application for judgment pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld) was filed on 15 March 2017. The defendant also filed a further amended application on 28 June 2017.

[10] Leave is sought on the basis that the parties had reached agreement to resolve the matter in accordance with the Deed of Settlement in 2014 and that Mr Amos subsequently defaulted on that agreement. Monies were paid by Mr Amos to Perpetual in April 2015 following the sale of the Clayfield Property. In 2016, Mr Amos was requested inter alia to surrender possession of the Ascot Property as provided under the Deed of Settlement in the event of default. Mr Amos refused to provide possession of the property.

Correspondence was subsequently exchanged between the parties' solicitors to no avail, leading to the present applications by both parties. The Deed of Settlement provided for judgment to be entered by consent and for the recovery of possession of the properties in the event of default in the original proceedings. Mr Amos contends that the whole Deed of Settlement should be set aside and the original proceedings should go to trial. Pursuant to the Deed of Settlement the proceedings were not to be discontinued until the payment of the settlement sum was made in accordance with paragraph 2 of the Deed of Settlement.[3]

[11] In the circumstances I am satisfied that it is appropriate for the Court to give leave for a step to be taken in the proceedings pursuant to rule 389(2) and I will grant such leave.

Substitution of Perpetual as the second plaintiff

[12] In 2014, Perpetual as custodian of the Howard Mortgage Fund together with Fidante in its capacity as responsible entity of the Howard Mortgage Fund sold assets of the fund, which included Mr Amos' loan, to Nomura Special Investments Singapore Pte Ltd ("**NSIS**") under a Sale Deed.

[13] Pursuant to clause 4 of the agreement, with effect on and from the completion date, the sellers agreed to assign and transfer all of their rights, title and interest in and to the Howard Mortgage Fund assets to the buyer and the buyer agreed to accept the assignment and transfer of such rights, title and interest in and to the Howard Mortgage Fund assets.

[14] By an Accession Deed dated 28 July 2014 between Perpetual and Fidante and NSIS, NSIS assigned to Perpetual in its capacity as trustee of the Argyle Capital Management Trust No. 1 all of NSIS's rights under the Sale Deed.[4]

[15] On 28 July 2014 an Accession Deed was executed between Perpetual and Fidante as the sellers, Nomura Special Investments Singapore Pte Ltd as the original buyer and Perpetual Trustee Company Limited in its capacity as trustee of the Argyle Capital Management Trust No. 1 as assignee.[5]

[16] Pursuant to the Accession Deed, with effect on and from the Accession Date the assignee became a party to the Sale Deed as buyer and was immediately entitled to all the rights of the buyer under the Sale Deed and assumed all of the obligations of the buyer under the Sale Deed. This included, *inter alia*, the debt of Mr Amos.[6]

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3 Paragraph 7.2 of the Deed of Settlement.

4 Clause 1.7 of the Sale Deed provided for the Buyer to assign all or part of its rights of the Buyer under the Sale Deed under cl 1.7 of the Sale Deed.

5 MLC-9 to the affidavit of M Lenicka, CFI 61-62, p 235.

6 MLC-9 to the affidavit of M Lenicka, CFI 61-62, p 239.

[17] The purchase price was paid to Fidante Partners Limited on 28 July 2014.[7]

[18] Notice of the assignment was given to Mr Amos by a letter dated 28 July 2014.[8]

[19] On 26 August 2014, Perpetual as trustee of the Argyle Capital Management Trust No. 1 gave notice to Mr Amos that his loan and related securities had been transferred to Perpetual and all payments were to be made to a bank account nominated by Perpetual.[9]

[20] The Deed of Settlement is binding upon, *inter alia*, a party's assignee.[10]

[21] Perpetual Trustee Company Limited (as trustee of the Argyle Capital Management Trust No. 1) as the assignee of the debt of Mr Amos is a person whose presence before the Court is necessary to enable the Court to adjudicate effectually and completely on all the matters in dispute and ought to be substituted for Fidante as second plaintiff.[11]

[22] Accordingly, pursuant to r 69(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld), I order that Perpetual Trustee Company Limited in its capacity as trustee of the Argyle Capital Management Trust No. 1, be substituted as the second plaintiff.

Was the debt assigned to Perpetual?

[23] A separate issue from that of the joinder of Perpetual as trustee of the Argyle Capital Management Trust No. 1 is whether there was an assignment to Perpetual as custodian of the Howard Mortgage Fund on 18 March 2005 of the debt that is the subject of Mr Amos' loan which was completed by the notice given to Mr Amos on 24 August 2005.

[24] According to Mr Amos' counsel, at the time when the Deed of Settlement was executed, the debt that the first plaintiff purported to compromise had been assigned to Perpetual and notice of that assignment had been given pursuant to s 199 of the *Property Law Act* 1974 (Qld) (the "**Property Law Act**"). In those circumstances, Mr Amos' counsel contends that Perpetual was a necessary party to the Deed of Settlement

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7 MLC-9 to the affidavit of M Lenicka, CFI 61-62, p 247.

8 MLC-10 to the affidavit of M Lenicka, CFI 61-62, p 248 and see 249.

9 MLC-10 to the affidavit of M Lenicka, CFI 61-62, p 249. Mr Amos wrote to Perpetual following the receipt of the August letter saying that he had not received a copy of the July letter and requested a copy. Mr Amos subsequently paid amounts in respect of the Debt under the Deed of Settlement to Perpetual on 2 April 2015 enclosing a copy of the settlement statement and a cheque for the deposit in the amount of $1,000 made out to Perpetual Trustee Company Limited as the trustee of the Argyle Capital Management Trust No. 1. Mr Amos states that he received this letter but not the letter of July 2014 which he requested from Perpetual. He subsequently made payments to Perpetual as trustee for the Argyle Capital Management Trust No. 1 in 2015.

10 Clause 13.9 of the Deed of Settlement relevantly states that "this Deed binds each of the parties hereto and their respective successors, transferees, heirs and assigns."

11 Fidante no longer having an interest in the property assigned

and the Deed was ineffective unless it was a party, since PTAL could not compromise the debt as it had no interest in the debt.

[25] The plaintiffs' contend that the effect of the Custody Agreement and the notice to Mr Amos in August 2005 did not assign the debt and that Perpetual was not a necessary party to the Deed. The plaintiffs contend that there was no assignment of the debt until 2014. The plaintiff submits that PTAL was a proper party to the Deed of Settlement because it was the mortgagee and Fidante was a proper party as it was the lender. Further it contends the Fidante as the lender was a party and could compromise the debt and could give directions as managing trustee to the custodian to put that into effect.

[26] PTAL was the prior custodian of the Howard Mortgage Fund. It was and remains the mortgagee of the mortgage of the Ascot Properties.[12]

[27] Pursuant to the Custody Agreement dated 18 March 2005[13] Perpetual was appointed by Challenger to provide custodian services in relation to the assets.

[28] Clause 2.1 of that agreement provided:[14]

> "On and from the Effective Date, Challenger appoints the Custodian as custodian of the Assets on the terms and conditions of this Agreement. The Custodian accepts that appointment."

[29] Assets are defined in clause 1.1 to mean:

> "…in respect of a Scheme, such of the assets of the Scheme <u>that are transferred or delivered to the Custodian by Challenger on behalf of the Scheme</u> and accepted by the Custodian to be held in accordance with the terms of this Agreement." (emphasis added)

[30] The scheme is identified in Schedule C as including the Howard Mortgage Trust, which is the relevant scheme in relation to the loan to Mr Amos.

[31] Clause 3 imposed various duties upon the Custodian including holding the Assets and any documents evidencing title to the Assets on the terms and conditions of the agreement. Pursuant to clause 5.1 of that agreement, the Custodian was required to act on proper instructions. Proper instruction is a defined term which means an instruction

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[12] While it executed a transfer of the mortgage on 28 July 2014, a caveat lodged by Mr Amos in 2011 prevented it from being registered. Under s 62 of the *Land Title Act* 1994 (Qld) upon registration of the transfer of the mortgage the transferee becomes entitled to the rights, powers and privileges of a mortgagee's interest under a registered mortgagee. Where a mortgagee's remedies derive from contract, an unregistered transferee would need a legal assignment of the contractual rights before the assignee could enforce the contract: see *Dwyer v Derek* [2004] 1 Qd R 371 at 374 and 377.

[13] MLC-7 to the affidavit of M Lenicka, CFI 61-62, p 79.

[14] MLC-7 to the affidavit of M Lenicka, CFI 61-62, p 88.

provided by Challenger to the Custodian that is in writing and, *inter alia*, relates to assets.

[32] On 24 August 2005 a letter was sent to Mr Amos from Challenger advising that they had changed the custodian to Perpetual Trustee Company Limited and could no longer accept monthly interest payments made payable to PTAL. It advised that monthly interest instalment payments going forward must be made to Perpetual.[15] Mr Amos' counsel contends it gave notice of the assignment to Mr Amos as required by s 199 of the *Property Law Act* and that there was a legal assignment.

[33] Mr Amos relies on a combination of s 19 of the *Trusts Act* 1973 (Qld) (the "**Trusts Act**") and s 199 of the *Property Law Act* to contend that an assignment occurred.

[34] Section 199 of the *Property Law Act* provides:

> "(1) Any absolute assignment by writing under the hand of the assignor… of any debt or other legal thing in action, of which express notice in writing has been given to the debtor… from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law… to pass and transfer from the date of such notice –
>
> (a) the legal right to such debt or thing in action; and
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> (b) all legal and other remedies for the same; and
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> (c) the power to give a good discharge for the same without the concurrence of the assignor."

[35] Relevantly section 19(2) of the *Trusts Act* provides:

> "Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust –
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> (a) the trust property shall be vested in the custodian trustee as if the custodian trustee were the sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act; and
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> …
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> (c) the sole function of the custodian trustee shall be to get in and hold the trust property and invest its funds and dispose of the assets as the managing trustees in writing direct, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustees in writing direct; and
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> …

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[15] EA-21 to the affidavit of E Amos, CFI 74.

(g) all actions and proceedings touching or concerning the trust property shall be brought or defended in the name of the custodian trustee at the written direction of the managing trustees, and the custodian trustee shall not be liable for the costs thereof apart from any payable out of the trust property; …"

[36] Counsel for Mr Amos contends that the relationship established as a custodian is that the custodian is the legal owner and other parties are equitable owners of any trust property pursuant to s 19 of the *Trusts Act*. In this case, it is said that trust property includes the relevant property is Mr Amos' debt. It contends that the effect of s 19 was to vest the debt of Mr Amos, in Perpetual and that the notice given to Mr Amos of the appointment of Perpetual served to effect a legal assignment of the debt to Perpetual pursuant to s 199 of the *Property Law Act*. It is submits that PTAL therefore had no interest in the debt under the Deed of Settlement. The Deed failed to achieve its effect because it was compromised with the wrong party. It was further submitted that the fact that the mortgage remained with PTAL did not matter as the mortgage did not give indefeasibility to the debt and the debt could be assigned.

[37] According to further submissions of the plaintiffs, even if the submission of Mr Amos is accepted, the Deed of Settlement is not ineffective by reason of the correct custodian not being a party to it for the following reasons:

(a) Fidante as the responsible entity of the scheme is a party to the Deed and it could still enforce the defendant's obligations under the Deed. Under both s 19 of the *Trusts Act* and pursuant to the terms of the 2005 Custody Agreement, Perpetual could only act in accordance with Fidante's instructions;

(b) The obligations of PTAL and Fidante was, by clause 13.7, joint liability of all them and separately liability of each of them so that the deed is still effective in respect of Fidante;

(c) To the extent to which the deed is invalid or unenforceable, those unenforceable provisions are capable of severance without affecting the validity and enforcement of the Deed.

[38] No transfer of the mortgage for the Clayfield or Ascot property was transferred by PTAL to Perpetual in 2005 nor were any vesting orders made. A transfer of mortgage was executed by PTAL in favour of Perpetual in July 2014 as contemplated in the Sale Deed. Perpetual was acting in the capacity of a trustee of the Argyle Capital Management Trust No. 1 as the assignee under the Accession Deed.

[39] Under the mortgage the lender was defined to be Challenger Managed Investments Limited as responsible entity for the Howard Mortgage Trust and as such as trustee of the Trust.[16]

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[16] MLC-24 to the affidavit of M Lenicka, CFI 61-62, p 342.

[40] Clause 2 of the Schedule to the Mortgage provides that in consideration of the Lender entering into the Facility Agreement and providing an advance or other financial accommodation and to secure to the Lender all moneys which the mortgagor is liable to pay the Lender, the Mortgagor agrees to a number of matters including the provisions in the Memorandum of Mortgage.[17] Clause 6 of the Schedule to the Mortgage provides, *inter alia*, that the Lender accepts the benefit of the Mortgagor's promise in the terms of the mortgage in accordance with s 55 of the *Property Law Act*. Clause 7 provides, *inter alia*, that the mortgage is collateral to the Facility Agreement with the Lender.

[41] Under clause 2.1 of the Memorandum of Mortgage, the mortgagor will pay the Mortgagee the Secured Moneys payable by it, subject to the provisions of the mortgage and any other agreement for the time being in force between the Mortgagee or the Lender and the Mortgagor governing the time or manner of payment. Clause 2.2 provides for the Mortgagor to pay the Mortgagee interest.[18] Clause 5.3 of the Memorandum of Mortgage provides that a consequence of default is that the security constituted by the mortgage becomes enforceable.

[42] Clause 6.12 of the Memorandum of Mortgage provides that "Subject to other transaction documents, the Mortgagee may assign all or part of its rights under this Mortgage and each Collateral Security."

[43] As was discussed by Dalton J in *Public Trustee (Qld)* v *Opus Capital Limited,*[19] a custodian is a statutory invention apparently having its origin in section 4 of the *Public Trustee Act* 1906 (UK). There is a division of the functions normally reposed in one trustee between two, a managing trustee and a custodian trustee. Her Honour referred with approval to *Re Brook Bond and Co Ltd's Trust Deed*[20]*,* where Cross J stated:

> "It is apparent that the duties of a custodian trustee differ substantially from those of an ordinary trustee…. The exercise of powers or directions [sic] is a matter for the managing trustees which the custodian trustee has no concern, and he is bound to deal with the trust property so as to give effect to the decisions and actions taken by the managing trustee unless what he is requested to do by them would be a breach of trust or would involve him in personal liability."

[44] Her Honour further noted at [22], that after the custody agreements terminated and while the public trustee retained the legal title to the property of the managed investment schemes, it continued as a trustee for the investors of the scheme. Her

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17 As defined.

18 Unless the mortgage or an agreement with the lender or the mortgagor provides otherwise.

19 (2013) 96 ACSR 493 at [20].

20 [1963] 1 Ch 357.

Honour's decision was referred to by the Court of Appeal in *Kern Consulting Group Pty Ltd & Ors v Opus Capital Limited.*[21]

[45] The appointment of a custodian trustee does not create a separate trust. It has also been held that the responsible entity retains the equitable title on trust for the investors of a scheme.[22]

[46] I find that the Deed of Settlement is not ineffective for want of parties and that the argument presented on behalf of Mr Amos must be rejected for the following reasons:

(a) The 2005 Custody Agreement provided that assets to which the custodian is appointed are the assets on the terms and conditions of the 2005 Custody Agreement. Assets is defined to mean those assets of the scheme that are transferred or delivered to the custodian by Challenger. All assets under the scheme were not automatically transferred or assigned under the terms of the 2005 Custody Agreement. The vesting of the "trust property" pursuant to s 19(a) of the *Trusts Act* would not extend to assets beyond those to which the custodian was appointed, nor were any vesting orders made.

(b) No transfer of the mortgage was executed by PTAL to Perpetual in 2005 whereby Perpetual may have become an equitable assignee, although until registered it would have no effect on the registered interest in land. In any event, in order to recover the mortgage debt as an equitable assignee, the assignor as the legal owner of the debt as the longer owner of the debt would have to be joined.[23] While there may be an assignment of contractual rights[24] under the mortgage prior to the legal transfer of the mortgage, there was no such assignment of any contractual rights to the debt under the mortgage to Perpetual in 2005.

(c) In any event the letter of 24 August 2005 did not give notice of an unconditional assignment to Perpetual of the principal of the loan of Mr Amos. It was confined to monthly interest payments. Its terms were consistent with a direction being given by Challenger as to the payment of interest.[25] Even if one was to assume it was notice of the assignment it was notice of an unconditional assignment of the whole of the debt. The appointment of Perpetual as Custodian together with the letter of 24 August 2005 did not effect a legal assignment of the debt such that PTAL no longer had an interest in the debt.

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[21] [2014] 2 Qd R 379.

[22] *Commissioner of State Revenue v Lend Lease Funds Management Limited* (2011) 33 VR 20 4.The point remained undecided in *Kern Consulting Group Pty Ltd v Opus Capital Ltd* (2014) 100 ACSR 327

[23] *Dwyer v Derek* (2004) 1 QdR 371 at 374-5

[24] Which would have to be a legal assignment: *Dwyer v Derek* (2004) 1 QdR 371 at 377

[25] An assignment would not have to have been made to Perpetual in order for such a direction to be made. Under s 601FB of the *Corporations Act* 2001 (Cth) a responsible entity may appoint an agent or otherwise engage a person to do anything that it is authorised to do.

(d) Even if the effect of appointing Perpetual as custodian together with s 19(a) of the Trusts Act resulted in Perpetual being vested with rights in relation to the debt payable under the Mortgage, such rights would be equitable chose in action. Thus, even with the notice being provided to Mr Amos in August 2005 there would have been no legal assignment of the debt under the mortgage and PTAL remained the legal owner of the debt.

(e) In the circumstances there was no legal assignment of the debt.

[47] Fidante (formerly Challenger Managed Investments) was the Lender under the Facility Agreement and Mr Amos was bound by both the terms of the Facility Agreement as well as the mortgage.

[48] Fidante as responsible entity was the Managing Trustee for the purposes of s 19 of the *Trusts Act*. Perpetual had to act in accordance with instructions of Fidante including as to any actions or proceedings to be brought in its name or in relation to the disposal of the assets.[26]

[49] If the loan provided by Challenger to Mr Amos was an asset in respect of the scheme that was transferred or delivered to the custodian by Challenger on behalf of the scheme and accepted by the custodian to be held in accordance with the terms of the agreement, Perpetual was constrained to act in accordance with instructions given by Fidante and previously Challenger, both under the terms of the 2005 Custody Agreement and s 19 of the *Trusts Act*.

[50] Even if PTAL had no interest in the debt, Fidante was separately liable under the Deed of Settlement.[27]

[51] I find that PTAL as the holder of the mortgage was correctly a party to the Deed. It was the party to the mortgage who relevantly would sue to enforce the mortgage. Clause 6.2 of the Deed of Settlement provided for a discharge of the mortgage to be provided upon payment of the settlement sum. That discharge would have to be effected by PTAL even if could be directed to do so by Perpetual. Further, Fidante was the relevant party who loaned the monies to Mr Amos under the Facility Agreement.

[52] I find that the absence of Perpetual as a party does not result in the Deed of settlement being ineffective.

What was the representation?

[53] According to Mr Amos, he executed the Deed of Settlement as a result of misrepresentation by the plaintiffs.

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[26] And pursuant to clause 5.1 of the Custody Agreement. There were some circumstances where Perpetual was obliged to act which are not relevant to the present considerations. Perpetual was also bound to transfer the assets upon termination of the Custody Agreement to the person nominated by Challenger: clause 18.4.

[27] Deed of Settlement at clause 13.7.

[54] A false representation of a material fact made prior to a compromise and which induces it may, at the instance of the party misled, operate to vitiate the compromise. The submissions made on behalf of Mr Amos treated the alleged misrepresentation as an innocent representation.

[55] Mr Amos alleges the misrepresentation was that the loan balance was $618, 022 or a lesser amount, not $718, 640.80 as represented in the Deed of Settlement. It is also contended that there was misrepresentation on the basis of non-disclosure. The basis of that has not been clearly articulated but it appears to be based on non-disclosure of the loan balance component of the alleged amount said to be owing and of legal costs or non-disclosure of documents. While Mr Amos submits he acted on the basis of full disclosure having been made at the time of agreeing to the Deed of Settlement, there is no proper basis articulated for suggesting that proper disclosure had not been made and that was a basis for vitiating the settlement.

[56] Mr Amos in his affidavit raises the fact that the purchase price of the loan in the Sale Deed and Accession Deed was $466, 880, but no case has been articulated as to how that is relevant. Mr Amos in his affidavit suggests that if he is ordered to pay the settlement sum in the Deed of Settlement, the recipient of the sum will be unjustly enriched. As such it appears to be only relevant to the question of relief.

[57] Mr Amos asserts that he relied on a misrepresentation which induced him to enter into the Deed of Settlement and that he purported to rescind the Deed of Settlement on 8 February 2017,[28] after he says he discovered it was false. In the alternative, he claims that the plaintiffs engaged in misleading and deceptive conduct in making the representations and that he is entitled to relief under the *Australian Consumer Law*.

[58] Mr Amos was not cross-examined on his affidavit.

[59] By the time of the purported rescission by Mr Amos and the hearing of this application, the Deed of Settlement had been partially performed insofar as Mr Amos had sold the Clayfield Property and paid part of the sum to Perpetual as Trustee of Argyle Capital Management no 1, which he was obliged to pay under the Deed of Settlement.

[60] The plaintiffs dispute that the representation was made or that it induced Mr Amos to enter into the Deed of Settlement or that there was misrepresentation by non-disclosure. The plaintiffs also claim that Mr Amos cannot rely on any misrepresentation because it is barred by clause 13.8 of the Deed.

[61] A threshold issue is whether the plaintiffs made the misrepresentation.

[62] Mr Amos in his affidavit[29] states at [22]:

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[28] Although the letter GPC-1 to the affidavit of G Collinson does not expressly rescind the Deed. Rather it asserts the Deed is invalid.

[29] Affidavit of E Amos, CFI 74.

> "As at 30 May 2014, the Plaintiffs stated that I was indebted to them in the sum of $718,640.80 pursuant to the Loan. This statement is reflected in Recital A to the Deed of Settlement drafted by the Plaintiffs' solicitors."

[63] Recital A states:

> "As at 30 May 2014, PTAL and Fidante alleged that Mr Amos is indebted to them in the sum of $718,640.80 pursuant to loan account number 60 (**Loan Account**) upon which interest and fees continue to accrue from 30 May 2014 and legal costs (**Debt**)."

[64] Recital B states that Mr Amos disputes the Debt.

[65] It is difficult to reconcile Mr Amos' assertion that he was induced to enter the Deed of Settlement on the basis that he believed the representation as to the amount of the debt to be true given the terms of Recital B[30].

[66] According to Mr Amos, Recital A represents that the debt was a sum of $718,640.80, when that was not the debt. He relies on the Sale Deed and the Accession Deed executed in July 2014 which records the loan balance as $618,022.

[67] The representation in Recital A is as to the sum which PTAL and Fidante allege Mr Amos is indebted to them as at 30 May 2014.

[68] At the hearing Counsel for Mr Amos submitted that the representation made to Mr Amos went beyond that stated in Recital A and that Mr Amos' evidence in [22] is that the plaintiffs stated that he was indebted to them for the amount of $718,640.80.[31] That does not accord with the terms of [22] of Mr Amos' affidavit.

[69] The second sentence of [22] states "this statement is reflected in Recital A…" and does not suggest that there was a separate representation made that was different from Recital A. Further, the submissions made on behalf of Mr Amos referred to Recital A of the Deed of Settlement as being the source of the misrepresentation. Further, Mr Amos in a letter of 12 May 2017 to Argyle Capital Management Trust No. 1 also stated:

> "In fact, the deed is void *ab initio* as I was induced to sign it by the Plaintiffs and Norton Rose Fulbright's misrepresentations made to me that the Plaintiffs had made full disclosure according to law and by further misrepresentations in the deed that:
>
> > "As at 30 May 2014, PTAL and Fidante alleged that Mr Amos is indebted to them in the sum of $718,640.80 pursuant to loan account number 60 (**Loan Account**) upon which interest and

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[30] The question of estoppel by deed was not raised by the plaintiffs

[31] If such a representation was made separately from Recital A, no details of who made the representation and what was said have been deposed to.

> fees continue to accrue from 30 May 2014 and legal costs (**Debt**)."[32]

[70] The same reference was made in the letter from Keller Nall and Brown to Norton Rose Fulbright dated 26 May 2017.[33]

[71] Thus I find that the scope of any representation, assuming that there was an oral representation, does not extend beyond the terms of Recital A.

Was the representation false?

[72] Mr Amos' counsel contends that the debt was not in the sum of $718,640.80 as stated. This is by reference to the Sale Deed dated 27 June 2014 and the Accession Deed dated 28 July 2014, which record the balance of the loan as $618,022.

[73] However, the fact that legal costs are included in the amount of alleged indebtedness is evident from the terms of Recital A itself. It is apparent that the amount for which Mr Amos is alleged to be indebted was not confined to a "loan balance" but included legal costs. Recital A refers to "and legal costs" which are said to "continue to accrue" from 30 May 2014. Thus it was at least implicit in Recital A that the amount for which Mr Amos was indebted did include an amount for legal costs and any amount owing by Mr Amos in the future would continue to include such costs. The amount was not, as Mr Amos asserts, stated to be the 'loan balance'.

[74] As to the amount of $718,640.80, Mr Lenicka deposed to the fact that the amount was calculated with reference to the following:

(a) The balance of the loan as at 1 June 2014; and

(b) Estimated fees of Norton Rose Fulbright to completion of trial and estimated counsel's fees for this to pay Peter Hastie (as he was then known) to the completion of trial which fees are payable pursuant to the terms of the loan agreement and the mortgage.[34]

[75] Mr Amos contends that the reference by Mr Lenicka to estimated fees is unhelpful to the plaintiffs and shows the falsity of what was represented. He asserts that the representations were what was then owed, not what might become owing in the future. Further, Mr Amos' counsel submits that the sum of $718,640.80 is a definite sum and a person cannot be indebted for an estimate.

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[32] EA-17 to the Affidavit of E Amos, CFI 74.

[33] EA-19 to the Affidavit of E Amos, CFI 74.

[34] Affidavit of M Lenicka CFI 75 at [6].

[76] Recital A refers to "indebted".[35] According to the online Oxford English Dictionary, indebted means, *inter alia*, "to bring under monetary obligation; to involve in debt".

[77] A monetary obligation may be based on an estimate. An estimate may be an estimate of a precise amount, although subject to clarification and change. The amount may not legally constitute a debt due and owing but that does not mean it is false to state an amount that is alleged to be the subject of a person's indebtedness. The reference to 'Debt' is used to encompass what is set out in Recital A, rather than being used in the traditional legal sense. Further, it is possible that an amount may be owing even though it relates to amounts calculated to a date postdating the date on which they are stated to be owing. In the present case, the Deed of Settlement was entered into just prior to the commencement of trial. The parties were due to commence the trial on 2 June 2014 for a period of two days. Legal costs until the end of trial may well have been incurred and able to be claimed from Mr Amos.

[78] The amount stated must be construed in the context of the fact that the amount Mr Amos is said to be indebted is what PTAL and Fidante allege[36] to be the amount of indebtedness. It is a claim or assertion without proof or pending proof. There is no evidence suggesting that PTAL and Fidante did not allege what is stated. The basis of the allegation has been set out in the affidavit of Mr Lenicka. Whether it ultimately would have been established at trial as a matter of fact and law is another matter.

[79] I do not find that there was any misrepresentation as to the amount for which Mr Amos was alleged to be indebted as set out in Recital A of the Deed of Settlement.

[80] I turn to consider whether there was a misrepresentation in not stating that the amount of $718,640.80 included an amount of some $100,000 for legal fees or not explicitly stating the amount of the loan balance.

[81] In order to establish a case of misrepresentation by silence, more is required than mere silence. The question in this case is whether the failure to disclose the loan balance and/or the amount of the legal fees included in the sum of $718, 640.80 results in it being a misrepresentation. On the basis of the construction of Recital A which I have found above it was clear on its face that the alleged amount of Mr Amos' indebtedness was not confined to the "loan balance" and included interest and legal costs. There was no non-disclosure and I find there is no misrepresentation by non-disclosure.

[82] Even if it was not implicit in Recital A that the amount did include legal costs (as I have found), there was no obligation to disclose that it did include legal costs. The amount of alleged indebtedness stated in Recital A of the Deed of Settlement was in general terms.

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[35] Although the deed refers to 30 May 2014 it was not signed by Mr Amos until 1 June 2014 and by the plaintiffs until 2 June 2014. No point was made about the fact the amount of $718,640.80 consisted of the balance of 1 June 2014 unsurprisingly since the difference is unlikely to have been material.

[36] Oxford English Dictionary online relevantly states allege to mean: To claim (something unproven) as true; to assert or affirm without proof, or pending proof; to make an allegation about someone or something.

Under the terms of the mortgage, Mr Amos was liable to pay, *inter alia*, legal costs on a full indemnity basis.[37] That is plainly a source of Mr Amos' indebtedness to PTAL and Fidante. The fact that legal costs of the plaintiffs incurred as a result of Mr Amos defending the proceedings were being claimed as part of the amount owing had been disclosed in correspondence between Mr Amos and the plaintiffs.[38] The obligation of Mr Amos to pay legal costs was the subject of dispute between the parties.[39]

[83] Further, Mr Amos' lawyers had been informed in correspondence that the amount of principal and accumulated interest was $614,242.75 owing as at 27 May 2014, which was set out in spreadsheets of calculations provided to Mr Amos' lawyer.[40] Mr Amos continued to have the benefit of legal advisors when he entered into the Deed of Settlement.

[84] Mr Amos in clause 1 agreed that the Recitals were true and correct in every particular.[41] Mr Amos was provided with legal advice in relation to the Deed of Settlement and acknowledged that he had been given advice and understood the general nature and effect of the documents.[42]

[85] While there is a disparity between what is referred to as the balance of loan the in the Sale Deed and Accession Deed being an amount of $618,022 and the debt Mr Amos agreed was owing in the Deed of Settlement, namely $620,000 that is not relied upon by Mr Amos. His counsel in oral submissions accepted in any event the difference between $618,022 and $620,000 was not material, and it was not pursued as a separate basis.[43]

[86] In any event, the Affidavit of Ms Eskey explains the fact that the difference is a legal fee of $1,978.07 which was due and owing on 1 June 2014 but not charged to the loan until 12 June 2014. She deposes to the fact that the balance of the loan as at 1 June 2014 was in fact $620,000.

[87] By the Deed of Settlement Mr Amos in clause 2.1 acknowledged that as at 30 May 2014 he was "indebted to Fidante and PTAL in the sum of $620,000 (including GST, if any)

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[37] Affidavit of Lenicka CFI 61-62, p 346, clause 2.3.

[38] Affidavit of Amos, CFI 50, at [5]; Letter 16 May 2014 Fidante Partners to Mr Amos.

[39] Affidavit of Amos CFI 74, EA-9, p 34.

[40] Affidavit of G Collinson CFI 49, GPC-1.

[41] No argument was raised that there was estoppel by deed so I have not considered that argument.

[42] MCL-2, p 42-43, affidavit of Lenicka, CFI 61-62.

[43] T1-26/35-37 and T1-27/6-10.

in respect of all matters owing to Fidante and PTAL in respect of the claims made in the proceedings" not the amount of $718,640.80.[44]

[88] That the Sale Deed and Accession Deed included an amount of $618,022 does not establish the falsity of the representation, as to that amount of indebtedness nor that there was a misrepresentation by non-disclosure. They are documents prepared in the context of a commercial transaction and were limited to the amount of principal and interest. They do not constitute an admission that legal fees were not or were not able to be claimed as part of the amount said to be owing by Mr Amos.

[89] I do not find that Mr Amos has established that any misrepresentation was made under Recital A of the Deed of Settlement.

[90] The present case is quite different from *Dietz v Lennig Chemicals Ltd,*[45] which was relied upon by Mr Amos. That was a case where the misrepresentation was established on the basis that between the time of settlement of a dependency claim and the seeking of Court approval, the widow had remarried and that had not been disclosed to the defendant prior to their consenting to the order.

[91] I am also not satisfied that a statement in terms of Recital A constituted a misrepresentation entitling Mr Amos to relief for misleading and deceptive conduct under the *Australian Consumer Law,* for the reasons set out above.[46]

[92] Even if misleading and deceptive conduct was established, there is a real question of whether it caused loss or likely loss, given that under the Deed Mr Amos only agreed to pay what was due and owing as at 1 June 2014, as set out in Ms Eskey's affidavit.[47] However, 'Loss' and 'Damage' under s 243 of the *Competition and Consumer Act* 2010 (Cth) is not however confined to financial loss. It is not a matter I have to consider further.

[93] On the basis that I have found that there was not misrepresentation by the plaintiffs, I do not have to determine any of the other issues with respect to the question of inducement or whether rescission or the setting aside of the Deed of Settlement would be an available remedy when the Deed of Settlement had been partially performed.

[94] On the basis of the above, I have determined the Deed of Settlement should not be set aside and the defendant's application should been dismissed.

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[44] Which is consistent with the fact he disputes the amount of $718,640.80 as his amount of indebtedness in Recital B.

[45] [1969] 1 AC 170.

[46] While the test in terms of non-disclosure refers to the generation of a reasonable expectation: *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [14] on French CJ and Kiefel J (as her Honour then was) the outcome based upon the above findings would be the same.

[47] Affidavit of L Eskey [6]-[7].

Is Mr Amos prevented from relying on the alleged misrepresentation due to clause 13.8 of the Deed?

[95] The plaintiffs contend that clause 13.8 and clause 12.1 prevent Mr Amos from seeking to rely on any alleged misrepresentation in relation to entry into the Deed.

[96] Clause 13.8 provides that:

> "This Deed shall constitute the sole and entire agreement between the parties in relation to the subject matter of this Deed and no warranties, representations, or other terms and conditions whatsoever not recorded herein shall be of any force or effect."

[97] Clause 12.1 provides that:

> "This Deed is a complete defence to any action, proceeding or suit which may be taken or commenced by Mr Amos against the Fidante and/or PTAL in relation to any matters the subject of the release set out in clause 11.1 of this Deed."

[98] Clause 11.1 provides that:

> "Upon entering into this Deed, Mr Amos releases Fidante and PTAL and their present and former directors, employees and agents from all claims, causes of action, proceedings, suits, demands or costs orders in the Proceeding (if any) whatsoever (save for their obligations arising under this Deed) that they may have or which they at any time might have had or but for the execution of this Deed might have against Fidante and/or PTAL, its present and former directors, employees and agents in respect of the Debt, the Loan Account, the Mortgage, the Proceeding and any fact, matter or thing otherwise related to or in any way connected with the subject matter of this Deed and the Proceeding."

[99] I did not consider the application of clause 13.8 at the outset because while exclusions such as clause 13.8 may prevent a party from relying on an innocent misrepresentation, they cannot exclude liability for misleading and deceptive conduct, although they are relevant to the question of the reliance.[48] Given my findings above, I am not required to address this question. The operation of the release in clause 11.1 and whether the terms of the release may operate in the present case, given it extends to any "fact, matter or thing … in any way connected to this Deed", particularly in relation to misleading and deceptive conduct was not addressed in argument. I also do not need to consider it further.

Should judgment be entered in favour of the plaintiffs?

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[48] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

[100] I am satisfied on the evidence presented by the plaintiffs that Mr Amos has failed to discharge his obligations under the Deed of Settlement and is in default of the Deed of Settlement

[101] The plaintiffs seek judgment pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld) on the basis of the terms of the Deed of Settlement. Rule 658 empowers the Court on the application of a party to make any order, including a judgment, that the nature of the case requires. This includes entering judgment on the basis of the terms of a settlement agreement.[49]

[102] In the event of a default by Mr Amos, which I have found has occurred, the unpaid balance becomes immediately due and payable in full by Mr Amos. Clause 4.2 of the Deed of Settlement provides for judgment to be given in the event of a default by Mr Amos for the default sum together with legal costs incurred on an indemnity basis as a consequence of Mr Amos' default and any proceeding issued in respect of the Deed. It further provides for Mr Amos to immediately deliver up possession of the land and that he irrevocably consents to the entering of judgment against him for possession of the land together with all legal costs incurred on an indemnity basis as a consequence of his default and for any proceeding that is issued in respect of the Deed.

[103] As contemplated by subclauses 4.2(6) and (7) of the Deed of Settlement, the affidavit of Ms Eskey[50] deposes to the event of default, namely, Mr Amos has failed to strictly and fully comply with the terms of the Deed in failing to have made any payment under the Deed since 8 April 2015 and failing to pay the settlement sum on 1 October 2014 as provided for in clause 2.2 of the Deed. Ms Eskey also deposes that as at 18 July 2017 the default sum owing was $484,830.29. The unpaid balance of the settlement sum includes all amounts owing in respect of interest calculated at the lower rate pursuant to the mortgage and transaction documents.[51] As that amount may have altered since the time of the application, I will hear the parties further as to the amount now owing as the default sum. Orders for possession of the Ascot Property are provided for under clause 4.2.

[104] I note that the draft orders sought by the plaintiffs are different from the consent order contained in the Deed of Settlement insofar as provision is made for Perpetual to have possession pursuant to s 78 of the *Land Title Act* 1994 (Qld) (the "**Land Title Act**") and for it to have powers under s 83 of the *Property Law Act*. That presumably arises from the fact that the transfer of the mortgage from PTAL to Perpetual has not been able to be registered due to a caveat having been lodged by Mr Amos on 19 August 2011, which I will deal with below.

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[49] *Amos v National Australia Bank* [2001] QSC 031; *Warwick v Tankey* [2004] QSC 274 at [19].

[50] CFI 76 at [11] and [14].

[51] See clause 2.2.

[105] Whether that remains necessary if the caveat is removed can be addressed by the parties. There is also a separate order in respect of costs which differs from that proposed in the consent order.

[106] I will hear the parties as to the terms of the draft orders including as to the proposed orders as to costs on a date to be fixed.

Should the caveat be removed?

[107] The plaintiffs seek an order removing a caveat lodged by Mr Amos on 19 August 2011 over the Ascot Property pursuant to s 127 of the *Land Title Act*.

[108] The grounds upon which a caveatable interest is claimed are:

(a) The defendants cannot claim in the proceedings for recovery of possession seeking an injunction restraining PTAL from exercising its power to sell the properties the subject of the mortgage; and

(b) Non-compliance with s 96 of the *Property Law Act* by PTAL as mortgagee in that, even if PTAL was entitled to issue a notice, which Mr Amos claims it was not, it accepted more than three months' payment of interest after the date the mortgagee alleges the loan was repaid; and

(c) The mortgagee had further not complied with s 96 as it issued a notice under section 84;

(d) The Form 4 was issued in the wrong name as PTAL changed its name to The Trust Company (PTAL) Limited on 21 June 2010, prior to the issue of the notice on 7 September 2010, and the notice incorrectly stated that the mortgagee is Challenger Managed Investments Limited.

[109] In order to maintain a caveat, the caveator needs to show that there is a serious question to be tried in relation to the land and that the balance of convenience favours the caveat remaining pending a decision in relation to the serious question to be tried.

[110] The plaintiffs contend that the rights claimed by Mr Amos under the caveat were compromised by the terms of the Deed of Settlement, in particular the covenants given by Mr Amos in favour of the plaintiff. Under clause 1(3), Mr Amos covenanted that he had been properly served with a valid demand under the mortgage and had failed to comply with the demand. He further covenanted in clause 4.2 that he would deliver possession of the security property to Fidante and the Trust Company and consented to those parties entering judgment against him in the proceedings in the event of default. In clause 12.1 of the Deed of Settlement, Mr Amos provided a release from all claims which would include the claims raised in the caveat.

[111] Counsel for Mr Amos contends that it would be inappropriate to remove the caveat in any other circumstances other than the Court rejecting in their entirety the submissions

that have been made before it on his behalf.[52] The Court has rejected the submissions made on Mr Amos' behalf in their entirety.

[112] I find that the matters raised in the caveat ceased to be a basis to maintain the caveat given the terms of the Deed of Settlement even though the caveat was not specifically addressed in the Deed of Settlement expressly. I note that the application of the plaintiffs in paragraph 3 seeks the removal of the caveat. The onus is on the caveator to show that there is a serious question to be tried and the status quo should be maintained. That onus has not been discharged. Monies remain owing under the Deed of Settlement to the plaintiffs and recovery of possession of the Ascot Property is provided for under the Deed of Settlement in the event of default.

[113] In the circumstances, there is no serious question to be tried such that the caveat ought to remain nor does the balance of convenience favour it being maintained. It is appropriate that I remove the caveat pursuant to section 127 of the *Land Title Act*.

Conclusion

[114] I am therefore satisfied that:

(a) Leave should be given for the matter to proceed pursuant to rule 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) given that the proceedings were adjourned pending the parties satisfying the terms of the Deed of Settlement which has not been complied with by Mr Amos and the provisions as to the default under the Deed of Settlement provide for judgment to be given in these proceedings;

(b) Pursuant to rule 69(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld), Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 be substituted for the second plaintiff on the basis that the Perpetual has been assigned the rights in respect of the loan pursuant to the Sale Deed and Accession Deed.

(c) The defendant's further amended application filed 28 June 2017 be dismissed on the basis that there is no basis upon which the Deed of Settlement dated 30 May 2014 should be set aside or declared void *ab initio*.

(d) Pursuant to rule 658 of the *Uniform Civil Procedure Rules* 1999 (Qld) the plaintiffs are entitled to an order for payment of the default sum, possession of the Ascot Property and to costs payable under the terms of the Deed of Settlement for the reasons set out above. The form of order will however be subject to further submissions from the parties.

(e) Pursuant to section 127 of the *Land Title Act*, Caveat No. 714019412 lodged by the defendant on 19 August 2011 over the title to the Ascot Property should be ordered to be removed from Queensland Title Reference 11885013.

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[52] T1-23/10-20.

Orders

[115] I order that:

(1) Leave be given for the matter to proceed pursuant to r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld);

(2) Pursuant to rule 69(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld), Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 be substituted for the second plaintiff;

(3) The defendant's further amended application filed 28 June 2017 be dismissed; and

(4) Pursuant to section 127 of the *Land Title Act* 1994 (Qld), Caveat No. 714019412, lodged by the defendant on 19 August 2011 over the Title to the Property, be removed from Queensland Title Reference 11885013.

[116] Upon hearing the parties' further submissions, I order that:

(5) Pursuant to rule 658 of the *Uniform Civil Procedure Rules* 1999 (Qld):

(a) The defendant pay Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 the sum of $513, 053.85; and that

(b) Pursuant to section 78 of the *Land Title Act* 1994 (Qld) Perpetual Trustee Company Limited ACN 000 001 007 in its capacity as trustee of the Argyle Capital Management Trust No. 1 have possession of the property at 247 Lancaster Road, Ascot, Queensland, described in the Queensland Land Registry as Lot 25 on RP 33643, Title Reference 11885013.

(6) The defendant pay:

(a) The plaintiffs' costs of an incidental to the application filed on 15 March 2017; and

(b) The plaintiffs' costs of and incidental to the applications filed by the defendant on 16 March 2017, 10 April 2017 and 28 June 2017; and

(c) Any further legal costs incurred by the plaintiffs as a consequence of the defendant's default under the Deed of Settlement between the parties dated 30 May 2014 pursuant to clauses 4.2(2) and 4.2(4) of that Deed, but excluding the costs in relation to the application of 19 April 2017 and any reserved costs to be assessed on the indemnity basis.