SUPREME COURT OF QUEENSLAND

CITATION:	*Sino-Resource Imp & Exp Co Ltd v Oakland Investment Group Ltd* (No 2) [2018] QSC 133
PARTIES:	**SINO-RESOURCE IMP & EXP CO LTD** (*Applicant*) **v** **OAKLAND INVESTMENT GROUP LIMITED BVI COMPANY 1913227** (*Respondent*)
FILE NO/S:	553 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	6 June 2018
DELIVERED AT:	Brisbane
HEARING DATES:	24 May 2018; further submissions in writing 28 May 2018 (applicant), 1 June 2018 (respondent)
JUDGE:	Henry J
ORDERS:	**1. The respondent shall prepare and lodge with the Land Titles Office the documents necessary to effect the removal of any reference to mortgages numbered 717541242 and 717541414 from the interests purportedly mortgaged by those mortgages so as to effect the removal by 4pm 13 June 2018.** **2. In the event order 1. is not complied with by the deadline it imposes, it is directed that a Registrar of the Supreme Court of Queensland shall execute form 3 releases of mortgage in respect of mortgages numbered 717541242 and 717541414 and the Crown Solicitor is authorised to forthwith lodge those executed releases.** **3. The application is otherwise dismissed.** **4. The respondent will pay the applicant's costs of the application on the indemnity basis.**
CATCHWORDS:	MORTGAGES – MORTGAGES AND CHARGES GENERALLY – RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE – where the first

mortgagee asserts the expenses of taking and maintaining possession as mortgagee of the mortgaged property are secured by the mortgage notwithstanding that the mortgagees purported loan to the mortgagor was a sham and did not in fact occur – where the first mortgagee acted in bad faith in taking possession – whether another mortgagee is entitled to an order recovering the first mortgagee's mortgages in consequence of the sham

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – OTHER MATTERS – APPLICATION – where the order sought was not included in orders specified in the filed application – whether the orders to be given on an application must be confined to the orders recited in the application filed

Land Title Act 1994 (Qld) ss 184(1), s 185(1)(a).
Uniform Civil Procedure Rules 1999 (Qld), rules 5, 484 and 485.

Downsview Nominees v First City Corp [1993] 3 All ER 626, cited
Equititrust Limited v Gamp Development Pty Ltd & Ors [2009] QSC 115, cited
Equititrust Limited v Gamp Developments Pty Ltd & Ors (No2) [2009] QSC 168, cited
Featherstone v Ashala Model Agency Pty Ltd (in liq) & Anor [2017] QCA 260, cited
Frazer v Walker [1967] 1 AC 569, cited
Mainland v Upjohn [1889] 41 Ch D 126, cited
Miller v Gunther & Ors [2005] QSC 090, cited
Quennell v Maltby & Anor [1979] 1 All ER 568, cited
Santley v Wilde [1899] 2 Ch 474, cited
Sino-Resource Imp & Ex Co Ltd v Oakland Investment Group Ltd [2018] QSC 98, cited
Vickers v Jackson
White v Tomasel [2004] Qd R 438, cited

COUNSEL: D A Savage QC for the applicant
M K Callanan for the respondent

SOLICITORS: Connolly Suthers for the applicant
Bransgroves Lawyers for the respondent

[1] In answering the separate question in this application I declared no money was due under and by virtue of a loan agreement secured by the respondent's mortgages numbered 717541242 and 717541414 over Passage's estate at Port Hinchinbrook

Resort.[1] On 24 May 2018 I heard the parties in respect of consequential orders and costs. On that occasion I made some orders about costs and the discharge of a payment for security for costs but otherwise reserved my decision about consequential orders, giving leave for the filing of further written submissions, which have since been received and considered.

[2] The issue to now be determined is whether the respondent's mortgages over the estate should be removed. The mechanism by which Sino seeks that remedy is a direction that one of the court's registrars execute a form 3 release of mortgage, in respect of the mortgages, in registrable form. Sino submits its right to such an order, depriving the respondent of the security provided by its mortgages, flows as an inevitable consequence of my answer to the separate question. That answer involved a finding that the loan purportedly secured by the mortgages was a sham and that in fact there had been no loan.

[3] The respondent, Oakland, submits such an order ought not be made for two main reasons. Firstly, Oakland submits the right to the order sought does not flow as an inevitable consequence of the declaration because, on a literal application of the terms of the mortgages, Oakland is entitled to recoup monies, secured by the mortgages, expended by Oakland in exercising and maintaining its purported right of possession under the mortgages ("the first issue"). Secondly, Oakland complains an order directing the removal of the mortgages was not an order sought by the terms of the application ("the second issue").

The first issue: Does the remedy of removing the mortgages arise as an inevitable consequence of the declaration and notwithstanding that Oakland's expenses of exercising and maintaining possession are purportedly secured by the mortgages?

[4] Oakland's argument on the first issue is premised on the assumption that expenses incurred by Oakland in exercising possession of the estate are recoverable, notwithstanding that its debt cancelling loan was a sham and that it had never actually lent the money purportedly secured by the mortgages. For the purposes of the present argument it can be accepted that Oakland would have incurred cost in exercising its purported right of possession and thereafter maintaining the estate in its purported role as mortgagee in possession. Likewise it can be accepted that on a literal reading of the mortgages Oakland's right to recover such costs would be secured by the mortgages over the estate.

[5] The difficulty with Oakland's position is the assumption that my finding Oakland's supposed loan to Passage was a sham has no consequence for its rights vis-a-vis Sino's rights in connection with the mortgaged property. Oakland's submissions assume that by reason of the indefeasibility conferred by s 184(1) *Land Title Act 1994* (Qld) its rights under the mortgages remain enforceable, regardless of the fact that the debt or liability which the mortgages were to secure – the raison d'être for the mortgages – was a sham. However, s 185(1)(a) precludes the operation of s 184 in respect of an equitable interest in the mortgaged property arising from the act of the registered proprietor.

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[1] *Sino-Resource Imp & Ex Co Ltd v Oakland Investment Group Ltd* [2018] QSC 98.

[6] Sino has such an interest and the standing to pursue it. As was observed in *Vickers v Jackson*[2] by Lord Justice Lloyd:

> "It has for many years been established that even if the mortgage recites a loan and contains acknowledgment of its receipt it is open to the borrower, or to anyone else interested in the mortgaged property the subject of the mortgage, to put in issue whether any and if so what amount is truly owing and secured: see *Mainland v Upjohn* and more recently *Close Asset Finance v Taylor* cited in Fisher and Lightwood *Law of Mortgage*". (citations omitted)

[7] Sino, as a mortgagee of the estate, has standing to seek personam relief against Oakland. Indefeasibility of title does not preclude the right of a party to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as the court acting in personam may grant.[3] The relevant equity here would be that of the second mortgagor seeking redemption of the first mortgage.[4]

[8] In *White v Tomasel,*[5] in an analysis reconciling the tension between the indefeasibility of title under the Torrens system and rights of action to divest the title holder, McMurdo J (as he then was) observed:

> "Under the Torrens system, the registered proprietor is neither obliged to enquire as to the history of the title nor bound by an antecedent unregistered interest of which the registered proprietor was aware or would have been aware had such an enquiry been made: *Bahr v. Nicolay*. Accordingly it has been recognised that the objects of the Torrens system permit the enforcement of a right in relation to land in this context only when the right derives from the acts of the registered proprietor against whom it is claimed. Although that limitation was not expressed in *Frazer v. Walker*, in *Breskvar v. Wall* Barwick C.J. limited this relevant category of claims to causes "setting up matters depending upon the acts of the registered proprietor himself", and the same limitation was expressed in *Bahr v. Nicolay*. By limiting this so-called exception to indefeasibility to obligations resulting from the actions of the registered proprietor, much of the tension between the operation of the general law and the Torrens statutes was avoided. It became possible to say, as Brennan J. said in *Bahr v. Nicolay*, that there was no inconsistency between indefeasibility provisions of Torrens statutes and the existence of causes of action which "may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title", citing Barwick C.J. in *Breskvar v. Wall*. Similarly, in *Vassos v. State Bank of South Australia*, Hayne J. said that the "vulnerability to in personam proceedings is not inconsistent with indefeasibility". The limitation is now expressed in s. 185(1)(a) which requires the "equity" to be one "arising from the act of the registered proprietor".

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2 [2001] EWCA Civ 725, [18].
3 *Frazer v Walker* [1967] 1 AC 569, 585.
4 See for example, *Mainland v Upjohn* [1889] 41 Ch D 126.
5 [2004] Qd R 438, 454, 455.

> Accordingly, to constitute an "equity" within s. 185(1)(a), the interest must derive from a recognised right of action, at law or in equity, which arises from the acts of the registered proprietor and which is not inconsistent with the policy of a Torrens system of title." (citations omitted) (emphasis added)

[9] The remedy now sought by Sino derives from the registered proprietor's act of knowing participation in the sham. It can hardly be thought to be consistent with the policy of a Torrens system of title that it would protect the title of a dishonest proprietor, such as Oakland, who well knew the purpose of the registered mortgages – securing repayment of money owed under a loan agreement – was a fiction.

[10] It is well established that a mortgage, whether legal or equitable, is security for repayment of a debt.[6] The existence of such a debt is necessarily an essential element of the mortgage's purpose, for that purpose is securing repayment of the debt.

[11] In *Downsview Nominees v First City Corp*[7] Lord Templeman observed, in delivering the judgment of the Privy Council:

> "Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flow two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower." (emphasis added)

[12] That case was concerned with the position of receiver and manager appointed by the mortgagee but Lord Templeman observed the same principles applied. Debunking an argument to the contrary, Lord Templeman observed:

> "The fallacy in the argument is the failure to appreciate that, when a receiver and manager exercises the powers of sale and management conferred on him by the mortgage, he is dealing with the security; he is not merely selling or dealing with the interests of the mortgagor. He is exercising the power of selling and dealing with the mortgaged property for the purpose of securing repayment of the debt owing to his mortgagee and must exercise his powers in good faith and for the purpose of obtaining repayment of the debt owing to his mortgagee."[8] (emphasis added)

[13] His Lordship went on to explain:

> "A mortgagee owes a general duty to subsequent incumbrancers and to the mortgagor to use his power for the sole purpose of securing repayment of

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6 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, 311.
7 [1993] AC 295, 312.
8 Ibid 312.

> the monies owing under his mortgage and a duty to act in good faith."[9] (emphasis added)

[14] In the present case Oakland well knew, when initiating steps to take possession as mortgagee, that such steps were unnecessary because there was no debt it needed to secure the repayment of. As at that time its mortgages were serving no purpose because, as it well knew, the debt cancelling loan was a sham. It had no interest at all to assert in priority to Sino. There had been no loan and Oakland in truth had no interest secured by the mortgages. Oakland was acting in bad faith, contrary to its duties to both Passage and Sino, in ever exercising its power of possession.

[15] The finding of a sham exposes Oakland as having had no interest to secure under its mortgages with the consequence, by reason of Sino's interest as a mortgagee, that Sino is entitled to the remedy of the removal of Oakland's mortgages.

[16] The argument that the recovery of Oakland's costs of taking and maintaining possession of the estate should be safeguarded by the continued registration of the mortgages, ignores the significance of Oakland having acted in bad faith in taking possession in the first place. Sino ought not be deprived of the remedy to which it is otherwise entitled in order for Oakland to continue to secure the repayment of costs it incurred after and as a result of having acted in bad faith, contrary to its duty to Sino.

The second issue: Is the remedy precluded because it was not expressly sought?

[17] What then of the argument that Sino ought to be deprived of its remedy because it was not a remedy sought in the filed application?

[18] The orders sought in the filed application were:

> "1. An account of what is due under and by virtue of a loan agreement between the Respondent as Lender (Oakland) and The Passage Holdings Pty Ltd ACN 602 422 891 as trustee for The Passage Holdings Unit Trust as Borrower (Passage) dated 22 September 2018 (the loan agreement), secured by mortgage number 717541242 and mortgage number 717541414 (Mortgages) over the land described in Annexure A hereto (Secured Property) at the date of the order made in this proceeding.
>
> 2. An account of what was due by Passage to Oakland (having regard to the definition of Secured Money as contained in the Loan Agreement) at the time Oakland exercised it power of sale under the Mortgages.
>
> 3. In the alternative to 2 above, an account of what is due by Passage to Oakland (having regard to the definition of Secured Money as

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[9] Ibid 317. Also see *Quennell v Maltby & Anor* [1979] 1 All ER 568, 571, where Lord Denning MR observed: "A mortgagee will be restrained from getting possession except when it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose…The legal right to possession is not to be enforced when it is sought for an ulterior motive."

contained in the Loan Agreement) as at the date of the order made in this proceeding.

4. An account of the rent and profits of, and the receipts from the sale of, the Secured Property received by or on behalf of Passage by Oakland.

Interim Orders/Interlocutory Orders

5. In the event that Oakland has entered into a contract of sale of any of the parcels of land comprising the Secured Property Oakland provide to the applicant within three (3) business days copies of the following documents recording or evidencing:

    a. The appointment of a real estate [sic - agent] to sell any of the parcels of land set out in Annexure A;

    b. The marketing and advertising for sale any of the parcels of land set out in Annexure A;

    c. The value of any of the parcels of land set out in Annexure A;

    d. The contract or contracts of sale for any of the parcels of land set out in Annexure A; and

    e. The distribution (including the settlement statement) of the sale proceeds of any of the parcels set out in Annexure A.

6. An order restraining Oakland from entering into any contract of sale by exercising its power of sale contained in the Mortgages to sell the land set out in Annexure A.

7. In the alternative, an order requiring Oakland to provide to the solicitors for the applicant, marked to the attention of Clive Scott, 3 business days written notice of their intention to enter into a contract of sale for any of the land set out in Annexure A.

8. An order that an authorised officer of Oakland swear an affidavit to be provided to the solicitor for the applicant within three (3) business days that sets out the following:

    a. The total amount advanced to Passage as secured by the loan agreement (Advance);

    b. The date or dates the Advance was made to Passage;

    c. The interest rate charged by Oakland to Passage;

    d. The date or dates of payments made by or on behalf of Passage in repayment of the advance to Oakland or their nominee;

    e. Any amounts received by Oakland or nominee [sic – by] way of rent or other payment since 4 August 2017.

    f. The amount said to be due and owing pursuant to the loan agreement as at the date of swearing the affidavit.

9. The Respondent pay the Applicant's costs of the application."

[19] The nature of the orders sought, in the context of Oakland's mortgages having priority over Sino's, bespeaks an obvious concern by Sino to prevent Oakland selling the estate as mortgagee. Such concern could only arise in the context of this case from a concern that the foundation for such a right accruing in the first place – the making of the loan – did not exist. The nature of the orders sought obviously reflected the latter concern. The order for the determination of the separate question went directly to the existence of that foundation.

[20] That Oakland understood the critical importance of the question whether a loan was made by it to Passage under the loan agreement is confirmed by its consent to the order for the separate determination of that very question. It is conceivable of course that in consenting to the order for the determination of the separate question Oakland was hopeful the answer would be favourable to it. Although an answer in the affirmative would not resolve the remaining minutiae of how much was owed to Oakland, it would affirm the legal foundation for Oakland's action as mortgagee in taking possession and moving to sell the estate. Conversely, Oakland must also have appreciated that an adverse answer would likely be fatal to the purported exercise of its rights under the mortgages because the underlying foundation for those rights was, necessarily, that a loan was actually made.

[21] Whether a failure to specifically articulate the relief ultimately sought within the orders initially sought will preclude the giving of such relief will depend upon the individual circumstances of the case. A pivotal consideration is fairness. So, for example, in *Featherstone v Ashala Model Agency Pty Ltd (in liq) & Anor*[10] Sofronoff P, in dealing with a decision that payments were voidable, notwithstanding that a liquidator had not alleged that the payments were unfair preferences, observed:

> "[34] It is now said that that was an error because the liquidator had not alleged in his pleading that the transaction fell within s 588FA. This really amounts to an argument that the trial was unfair insofar as his Honour based his decision upon a matter that had not been pleaded and to which the appellant, accordingly, did not have an opportunity to respond.
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> [35] However, that is not what happened in this case. In this case the nature of the proven transaction, the payment by the company of a creditor's debt almost in full thereby leaving the company with a substantial liability that it could not meet, necessarily leads to the conclusion that the payment was an unfair preference. However, his Honour did not decide the case on that basis although, in my respectful opinion, there would have been no unfairness in his so doing. The facts could have led to no other conclusion about the legal character of the payments and the defendant was denied no defence or opportunity to meet that case." (emphasis added)

[22] Counsel for Oakland sought to confine consideration of the present issue as if the application in which it arises were an application for summary judgment. Addressing *Featherstone*, counsel submitted that case was consistent with the approach taken on applications for summary judgment where relief can be granted if it falls within the claim made, but not otherwise. On this point counsel cited *Equititrust Limited v Gamp*

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[10] [2017] QCA 260 [34], [35].

Developments Pty Ltd & Ors (No2)[11] where Applegarth J adopted the approach of McMurdo J, as he then was, in the earlier related decision of *Equititrust Limited v Gamp Development Pty Ltd & Ors*[12] where his Honour had observed:

> "A plaintiff's claim must be that within the document by which the proceedings were commenced or as that has been amended with the leave of the court or a registrar. A plaintiff cannot seek summary judgment for relief which is not within its claim as filed or is duly amended."

[23] The present issue does not arise in an application for summary judgment. The order of 21 November 2017, requiring the determination of a separate question, was made by consent, pursuant to Chapter 13 UCPR at Part 5, "Separate decision on questions". Rules 484 and 485 are the rules which deal with the orders which may flow from the determination of such a separate question:

> "**484. Orders, directions on decision**
> If a question is decided under this Part, the court may, subject to rule 475, make the order, grant the relief and give the directions that the nature of the case requires.
>
> **485. Disposal of proceedings**
> The court may, in relation to a decision of a question under this Part, as the nature of the case requires –
> (a) dismiss the proceeding or the whole or part of a claim for relief in the proceeding; or
> (b) give judgment, including a declaratory judgment; or
> (c) make another order." (emphasis added)

[24] The conferral of a power to make such order "as the nature of the case requires" arises unremarkably from the very nature of the ordering of and determination of a separate question. Such an order will likely have a material consequence in the case in which it is sought, there being no utility in it otherwise. It cannot seriously be contemplated that Oakland thought it could enjoy the advantage of a potentially favourable answer to the question without also running the gauntlet of an adverse answer. The caution with which Oakland approached the revelations in Sino's written opening and its securing of an adjournment to consider its position and, in the end result, contest the question on its merits at the hearing demonstrates it was well aware of the material consequences of the answer to the question either way.

[25] Rule 5 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") relevantly provides:

> "**5. Philosophy – overriding obligations of parties and court**
>
> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality in facilitating the purpose of these rules.

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11 [2009] QSC 168 [2], [6], [9], [16].
12 [2009] QSC 115 [12].

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way."

[26] The parties' consent to the order for determination of the separate question was consistent with their implied undertaking pursuant to r 5(3). They deployed the rules, consistently with their purpose under r 5(1) of facilitating the just and expeditious resolution of a real issue, with likely inevitable determinative consequences if answered adversely to Oakland. Against this background, and a hearing of the separate question on the merits having occurred, it would be inconsistent with r 5(2) to interpret the words "the nature of the case requires" in rr 484 and 485 as confining available orders to those sought in the application. An order effecting the removal of Oakland's mortgages flows as such an inevitably appropriate consequence of the answer to the separate question being adverse to Oakland that the nature of the case requires such an order.

[27] As to the form of that order, Sino asserts it ought be a direction that a Registrar of this court effect the removal of the mortgages on the basis Oakland's director is overseas and disinterested in orders in the proceeding. Whether or not that is so, Oakland has legal representatives who it can instruct to remove the mortgages in compliance with my order.

[28] Adopting a course similar to that in *Miller v Gunther & Ors*[13] the preferable course is to order Oakland to remove the mortgages within five business days of this judgment, with a default direction to the Registrar in the event that order is not complied with.

Costs

[29] For reasons already given by me in ordering Oakland to pay Sino's costs of the hearing of the separate question, Sino should also have its costs of the application on the indemnity basis.

Orders

[30] My orders are:

1. The respondent shall prepare and lodge with the Land Titles Office the documents necessary to effect the removal of any reference to mortgages numbered 717541242 and 717541414 from the interests purportedly mortgaged by those mortgages so as to effect the removal by 4pm 13 June 2018.

2. In the event order 1. is not complied with by the deadline it imposes, it is directed that a Registrar of the Supreme Court of Queensland shall execute form 3 releases of mortgage in respect of mortgages numbered 717541242 and 717541414 and the Crown Solicitor is authorised to forthwith lodge those executed releases.

3. The application is otherwise dismissed.

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[13] [2005] QSC 090.

4. The respondent will pay the applicant's costs of the application on the indemnity basis.