Supreme Court

New South Wales

Case Name:	Harriette & Co Pty Ltd v Platine Property Development Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 1536
Hearing Date(s):	28 October and 1 November 2022
Date of Orders:	1 November 2022
Decision Date:	1 November 2022
Jurisdiction:	Common Law
Before:	Chen J
Decision:	(1) Upon the defendants/cross-plaintiffs' giving to the Court the usual undertaking as to damages, order that the plaintiff/cross-defendant, by itself, its servants or its agents, is restrained, until 5:00pm 18 November 2022, from: (a) enforcing or otherwise exercising any right under clause 4.1 of the Settlement Deed dated 5 August 2022 (Settlement Deed); (b) enforcing or otherwise exercising any right under clause 3 of the "Deed of Variation"; (c) filing or otherwise taking steps to file the "Consent Judgment" in Schedule 2 of the Settlement Deed (Consent Judgment); (d) otherwise seeking or requesting to have the Court make or enter the orders in the Consent Judgment; (e) for the avoidance of any doubt, exercising any power of sale with respect to, or taking possession of, the property located at Unit 2, 53 Suttie Road, Bellevue Hill NSW 2023 (folio ID 2/SP93524). (2) The Second Defendant through his counsel undertakes to the Court to pay $100,000 into Court by 5:00pm, Friday 4 November 2022. (3) All questions of costs are reserved.

(4) The Court's orders be entered forthwith.
(5) The proceedings are listed before the General Registrar in the Common Law Division at 9:00am 3 November 2022 in order to obtain a hearing date and further orders in relation to evidence and related matters.

Catchwords:

CIVIL PROCEEDINGS – Interlocutory applications – Real property
LAND LAW — Mortgages — Statutory power of sale under Real Property Act 1900 (NSW)

Legislation Cited:

Conveyancing Act 1919 (NSW)
Evidence Act 1995 (NSW)
Real Property Act 1900 (NSW)
Supreme Court Act 1970 (NSW)

Cases Cited:

1st Fleet Pty Ltd v Australian Cooperative Foods Ltd [2006] NSWSC 881
AJG Capital Pty Limited v AJG Properties [2010] NSWSC 884
Appleton Papers Inc v Tomasetti Paper Pty Ltd [1983] 3 NSWLR 208
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618; [1968] HCA 1
Cameron v UBS AG (2000) 2 VR 108; [2000] VSCA 222
Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148; [1986] HCA 58
Chamberlain Early Learning Centre Pty Limited v Chamberlain Group Pty Limited [2015] NSWSC 751
Deguisa v Lynn (2020) 268 CLR 638; [2020] HCA 39
Films Rover International Ltd v Cannon Film Sales Ltd (1987) 1 WLR 670
GE Personal Finance Pty Ltd v Smith [2006] NSWSC 889
GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd (2013) 305 ALR 363; [2013] FCAFC 102
Hi Tech Group Australia Ltd v Riachi [2021] NSWSC 1212
In the matter of Gladstone Pacific Nickel Limited [2011] NSWSC 1235

	Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161; [1972] HCA 74 Ippin Textiles Pty Ltd v Winau Aust Pty Ltd (2021) 386 ALR 286; [2021] NSWCA 9 King Investment Solutions Limited v Hussain (2005) 64 NSWLR 441; [2005] NSWSC 1076 Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533 Lachlan v HP Mercantile Pty Ltd (2015) 89 NSWLR 198; [2015] NSWCA 130 NWL Ltd v Woods [1979] 1 WLR 1294 Shercliff v Engadine Acceptance Corporation Pty Ltd [1978] 1 NSWLR 729 Tegra (NSW) Pty Limited v Gundagai Shire Council (2007) 160 LGERA 1 Westfield Management Limited v Perpetual Trustee Company Limited (2007) 233 CLR 528; [2007] HCA 45
Texts Cited:	Practice Note SC CL 6
Category:	Principal judgment
Parties:	Harriette & Co Pty Ltd Platine Property Development Pty Ltd
Representation:	Counsel: N Kabilafkas (Plaintiff) D Southwood (Plaintiff) J Jaffray (Defendant) N Condylis (Defendant) Solicitors: Siyu Zhang (Plaintiff) Eric (Yue) Huang (Defendant)
File Number(s):	2021/363506

JUDGMENT EX TEMPORE (REVISED)

1 The defendants, by summons filed on 24 October 2022, seek an order that the plaintiff be restrained from seeking or requesting to have the Court make or enter orders in a consent judgment that has been signed by the parties (para 5). The injunction is sought until 5 pm on 18 November 2022. Although the

summons is seeking a range of other orders, by way of final relief, that is the only order presently sought.

2 This matter came before me, at short notice, as Duty Judge on 28 October 2022. There was insufficient time to hear all of the arguments: the plaintiff made its submissions, and the matter was stood over to the first available time to resume the hearing – being today.

3 The parties had, before 28 October 2022, agreed on orders preserving the status quo. The parties consented to those orders being extended until 5 pm on 1 November 2022.

Background

4 By statement of claim filed 22 December 2021, the plaintiff commenced proceedings seeking to recover money alleged to be outstanding pursuant to a loan agreement (the 'loan agreement') between the plaintiff and the first defendant on 22 October 2019, and guaranteed by the second and third defendants. The statement of claim sought recovery of $7,161,654.33 – which included the principal sum, interest, as well as court costs.

5 The key terms of the loan agreement are as follows: the loan amount was $5 million; the repayment date was 6 March 2020; the loan was to be secured by two mortgages – the first was a mortgage over property owned by the second and third defendants (in the Settlement Deed, later executed, this is referred to as 'parcel A', and is a unit in Bellevue Hill, NSW), the second were equitable mortgages (it appears that registered mortgages were executed; nothing turns on this) over other property, being four lots in a strata plan; and the loan was also to be secured by personal guarantee given by the second defendant, although it appears that guarantees were executed by the second and third defendants.

6 The mortgage over parcel A was executed by the defendants on 15 November 2019. The annexure to that mortgage – described in the mortgage as 'ANNEXURE A' – was signed by them on 22 October 2019. It is accepted by the parties that, upon registration of the mortgage, only the mortgage itself was registered; that is, 'ANNEXURE A' to the mortgage was *not* registered.

7 It seems clear that there was an act of default, in that the money loaned was not repaid by the repayment date. As earlier noted, the plaintiff commenced proceedings in this Court on 22 December 2021 seeking to recover the money from the defendants together with interest: as against the first defendant, under the loan agreement for failure to perform, and the second and third defendants were sued on the guarantees that they had given.

8 Following the plaintiff commencing proceedings for the recovery of the money, an in principle settlement was reached by the parties on 26 July 2022 – following which, on 5 August 2022, the plaintiff and the second and third defendants executed a deed of settlement. That deed was later varied, by agreement, on 30 September 2022.

9 Relevantly, by the settlement deed:

(1) The second and third defendants agreed to pay the plaintiff the sum of $6,550,000, by payments made by 30 August 2022 ($100,000): cl 2.4(a) and by 30 September 2022 ($6,450,000): cl 2.4(b). A failure to comply with these requirements constituted an act of default, conferring upon the plaintiff an entitlement to file the Consent Judgment ('the Consent Judgment') without any further notice to the defendants: cl 4.1.

(2) The second and third defendants agreed to pay the plaintiff $60,000 by 27 July 2022 and $60,000 by 2 August 2022: cl. 3.2.

(3) There was provision for default if the second and third defendants failed to make the payments in accordance with cl 2.4: cl 4.1. Such a failure conferred an entitlement upon the plaintiff "to file the Consent Judgment" that was contained in Schedule 2. Put simply, by the orders contained in the Consent Judgment, the plaintiff was entitled to judgment against the defendants in the amount of $5 million; interest was to accrue from 6 March 2020 (the date upon which monies were to be repaid) at a rate of 24% per annum; the plaintiff was granted leave to issue a writ for possession of parcel A, as well as an order permitting the sale under the registered mortgage of that lot pursuant to ss 57 and 58 of the *Real Property Act 1900* (NSW).

10 The Consent Judgment provides for the repayment of the principal amount paid under the loan, plus interest (orders 1-3); an order for the sale and possession of the property described as parcel A (orders 4, 5 and 8); and for the payment of the plaintiff's costs (order 9). (The parties agreed there were errors in the proposed orders: orders 6 and 7 were duplications of orders 4 and 5. Nothing turns on this).

11 On 30 September 2022, a deed of variation was executed by the parties. Relevantly, that deed varied the settlement deed as follows:

(1) cl 2.4(a) which formerly required the payment of $6,450,000 by no later than 30 September 2022, was varied so as to require payment of $450,000 by no later than 11 October 2022.

(2) A new cl 2.4(c) was inserted requiring payment of $6 million by no later than 18 October 2022.

(3) In consideration for the variation to cl 2.4, the defendants were required to pay the plaintiff:

(a) $30,000 by no later than 30 September 2022: cl 2(a).

(b) $10,000 by no later than 11 October 2022: cl 2(b).

(c) $60,000 by no later than 18 October 2022: cl 2(c).

(4) The failure to perform the obligations contained within cl 2 by the time stipulated also conferred upon the plaintiff a right to file the consent judgment: cl 3.

12 The total owing, following the deed of variation, was $6.55 million.

13 The second and third defendants have paid some money to the plaintiff: to date they have paid $710,000. The agreed position of the parties is that a final payment of $6.06 million was required to be made by 18 October 2022, but was not. The plaintiff considered the failure to pay this amount to be an act of default, and took steps to enforce rights conferred upon it under the settlement deed.

14 To recap, slightly: working backwards, based upon the agreed amount owing as at 18 October 2022 – being $6.06 million – it appears that: (a) $450,000 was paid on or around 11 October 2022; (b) $30,000 was paid on or around 30 September 2022; and (c) $10,000 was paid on or around 11 October 2022. (That is, $490,000 has been paid since the date of the deed of variation).

15 The defendants have not contested that there has been an act of default conferring upon the plaintiff the right to file the consent judgment. Rather the defendants argue, by the Cross Summons filed 24 October 2022, that they are entitled to final relief: they contend that cl 4.1 of the settlement deed, cl 3 of the deed of variation, and the Consent Judgment are void and otherwise unenforceable “by reason of the doctrine against penalties”; they contend that they are entitled to relief against forfeiture; and, finally, they contend that the

plaintiff is not entitled to exercise the power of sale under ss 57 and 58 of the *Real Property Act 1900* (NSW).

16 Some further matters should also be noted. First, it is clear that the plaintiff had exercised forbearance on a number of occasions in order to permit the second and third defendants to meet the financial obligations under the deed: they are variously referred to in the affidavit of Yu Chen affirmed 25 October 2022, and summarised in the submissions filed by the plaintiff dated 27 October 2022, par 19. Secondly, as the plaintiff has fairly acknowledged, it has received consideration for this forbearance: cll 3.1 and 3.2. of the settlement deed, which made provision for the payment of $120,000 to reflect the forbearance. (It has also received some forbearance under the deed of variation – possibly in the order of $40,000).

The relief sought: the interim injunction

17 The power to grant an interlocutory injunction is contained in s 66(4) of the *Supreme Court Act* 1970 (NSW). That section provides:

> The Court may, at any stage of proceedings, on terms, grant an interlocutory injunction in any case in which it appears to the Court to be just or convenient so to do.

18 Notwithstanding the breadth of the discretion conferred, the courts have developed "organising principles … having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed": *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46 at [19] ('*O'Neill*'). These principles are well-established, and there was no debate about them before me.

19 The granting of interim relief is discretionary, and the Court thus has to exercise its discretion in a manner best calculated to achieve justice between the parties: *Appleton Papers Inc v Tomasetti Paper Pty Ltd* [1983] 3 NSWLR 208, 216. That exercise involves consideration of two matters: (i) the nature of the plaintiff's case (including the apparent strength of that case); and, (ii) the balance of convenience: *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622-623; *O'Neill* at [19]; [65]-]72].

20 Although it is usual to deal with each question separately, and for the purposes of this judgment I will do so, each bears on the assessment of the other: *O'Neill* at [71]-[72]; *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd* (2013) 305 ALR 363; [2013] FCAFC 102 at [81(j)] (Bennett, Jagot and Griffiths JJ).

A prima facie case

Introduction

21 In considering the requirements for a "prima facie" case, an applicant for interim relief is not required to show "that it is more probable than not that at trial the [applicant] will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial": *O'Neill* at [65].

22 Some further matters should also be noted. First, when considering whether there is a prima facie case, the Court's task is not to conduct a preliminary trial of the action "or withhold interlocutory relief upon a forecast as to the ultimate result of the case": *Beecham* at 622; see also *1st Fleet Pty Ltd v Australian Cooperative Foods Ltd* [2006] NSWSC 881 at [5] (White J). Secondly, notwithstanding the general approach, in certain situations – where granting interlocutory relief may have the effect, at least in practical terms, of deciding the application for final relief – the Court will be required, beyond the prima facie test, to evaluate the strength of the applicant's case: *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533, 536 ('*Kolback*'). (Neither side suggested that this was the situation here, so it may be put to one side). Thirdly, in relation to contested questions of law, whether the court should attempt to resolve a disputed question of law will depend on the particular circumstances of the case, including whether the question is novel or difficult and whether it is susceptible of resolution on the present state of the evidence or whether urgency renders it impractical to give proper consideration to the question: *Kolback* at 535. Finally, the enquiry is necessarily fact-sensitive: everything "must depend upon the circumstances of the case, including the extent to which the applicant has had an opportunity to present the facts to the court and the consequences of granting or of refusing relief": *In the matter of Gladstone Pacific Nickel Limited* [2011] NSWSC 1235 at [56] (Ball J).

23 As noted above, the defendants raised three matters which they contend give rise to a prima facie case.

The unregistered memorandum

24 The second and third defendants essentially argued that the pleaded right to exercise the power of sale did not arise. This was because, first, the alleged basis of the right to exercise the power of sale arose from what was said to be "events of default" as set out in a document described as 'Annexure A' – a document described as "Mortgage Memorandum of Standard Conditions") said to form part of the registered mortgage: statement of claim, pars 13-16, 42-43; and, secondly, "Annexure A" did not form part of the mortgage in fact registered.

25 In those circumstances it was said that regard could not be had to Annexure A in construing the mortgage and, by extension, in relying upon it to confer the right of sale.

26 Two things are clear. One is that "Annexure A" did not form part of the mortgage in fact registered: see the affidavit of Chao Deng affirmed 25 October 2022, Exhibit CD-1. The other is that the mortgage as registered did make reference to Annexure A: see that same evidence.

27 The second and third defendants, in aid of their submission, rely upon what was said in *Ippin Textiles Pty Ltd v Winau Aust Pty Ltd* (2021) 386 ALR 286; [2021] NSWCA 9. In that case, Leeming JA (Brereton JA agreeing) doubted whether regard could be had to an unregistered document such as Annexure A when construing the terms of the mortgage: at [57].

28 The plaintiff took a contrary position, submitting that the present state of the law was against the reservation made by Leeming JA (and Brereton JA) in *Ippin*. It argued that the law was that a court could construe the mortgage by reference to a document not on the register and, as a consequence, could rely upon not only the terms of Annexure A, but the power of sale in s 58 of the *Real Property Act 1900.*

29 I was taken by both sides to a considerable number of authorities, but the only one that touched upon the issue in question was the decision in *Ippin.* In my

view there is a serious question to be tried about the issue so presented. Whilst it is true, as the plaintiff submitted, that Leeming JA did not determine the question, I cannot accept that Leeming JA (and Brereton JA) were not alive to the contrary line of authority. Indeed, it is clear from the careful analysis that Leeming JA undertook, that he was mindful of it: the references to the High Court decisions in *Westfield Management Limited v Perpetual Trustee Company Limited (2007) 233 CLR 528;* [2007] HCA 45 and *Deguisa v Lynn* (2020) 268 CLR 638; [2020] HCA 39 put the matter beyond doubt.

30 In any event, I am persuaded that the issue presented raises a "contested question of law", and it would not be, in the circumstances, practical to attempt to resolve it without full consideration: *Kolback* at 535.

31 The plaintiff further submitted that, independently of Annexure A, an entitlement to exercise the power of sale arose upon compliance with the requirements contained within the *Conveyancing Act 1919* (NSW) or by judicial sale of the property based on the mortgage registered or the existence of an equitable mortgage. In either case, it was said that relief would be available almost as of right. In that way, so it was argued, there remains no prima facie case based on any "irregularity" in connection with Annexure A.

32 In relation to the notice requirements under the *Conveyancing Act 1919*, it was accepted that those steps had not yet been taken (if they are to be taken).

33 In relation to any judicial sale, I respectfully disagree with the plaintiff's submission: at a minimum, I consider there to be a serious question about whether, and if so upon what terms, the plaintiff might be entitled to judicial sale of parcel A. That is for the following reasons.

34 First, although it may be accepted that the plaintiff would have a right to apply for judicial sale, that would require the plaintiff to seek such an order (it presently does not do so; as the second and third defendants have submitted, the pleaded right to the power of sale is based on 'Annexure A').

35 Secondly, relief by way of judicial sale is a discretionary remedy; it does not issue as of right. As was pointed out in *King Investment Solutions Limited v*

Hussain (2005) 64 NSWLR 441; [2005] NSWSC 1076 at [119] ('*King Investment*'):

> "The point, for present purposes, is not that the discretion to order a sale will necessarily be exercised in the twenty-first century in the same way as it was in the nineteenth. Rather, one point is that there *is* a discretion to be exercised, and without factual material by reference to which the discretion can be exercised, which includes at least the value of the property and the amount owing on the security of it, the exercise of the discretion itself is likely to miscarry. Another point is that the courts have exercised considerable caution in the making of orders for sale".

36 As Campbell J noted, absent all relevant factual material – the case here – one cannot say how the discretion might be exercised.

37 Thirdly, one of the discretionary issues commonly considered before the remedy is granted is whether "to allow some further time in which redemption can take place": *King Investment* at [111]-[119]; *AJG Capital Pty Limited v AJG Properties* [2010] NSWSC 884 at [27]. That is the situation here.

38 In my view, it does not follow that the availability of the right to seek judicial sale of parcel A means that judicial sale will inevitably occur – such that the omission to have Annexure A registered is of no practical moment when considering whether there is a prima facie case in connection with the power of sale of parcel A. The availability of that remedy is discretionary and, in light of the matters that I have raised, gives rise to a prima facie case against exercising the discretion to order a sale.

The remaining argument

39 I return now to briefly address the other way in which it was argued by the defendants that a prima facie case arises on the cross summons. It was said that relief against forfeiture rises and falls on whether a prima facie case can be made out in connection with the argument that cl 4.1 of the settlement deed, cl 3 of the deed of variation and the consent judgment are void because they constitute penalties, and I have approached the matter in this way.

40 The present application calls for no fine-grained analysis of the law in connection with penalties. The argument raised by the defendants is that the agreement needed to embody an acknowledgement, express or implied, of a

debt which was ultimately compromised in the settlement. The argument of both parties before me focused upon this particular requirement.

41 The case for the second and third defendants is that this would involve construction of the settlement deed and, importantly, that the settlement deed did not acknowledge the debt in express terms, nor did it do so implicitly: the deed was expressed to be "without admissions": see recital N of the settlement deed. On the other hand, the plaintiff argued that the second defendant had "admitted" indebtedness in an email dated 19 May 2022 and, coupled with the failure to file a defence to the underlying proceedings, these matters should be accepted to amount to an acknowledgement.

42 It is difficult to meaningfully assess the merits of the defendants' contention. The case appears to be difficult, particularly in light of the authorities drawn to my attention by the plaintiff including *Lachlan v HP Mercantile Pty Ltd* (2015) 89 NSWLR 198; [2015] NSWCA 130 and *Cameron v UBS AG* (2000) 2 VR 108; [2000] VSCA 222. Nevertheless, I am inclined to accept that there is an arguable case on the issue argued, albeit one that is not without difficulty. In this respect, the issue will turn on what is a contested issue of fact – being whether there was an acknowledgement in the sense discussed. In that situation, the proper approach is to assume the contest will be resolved favourably to the plaintiff: *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729, 733-734; *1st Fleet Pty Ltd v Australian Cooperative Foods Ltd* [2006] NSWSC 881 at [5]. That would not be a complete defence, even if it were made out, to the plaintiff's claim: it would simply operate to reduce it to a degree – said to be in the order of around $1.3 million.

Balance of convenience

43 The balance of convenience involves balancing the risk of doing an injustice. In *Beecham* (at 623) it was said that the Court must consider "whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted".

Hardship

44 Thus, where (as here) there is no issue about whether granting relief will work an injustice on a third party, one must balance the hardship that would be suffered by the respective parties if the injunction were, or were not, to be granted: *Hi Tech Group Australia Ltd v Riachi* [2021] NSWSC 1212 at [49] (Ward CJ in Eq). Further, the Court should grant an interlocutory injunction whenever refusing such relief would carry a greater risk of injustice than granting the relief: *Films Rover International Ltd v Cannon Film Sales Ltd* (1987) 1 WLR 670, 680 (*'Films Rover'*); *Tegra (NSW) Pty Limited v Gundagai Shire Council* (2007) 160 LGERA 1 at [39]. In *Films Rover* this was described as a "fundamental principle" (at 680).

45 In my view, any harm or any injustice suffered by the plaintiff would be modest if the injunction were granted. On the other hand, to permit the plaintiff to take possession of the property known as parcel A – that is, to take possession of the family home of the second and third defendants – would cause serious hardship and injustice to those defendants. I am satisfied that the defendants "will suffer irreparable injury for which damages will not be adequate compensation unless an injunction is granted": *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; [1986] HCA 58 at [11] (Mason A-CJ); *O'Neill* at [19].

46 I am equally satisfied that damages would be an adequate remedy for the plaintiff, and the plaintiff did not submit otherwise.

The undertaking as to damages

47 The defendants have offered the usual undertaking as to damages.

48 The plaintiff has submitted that the undertaking would be in effect worthless – on the basis that the defendants simply did not have the means to satisfy any damages that might be awarded and that there is no evidence to enable the Court to assess that offer.

49 I do not accept that the offer would be inutile. It is true that there is only limited financial information in evidence, and no particular material dealing with either defendant was in evidence. Nevertheless, there is valuation evidence – which

varies – as well as the evidence from Westpac that it is in the process of finalising an application for finance in the amount of $6 million.

50 In my view the offer of the usual undertaking as to damages favours the grant of relief.

Practical and discretionary considerations

51 It is important to remember that the grant of relief is not only discretionary, but practical: the "court does not lose sight of the practical realities of the situation to which the injunction will apply": *NWL Ltd v Woods* [1979] 1 WLR 1294, cited approvingly in *Chamberlain Early Learning Centre Pty Limited v Chamberlain Group Pty Limited* [2015] NSWSC 751 at [48] (Hallen J).

52 Here there is, I am quite satisfied, a realistic prospect of the defendants obtaining refinance that would enable them, but for a contextually small sum, to discharge their liability to the plaintiffs in the amount that was agreed on 18 October 2022 – that is, the amount of $6.06 million.

53 The second and third defendants, on their evidence, have been seeking finance from Westpac since 10 August 2022: the evidence is that subject to the provision of some financial reports, the expectation was that a "final loan will be approved around 28th October, and the amount is still $6 million": affidavit of Yue Huang affirmed 24 October 2022, YH-19. The applicant for that loan was the second defendant. I accept that evidence and, further, that the outcome of the application for finance is "imminent".

54 In this respect I note that the property described as parcel A was, in June 2022, valued in excess of $10 million: affidavit of Yue Huang affirmed 24 October 2022, par 32 and YH-20. That said, more recent evidence tendered by the plaintiff suggests that it is considerably lower than that – in the order of $6M – although valuation evidence from the defendants from October 2022 suggests that the value of the property is around $8 million.

55 In my view, it does not really matter what the valuation evidence says in light of the fact that Westpac is likely to loan the amount of $6 million. Further, to the extent that the presence of caveats on the title might suggest that the level of indebtedness of the second and third defendants is a cause for concern, the

fact that the bank is prepared to loan $6 million notwithstanding, suggests (at least) that the bank takes a different view.

56 To be clear, I accept the evidence that finance is likely to be approved, imminently, and in the amount of $6 million.

57 I have not overlooked the plaintiff's submission that the defendants may have been seeking finance before August 2022 – during argument it was suggested, by reference to the affidavit of Yu Chen affirmed 25 October 2022, exhibit page 18, that it was most likely since June 2022. That may well be so. But it does not detract, or undermine, in my view, the findings that I have made that relate to the particular financier – *viz*., Westpac Bank.

58 There is a further practical consideration which is important. The defendants only seek interim relief until 18 November 2022. That is 17 days away. In my view, particularly where the outcome of the application for finance with Westpac will all but certainly be known before that time, it seems to me that it is in the interests of no party that steps be taken to exercise any power of sale under s 58 of the *Real Property Act*. That is because, on the findings that I have made, any attempt to exercise the power of sale would inevitably be met with an application to restrain that sale because the mortgage debt would be discharged or, if disputed, paid into Court: *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161, 164 and 168-169. The availability of finance to discharge a mortgage – or that there is credible evidence that finance will be available – reflects a common circumstance in which a stay (or injunction) to restrain the mortgagee's power of sale will be ordered: see *GE personal Finance Pty Ltd v Smith* [2006] NSWSC 889 at [9]-[19] (Johnson J); see also Practice Note CL 6, par 29.

59 Finally, the order is for a confined period – as I have identified above, for 17 days. The shortness of the period of the order negates, in my view, any possible hardship that the plaintiff may suffer.

60 The plaintiff argues that there is little point in granting relief because, in short, the plaintiff would still be able to maintain its claims under the statement of claim, with the possibility that it will secure judgment "for an amount at least equal to, and more likely greater than, the Consent Judgment" (submissions at

[32]-[33]). Although that may transpire to be correct, I do not consider that it tells against the order that the defendants seek.

Equitable considerations

61 As the plaintiff submitted, the Court may consider whether there are equitable considerations that justify granting – or refusing – interim relief. In this case the plaintiff specifically submitted that the defendants were required to "do equity" (submissions at [28]) and that their failure to so do is evidenced by the fact that they have not offered to pay money into court or otherwise discharge the debt. The simple answer to that complaint, in my view, is that they will do so once the finance is confirmed: see above. I respectfully cannot see how the failure to tender the money (that requires finance which is yet to be approved) amounts to the defendant not "doing equity".

62 The plaintiff has submitted that the defendants conduct has been "evasive" and, further, have sought to cast doubt over whether, in fact, the loan was "imminent" by submitting that that evidence was "vague". I do not accept either submission, that is particularly where the evidence was admitted without objection (for example, no objection seeking to limit the use of the evidence was sought under s 135 of the *Evidence Act 1995* (NSW)); and, more importantly, there is no other evidence that would lead me to doubt it.

63 Thus, I am not satisfied that there is any conduct of either defendant that is disentitling.

Conclusion: the defendants are entitled to relief

64 This is not a final hearing. When the Court is being asked to grant interlocutory relief, it must consider what course is best calculated to achieve justice between the parties pending resolution of the dispute, having regard to the consequences to each party that arise from granting the relief, or not.

65 In this case, discretionary considerations remain important. For the reasons that I have given, the balance of convenience clearly and distinctly favours the relief sought by the defendants. In my view the course that is best calculated to achieve justice is to grant the injunction sought by the defendants.

Orders

66 For these reasons I make the following orders:

(1) Upon the defendants/cross-plaintiffs' giving to the Court the usual undertaking as to damages, order that the plaintiff/cross-defendant, by itself, its servants or its agents, is restrained, until 5:00pm 18 November 2022, from:

(a) enforcing or otherwise exercising any right under clause 4.1 of the Settlement Deed dated 5 August 2022 (**Settlement Deed**);

(b) enforcing or otherwise exercising any right under clause 3 of the "Deed of Variation";

(c) filing or otherwise taking steps to file the "Consent Judgment" in Schedule 2 of the Settlement Deed (**Consent Judgment**);

(d) otherwise seeking or requesting to have the Court make or enter the orders in the Consent Judgment;

(e) for the avoidance of any doubt, exercising any power of sale with respect to, or taking possession of, the property located at Unit 2, 53 Suttie Road, Bellevue Hill NSW 2023 (folio ID 2/SP93524).

(2) The Second Defendant through his counsel undertakes to the Court to pay $100,000 into Court by 5:00pm, Friday 4 November 2022.

(3) All questions of costs are reserved.

(4) The Court's orders be entered forthwith.

(5) The proceedings are listed before the General Registrar in the Common Law Division at 9:00am 3 November 2022 in order to obtain a hearing date and further orders in relation to evidence and related matters.

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Amendments

11 November 2022 - Format

11 November 2022 - Format