

Memorandum

To: Adam
From: Timothy Davis
Date: 17/07/2009
Re: Property Advice

Dear Adam,

Pursuant to your instructions, I have considered the factual material provided by you in respect to the actions of the mortgagee - Cheap 'N Easy Finance - and the subsequent purchaser – Calum.

It is my opinion that the mortgagee has breached their exercise of the power of sale under s77(1) of the *Transfer Land Act 1958*, and you are eligible to file for an injunction stopping the subsequent purchaser, Calum, from registering his interest.

All supporting material leading to this conclusion is attached and if you have any further questions or inquiries please don't hesitate to contact me.

Yours Faithfully,

Timothy Davis

1. Supporting Material

2. Issue 1

2.1 *Power of Sale*

- 2.2 In Victoria, sale and transfer of land is governed by the *Transfer Land Act (Vic) 1958* ('**the TLA 1958**'). This Act provides statutory authority for mortgagors and mortgagees in respect to sale and transfer of registered Torrens land. Accordingly, the house and acreage that you own at Aireys Inlet is governed by the relevant provisions stipulated in this legislation.
- 2.3 On the purchase of your property in 2007, you agreed to a mortgage contract with Cheap 'N Easy Finance – the mortgagee – and subsequently registered the purchase of this property in accordance registration conditions stipulated under the TLA 1958. The mortgagee also registered the mortgage transaction with the Titles office in accordance with s74 of the TLA 1958 and in doing so acquired a registered interest in the land.
- 2.4 Importantly, the mortgagee's registration of your mortgage entitles them to a redeemable interest in your property until such a time as the mortgage debt is discharged. This interest is measured as the difference between the amount of mortgage debt remaining and the value of the mortgaged property,¹ and is termed a 'mortgage covenant' which remains affixed to your registered title until such a time as you dispose of the property or the mortgage itself.
- 2.5 Typically, the right to enforce this redeemable interest is stipulated by the terms of the mortgage contract and a contravening event which triggers a breach of it. In the current circumstances, you defaulted on your agreed mortgage contract repayments from September 2008 and this has resulted in the mortgagee issuing you with a notice of default. Under s76(1) of the TLA 1958 – the mortgagee must provide you with a notice, in writing, informing you of your default and respective ways in which you can rectify the breach in accordance with s80(3) of the *Consumer Credit Code (Vic)* ('**the Code**').²
- 2.6 The provision of the default notice was provided by the mortgagee on the 15th December requesting full payment of the outstanding repayments by the 4th January 2009. Such a demand is in contravention of s77(1) of the TLA 1958 and the s80(2) of the *Consumer Credit (Victoria) Act 1995* which provides that a creditor (mortgagee) must provide 'a debtor at least 30 days from the date of the notice to remedy the default' before beginning enforcement proceedings – inferring that no further action should have occurred until after the 13th January 2009.

¹ Edgeworth, Rossiter, Stone & O'Connor, *Sackville & Neave - Australia Property Law*, LexisNexis Butterworths, 8th Edition, Pg 1077.

² s5 of the *Consumer Credit (Victoria) Act 1995* incorporates the *Consumer Credit Code (Qld)* and is termed the *Consumer Credit Code (Vic)*. This Act governs Consumer Credit transactions in Victoria including mortgage transactions.

- 2.7 Additionally, the condition attached to the notice of default by the mortgagee requiring you to pay the mortgage amount 'in full', is interpreted under s84 of the Code as an acceleration clause. Acceleration clauses are governed by the exclusive jurisdiction of the mortgage contract and can only be enforced in accordance with s85 of the Code. S85 clearly provides the requirements under which a mortgagee can enforce an acceleration clause such that - the mortgagor must have been provided valid notice in accordance with s80 and this notice must contain a statement regarding the additional accelerated liabilities under the mortgage contract.
- 2.8 You have not provided evidence in relation to the mortgage contract or whether it includes any accelerated clauses under s84 of the Code. It is requested that this information be provided before advice is provided in this regard.
- 2.9 *Equitable Duty of Conduct in Sale*
- 2.10 On the 12th January, the mortgagee exercised enforcement over the property as the mortgage default had not been remedied in accordance with s80(2) of the Code. In s77(1), the TLA 1958 provides the mortgagee with a statutory power of sale once they have satisfied the notice and remedy requirements outlined 2.5 to 2.7 above. In providing this statutory power of sale, the TLA 1958 also requires that mortgages exercise the power in 'good faith' and having 'regard to the interests of the mortgagor, grantor or other persons'.
- 2.11 Despite the mortgage breach of the notice requirements under the TLA 1958 and the Code as indicated in 2.5 and 2.6 – a real estate agent – Betty's Estate Agency – was instructed by the mortgagee to sell the property on the 26th January 2009 in accordance with s77(1) of the TLA 1958 and s80(2) of the Code. The language of this section allows the mortgagee to 'sell or concur with any other person in selling' the mortgaged property - establishing sufficient authority for the real estate agency to Act on behalf of the mortgagee.
- 2.12 *Interpreting 'good faith' and 'regard to the interests'*
- 2.12.1 It is now well accepted that the conduct of the mortgagee is of critical importance in exercising the power of sale and the redeeming the mortgage interest. A number of cases have interpreted the obligations required of a mortgagee when exercising the power sale in accordance with the sections highlighted in 2.10 – the most recent being the Victorian Supreme Court decision by Vickery J in *Nolan v MBF Investments Pty Ltd*.³
- 2.12.2 Vickery J provided extensive commentary on the meaning of 'good faith' and 'interests' from both national and international law in *Nolan v MBF Investments Pty Ltd*.⁴ His Honour concluded that s77(1) is a 'facilitative provision' which is designed to enable a mortgagee to realize its debt within the terms of the statute, and as 'a protective counterbalance to the otherwise unfettered power of the mortgagee upon a sale of the mortgaged property'.⁵

³ *Nolan v MBF Investments Pty Ltd* [2009] VSC 244.

⁴ *Ibid* at [108].

⁵ *Ibid* at [109].

- 2.12.3 His Honour compared the meaning of ‘good faith’⁶ as provided by Griffith CJ, Barton and O’Connor JJ in the decision of *Barns v Queensland National Bank Ltd*⁷ who stated

‘if the mortgagee willfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith’.⁸

against that of Menzies J in *Forsyth v Blundell*,⁹ who held that ‘good faith’ meant to take ‘reasonable precautions to obtain a proper price is but a part of the duty to act in good faith’.¹⁰

- 2.12.4 Vickery J also stated that the s77(1) definition of ‘regard to the interests of the mortgagor’ should be interpreted as

‘[e]xercising good faith in carrying out the statutory process ... and having “regard to the interests of the mortgagor” and other persons, by providing a further measure of protection to the mortgagor on the one hand, and imposing a further measure of responsibility on the mortgagee in the exercise of its power’.¹¹

2.13 *Property Value and Mortgagee Duties*

- 2.13.1 Vickery J’s judgment affirmed the decision provided by the Victoria Supreme Court of Appeal in *Vasiliou v Westpac Banking Corporation*¹² who agreed with the rationale established by Ashley J in *Guss v Geelong Building Society (in liq)*.¹³ Ashley J contrasted the decisions of Lush J in *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd*¹⁴ – who argued that a mortgagee’s obligation was to take reasonable care to obtain a ‘proper price’ – against that of Murphy J’s interpretation of s77(1) in *Goldcel Nominees Pty Ltd v Network Finance*¹⁵ – who held that the duty of the mortgagee was to take ‘reasonable steps to obtain the best price’ – and concluded that Murphy J’s decision set a higher standard.

⁶ *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [100].

⁷ *Barns v Queensland National Bank Ltd* [1906] HCA 26; (1906) 3 CLR 925 at 943–944.

⁸ *Ibid* 6 at [101].

⁹ *Forsyth v Blundell* [1973] HCA 20.

¹⁰ *Ibid* at [3].

¹¹ *Ibid* 6 at [108].

¹² *Vasiliou v Westpac Banking Corporation* (2007) VSCA [113].

¹³ *Guss v Geelong Building Society (in liq)* [2001] VSC [37].

¹⁴ *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309.

¹⁵ *Goldcel Nominees Pty Ltd v Network Finance Ltd* [1983] VR 309 at [313].

2.13.2 In determining whether the mortgagee has adequately exercised the power of sale and achieved the ‘best’ or ‘proper price’, Lush J in *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd*¹⁶ stated that ‘a mortgagee is entitled to give first consideration to his own interests’.¹⁷ His Honour subsequently provided a number of obligations that a mortgagee must adhere with when exercising the power of sale in order to achieve the ‘best’ or ‘proper price’. These obligations included

- (a) the duty to act in good faith
- (b) the consideration to his own interests
- (c) not selling the property without advertising such that it ‘bring the property to notice of persons likely to be interested’
- (d) not being bound to ‘adopt or accept any arrangement or price’ merely to settle the debt
- (e) being bound to take reasonable steps to ascertain the value of the property before sale.¹⁸

2.13.3 Generally, the Victoria Supreme Court of Appeal in *Vasiliou v Westpac Banking Corporation*¹⁹ agreed with the comparison outlined in 2.13.2 and clarified the position of Lush J by requiring a mortgagee to take ‘reasonable steps to obtain the best price consistent with its entitlement to realize its security’.²⁰ However, the Court of Appeal disagreed with Lush J in respect to the advertising obligations of the mortgagee such that

‘the presence, or absence, of advertising will rarely be decisive. What matters is the price obtained. If the price is satisfactory, a failure to advertise will be immaterial. Conversely, if the price is unsatisfactory, as a result of the mortgagee’s acts or omissions, the fact that the property was advertised would be unlikely to be an answer to the allegation that the duty under s.77(1) had been breached’.²¹

2.14 Breach of s77(1)

2.14.1 In determining whether the mortgagee has breached s77(1), and in ascertaining the most appropriate course of action and remedies available, it is prudent to firstly examine the rejection of Brett’s offer of \$105,000 on the 17th January 2009. As provided by Lush J in *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* and outlined in 2.13.2 above, the mortgagee ‘is not bound to adopt or accept any arrangement or price to settle the debt’.²²

2.14.2 Furthermore, s76(1) of the TLA 1958 provides that the mortgagee is able to sell the mortgaged land by ‘public auction or private contract’ which infers that the mortgagee is able to engage in any relationship to sell the property as long as the sale is enacted in ‘good faith’ and has regard to your ‘interests’.

¹⁶ *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309.

¹⁷ *Ibid* at 313.

¹⁸ *Ibid* at 310.

¹⁹ *Vasiliou v Westpac Banking Corporation* (2007) VSCA [113].

²⁰ *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [94].

²¹ *Ibid* 19 at [63]-[64].

²² *Ibid* 16 at 310.

2.14.3 The subsequent instruction to Betty's Estate Agency to place the reserve of \$140,000 must also be considered. In *Southern Goldfields Ltd v General Credits Ltd*,²³ the Full Supreme Court of Western Australia provided that the purpose and effect of a 'reserve price' is

'[n]o more than a fixing of a price below which bids will not be accepted ... which has no effect on the amounts bid or the market price ... the setting of a reserve in itself could not amount to the willful or reckless sacrificing of the interests of the mortgagor'.²⁴

2.14.4 Accordingly, the setting of such a reserve – regardless of the amount – does not establish that the mortgagee confined their attention to their own interests, or that the sale was conducted in such a manner that it constituted a complete disregard of your interests. As stated by Franklyn J in *Southern Goldfields Ltd v General Credits Ltd*²⁵

'the fixing of the reserve price in the absence of fraud or collusion has no relationship to the highest price bid or obtainable other than to set a figure below which bids will be rejected, and cannot itself lead to a reasonable inference that any better price might have been obtained'.²⁶

2.14.5 The property was advertised for two weekends preceding the auction and on the 19th January 2009, your evidence provides there was a 'freak flood' which 'surrounded Aireys Inlet' and caused the displacement of the auction board advertising the sale of the property. As stated at 2.13.3 and in accordance with the *Vasiliou v Westpac Banking Corporation* decision, 'the presence, or absence, of advertising will rarely be decisive. What matters is the price obtained.'²⁷ Consequently, this infers the both the display of advertising in the local paper for only 'two weeks' and the displacement of the advertising board, are not substantial enough considerations to constitute a breach of the 'good faith' or 'interests' requirements of s77(1).

2.14.6 However, the 'freak flood' providing 'difficult' access on the day of the auction, and the subsequent change of venue notification displayed by a 'small paper sign with sticky tape' - which was consequently 'damaged by flood waters' - may constitute a breach of s77(1). The law remains undeveloped in respect to whether the duty of a mortgagee extends beyond the ambit of 'good faith' to include a duty of care when exercising the power of sale.²⁸ However, as stated at 2.12.3, the mortgagee must not 'willfully and recklessly deal with the property' such that the 'interests of the mortgagor are sacrificed'.²⁹

²³ *Southern Goldfields Ltd v General Credits Ltd* (1991) 4 WAR 138.

²⁴ *Ibid* at 141.

²⁵ *Ibid* 23 .

²⁶ *Ibid* at 146.

²⁷ *Vasiliou v Westpac Banking Corporation* [2007] VSCA 113 at [63]-[64].

²⁸ As stated by Murphy J in *Goldcel Nominees Pty Ltd v Network Finance Ltd* [1983] 2 VR 257 at 263 'The High Court in *Forsyth* declined to resolve the conflict ... of whether the duty of a mortgagee goes beyond a duty to act in good faith'.

²⁹ *Barns v Queensland National Bank Ltd* [1906] HCA 26; (1906) 3 CLR 925 at 943–944.

2.14.7 Arguably, as stated in 2.14.5, while the ‘presence, or absence, of advertising will rarely be decisive’³⁰ in determining a breach of s77(1) – it is submitted that the conduct of the real estate agent in notifying potential purchasers of the subsequent venue change on the day of the auction is ‘willfully reckless’³¹ and indifferent to the interests of the mortgagor. As stated in *Pendlebury v Colonial Mutual Life Assurance Society*³²

‘by ‘reckless’ then, I understand a disregard of the mortgagors interest, ignoring his profit in the possible surplus, in short, *not caring whether it’s fair and proper value was obtained or not*’.³³

2.14.8 It is antithetical to contend that such late – and subsequently illegible – change of venue notification would not adversely affect the outcome of property sale by contributing to decrease in the value of the property – clearly evinced by the ‘three people’ who subsequently attended the auction. As a result, and in accordance with the comments provided at 2.12.3 and as stipulated by Lush J’s at 2.13.2, it is submitted that the mortgagee has breached s77(1) of the TLA 1958 by ‘willfully and recklessly’ failing to take ‘reasonable care to protect the mortgagors interests’,³⁴ and by having a complete disregard to the ‘good faith’ requirement of this section.

2.14.9 Additionally, through the evidence you have submitted, the valuation provided by Betty’s Real Estate values your property ‘at most \$110,000’. At 2.13.2 above, a requirement stipulated by Lush J is that the mortgagee is ‘bound to take reasonable steps to ascertain the value before selling’.³⁵ In *Vasiliou v Westpac Banking Corporation*,³⁶ the Court determined the correct property valuation by comparing multiple valuations of separate qualified valuers against the final sale price in order to determine the market value.³⁷

2.14.10 In the evidence you have provided, there is nothing which establishes that Betty’s Estate Agency is a qualified property valuer or that the valuation figure of \$110,000 was correct– both aspects critical to the Courts determination of ‘property value’ in *Vasiliou v Westpac Banking Corporation*.³⁸ Additionally, it is commercially prudent – and a contended measure of ‘reasonableness’ – to obtain multiple and independent property valuations and to take an ‘average’ value – something which did not occur in this case. As a result, it is argued that it is not ‘reasonable’ to accept one valuation of a property before engaging in the selling process. In *Vasiliou v Westpac Banking Corporation*,³⁹ numerous valuations and substantive rationalization was required by the Court in determining whether the property was sold within the statutory confinements of s77(1) of the TLA 1958.

³⁰ *Vasiliou v Westpac Banking Corporation* [2007] VSCA 113 at [63]-[64].

³¹ *Barns v Queensland National Bank Ltd* [1906] HCA 26; (1906) 3 CLR 925 at 943–944.

³² *Pendlebury v Mutual Life Assurance Society* (1912) 13 CLR 676.

³³ *Ibid* at 702.

³⁴ *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [108].

³⁵ *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 at 310.

³⁶ *Vasiliou v Westpac Banking Corporation* [2007] VSCA 113.

³⁷ *Ibid* at [26]-[27] and at [32].

³⁸ *Ibid* at [47].

³⁹ *Ibid* at [47].

2.14.11 The passing in of the property and the subsequent ‘after sale purchase’ by ‘Calum, who did not attend the auction’ – while a valid private transaction as stated in 2.14.2 – further provides that the valuation of the property may have been higher had the auction not been conducted in such a ‘willfully reckless’ manner. Accordingly, it is contended that s77(1) of the TLA 1958 has been breached by the mortgagee through their complete disregard for the statutory requirements of acting in ‘good faith’ and with ‘regard to the interests of the mortgagor’.

3. Issue 2

3.1 *Prevention of Registration by Subsequent Purchaser*

3.2 *Restrain the Power of Sale*

3.3 A fundamental equitable component of a mortgage is the mortgagor’s right to redemption or right to redeem. The right to redeem was considered by Herring CJ in *Re Forrest Trust; Trustees Executors & Agency v Anson*⁴⁰ who stated

‘the fulfillment by the mortgagor of his obligations under the mortgage, that is to say, payment of the moneys due there under, followed by whatever is necessary on the part of the mortgagee to free the land itself and the mortgagor in the use and enjoyment of it’⁴¹

3.4 Accordingly, prior to the registration of any subsequent interest on the title – afforded to a subsequent purchaser by the mortgagees statutory power of sale under s77(1) – the right of redemption provides that a sale can be restrained if the mortgagor pays the mortgagee the total amount of the mortgage debt, or the amount claimed by the mortgagee to be due.

3.5 If there is a breach of the mortgagees power of sale under s77(1), the mortgagee is selling the property without any legal title to transfer to the subsequent purchaser. Importantly, in *Forsyth v Blundell*,⁴² Walsh J provided that if a subsequent purchaser does not have notice of a breach of the mortgagees power of sale after purchasing the property, but before the completing the final purchase contract, then the mortgagor can challenge the sale such that

‘[i]f (the sale of the property) is not exercised in good faith there is no reason that can be derived from any general principle for holding that before completion the purchaser get a good title as against the mortgagor’.⁴³

⁴⁰ *Re Forrest Trust; Trustees Executors & Agency v Anson* [1953] VLR 246.

⁴¹ *Ibid* at 255.

⁴² *Forsyth v Blundell* [1973] HCA 20.

⁴³ *Ibid* at [32]. His Honour noted at [25] that if the purchaser has no notice of any impropriety at the contract of the contract and continues to have no notice at completion, the mortgagor loses any right of redemption.

3.6 In *Forsyth v Blundell*,⁴⁴ Walsh J also provided injunctive relief against the subsequent purchaser as His Honour contended this was the most suitable remedy to stop the completion of any purchase contract of sale. Accordingly, it is contended on the basis of the arguments presented in 2 above, regarding

- a) improper notice (at 2.6)
- b) breach of 'good faith' (at 2.14.8)
- c) 'willful and reckless' disregard to the mortgagors 'interests' (at 2.14.8 - 10)

that the mortgagee has breached their exercise of power under s77(1) of the TLA 1958. This provides you with a valid basis to submit urgent proceedings to the Court for injunctive relief against Calum.

3.7 *Consumer Credit Code Actions*

3.8 s66 of the Code provides hardship provisions for debt less than \$125,000⁴⁵ if a debtor's (mortgagor) circumstances change due to 'illness, unemployment or other reasonable cause'. Since your unemployment circumstances fall into the ambit of this provision, you should have been able to apply to the mortgagee to have the terms of the contract altered to facilitate an extension of the payment period or reduction of the repayment owed. If your debt was less than \$125,000 at the time notice was provided, then s71(c) of the Code provides the Court with the power to reopen the mortgage contract.

3.9 It is contended that s70 of the Code - regarding the reopening of unjust transaction - is not an available remedy as it specifically relates to 'the time (the mortgage) was entered into or changed'. In your circumstances, there is contention that the mortgagee unjustly forced you to enter the transaction or unjustly changed the contract.

⁴⁴ *Forsyth v Blundell* [1973] HCA 20.

⁴⁵ Per s66(3) of the *Consumer Credit Code* (Vic).