Reported	64 NSWLR 441
Decision :	1BFRA 577
	[2007] ALMD 2639
	[2007] ALMD 2663
	[2007] ALMD 2638
	[2007] ALMD 2350
	[2007] ALMD 2637



New South Wales
Supreme Court

CITATION :	**King Investment Solutions v Hussain [2005] NSWSC 1076**
HEARING DATE(S) :	20 September 2005
JUDGMENT DATE :	27 October 2005
JURISDICTION :	Equity
JUDGMENT OF :	Campbell J
DECISION :	Further evidence not admitted. Orders below for possession of land and sale set aside. Provision not a penalty.

CATCHWORDS :	MORTGAGES - remedies of the mortgagee - unregistered second mortgagee of Real Property Act 1900 land - availability of power of sale out of court - whether section 103 Conveyancing Act 1919 permits Court to make order for sale - whether Court has equitable jurisdiction to make order for sale - whether service of notice under section 57(2)(b) Real Property Act or section 111(2)(b) Conveyancing Act a precondition for exercise of Court's power of sale - whether Court can make order for sale in absence of first mortgagee - whether Court can make order for sale of entire interest in land, rather than of the land subject to the interest of the first mortgagee - need for evidence of value of property - need for evidence of amount owing to first mortgagee - matters to be provided for in order for sale - whether unregistered second mortgagee of Real Property Act land entitled to order for possession and writ of possession - whether such a mortgagee entitled to specific performance of covenant to deliver possession upon default - APPEAL AND NEW TRIAL - admission of further evidence - whether order for summary judgment is a final order - whether special circumstances required before further evidence admitted on an appeal from summary judgment - PENALTY - clause in mortgage agreeing to accept lower rate of interest if interest promptly paid - whether a penalty - PROCEDURE - Supreme Court procedure - power to make orders in Chambers - power to make orders on basis that reasons will be delivered later
LEGISLATION CITED :	Chancery Procedure Act 1852 (Imp) Civil Procedure Act 2005 Conveyancing Act 1919 Conveyancing and Law of Property Act 1881 (Eng) Conveyancing (Covenants) Amendment Act 1986 Equity Act 1901 Real Property Act 1900 Supreme Court Act 1970 Supreme Court Rules 1970 Uniform Civil Procedure Rules 2005
CASES CITED :	

Akins v National Australia Bank (1994) 34 NSWLR 155
ANZ Banking Group Ltd v Comer (1993) 5 BPR 11,748
Asian Investments Corporation Limited v Symons (Supreme Court of NSW, 10 April 1996, unreported)
Au Pui-Kuen v Attorney-General (Hong Kong) [1980] AC 351
Australia and New Zealand Bank Ltd v Hathaway [1957] QWN 49
Breskvar v Wall (1971) 126 CLR 376
Brewer v Square [1892] 2 Ch 111
Burmester v Moxon (1866) 35 Beav 310; 55 ER 915
Calvert, A Treatise upon the Law respecting Parties to Suits in Equity (2nd ed, London, 1847)
Christy v Van Tromp (1886) WN (Eng) 111
CJ Belmore Pty Ltd v AGC (General Finance) Ltd [1976] 1 NSWLR 507
Commissioner of Taxation (Cth) v St Helen's Farm (ACT) Pty Ltd (1981) 146 CLR 336
Computer Edge Pty Ltd v Apple Computer Inc (1984) 54 ALR 767
Cox Brothers (Australia) Limited and Another v Cox (1934) 50 CLR 314
Cradock v The Scottish Provident Institution (1893) 69 LT 380
Cripps v Wood (1882) 51 LJ Ch 584
Croft v Kennaugh [1945] VLR 40
Cropper v Mellersh (1855) LJ Ch 430
Robert William Cumming v Tradebanc International Ltd [2002] NSWSC 70
Davies v Wright (1886) 32 Ch D 220
In Re A Debtor (1903) 19 TLR 152
Re DEF and the Protected Estates Act [2005] NSWSC 534
Duff v Devlin [1924] IR 56
Re Elliot (1886) 7 LR (NSW) 271
Farmer v Curtis (1829) 2 Sim 466; 57 ER 862
Fisher & Lightwood's Law of Mortgage, Australian Edition, 1995
Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (2001) 4 VR 28
Foster v Harvey (1863) 4 De G J & S 59; 46 ER 837
Garfitt v Allen (1887) 37 Ch D 48
Gill and Another v Residential Tribunal and Others

(2001) 53 NSWLR 425
Green v Biggs (1885) 52 LT 680
Guardian Mortgages v Miller [2004] NSWSC 1236
Hall v The Nominal Defendant (1966) 117 CLR 423
Hartigan v International Krishna Consciousness [1999] NSWSC 139
Heath v Crealock (1874) 10 Ch App 22
Hemmes Hermitage Pty Ltd v Abdurahman and Another (1991) 22 NSWLR 343
Hewitt v Nanson (1858) 7 WR 5
Re Hodson and Howes' Contract (1887) 35 Ch D 668
Hunt and Another v Knabe (No 2) (1992) 8 WAR 96
Hurst v Hurst (1852) 16 Beav 372, 51 ER 822
J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) 125 CLR 546
Jones v Harris [1887] WN (Eng) 10; (1887) 55 LT 885
Re Jordan, ex parte Harrison 13 QBD 228
Langton v Langton (1855) 3 WR 222; 3 Equity Reports 394
Licul v Corney (1976) 8 ALR 437
Manchester and Salford Bank v Scowcroft (1883) 27 Sol Jo 517
Manton v Parabolic Pty Ltd (1985) 2 NSWLR 361
Marriott v Kirkham (1862) 3 Giff 536; 66 ER 521
Martin v Abbott Australasia Pty Ltd [1981] 2 NSWLR 430
Meagher Gummow & Lehane's Equity Doctrines & Remedies 4th edition, 2002
Melbourne Tramways Trust v Melbourne Tramway & Omnibus Co Ltd (1887) 13 VLR 487
Merchant Banking Co of London Ltd v London and Hanseatic Bank (1886) 55 LJ Ch 479
Midland Montagu Australia Ltd v Cuthbertson & Anor (1989) 17 NSWLR 309
Mills v Lewis (1985) 3 BPR [97205]
Moore v Morton [1886] WN 196
Mulvena v Government Insurance Office of New South Wales (NSW Court of Appeal, 16 June 1992, unreported)
Newman v Selfe (1864) 33 Beav 522; 55 ER 471
Nommack (No 100) Pty Ltd v FAI Insurances Ltd (in liq) [2003] NSWSC 359; (2003) 45 ACSR 215
Norman v Beaumont [1893] WN (Eng) 45

Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346; (2001) 53 NSWLR 116
In re Owen [1894] 3 Ch D 220
Palmer v Clarke (1989) 19 NSWLR 158
Parker's Practice in Equity (NSW) 2nd edition 1949
Phillips v Gutteridge (1859) 4 De G & J 531; 45 ER 206
Reliance Corp Pty Ltd v Orwin (1964) 82 WN (Pt 1) NSW 11
Rose v Page (1829) 2 Sim 471; 57 ER 864
Sandgate Corporation Pty Ltd (in liq) and Others v Ionnou Nominees Pty Ltd and Others (2000) 22 WAR 172
Schiffer v Pattison [2005] FCA 494; (2005) 215 ALR 505
Setons Judgments and Orders 7th ed 1912
Slade v Rigg (1843) 3 Hare 35; 67 ER 286
Smith v Robinson (1853) 1 Sm & Giff 140; 65 ER 61
Smithett v Hesketh (1890) 44 Ch D 161
Spry, Equitable Remedies, 6th edition, 2001
Standard Discount Co v La Grange (1877) 3 CPD 67
Stratford v Ministry of Transport [1992] 1 NZLR 486
Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq) [2003] NSWSC 1008; (2003) 59 NSWLR 361
Tennant v Trenchard (1869) LR 4 Ch App 537
Tietyens v Cox (1916) 17 SR (NSW) 48
Thomson v Deputy Commissioner of Taxation (Supreme Court of Victoria, Court of Appeal, 16 June 2000, unreported)
Union Bank of London v Ingram (1882) 20 Ch D 463
United Travel Agencies Pty Ltd v Cain (1990) 20 NSWLR 566
Wallingford v Mutual Society (1880) 5 App Cas 685
Wickenden v Rayson (1855) 6 De G M & G 210; 43 ER 1212
Wickham v Nicholson (1854) 19 Beav 38; 52 ER 262
Wickstead v Browne (1992) 30 NSWLR 1
Wickstead v Browne (30 April 1993, (1993) 10 Leg Rep SL 2)

	Wilkins v Reeves (1855) 3 WR 305 Williams v Owen (1883) 48 LT 388 Whitbread v Roberts (1859) 28 LJ Ch 431 Whitfield v Roberts (1859) 5 Jur NS 113 Witts v Young (1870) WN (Eng) 172 Woof v Barron (1873) WN (Eng) 71 Woolley v Colman (1882) 21 Ch D 169 Yarrangah Pty Ltd v National Australia Bank Ltd (1999) 9 BPR 17,061 Zanzoul v Westpac Banking Corporation (1995) 6 BPR 14,142
PARTIES :	King Investment Solutions Pty Ltd - Plaintiff/Respondent Fahmi Mustafa Hussain - First Defendant/Appellant Meraj Ather Hussain - Second Defendant/Appellant
FILE NUMBER(S) :	**SC** 2411/05
COUNSEL :	D Knaggs, solicitor - Appellants MW Young - Respondent
SOLICITORS :	Cross Law - Appellants Bransgroves - Respondent

LOWER COURT JURISDICTION :	Supreme Court (Master)
LOWER COURT JUDICIAL OFFICER :	AsJ Macready

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
EQUITY LIST

CAMPBELL J

27 OCTOBER 2005

2411/05 KING INVESTMENT SOLUTIONS PTY LTD v FAHMI MUSTAFA HUSSAIN & ANOR

JUDGMENT

1 **HIS HONOUR**: At the end of the hearing of this matter on 20 September 2005 I reserved judgment. I made orders in this matter on 19 October 2005, on the basis that I would give the reasons for those orders at a later time. These are those reasons.

2 Mr and Mrs Hussain gave a second mortgage over their house to King Investment Solutions Pty Ltd on 17 December 2004. The mortgage secured a loan of $95,000, for a period of two months. Interest on it was payable at 118.8% per annum, payable monthly in advance.

3 On 17 February 2005 Mr and Mrs Hussain did not repay the loan. They have not repaid the loan since then, nor did they pay any interest on the loan between the time they paid the instalment which fell due on 17 January 2005 and 1 August 2005.

4 Because the mortgage was unregistered, the mortgagee did not seek to exercise a power of sale out of court. Instead, it began proceedings in this Court on 13 April 2005, seeking an order for possession of the land, orders enabling it to sell the land, and judgment for the amount of principal and interest owing.

5 On 1 August 2005 an Associate Judge granted summary judgment to the mortgagee on all its claims.

6 Now, Mr and Mrs Hussain appeal against that decision. They seek to tender some further evidence on the appeal.

7 The issues which arise on the appeal are:

1. Ought the further evidence be received.

2. Were the orders for possession and sale validly made, and

3. Are any of the provisions of the mortgage relating to interest void as penalties, resulting in the judgment for money due being for too high an amount.

PART A - Admissibility of Further Evidence On Appeal

Rights of Appeal from an Associate Judge

8 The Notice of Appeal in this matter was filed on 26 August 2005 – ie, after the commencement of the ***Civil Procedure Act 2005*** and the ***Uniform Civil Procedure Rules 2005*** ("**UCP Rules**") on 15 August 2005. Thus, even though the case appealed from was decided under the ***Supreme Court Act 1970*** and ***Supreme Court Rules 1970***, this appeal must be

decided under the ***UCP Rules***, and such of the ***Supreme Court Act 1970*** and ***Supreme Court Rules 1970*** as have survived the introduction of the ***UCP*** regime.

9 Any judgment given or order made by a Divisional Associate Judge in a Division may be set aside or varied by the Court: Section 118(3) ***Supreme Court Act 1970***.

10 Rule 45.4 ***UCP Rules*** (formerly Part 60 rule 10 ***Supreme Court Rules 1970***) says how the power to set aside or vary conferred by section 118(3) is exercised: ***Gill and Another v Residential Tribunal and Others*** (2001) 53 NSWLR 425 at 428, [15] – [21]. It is by appeal to *"the Supreme Court"* (which means a single judge – section 40 ***Supreme Court Act 1970***), except in any case where an appeal lies to the Court of Appeal. An appeal lies to the Court of Appeal from an Associate Judge pursuant to Part 60 rule 17 ***Supreme Court Rules 1970***, and also pursuant to some other provisions of the Rules (eg Part 70 rule 6 ***Supreme Court Rules 1970***).

11 In the present case, the power which the learned Associate Judge exercised was the power arising under Part 13 rule 2 ***Supreme Court Rules 1970*** to grant summary judgment to a plaintiff. While no question is raised by a party as to the competence of the appeal, I need to satisfy myself of it. The only types of proceedings concerning which Part 60 rule 17 ***Supreme Court Rules 1970*** provides for an appeal to lie to the Court of Appeal, and which are not ones which are quite clearly different to the proceedings the subject of this appeal, are proceedings:

> "(a) upon a trial pursuant to Schedule D Part 3 paragraphs … 8, … 25, … 28…".

12 Schedule D Part 3 ***Supreme Court Rules*** list those types of proceedings as:

> " **8** *(Possession of land)* Trial or hearing of proceedings (except with a jury) where:
>
> (a) the only matter in question is a claim for the possession of land, or
>
> (b) the only matters in question are a claim for the possession of land and one or more of the following:
>
> (i) a claim or cross-claim for damages,
>
> (ii) a claim or cross-claim for other money,
>
> (iii) a claim or cross-claim for costs.
>
> …
>
> **25** Trial (except with a jury) of proceedings for any of the following matters:
>
> (a) the foreclosure or redemption of a mortgage or the enforcing of any charge or lien,
>
> (b) the specific performance, rectification, delivery up or cancellation of any agreement for the sale or purchase of any property or the lease of any property,
>
> (c) relief against fraud or mistake,
>
> (d) the execution of a trust or a declaration that a

trust subsists,

(e) the administration of the estate of a deceased person,

(f) any equitable claim or demand for recovery of money or damages, whether liquidated or unliquidated (not being a claim or demand of a kind to which paragraph (a), (b), (c), (d) or (e) applies).

...

28 In proceedings in which an associate Judge has jurisdiction to determine a matter under these rules, any inherent jurisdiction of the Court to decide any associated or appendant matter in issue in the proceedings."

13 Paragraph 8 does not apply because, although the proceedings before the Acting Judge counted as a "hearing of proceedings", there was more at issue in them than a claim for the possession of land, damages and costs. Paragraph 25 does not apply because, although the proceedings were ones in which enforcing of a charge was sought, the proceedings were an application for summary judgment, not a trial. Paragraph 28 does not apply because, although the proceedings, being ones for summary judgment, were ones which the Associate Judge had jurisdiction to determine under the rules, and one of the claims in those proceedings was (as will be seen later) a claim which was made in the inherent jurisdiction of the Court to enforce equitable charges, the exercise of that inherent jurisdiction of the court came to be considered as part of the determination of the application for summary judgement under the rules, not by way of the Associate Judge determining any associated or appendant matter.

14 That the appeal from the order for summary judgment in the present case should lie to a single judge is also consistent with the policy shown by Part 60 Rule 17 (k) ***Supreme Court Rules 1970***, which provides for there to be an appeal from an Associate Judge to the Court of Appeal:

"(k) where the decision of the associate Judge is a final decision *other than* :

(i) a decision on an application for a summary judgment, or

(ii) a decision on an application for a summary dismissal of proceedings" (emphasis added).

15 That paragraph of Rule 17 clearly evinces an intention that appeals from decisions granting summary judgement should not lie to the Court of Appeal.

16 Thus I am satisfied that the appeal was correctly brought to a single judge.

Further Evidence on Appeal

17 Section 75A ***Supreme Court Act 1970*** applies to an appeal from an Associate Judge to a single judge from the granting of summary judgment: section 75A(1) –(3). Section 75A(7) – (9) provide that on such an appeal:

> "(7) The Court may receive further evidence.
> (8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.
> (9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing."

18 There is dispute about the way in which section 75A ***Supreme Court Act 1970*** applies to appeals from interlocutory decisions. In ***Martin v Abbott Australasia Pty Ltd*** [1981] 2 NSWLR 430 Hunt J at 435-6 held that even an interlocutory decision can be a *"hearing on the merits"*, and so attract the *"special grounds"* test for admission of evidence on appeal, if the issue which arose in that interlocutory matter had been investigated. However, in ***Wickstead v Brownee*** (1992) 30 NSWLR 1 at 11 Handley and Cripps JJA (with whom, in this respect, Kirby P agreed at 4-5), though referring to and apparently applying ***Martin v Abbott Australasia Pty Ltd***, held that there was no requirement for *"special grounds"* under section 75A(8) on an appeal from an interlocutory order for summary dismissal of proceedings on the ground that the plaintiffs had failed to show any triable issue. This possible discrepancy in approach between ***Martin v Abbott Australasia*** and ***Wickstead v Browne*** had been noted by Young J in ***Asian Investments Corporation Limited v Symons*** (Supreme Court of NSW, 10 April 1996, unreported) and commented on by Bryson J in ***Hartigan v International Krishna Consciousness*** [1999] NSWSC 139, and by Burchett AJ in ***Nommack (No 100) Pty Ltd v FAI Insurances Ltd (in liq)*** [2003] NSWSC 359; (2003) 45 ACSR 215 at [3] – [4], 216-7. It was also adverted to by Heydon JA (with whom Mason P and Young CJ in Eq agreed) in ***Nowlan v Marson Transport Pty Ltd*** [2001] NSWCA 346; (2001) 53 NSWLR 116 at [13], 123, without seeking to resolve the possible discrepancy. I note that it may be possible that some interlocutory decisions involve a hearing on the merits (such as a decision whether a contract was entered in Australia, for the purpose of deciding whether the Court has jurisdiction), while others (such as whether to grant an interlocutory injunction) do not.

19 The decision of the Court of Appeal in ***Wickstead v Browne*** (1992) 30 NSWLR 1 was reversed by the High Court: ***Wickstead v Browne*** (30 April 1993, (1993) 10 Leg Rep SL 2). At the conclusion of an application for special leave to appeal the Court (Deane, Toohey and Gaudron JJ), granted special leave and, with the consent of the parties, proceeded immediately to give judgment on the appeal. As the case is reported only in the Legal Reporter I will set out here the relevant portion of the short judgment. The substance of their Honours reasons appears at page 18 of the transcript of the special leave application:

> "… we have come to a clear conclusion that in all the circumstances of this case, including the circumstance that the action against the respondent will be proceeding to trial on other counts in any event, the claim in negligence should not have been struck out.

> We note that we are in general agreement with the reasons given by Justice Kirby in the Court of Appeal for that conclusion and that we do not dissent from his Honour's acknowledgment of:
>
> > 'the force of the considerations to which Handley and Cripps JJA have collected to demonstrate that the [applicant's] cause of action in negligence faces serious legal difficulties and, accordingly, may fail.'"

20 The effect of the reversing of the Court of Appeal's decision in ***Wickstead v Browne*** (1992) 30 NSWLR 1 is that it has no status as a binding precedent, even in relation to points on which the appeal was not taken: ***Commissioner of Taxation (Cth) v St Helen's Farm (ACT) Pty Ltd*** (1981) 146 CLR 336 at 410; ***Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)*** [2003] NSWSC 1008; (2003) 59 NSWLR 361 at 379-80, [79]. Thus, the Court of Appeal's decision in ***Wickstead v Browne*** (1992) 30 NSWLR 1 can have no higher status than being a persuasive authority. Hence it does not authoritatively determine the present question, so far as a first instance judge is concerned.

21 It is not, however, necessary for me to resolve any question of whether, or when, section 75A(8) applies to an appeal from an interlocutory decision. That is because the decision being appealed from in the present case is a final decision, not an interlocutory one, and there has been a hearing on the merits.

Was the Decision Final or Interlocutory?

22 While frequently it is necessary to look to the practice books to decide whether a particular type of order is a final or an interlocutory one, the broad test is that an order is final if it concludes the rights of the parties *inter se*: ***Hall v The Nominal Defendant*** (1966) 117 CLR 423 at 430 per Barwick CJ, 439-40 per Taylor J, 447 per Owen J; ***Licul v Corney*** (1976) 8 ALR 437 at 446 per Gibbs J (with whom Mason J agreed); ***Computer Edge Pty Ltd v Apple Computer Inc*** (1984) 54 ALR 767 at 767-8 per Gibbs CJ.

23 In ***Cox Brothers (Australia) Limited and Another v Cox*** (1934) 50 CLR 314 the High Court decided that an order giving a plaintiff leave to sign final judgment was interlocutory. That decision was in keeping with two decisions to which the High Court had been referred, namely ***Standard Discount Co v La Grange*** (1877) 3 CPD 67, and ***In Re A Debtor*** (1903) 19 TLR 152. In each of those decisions the rationale was that the order granting leave to enter judgment did not become effectual against the defendant until it had been perfected by the further step of signing the judgment, and hence the granting of leave did not itself determine the rights of the parties.

24 The judgment of the learned Associate Judge, being made under Part 13 rule 2 ***Supreme Court Rules 1970***, was for the making of certain orders which had been asked for in paragraph 2 of a Notice of Motion filed 17 June 2005, namely:

> "(a) That the agreement contained in the mortgage be specifically performed by the Defendants giving to the Plaintiff possession of the Land.
> (b) By way of enforcement of order (a), judgment to the Plaintiff for possession of the Land, and leave to issue a Writ of Possession forthwith.
> (c) An order that the Land be sold by the Plaintiff either by public auction or by private contract on such terms as the Plaintiff may see fit.
> (d) An order that the Plaintiff be appointed to transfer the Land to the purchaser or purchasers thereof to effectuate sale thereof.
> (e) A declaration that from exchange of contracts for sale of the Land until completion of that sale, the Defendants will be trustee of the Land for the purchaser or purchasers of the Land.
> (f) An order that after the payment of all expenses with respect to the sale, the sale proceeds of the Land be applied so as to pay the mortgages and encumbrances of the Land in order of their priority and in accordance with their terms, with any residue to be paid to the Defendants.
> (g) Such further or other orders as may be required to effectuate judicial sale of the Land.
> (h) Liberty to the parties to apply with respect to any matter that may arise with respect to the sale of the Land or the distribution of the sale proceeds."

> As well there was judgment for $95,000 plus interest of $56,430, a total of $151,430, and an order that the defendant[s] pay the plaintiff's costs. The judgment was one given in Court, and so, pursuant to Part 40 rule 3(1) ***Supreme Court Rules 1970*** , takes effect (apart from the order for costs) on the date on which it is given.

25 In ***Thomson v Deputy Commissioner of Taxation*** (Supreme Court of Victoria, Court of Appeal, 16 June 2000, unreported) Brooking JA, delivering the judgment of the Court, held that a decision granting summary judgment of a plaintiff's claim was a final judgment. His Honour distinguished the decision in ***Cox Brothers (Australia) Limited and Another v Cox*** (1934) 50 CLR 314 on the ground that the relevant rules concerning the granting of summary judgment no longer made provision for leave to enter final judgment being granted. Similarly, the Supreme Court of Western Australia (Malcolm CJ, Murray and White JJ) in ***Hunt and Another v Knabe (No 2)*** (1992) 8 WAR 96 held that summary judgment, pursuant to a rule which did not make provision for any intermediate step of granting leave to enter judgment, was a final judgment. However, in ***Schiffer v Pattison*** [2005] FCA 494; (2005) 215 ALR 505 Weinberg J followed ***Cox Brothers (Australia) Limited and Another v Cox*** (1934) 50 CLR 314 in holding

that summary judgment on a claim for a debt was interlocutory. The decisions of the Victorian Court of Appeal and the Full Court of the Supreme Court of Western Australia, to which I have just referred, were not cited to his Honour, and he declined to distinguish ***Cox Brothers (Australia) Limited and Another v Cox*** (1934) 50 CLR 314, notwithstanding that he recognised that there is *"something odd about the notion that an order granting such judgment is not one that finally determines 'the substantive rights of the parties'."* (at [61], 516).

26 In my respectful view, the basis upon which the Victorian Court of Appeal distinguished ***Cox Brothers (Australia) Limited and Another v Cox*** (1934) 50 CLR 314 is sound. Further, it is hard to think of a judgment more final than a judgment which grants possession of the defendants' land, orders it be sold, and orders that the defendants pay a sum of money. It is for these reasons that I conclude that the order of the learned Associate Judge was a final order.

Was There a Hearing on the Merits?

27 The language of section 75A(8) ***Supreme Court Act 1970*** is cast in terms of whether there has been a *"hearing on the merits"*. That is related to, but not identical to, whether the order appealed from is a final order. In my view, there has been a hearing on the merits. The decision reached by the learned Associate Judge was, in effect, that the merits of the case were such that the defendant did not have even an arguable defence. Thus, section 75A(8) requires that only if special grounds are shown should further evidence be admitted in this appeal.

Whether Test for Further Evidence on Appeal Satisfied

28 The test for adducing further evidence on appeal has been stated in ***Akins v National Australia Bank*** (1994) 34 NSWLR 155 at 160:

> "… in general, three conditions need to be met before fresh evidence can be admitted. These are:
> (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
> (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict;
> (3) The evidence must be credible."

As is shown by the opening words, *"In general"* , that test is not an exhaustive statement of the criteria upon which further evidence may be admitted upon appeal: ***Nowlan v Marson Transport Pty Ltd*** [2001] NSWCA 346; (2001) 53 NSWLR 116 at [14], 124.

29 The evidence sought to be admitted on the appeal is the first mortgage over the land in question, and an affidavit from a solicitor about his experience of the relationship between the higher rate and the lower rate of interest set under mortgages. It is not necessary for me to consider the evidence in any more detail than this, because Mr Knaggs, for the appellants, accepts that if the appropriate test to apply for admissibility of

evidence in this appeal is the same as the test which is applied on an appeal from a final judgment after there has been a hearing on the merits, the evidence does not meet that test.

30 Rule 45.12(2) ***UCP Rules*** requires a party who proposes to adduce further evidence on an appeal to give notice of it to each other party not more than 7 days after the date of institution of the appeal. Mr Knaggs submits that the fact that Rule 45.12(2) imposes no restriction, other than timely notification, upon the evidence which may be adduced on appeal means that there is in fact no such restriction. I do not accept that submission. Rule 45.12(2) sets out a precondition for the admitting of further evidence on appeal, but is not a complete statement of the circumstances in which further evidence can be admitted on appeal. Other applicable criteria are the ones found in section 75A(7) – (9) ***Supreme Court Act 1970***. The introduction of the ***UCP Rules*** has not detracted from the continued applicability of section 75A(7) - (9).

31 I note that the further evidence sought to be tendered in this case was not notified within 7 days after the date of institution of the appeal. While it would be possible in an appropriate case, to relieve a party from compliance with Rule 45.12(2), in the present case that question does not arise.

32 For these reasons, I reject the two items of evidence, which are marked MFI-1 and MFI-2.

PART B - ORDERS FOR POSSESSION AND SALE

PART B1 – Background To Orders For Possession And Sale

Facts

33 Mr and Mrs Hussain's house is on land under the ***Real Property Act 1900***, of which they have at all relevant times been the registered proprietors. The land is, and at all relevant times has been, subject to a registered first mortgage in favour of Perpetual Trustee Company Limited.

34 The mortgage which Mr and Mrs Hussain gave to the unregistered mortgagee was in a form suitable for registration under the ***Real Property Act 1900***. It contained contractual provisions entitling the mortgagee to seize and take possession of the securities if there was a default (Clause 110(b) and 139). As well, Clause 139 conferred a power on the mortgagee upon default to *"exercise power of sale and/or foreclosure"*.

35 When these proceedings were commenced on 13 April 2005, the only parties to the proceedings were the second mortgagee as plaintiff, and the mortgagors as defendants. On 17 June 2005 the second mortgagee filed the Notice of Motion seeking summary judgment which led to the decision of the learned Associate Judge on 1 August 2005.

36 On 22 June 2005 the solicitors for the second mortgagee wrote to Perpetual Trustee Company Limited, identifying the court proceedings, and the street address and title reference of Mr and Mrs Hussain's home. The

letter said:

> "Our client holds the second mortgage over the above property, you hold the first.
> We enclose, by way of service, a copy of Notice of Motion, and supporting affidavit, to be heard on 11 July at 9.00am."

11 July 2005 at 9.00am was the first return date of the Notice of Motion.

37 The solicitors receive no reply to that letter. The first mortgagee took no part in the hearing of the Notice of Motion, or in any other way in the proceedings.

Power to Order Sale – the Decision Below

38 The decision appealed from followed the decision of Wood CJ at CL in ***Guardian Mortgages v Miller*** [2004] NSWSC 1236. In that case, at [121], Wood CJ at CL made an order for possession of a parcel of mortgaged ***Real Property Act 1900*** land, at the suit of a registered second mortgagee. His Honour also made an order for judicial sale of a different parcel of ***Real Property Act 1900*** land over which an equitable charge (which, so far as the reasons for judgment disclose, was the only encumbrance on that parcel of land) had been given. At [121] his Honour held, applying dicta of Young J in ***Yarrangah Pty Ltd v National Australia Bank Ltd*** (1999) 9 BPR 17,061, that there is inherent power in a court of equity to order judicial sale with respect to ***Real Property Act 1900*** land in circumstances analogous to those in which an order for sale under section 103 ***Conveyancing Act 1919*** will be available in relation to old system land.

39 That finding of Wood CJ at CL was an essential step in his Honour's reasoning towards the orders actually made. However his Honour records, at [118], and Mr MW Young (counsel for the respondent in this appeal, who also appeared in ***Guardian Mortgages v Miller***) confirms, the correctness of the proposition was not a matter of active contention in ***Guardian Mortgages v Miller***. Further ***Guardian Mortgages v Miller*** appears to differ from the present case, in that here the application for an order for sale is made by a second unregistered mortgagee, not by the holder of a first-ranking equitable encumbrance. As well, here the application for possession is made by a second unregistered mortgagee, not by a second registered mortgagee. Mr Young also informs me that about 50 applications for orders of the type sought in the present case have been made by unregistered mortgagees of ***Real Property Act 1900*** land in recent months to Associate Judges, but there has been no real contest about the power to make the orders, or the circumstances in which and conditions upon which the orders ought be made.

40 In those circumstances I propose to examine the relevant principles for myself. At the outset, I acknowledge the considerable assistance I have derived from the wealth of material contained in Chapters 21 and 22 of Fisher & Lightwood's ***Law of Mortgage***, Australian edition, 1995

(hereinafter referred to as "***F&L***").

Relevance of Old System Principles to Present Problem

41 In the course of examining the principles I will examine the power of the court to make orders like those appealed from concerning land under the old system, and also concerning land under the ***Real Property Act 1900***.

42 Part of the reason for examining the situation concerning old system land, even though the land in question in this appeal is under the provisions of the ***Real Property Act 1900***, is that unregistered equitable estates and interests can exist in ***Real Property Act 1900*** land. Even though the ***Real Property Act 1900*** establishes a system of title by registration, not a system of registration of title (***Breskvar v Wall*** (1971) 126 CLR 376 at 385 per Barwick CJ) it is not complete code. The means by which title is transferred (by a government official making an entry in a register), is vastly different under the ***Real Property Act 1900*** to the way that title is transferred under the old system, by private individuals executing documents. Even so, there can still be dealings with ***Real Property Act 1900*** land of a type which, though not creating or transferring any interest of a type which is recognised by the ***Real Property Act 1900*** itself, still create an obligation of conscience amounting in the eyes of equity to a right of property in the land. In particular, there can be equitable interests in land arising from unregistered mortgages: ***Re Elliot*** (1886) 7 LR (NSW) 271; ***J & H Just (Holdings) Pty Ltd v Bank of New South Wales*** (1971) 125 CLR 546. Further, concerning ***Real Property Act 1900*** land, " *... the existing conveyancing practice is only repealed so far as inconsistent with the Real Property Act*": ***Tietyens v Cox*** (1916) 17 SR (NSW) 48 at 53; see also ***Hemmes Hermitage Pty Ltd v Abdurahman and Another*** (1991) 22 NSWLR 343 at 345 per Kirby P.

43 It has been held that:

> "... the whole course of judicial interpretation of the ***Real Property Act*** has recognised the old law and practice of conveyancing as still applicable to equitable interests in land under the Act ... the new practice as to foreclosure, which especially provided for registered interests under the Act, has left the whole practice as to foreclosure undisturbed so far as equitable interests are concerned.": ***Tietyens v Cox*** (1917) 17 SR (NSW) 48 at 54-55.

44 Similarly, if there is a respect in which the ***Real Property Act 1900*** does not provide a means of enforcing the type of interest in land which an equity court recognises, it is to the practice and principles which were developed in accordance with old system land that a court administering equitable jurisdiction will now turn to decide what, if any, remedy is appropriate.

The Old System Mortgage – Form

45 Under the old system, a mortgage took the form of an absolute

conveyance of the land to a lender, with a covenant by the lender to reassign the land if the debt was repaid by a particular date. Equity recognised a right in the mortgagor, called the *"equity of redemption"*, whereby the mortgagor would be permitted to redeem the mortgaged land upon payment of all sums owing, even though the contractual date for repayment had passed. If a mortgagor purported to grant a second mortgage over land, at the time that a first mortgage was still extant, that second mortgage had no efficacy at common law. However, equity regarded such a transaction as amounting to the mortgagor effecting a mortgage of his equity of redemption. If a mortgagor also granted third, or fourth, mortgages, these were also regarded by equity as successive mortgages of the mortgagor's equity of redemption.

The Old System Mortgage – Redemption and Foreclosure

46 But the right of a mortgagor to redeem, recognised in the equity of redemption, was not one which lasted forever. As a corollary to the invention of the equity of redemption, equity also developed a court procedure for foreclosure of mortgages. Foreclosure was a procedure through which equity would regard the equity of redemption as having come to an end. In general, the procedure involved in a foreclosure action against a mortgagor involved a taking of accounts between the mortgagee who was seeking to foreclose and the mortgagor. Once the amount owing had been ascertained in this way, and a court official had certified the amount owing, the mortgagor was given an opportunity to redeem. This was done by an order *nisi* for foreclosure, that unless the mortgagor paid within a stipulated period of time he would be forever foreclosed of his right of redemption. If the mortgagor did not pay within that time, the court would then make an order *absolute* for foreclosure.

47 If a second or subsequent mortgagee wished to enforce his security, he was required to *"redeem up, foreclose down … pay out all mortgages of higher priority and give the opportunity of holders of mortgages of lower priority to redeem before foreclosing":* ***United Travel Agencies Pty Ltd v Cain*** (1990) 20 NSWLR 566 at 571.

48 The *"redeem up"* part of this slogan stated one of the rights in equity of a second or subsequent mortgagee. Such a mortgagee could redeem the mortgage of the mortgagee who was immediately in priority to himself, and thereby succeed to the rights of that mortgagee. Thus, a third mortgagee could redeem the second mortgage, and put himself in the position of the second mortgagee. As second mortgagee he could then redeem the first mortgage, and put himself in the position of the first mortgagee. In the position of the first mortgagee, he would have the legal title to the land, and the powers that went with that legal title.

49 The *"redeem up, foreclose down"* slogan also states the order in which foreclosures occurred when there was more than one mortgage. If an estate was subject to several mortgages, a first mortgagee who wished to foreclose would need first to give the second mortgagee an opportunity to

redeem, and if the second mortgagee did not redeem the first mortgagee could foreclose his interest; then the third mortgagee would be given an opportunity to redeem and in default of so doing have his interest foreclosed, and so on through all mortgages, and only finally was the interest of the mortgagor foreclosed: ***F&L*** para [22.22]. Thus a mortgagee *"forecloses down"* in the order in which mortgages have been granted. There were some circumstances in which a single time would be fixed for all subsequent mortgagees and the mortgagor to redeem, which simplified the procedure somewhat – ***F&L*** para [22.28] – [22.30] - but that is not of present concern. I mention these matters concerning the general law practice relating to redemption and foreclosure because they are the assumed background against which various of the judicial quotations that appear later in this judgment were made.

Equitable charges

50 As well as recognising equitable mortgages arising from a mortgage of an equity of redemption, equity also recognised equitable charges over land. It is not necessary that any particular words of charge be used to create an equitable charge by an instrument -- it is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to would constitute a security: ***Cradock v The Scottish Provident Institution*** (1893) 69 LT 380 at 382 per Romer J.

51 Where there is a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, the right of the party having such a charge is a sale, and not foreclosure: ***Tennant v Trenchard*** (1869) LR 4 Ch App 537 at 542 per Lord Hatherley LC; ***In re Owen*** [1894] 3 Ch 220. Under the general law a charge can be enforced only by application to the Court for an order for the sale of the charged property, not by the chargee taking unilateral action out of court: ***Melbourne Tramways Trust v Melbourne Tramway & Omnibus Co Ltd*** (1887) 13 VLR 487 at 490.

Nature of the Interest of a Registered Mortgagee of RPA Land

52 In contrast to the position under the old system, section 57 ***Real Property Act 1900*** provides that a mortgage under that Act *"has effect as security but does not operate as a transfer of the land mortgaged"*. The registered proprietor remains as registered proprietor, even when a mortgage is registered against his or her title.

53 However, statute confers upon a registered mortgagee a variety of powers which can be used to enforce the mortgage, including a power upon default to sell the land without taking any court proceedings. The interest of a registered mortgagee of Torrens Title land is sometimes referred to as a *"statutory charge"*, to recognise that it is an interest somewhat analogous to a charge, which has many important attributes which derive from statute.

Nature of the Interest of an Unregistered Mortgagee of RPA Land

54 The ***Real Property Act 1900*** itself confers no status upon an unregistered mortgage. Rather, the attributes of such a mortgage derive

from the contract between the mortgagor and mortgagee, and the general law. Relevant provisions of the contract can include whether there is a right to possession of the mortgaged land, whether there is a power of sale out of court upon default, whether there is a covenant to execute a registrable mortgage, and whether there is a covenant to procure the registration of a registrable mortgage. The rights under the general law could be affected by whether the unregistered mortgagee had custody of the certificate of title, and whether there were any prior mortgages. Rights under the general law may also depend upon the extent to which it is possible to obtain specific performance of particular covenants in the mortgage. Provided only that the intention to make the land security for a debt is clear, an unregistered mortgage will confer at least the rights which the general law confers upon a chargee. Whether there are any more extensive rights will depend upon the circumstances of the particular mortgage. In the present case, the intention of the mortgagors to make the land act as security for the debt is clear.

Availability of a Statutory Power of Sale Exercisable Out of Court by a Mortgagee

55 Before turning to the power of the Court to order a sale of the mortgaged property in the present case, it is appropriate to look at the circumstances in which a mortgagee can sell the mortgaged property without invoking the assistance of the Court.

56 Section 58 ***Real Property Act 1900*** confers on a mortgagee a power to:

> "… sell the land mortgaged … or any part thereof, and all the estate and interest therein of the mortgagor …"

However, as section 58(1) makes clear, that power can be exercised only when the mortgagee is authorised by section 57(2) to exercise the power under section 58. Section 57(2) confers power on *"a registered mortgagee …"* to exercise the powers conferred by section 58, if certain preconditions arise. Thus, the statutory power of sale of ***Real Property Act 1900*** land conferred by section 58 can be exercised only by a mortgagee who is registered: ***Midland Montagu Australia Ltd v Cuthbertson & Anor*** (1989) 17 NSWLR 309 at 313-5. Hence, that statutory power could not be availed of by the second mortgagee in the present case.

57 Section 109(1) ***Conveyancing Act 1919*** (which applies to ***Real Property Act 1900*** land: section 108 ***Conveyancing Act 1919***) also confers on a mortgagee a power *"to the like extent as if [it] had been in terms conferred by the instrument creating the mortgage… but not further"* to sell mortgaged property. Following amendments made to section 109 by the ***Conveyancing (Covenants) Amendment Act 1986*** it is no longer a requirement, for the existence of a power of sale under section 109, that the mortgage in question be made by deed.

58 While section 109 also confers the same power of sale upon a *"chargee",* in that section *"charge"* means a charge imposed under section 88F ***Conveyancing Act 1919***: section 108 ***Conveyancing Act 1919***. However, even if the word *"chargee"* in section 109 is construed analogously, so that it is limited to the type of chargees who have the benefit of a charge of under section 88F, the definition of *"mortgage"* in section 7 ***Conveyancing Act*** includes *"a charge on any property for securing money or money's worth"*. Thus by that route the power conferred on a *"mortgagee"* by section 109 might extend to the type of equitable mortgage or charge that exists in the present case.

59 That same possibility also arises by a different route. Section 7 ***Conveyancing Act 1919*** says that *"mortgagee"*, in relation to land under the provisions of the ***Real Property Act 1900***, has the same meaning as in that Act. Section 3 ***Real Property Act 1900*** defines *"mortgage"* as *"any charge on land (other than a covenant charge) created merely for securing the payment of a debt"*, and defines *"mortgagee"* as *"the proprietor of a mortgage"*. Further, in section 3 ***Real Property Act*** *"proprietor"* is defined as *"any person seised or possessed of any freehold or other estate or interest in land at law or in equity in possession in futurity or expectancy."* Thus, the *"proprietor"* of a mortgage can, within this definition, be the person entitled to an equitable charge over land, even if that equitable charge is not registered.

60 In light of these matters I conclude that the power of sale conferred by section 109 attaches to the interest of the second mortgagee in the present case.

61 That the power of sale under section 109 attaches to a particular mortgage does not necessarily mean that the power has become exercisable. Section 111 ***Conveyancing Act 1919*** sets out preconditions to a mortgagee exercising the power of sale under section 109. One of them involves the service of a notice under section 111(2)(b), which (in substance) tells the mortgagor what it must do to avoid the power of sale being exercised. Those preconditions do not apply to mortgages which are registered under the ***Real Property Act 1900*** (section 111(1) ***Conveyancing Act 1919***). However, as a matter of statutory construction, the preconditions apply to mortgages of ***Real Property Act 1900*** land which are not registered.

62 There was argument before me about whether the second mortgagee had ever served on the mortgagor a notice complying with section 111(2)(b).

63 However there is a more fundamental problem lying in the way of the second mortgagee exercising a power of sale conferred by section 109 in a way that is likely to provide it with a commercially effective remedy. It is that as a matter of construction of the power in section 109, it does not enable an unregistered second mortgagee of ***Real Property Act 1900*** land to sell the interest of the first mortgagee in the land. A sale of the land

subject to the interest of the first mortgagee is unlikely to prove attractive to potential purchasers.

64 There are two reasons for concluding that the power of sale under section 109 does not enable the unregistered second mortgagee to sell the interest of the first mortgagee. The first is that section 109 itself says that the power of sale (and other powers conferred by section 109) are conferred *"to the like extent as if they had been in terms conferred by the instrument creating the mortgage … but not further…".* It would not be possible for a contract between a mortgagor and a second mortgagee of land to empower the second mortgagee to convey the interest of the first mortgagee, unless the first mortgagee consented or in some other way conferred authority on the mortgagor to affect its interest in the land. Thus, the statutory power of sale under section 109 can stretch no further.

65 The second is that section 112(1) ***Conveyancing Act 1919*** sets out the effect of exercise of the statutory power of sale, namely that the mortgagee can

> "… convey the property sold for such estate and interest therein as is the subject of the mortgage … , freed from all estates, interests, and rights to which the mortgage … has priority, *but subject to all estates, interests, and rights which have priority to the mortgage* … " (emphasis added)

In this way, the statute itself recognises that the second mortgagee cannot convey the interest of the first mortgagee. See also ***Guardian Mortgages v Miller*** [2004] NSWSC 1236 at [120]; ***Re Hodson and Howes' Contract*** (1887) 35 Ch D 668; ***F&L*** para [20.39].

66 There is no other candidate for a statutory power of sale out of court which might apply to this mortgage. Thus, if the second mortgagee wanted to sell the entire interest in the mortgaged land, it needed to obtain a court order authorising it to do so.

PART B2 – The Order for Sale

Statutory Power for the Court to Order a Sale of Mortgaged or Charged Property

67 Section 48 of the ***Chancery Procedure Act 1852*** (15 & 16 Vict c 86) (Imp) provided:

> "It shall be lawful for the Court in any Suit for the Foreclosure of the Equity of Redemption in any mortgaged Property, upon the Request of the Mortgagee, or of any subsequent Incumbrancer, or of the Mortgagor, or any Person claiming under them respectively, to direct a Sale of such Property, instead of a Foreclosure of such Equity of Redemption, on such Terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the

> Priorities of Incumbrances, or giving the usual or any Time to redeem; provided that if such Request shall be made by any such subsequent Incumbrancer, or by the Mortgagor, or by any Person claiming under them respectively, the Court shall not direct any such Sale, without the Consent of the Mortgagee or the Persons claiming under him, unless the Party making such Request shall deposit in Court a reasonable Sum of Money, to be fixed by the Court, for the Purpose of securing the Performance of such Terms as the Court may think fit to Impose on the Party making such Request."

68 The enactment of the section was immediately welcomed by the Chancery court in England:

> "… the effect of the enactment is to supply something, the absence of which was often the occasion of extreme injustice, delay and expense, without answering any useful purpose; I mean a power in the Court to direct a sale in lieu of foreclosure.": (per Stuart V-C ***Smith v Robinson*** (1853) 1 Sm & Giff 140 at 141;65 ER 61 at 62.

69 Section 25 ***Conveyancing and Law of Property Act 1881*** (Eng) (44 & 45 Vict c.41) widened that power. Its terms were not materially different from those which are now appear in section 103 ***Conveyancing Act 1919 (NSW)***. Section 103 ***Conveyancing Act 1919*** presently provides:

> "(1) Any person entitled to redeem mortgaged property may have an order for sale instead of for redemption in any proceedings instituted by the person either for redemption alone or for sale alone, or for sale or redemption, in the alternative.
>
> (2) In any proceedings, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money or an amount secured by a charge, the Court, on the request of the mortgagee or person whose land is subject to the charge, or of any person interested either in the mortgage money or amount so secured or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or person whose land is subject to the charge or any person so interested does not appear in the proceedings, and without allowing any time for redemption or for payment of any mortgage money or amount so secured, may direct a sale of the mortgaged or charged property on such terms as to the Court may seem just, including, if the Court thinks fit, the deposit in court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.
>
> (3) In any proceedings instituted by a person interested in the right of redemption or by a person whose land is subject

> to a charge and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any party or other person, and may give such directions as to the Court may seem just respecting the costs of the defendants or any of them.
> (4) In any case within this section the Court may direct a sale without previously determining the priorities of incumbrancees or mortgagees, and may direct a sale out of Court …"

70 One respect in which this power was wider than the power under the 1852 Act was that the order for sale was not restricted to an order made *"instead of a foreclosure"*: ***Union Bank of London v Ingram*** (1882) 20 Ch D 463.

71 In ***Woolley v Colman*** (1882) 21 Ch D 169 at 173 Fry J said of the 1881 Act *"Sub-sects 1 and 2 of sect 25 are expressed in different terms, and it appears to me that they confer distinct and separate powers."* Likewise the powers conferred by section 103(1) and by section 103(2) ***Conveyancing Act 1919*** are distinct powers. An equitable chargee has no entitlement to redeem mortgaged property – only a mortgagor or a true equitable mortgagee has that – so if the second mortgagee in the present case were properly regarded as a mere chargee, it would not have the power under section 103(1). However, even if the second mortgagee was a mere chargee, the words in section 103(2) are capable of applying to an application by that second mortgagee to the Court for an order for sale of the charged property.

Does section 103 Apply to RPA Land?

72 But there is a question about whether section 103 applies at all to ***Real Property Act 1900*** land. Section 6(1) ***Conveyancing Act 1919*** says:

> "(1) Except as hereinafter provided, this Act, so far as inconsistent with the ***Real Property Act 1900*** , shall not apply to lands, whether freehold or leasehold, which are under the provisions of that Act."

> I can find nothing in the ***Real Property Act 1900*** which is inconsistent with an unregistered second mortgagee being able to make application for an order for sale under section 103. Thus, section 6(1) does not provide a reason for section 103 not being available in the present case.

73 Part 7 Division 1 of the ***Conveyancing Act 1919*** stretches from section 90 to section 104 inclusive. Section 90 says:

> "The provisions of this Division apply to and in respect of mortgages of and charges on land under the ***Real Property Act 1900*** only to the extent specified in those provisions."

74 The only statement in section 103 about its application to ***Real***

Property Act 1900 land is that contained in section 103(7):

> "(7) Except as provided by section 101, this section applies only to charges imposed under section 88F on land which is not under the provisions of the ***Real Property Act 1900*** ."

75 There is some difficulty in construing section 103(7): Aitken, *"Mortgagor's Rights"* (2000) 74 ALJ 226 at 227. However, one thing which is clear about it is that it does not specify that section 103 applies to unregistered mortgages (or indeed any mortgages) under the ***Real Property Act 1900.*** And section 90 requires there to be a positive specification in section 103 that it applies to ***Real Property Act 1900*** land, before it applies. If follows, in my view, that section 103 does not, in its terms, apply to such unregistered mortgages.

76 This conclusion is the same as the conclusion reached, for a different reason, by Young J in ***Yarrangah Pty Ltd v National Australia Bank Ltd*** (1999) 9 BPR 17,061; [1999] NSWSC 97 at [22].

77 It also accords with the view expressed by Steytler J in ***Sandgate Corporation Pty Ltd (in liq) and Others v Ionnou Nominees Pty Ltd and Others*** (2000) 22 WAR 172 at 187-189. Though Steytler J held that the Western Australian equivalent of section 103 applied to Torrens Title land, he distinguished the context in which that section appears in the West Australian statute from the context in which section 103 appears in the New South Wales statute, and because of those differences found that the view expressed by Young J. in ***Yarrangabah*** did not apply to the Western Australian legislation.

General Law Jurisdiction to Order Sale?

78 In ***Yarrangah Pty Ltd v National Australia Bank Ltd*** (1999) 9 BPR 17,061; [1999] NSWSC 97 Young J considered a mortgagor's application to restrain a mortgagee from exercising, out of court, a power of sale of the mortgaged property. Though his Honour concluded that there was no basis for restraining the mortgagee from exercising the power, he gave consideration to whether there would be jurisdiction for the court itself to order a judicial sale of the property at the suit of the mortgagor, and held that there probably was jurisdiction to order judicial sale. From the context, it is clear that his Honour regarded this jurisdiction as being part of the jurisdiction of the Court to apply the principles of the law of equity. His Honour also held, however, that the circumstances of the case before him did not justify the making of such an order. It was these remarks which were followed by Wood CJ at CL in ***Guardian Mortgages v Miller***, as mentioned at para [38] above.

79 No party argued that Part 30 of the ***Supreme Court Rules 1970*** provided a jurisdictional basis for the order. That Part, which is reproduced in substance in Part 27 ***UCP Rules***, allows the court to make orders for the disposal of land in certain circumstances. It is derived from section 55 of the ***Chancery Procedure Act 1852*** (Imp). It does not seem to provide a promising candidate for a basis for the jurisdiction in the present case: notes

to section 14 ***Equity Act 1901*** in ***Parker's Practice in Equity (NSW)*** 2nd edition 1949 page 21-22.

80 In the present case, the mortgage of the second mortgagee contains a contractual power of sale. In itself, that provides a basis for the Court to have jurisdiction to make an order for sale of the mortgaged property, by way of an action for specific performance.

81 Another route leads to this same conclusion. The interest of a mortgagee of Torrens title land is only ever, even when the mortgage is registered, in the nature of a statutory charge, together with some of the attributes of an old system mortgage that are not inconsistent with the Torrens system and such equitable rights as arise from the contract between the mortgagor and mortgagee. An unregistered mortgage will likewise be regarded by equity as conferring an equitable charge together with some of the attributes of an old system mortgage that are not inconsistent with the Torrens system and such equitable rights as arise from the contract between the mortgagor and mortgagee. As seen earlier (para [53] above), an order for judicial sale is the standard way of enforcing an equitable charge. Indeed, the Court can order sale even where there is a charge or lien which expressly excludes the right to a legal mortgage: ***Tenant v Trenchard*** (1869) LR 4 Ch App 537.

82 I conclude that the Court has jurisdiction to order a sale at the suit of an unregistered mortgagee of ***Real Property Act 1900*** land. However, further consideration will need to be given to the circumstances in which, and terms on which, it is proper to make such an order. In particular, consideration will need to be given to the precise interest in the land over which the unregistered mortgage has been granted that can be ordered to be sold.

Service of Notice Under Section 57(2)(b) or 111(2)(b)?

83 One ground upon which the mortgagors attack the order made below is that no proper notice under either section 57(2)(b) ***Real Property Act 1900***, or under section 111(2)(b) ***Conveyancing Act 1919***, was served on them.

84 The notices required by those sections are statutory preconditions for the exercise of the power of sale conferred by, respectively, section 58 ***Real Property Act 1900***, and section 109 ***Conveyancing Act 1919***. Each of those sections are ones which confer on a mortgagee power to sell the mortgaged property out of court. The exercise of the Court’s equitable jurisdiction to order a sale of mortgaged property does not depend upon the service of notices under those statutory provisions. I respectfully agree with ***Guardian Mortgages v Miller*** [2004] NSWSC 1236 at [86] in this respect.

85 In fact, at the time of service of the Statement of Claim initiating these proceedings, the second mortgagee served on the mortgagors a document which purported to be a notice pursuant to both section 57(2)(b) ***Real Property Act 1900*** and section 112(2)(b) ***Conveyancing Act 1919***. Though criticisms were made by Mr Knaggs of the validity of this notice, it is not necessary to deal with those criticisms, as the second mortgagee does

not seek to support the decision below on the basis that a valid statutory notice was served.

Significance of First Mortgagee Not Being a Party

86 Calvert, ***A Treatise upon the Law respecting Parties to Suits in Equity*** (2nd ed, London, 1847) at p 15 –16 states the principle by reference to which one decides what parties need to be joined in an action by the holder of a second or subsequent security to enforce his interest:

> "… an incumbrancer, who merely desires to establish his charge, need not make a prior incumbrancer a party. Although he pray for satisfaction of his charge, the presence of the prior incumbrancer will not be required. The same rule is applicable, if he prays that, for the purpose of raising the amount claimed by him, a portion of the estate be sold subject to prior incumbrances. But if in the course of the suit he intends to apply for a receiver of the general proceeds of the estate, he proposes in that step to interfere with the interests of prior incumbrancers, and must for that purpose make them parties to the record: ***Gibbon v Strathmore*** , VC England 23 April 1841."

87 This is an application of a fundamental requirement for the exercise of a court's powers that a person whose rights will be affected by an order sought in proceedings should be a party to those proceedings.

88 Thus, in a suit for foreclosure, all persons interested in the equity of redemption, including the mortgagor, must be before the Court: ***Farmer v Curtis*** (1829) 2 Sim 466; 57 ER 862; ***Cropper v Mellersh*** (1855) LJ Ch 430; ***Moore v Morton*** [1886] WN 196; ***Setons Judgments and Orders*** 7th ed 1912 p 1858. That is because they are all people who are interested in the taking of the account, and also because they are the people whose rights in the property will cease if the foreclosure order is made.

89 Under the general law, a second or later encumbrancer may foreclose the mortgagor and those subsequent, without joining any encumbrancers prior to themselves: ***F&L*** [22.6]; ***Rose v Page*** (1829) 2 Sim 471; 57 ER 864; ***Slade v Rigg*** (1843) 3 Hare 35 at 38; 67 ER 286 at 287. However, that is so because a prior encumbrancer can suffer no detriment to his legal rights if an order for foreclosure of interests below him is made. The first mortgagee still has the legal estate, to secure the debt that is owed to him. Even if a third mortgagee forecloses a fourth mortgagee and the mortgagor, that does not affect the second mortgagee, because the second mortgagee still has the right to redeem the first mortgagee, and foreclose the third mortgage.

90 Sometimes, rules of court make exceptions to this requirement for all persons interested in the relief claimed in the suit to be parties. Thus, there is sufficient representation of parties if the beneficiaries of an interest in the land which is held on trust are represented by the trustee, in accordance with a rule of Court: ***Wilkins v Reeves*** (1855) 3 WR 305. In an Irish case, it

was held that it was possible for a first mortgagee to be bound by an order for sale of the mortgaged property obtained by a subsequent mortgagee, in proceedings to which the first mortgagee was not a party, if a particular form of notice was given to the first mortgagee - however that was only because of a specific provision of the rules relating to the administration of equity in Ireland, and the giving of informal notice of the order for sale to the first mortgagee did not suffice: ***Duff v Devlin*** [1924] IR 56. However, there is no such rule of court which applies here.

91 In the present case, the first mortgagee is a necessary party to an action seeking an order for sale of the entire interest in the property. The orders which were made in the present case are ones which could result in the interest of the first mortgagee in the land being terminated, as a consequence of a transfer to a purchaser, which was authorised by the orders, becoming registered. That result could arise even if the sale proceeds were insufficient to pay out the interest of the first mortgagee. Particularly is that so when the orders empowered the second mortgagee to sell the land *"either by public auction or by private contract on such terms as the Plaintiff may think fit"*. That termination of the interest of the first mortgagee could follow from the orders even if the first mortgage had a high interest rate or some other feature which was attractive to the first mortgagee, and the first mortgage did not want the mortgage to be paid out on any basis other than those contractually agreed between the mortgagor and the first mortgagee, or available to the mortgagor as a matter of law, eg under section 93 ***Conveyancing Act 1919***.

92 The court does not take away property rights of a person, without specific statutory authority, in proceedings to which that person is not a party. The absence of the first mortgagee from the proceedings is a fundamental flaw to the order for sale which was made in the present case. It is not cured by having given informal notice of the Notice of Motion to the first mortgagee.

93 Even if the first mortgagee were a party, it does not follow that an order for sale of the entirety of interests in the mortgaged land would be made at the suit of the unregistered second mortgagee. ***Langton v Langton*** (1855) 3 WR 222; 3 Equity Reports 394 held that when proceedings were brought for the administration of a deceased estate, to which an equitable first mortgagee of an interest in an asset of the estate was party, the court should not order a sale of the mortgaged property in such a form as to oblige the mortgagee to concur in the sale - it should be either a sale subject to the mortgage, or, with the consent of the mortgagee, free from the mortgage.

94 To similar effect is ***Wickenden v Rayson*** (1855) 6 De G M & G 210; 43 ER 1212. That case was a suit for the administration of real estate subject to various securities. Lord Cranworth LC at 213 of De G M & G; 1214 of ER referred to

> "… the clear rule of the Court, that a sale cannot be directed against a mortgagee without his consent. The only difference

> in practice in cases of this kind was, that where the mortgagee was a party to the suit, the Court would not make the order in the usual alternative form, but would put it at once to the mortgagee whether he would consent to a sale or not."

95 The *"usual alternative form"* which Lord Cranworth LC referred to was a form of order whereby:

> "… the estate is ordered to be sold free from the incumbrances, if any, of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent, leaving the incumbrancers to consent at Chambers to the sale, if they think fit." (*Seton's Judgments and Orders* , 7th ed 1912 p.332).

The result was that where a superior mortgagee did not consent to sale sought by a later mortgagee, the court ordered the sale only subject to his mortgage.

96 ***Wickenden v Rayson*** was a case where section 48 of the ***Chancery Procedure Act 1852*** did not apply because that section allowed an order for sale only in suits for foreclosure. Thus, the case is an important indication of how far the inherent jurisdiction of the Court to order sale of mortgaged property goes.

97 I recognise that ***Wickenden v Rayson*** was an administration suit, not an application by an equitable mortgagee or chargee for sale, but it is hard to see how that makes a difference. The general law jurisdiction that the court is exercising, in ordering a sale of charged property, is one to give effect to the personal obligations that arise between the chargor and the chargee as a result of the giving of the charge. What the chargee has done, by agreeing that his property shall be subject to the charge, is agreeing that *his interest* in the property will be a security for the relevant debt. That agreement between the chargor and the chargee is one to which the first mortgagee is not a party. The first mortgagee had an interest, which arose prior in time to that of the chargee, and hence the right that the chargee acquired was one that was subject to the rights of that first mortgagee. Giving effect to the equities that exist between the chargor and the chargee could not involve an order that had a detrimental effect on that prior right of property of the first mortgagee. If a court is to order sale of all interests in mortgaged land at the suit of an unregistered second mortgagee, a statutory power, like that in section 103 ***Conveyancing Act 1919***, would need to be available to the court, not merely its inherent equitable jurisdiction. Even in relation to the statutory power, there would be a question whether it would be an appropriate exercise of the power to order a sale of the entire interest in the land at the suit of a subsequent mortgagee over the opposition of a prior mortgagee.

98 Though that is enough to result in the setting aside of the order for sale

that was made below, there are some other difficulties in the making of the order, which would exist even if the court had power to make the order for sale of the entire interest in the land. The cases upon which the rest of the discussion of the order for sale is based are ones that related to the exercise of the statutory power for the Court to order sale.

99 A further problem which arises from the absence of the first mortgagee from the proceedings is that before any contract for the sale of land is executed by the second mortgagee pursuant to the orders made below, it would be open to the first mortgagee to itself exercise its own power of sale. That is because an order for sale obtained by a second mortgagee does not prevent a sale by a first mortgagee who is not a party to be action: ***Duff v Devlin*** [1924] IR 56. That there is this possibility of there being competing sales is an undesirable consequence, which could in some circumstances depress the price obtained for the land. That consequence would not arise if the first mortgagee were a party to the suit and consented or (if such an order could be made) became bound to permit the court-ordered sale to proceed. For as long as there is this possibility of competing sales, the possibility is one the Court would take into account in deciding whether to make an order for sale of the land or any interests in it.

Evidence of Value and First Mortgage Debt

100 The evidence in this case does not include any evidence of the value of the property. Nor does it include any evidence of how much is owed to the first mortgagee.

101 A sale will usually not be ordered where there is no evidence of value of the property: ***Smithett v Hesketh*** (1890) 44 Ch D 161 at 163; ***Manton v Parabolic Pty Ltd*** (1985) 2 NSWLR 361 at 380. In fact there is at least one example of a sale being ordered even though there was no evidence of value: ***Wickham v Nicholson*** (1854) 19 Beav 38; 52 ER 262. However, in most cases it would not be a proper exercise of a judicial discretion to order sale at the suit of a second mortgagee unless there was some evidence of value. Without that evidence, it would not be possible to fix a reserve price for any sale, would not be possible to form a view about whether it was appropriate to give the mortgagors time to pay before a sale could be made (and if so how long), and there would be serious difficulties in deciding who should have the conduct of the sale, and what conditions ought be imposed for the protection of the first mortgagee.

102 It is at least open to argument that an order of the type made here, conferring on the second mortgagee power to sell on such terms as it saw fit, gave it complete *carte blanche* to sell, not confined even by the duties which a court treats as attaching by implication to the exercise of a contractual or statutory power of sale out of court. I do not decide that that is the effect of the order. However, it seems to me to be undesirable for there to be room for doubt about whether the second mortgagee has *carte blanche* in this way. If the Court is authorising the sale, it should exercise some control over the terms and manner of conduct of the sale. The various

topics listed in the last sentence of the previous paragraph are the sort of matters that should be addressed in exercising that control.

Preliminary taking of accounts?

103 In the nineteenth century, if there was any doubt about the amount the mortgagor owed to the mortgagee, the court's practice was to order an account be taken, and to give the mortgagor an opportunity of paying the amount found to be due, before any sale was ordered: ***Seton's Judgments and Orders*** 7th ed 1912 p 1985 precedent 3, p 1989 precedent 10. However the ordering of an account of what was due by the mortgagor to the mortgagee, as a prerequisite to an order for sale, could be dispensed with when it was clear that the security would be inadequate: ***Williams v Owen*** (1883) 48 LT 388. The present relevance of this practice is that it shows the importance the Court attached to needing to know how much debt was secured by the property, before the order for sale was made. As the rest of this judgment which deals with the order for sale will show, that importance continues now.

Reserve Price

104 The courts have repeatedly fixed a reserve price when ordering sale: ***Whitbread v Roberts*** (1859) 28 LJ Ch 431; ***Whitfield v Roberts*** (1859) 5 Jur NS 113; ***Burmester v Moxon*** (1866) 35 Beav 310; 55 ER 915; ***Witts v Young*** **(**1870) WN 172; ***Woolley v Colman*** (1882) 21 Ch D 169 at 173; ***Brewer v Square*** [1892] 2 Ch 111 at 115.

105 Such a reserve is calculated to be sufficient to cover the amount due for principal and interest and costs to the first mortgagee when the mortgagor is given the conduct of the sale. By analogy, when a second mortgagee is given the conduct of the sale it should also be sufficient to cover the principal, interest and costs of the first mortgagee. In the present case, when the amount owed to the first mortgagee was not known, it was not possible to have a sound basis on which a reserve price could be fixed.

Security to Protect the First Mortgagee

106 It is usual (as is recognised in the terms of section 103(3) ***Conveyancing Act 1919***) for the Court to give consideration to what security a person seeking an order for sale should be required to provide: ***Hurst v Hurst*** (1852) 16 Beav 372, 51 ER 822; ***Whitbread v Roberts*** (1859) 28 LJ Ch 431; ***Merchant Banking Co of London Ltd v London and Hanseatic Bank*** (1886) 55 LJ Ch 479; ***Cripps v Wood*** (1882) 51 LJ Ch 584; ***Norman v Beaumont*** [1893] WN (Eng) 45.

107 There is a decision that, when mortgagors were given the conduct of a sale security was not required, because they alone would be liable for the costs of sale: ***Davies v Wright*** (1886) 32 Ch D 220. However this decision was not followed in ***Brewer v Square*** [1892] 2 Ch 111 at 115 - in ***Brewer***, when mortgagors were given the conduct of a sale, they were ordered to bring into court a sum of money as security for costs, with the amount ordered being fixed on the basis that it covered additional costs, beyond

those which the mortgagors would need to meet in carrying out the sale. ***Brewer v Square*** is the better decision in this respect.

108 In ***Norman v Beaumont*** [1893] WN (Eng) 45 the conduct of a sale was given to a fourth mortgagee, in circumstances where the plaintiff first mortgagee sought foreclosure on the ground that its security had become inadequate, and the fourth mortgagee asserted that the value of the property was greater than the value which the plaintiff put on it. The term upon which the conduct of the sale was given to the fourth mortgagee was that it pay into court a sum sufficient to protect the first mortgagee against loss.

109 One risk against the possibility of which it may be appropriate that security should be provided, if a sale is ordered, is that the first mortgagee might be kept out of its money during the pendency of a suit for the specific performance of a contract for the sale of the mortgaged premises: ***Burmester v Moxon*** (1866) 35 Beav 310; 55 ER 915.

110 The practical effect of the order for payment of the proceeds of sale into Court in the present case is that the first mortgagee will need to be involved in the proceedings to get the money out, and to establish the amount of its debt. It will inevitably incur expenses in the course of so doing. Part of the protection of the first mortgagee which the Court ought have considered is whether it should require that security be provided in relation to these expenses.

Allowance of Time to Redeem

111 There will always be a question of discretion whether it is appropriate to order an immediate sale, or to allow some further time in which redemption can take place.

112 In the nineteenth century cases, factors which have been held to justify an order for immediate sale are if all the parties interested in the equity of redemption are represented, either individually or by a representative of a class to which they belong being party to the suit (***Marriott v Kirkham*** (1862) 3 Giff 536; 66 ER 521), where the property is wholly unproductive (***Foster v Harvey*** (1863) 4 De G J & S 59; 46 ER 837 – though the reported case is an appeal, and the judges hearing this appeal made clear that they would have given the mortgagor time to redeem if they had been exercising the discretion for themselves), or where the rents are not enough to keep down the interest (***Phillips v Gutteridge*** (1859) 4 De G & J 531; 45 ER 206). In another case, while it was held that there was power to order an immediate sale where there are considerable arrears of interest, and it is not necessary to give the mortgagor the same period of six months in which to pay as a mortgagor is ordinarily entitled to under a foreclosure decree, the Court actually gave 3 months in which to pay, taking into account that the end of that 3 months would be a more propitious time of year for a sale than would six months from the date of the hearing (***Newman v Selfe*** (1864) 33 Beav 522; 55 ER 471).

113 In ***Green v Biggs*** (1885) 52 LT 680 Kay J was faced with a situation where, by the time of trial, nearly two years of interest was unpaid. However there was no evidence that the value of the property was insufficient to satisfy the security. At the trial of an action in which the mortgagee sought payment, or in default sale or foreclosure and possession, the mortgagor did not appear. Kay J refused to make an order for immediate sale, and said, at 681:

> "The usual plan is to allow some months for redemption after the certificate is made. I cannot see that, unless under special circumstances, the Court shall order a sale immediately after the certificate without giving the mortgagor time to turn round. I shall accordingly allow three months in this case for the mortgagor to redeem in. In case there is no redemption within that time, then there must be a sale. An account must be taken of what is due to the plaintiff for principal, interest and costs. Three months after the chief clerk's certificate is made the hereditaments, or so much thereof as will be sufficient to satisfy the amount found due to the plaintiff, must be sold with the approbation of the Court."

No order for possession was in fact made.

114 In ***Jones v Harris*** [1887] WN (Eng) 10; (1887) 55 LT 885 the mortgagor was given 3 months in which to redeem following the certificate certifying what was due on the mortgage, following which a sale could occur.

115 ***Smith v Robinson*** (1853) 1 Sm & Giff 140 at 141;65 ER 61 at 62 was an application by a first mortgagee for foreclosure, or in the alternative, sale. The mortgagor was served with the proceedings, but did not appear at the hearing. The first mortgagee thereupon asked for an immediate order for sale. Sir John Stuart V-C refused to make an immediate order for sale, even though the principal and interest had not been paid for three years. He ordered an account be taken of the principal, interest and costs which were due, that the mortgagor be given a month from the taking of that account to make payment, and in default of payment that a sale take place under the direction of the Court.

116 In ***Witts v Young*** (1870) (Eng) WN 172 a foreclosure decree was made in favour of a mortgagee, but as well an order for sale was made at the request of the mortgagor, on the basis that if the property was not sold within six months, with a reserve of the amount owing to the first mortgagee, foreclosure should follow.

117 In ***Woof v Barron*** (1873) WN (Eng) 71 a further month was allowed to redeem, in circumstances where the mortgagor had executed a memorandum agreeing to grant a legal mortgage with a power of sale, and, at the time of the hearing, the 3 months default in payment of interest which was at that time needed to be able to exercise a power of sale had

already elapsed.

118 As to permitted delays in effecting a sale, see also ***Seton's Judgments and Orders*** 7th ed 1912 p 1847.

119 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.

Conduct of the Sale

120 Before the court can order a sale of mortgaged property consideration must be given to who is to have the conduct of the sale.

121 The cases provide illustrations of the sort of factors which are taken into account. In a suit in which a second mortgagee of a quarter share in the land applied for a sale, the conduct of the sale was given to the first mortgagee of the entirety, on the ground that it would be more convenient and less expensive because he had the title deeds: ***Hewitt v Nanson*** (1858) 7 WR 5 per Kindersley V-C. In an action by an equitable mortgagee by deposit of title deeds, the conduct of the sale, in absence of objection, was given to the mortgagors, as it was in their interests to obtain the best price: ***Davies v Wright*** (1886) 32 Ch D 220. In ***Norman v Beaumont*** [1893] WN (Eng) 45 the conduct was given to a puisne mortgagee on his paying into court 10% of valuation placed by him on the mortgaged property.

122 In a case concerning a somewhat similar right of sale arising under the Bankruptcy Rules it has been held that the conduct of the sale will generally be given to the mortgagee when the security is insufficient (because the mortgagee has an interest in that situation in maximising its recovery), and to the mortgagor when the security is likely to be more than sufficient (because the mortgagee in that situation has no interest in maximising any surplus over the amount of the mortgage debt) but the Court has full discretion in the matter: ***In re Jordan, ex parte Harrison*** (1884) 13 QBD 228 at 231. Similarly, in ***Woolley v Colman*** (1882) 21 Ch D 169 at 173-174 where property was subject to four mortgages, and the value of the property seemed sufficient to at least pay out the first two mortgages, conduct of the sale was given to the mortgagor where the third and fourth mortgagees consented to that course. Likewise in ***Manchester and Salford Bank v Scowcroft*** (1883) 27 Sol Jo 517 the conduct of the sale was given to the party who, taking into account the value of the property and the amount owing under the various mortgages, had an interest in obtaining the largest price for the property, rather than to those who were only interested in obtaining what was sufficient to cover their security. In ***Christy v Van Tromp*** (1886) WN (Eng) 111 where there were two

mortgages, and the value of the property was more than enough to pay both the first and second mortgagees, the conduct of the sale was given to the first mortgagee.

123 These cases provide a further illustration of why it is necessary for the court to know whether or not the security will be insufficient, and hence needs to know the value of the property and the amount secured on it before a proper exercise of discretion can be engaged in.

PART B3 – The Order for Possession

General Principles about Orders for Possession

124 It is convenient to consider the order for possession made in the present case against the background of some principles concerning the granting of orders for possession of land to a mortgagee or chargee.

125 A registered second mortgagee of Torrens land can bring proceedings in ejectment: ***Zanzoul v Westpac Banking Corporation*** (1995) 6 BPR 14,142; ***ANZ Banking Group Ltd v Comer*** (1993) 5 BPR 11,748; ***Croft v Kennaugh*** [1945] VLR 40; ***Australia and New Zealand Bank Ltd v Hathaway*** [1957] QWN 49. If there is a competition between the first registered mortgagee and second registered mortgagee as to who has the better right to possession, the first mortgagee has priority: ***Reliance Finance Corp Pty Ltd v Orwin*** (1964) 82 WN (Pt 1) NSW 11 at 15; ***Zanzoul v Westpac Banking Corp*** (1995) 6 BPR 14,142, at 14,145. However, in circumstances where the first mortgagee does not seek possession, the existence of a first mortgage is not a reason why a mortgagor is entitled to deny a registered second mortgagee possession: ***Zanzoul*** at 14,145.

126 By contrast, a mere equitable chargee of land has no right to possession: ***Garfitt v Allen*** (1887) 37 Ch D 48.

127 In New South Wales, an equitable mortgagee of land has no entitlement to an order for possession, of the type provided for by section 79 ***Supreme Court Act 1970*** prior to its repeal on 15 August 2005, and now by section 20 ***Civil Procedure Act 2005***: ***Mills v Lewis*** (1985) 3 BPR [97205] at 9431 – 9431.3 per Priestley JA (with whom Hope and Glass agreed). However, if there is a covenant in the mortgage entitling an equitable mortgagee to possession upon default, once there has been a default an equitable mortgagee is entitled to a declaration that it is entitled to possession, and, in an appropriate circumstance, an order in the nature of specific performance requiring the mortgagor to give possession to the mortgagee: ***ibid***.

Application to this Case

128 At the outset, I should say that the order for possession made by Wood CJ at CL in ***Guardian Mortgages v Miller*** was made in significantly different circumstances to the present -- there, it was made in relation to land of which the plaintiff was a registered mortgagee.

129 In the present case, the mortgage of the second mortgagee contained a covenant for possession upon default, and so provided the basis for an order in the nature of specific performance of that covenant. However, an order in the nature of specific performance of such a covenant will be directed to the mortgagors, ordering them *in personam* to give up possession to the mortgagee. It would not, of itself, lead to the making of an order for possession of land (which, as explained in ***Mills v Lewis*** (1985) 3 BPR [97205] is justified only when an order for ejectment would have been justified at common law), nor to the issuing of a Writ of Possession.

130 To the extent that the second mortgagee sought specific performance of the covenant in the second mortgage to give possession upon default, such an order for specific performance is a discretionary remedy, concerning which the court can take into account any interests of third parties who are not bound by the equity which gives rise to the claim for specific performance: Spry, ***Equitable Remedies***, 6th ed 2001, p 201-203; Meagher Gummow & Lehane's ***Equity Doctrines & Remedies*** 4th ed, 2002, para [20-110]. In this way, the rights of the first mortgagee to possession could be taken into consideration.

131 Even if such an order for specific performance were made, it would be an *in personam* order for the mortgagor to give up possession, which would not bind the first mortgagee in any way. It would be open to the first mortgagee to exercise its statutory right under section 60 ***Real Property Act 1900*** to possession upon default, and that statutory right would be likely to have priority over the right to possession of the second mortgagee.

132 These matters show that, though order (a) of the orders made below (set out at para [24] above) was not in principle inappropriate as a way of enforcing the covenant to give possession upon default (subject to any question of whether the first mortgagee should have been joined in an application for that order, and of discretionary defences), the order for possession and the order for leave to issue a Writ of Possession should not have been made.

133 These matters concerning the order for possession have another significance as well – they impact upon the discretion to make the order for sale of the land. As Lord Cairns LC said in ***Heath v Crealock*** (1874) 10 Ch App 22, at 32:

> "A Court of Equity is not in the habit of ordering a sale unless it can go on and complete the sale in every necessary way, giving possession and insuring that the title deeds shall be handed over."

When the first mortgagee has the power to take possession of the land, in a way that the second mortgagee cannot stop, that is a relevant matter to take into account in deciding whether to make the order for sale of the land at all.

PART B4 - Conclusion on Order for Sale and Possession

134 There is an inherent power for the Court to make an order for sale of land at the suit of an unregistered second mortgagee. However in the present case there are significant shortcomings in the exercise of that power. The most significant is the absence of the first mortgagee from the suit, even though its interests were directly affected by the orders sought. Another is that the inherent power of the Court to enforce the second mortgage enables it to order sale of only the interest of the mortgagor which has been mortgaged to the second mortgagee.

135 These have the effect that the power has not in substance been exercised. The orders for possession and for issuing of a Writ of Possession are likewise ones which were not justified. Though the making of an order for specific performance of the covenant to give possession upon default is the sort of remedy which can in some circumstances be given in relation to an unregistered ***Real Property Act 1900*** mortgage, in the present case it was done in the context of the making of the other orders which were flawed. Even that order is infected by the errors in the others. Each of the orders which are listed in subparas (a) to (h) in para [24] above should be set aside.

PART C - PENALTIES

136 The interest rate under the present mortgage was 118.8% pa, reducible to 60% pa if paid within 7 days of the due date. There is no doubt that both the higher rate and the lower rate are very high rates of interest. However, no attack is made on the mortgage as being unconscionable, or in any other way able to be set aside. Nor was it alleged that the mortgage was one to which the ***Consumer Credit (New South Wales) Code*** applies.

137 Rather, the attack which is made is that the margin between 60% and 118.8% is such that it could not possibly be a genuine pre-estimate of the loss arising from late payment, and hence is a penalty.

138 That argument fails. One requirement for a provision in a contract being a penalty is that it states a consequence which is agreed to follow from breach of one of the provisions of the contract. The structure of the interest clause in the present case is not like that. Rather, the interest clause in the contract involves a promise by the mortgagors to pay interest at 118.8%, and a promise by the mortgagee that, if the mortgagors pay the interest on time, or no more than 7 days late, the mortgage will accept interest at 60%. A clause structured in that way is not regarded as a penalty: ***Wallingford v Mutual Society*** (1880) 5 App Cas 685 at 702; ***CJ Belmore Pty Ltd v AGC (General Finance) Ltd*** [1976] 1 NSWLR 507. There is a lot to be said for the view that a clause which gives a benefit to a contracting party who performs the contract is no different in substance to a clause which imposes a detriment, equal in amount to that benefit, on a contracting party for breach. There is also a lot to be said for the view that equity ought look to substance not form. However, the law in this respect has been settled for too long for a first-instance judge to give effect to those views.

139 The mortgagors also attacked other clauses in the mortgage, including certain clauses which provided for damages for late payment, and which fixed the rate at which legal fees could be charged. However, none of those other clauses entered into the calculation of the monetary amount for which judgment was given in the Court below. Thus, it is unnecessary to decide whether those other clauses are penal.

140 Insofar as the appeal attacks the quantum of the monetary judgment in the Court below, it will be dismissed.

Costs

141 Even though the appellants have failed in two of the three broad topics which were raised in this appeal, the argument concerning the topic on which the appellant succeeded was considerably longer and more complex than the other two arguments put together.

142 Rather than have the parties incur the expense of another appearance, I have made a costs order on the basis which at the time of making the orders on 19 October 2005 seemed to me to be correct, without assistance from counsel, and reserved to either party liberty to argue for a different order. That costs order was that the respondent to the appeal pay one half of the costs of the appeal, and one half of the costs in the Court below.

Orders

143 The orders I made on 19 October 2005 were:

> 1. The orders made in these proceedings on 1 August 2005 are varied by setting aside those parts of the orders which provide *"I make order 2 on the notice of motion of 17 June 2005 and"* and *"I order the defendant to pay the plaintiff's costs"* , and inserting in their place *"I order the plaintiff to pay one-half of the defendant's costs."*
>
> 2. The respondent to this appeal to pay one half of the appellant's costs of the appeal.
>
> 3. These orders not be entered for 21 days from the date that reasons for these orders are handed down, unless the Court otherwise orders.
>
> 4. Grant liberty to either party to apply, within 14 days after the date that reasons for these orders are handed down, to revoke or vary any of these orders insofar as they relate to costs.

****

POST SCRIPT

144 After he had been notified of the orders made in this matter, and that reasons would be delivered later, Mr Knaggs, very properly, raised a concern about whether it was correct for the order to have been made in

Chambers, and for reasons for the decision to be simply sent to the parties, without any separate appearance in Court. He drew attention to Rule 36.2 and 36.3 ***UCP Rules***.

145 A judge of this Court frequently makes orders in Chambers. In the Equity Division the usual practice is to make orders in adoption matters and protective matters in Chambers. Other orders, such as consent orders, where the Court wants to save parties the expense of an additional appearances, are also made in Chambers. In our system of law, the custom and practice of superior courts can itself be a source of law, at least unless it is shown to be contrary to a Statute or a provision of the substantive law.

146 Section 11 ***Supreme Court Act 1970*** says:

> **"11 Distinction between court and chambers**
> (1) The distinction between court and chambers is abolished.
> (2) The business of the Court, whether conducted in court or otherwise, shall be taken to be conducted in court."

147 People who are judges of the Court do many things in their capacity as private citizens. The test under section 11 for whether, when a person who is a judge does some act, that act counts as an action of the Court, is a functional one – it depends on whether what a Judge is doing when he or she does that act is *"the business of the Court"*. Under section 11, there is no restriction on where the Supreme Court may exercise its powers, apart possibly from constitutional limits, not relevant in this case, requiring there to be a nexus with New South Wales. This is shown by section 11(2), which by the expression *"or otherwise"* contemplates no restriction on where the business of the Court might be conducted. Accordingly, sometimes a Duty Judge will make orders at his or her home, or at whatever other place the applicant for the orders meets the Judge, or is able to communicate with the Judge (as happens if a particularly urgent order is made following a telephone application). If those orders are the type of order which is part of the business of the Court, the orders are ones made by the Court.

148 The orders in the present case were clearly made as part of the business of the Court. That they were made in Chambers does not detract from their validity.

149 Rule 36.2 ***UCP Rules*** says:

> " **36.2 Written reasons for judgment**
> (cf SCR Part 40, rule 2; DCR Part 31, rule 9; LCR Part 26, rule 2)
> (1) If the court gives any judgment, or makes any order or decision, and its reasons for the judgment, order or decision are reduced to writing, it is sufficient for the court to state its judgment, order or decision orally, without stating the reasons.
> (2) After a judgment, order or decision has been stated orally under subrule (1), a written copy of it, including the court's reasons for it, must then be delivered to an associate,

registrar or some other officer of the court for delivery to the parties or may instead be delivered directly to the parties."

150 Rule 36.2(1) is designed to make clear that, in the usual situation of judgment being given in open Court, it is sufficient for the Judge to state the orders, say words to the effect of *"I publish my reasons"* and then make available for delivery to the parties a written transcript of the reasons.

151 In the interpretation of Rule 36.2(2), the word *"then"* means *"at that time"*, not *"at any time thereafter"* – ***Palmer v Clarke*** (1989) 19 NSWLR 158 at 173, per Samuels JA. However, Rule 36.2(1) is concerned with the situation where *both* the Court gives a judgment or makes an order or decision, *and* there are written reasons available at the time for that judgment, order or decision. That is because Rule 36.2 applies only *"after a judgment, order or decision has been stated orally under subrule (1)"*, and Rule 36.1 operates only when the Court both gives judgment, etc, and its reasons are reduced to writing. Thus, Rule 36.2 has nothing to say to a situation where orders are made without giving reasons at the time. Whether it is possible for a Judge to do that depends on matters other than Rule 36.2.

152 Rule 36.3 ***UCP Rules*** provides:

" **36.3 Reserved decision**

(cf DCR Part 2A, rule 7, Part 31, rule 10)

(1) If in any proceedings a judicial officer reserves his or her judgment or decision on any question, he or she:

(a) may give the judgment or decision, either in open court or in the absence of the public:

(i) at the venue for those proceedings, or

(ii) at any other place at which he or she is authorised to hear or dispose of those proceedings, or

(b) may reduce the judgment or decision to writing, sign it and forward it to the registrar at the venue for the proceedings.

(2) If a registrar receives a judgment or decision forwarded under subrule (1) (b):

(a) the registrar must appoint a time for the judgment or decision to be read, and

(b) the registrar must give at least 24 hours' notice to the parties, in writing or otherwise, of the appointed time, and

(c) at the appointed time, the judgment or decision must be read by another judicial officer of the court, or by the registrar, whether or not the court is sitting at that time.

(3) A judgment or decision given under subrule (1) (a) or read under subrule (2) (c) takes effect on the day on which it is so given or read and is as valid as if given by the judicial officer

> at the hearing of the proceedings to which the judgment or decision relates.
> (4) Rule 36.2 applies to a judgment or decision referred to in this rule in the same way as it applies to a judgment or decision referred to in that rule."

153 In the application of that rule to the Supreme Court, Rule 36.3(1)(a) has the effect that a judgment or decision may be given at any place at all. It is only if a judgment or decision is reduced to writing, signed and forwarded to the Registrar, that the procedures under Rule 36.3(2) come into play. The power under Rule 36.3(1)(b) is not one which has been availed of in the present case. Thus Rule 36.3 does not decide whether the procedure I followed was correct.

154 I decide nothing about whatever may now be the situation, after adoption of the ***Uniform Civil Procedure*** practice, concerning the power of a District Court judge to give reasons at a different time to the making of orders (***Palmer v Clarke*** (1989) 19 NSWLR 158), or concerning the power of a judicial officer in the Local Court to adopt an informal means of making orders and notifying the parties of them (***Robert William Cumming v Tradebanc International Ltd*** [2002] NSWSC 70 at [38] – [58]). Because there are no restrictions on the manner in which, or place at which, the Supreme Court can make orders, the type of complications which were considered in the two cases just mentioned do not apply to the Supreme Court.

155 A significant difference between the Supreme Court on the one hand, and the District Court and the Local Court on the other, is that the Supreme Court is a superior court of record. Thus, its orders are valid unless and until overturned on appeal: ***Re DEF and the Protected Estates Act*** [2005] NSWSC 534 at [19] - [20] and cases there cited. That principle would mean that the orders I made would be valid unless challenged on appeal, even if they were made by an impermissible procedure. However it would be wrong to allow that consideration to affect my conclusion on whether or not the procedure was correct. One reason is because I cannot know at this stage whether the orders will be appealed against. Another is that the fact that the orders might ultimately come to be ones which were unassailably valid is not a reason for knowingly persisting in a procedure which is wrong.

156 There is an inherent power for a superior court to make orders, and give reasons later. In ***Au Pui-Kuen v Attorney-General (Hong Kong)*** [1980] AC 351 Lord Diplock, delivering the opinion of the Privy Council, said, at 356:

> "Their Lordships appreciate that, particularly in criminal cases, it may be desirable, in order to avoid delay, that a court should announce its decision orally at the conclusion of the hearing and state that reasons for the decision will be rendered in writing later. This is a common practice in criminal appeals and an analogous procedure is often adopted by this Board. It is, however, in their Lordships' view,

> important if the court proposes to provide written reasons for its decision later (1) that it should announce in open court that such is its intention; (2) that the written reasons when prepared should be "handed down" to the parties or otherwise formally communicated to them; and, if they relate to proceedings that have taken place in open court, (3) that the written reasons should be available for public inspection."
>
> While that passage is dealing with the situation where a court announces its decision in open court, and gives reasons later, his Lordship's statement could not have been made if there were no inherent power for a superior court to make orders and give reasons later.

157 In ***Stratford v Ministry of Transport*** [1992] 1 NZLR 486 at 488-489 Eichelbaum CJ said:

> "… it is well established, as a matter of practice, that a judge may announce the decision and defer the giving of reasons. Generally, it is a process judges endeavour to avoid; the preferable course is that the decision is accompanied by the reasons for it. However, in the exigencies of judicial life, sometimes it is impossible to avoid separating the two, for example when in injunction proceedings or the like an immediate decision is required, or in the case of rulings during a jury trial when on occasions it may be necessary to proceed without delay."

158 In ***Mulvena v Government Insurance Office of New South Wales*** (NSW Court of Appeal, 16 June 1992, unreported) Mahoney JA, with whom Clarke JA generally agreed, recognised, at 10, that ***Palmer v Clarke*** *"… establishes that where an order is made by the District Court and reasons are given, not then, but subsequently, an error has occurred."* Obiter, at 11, his Honour contrasted that situation of the District Court with the situation of the Supreme Court:

> "A court of unlimited jurisdiction may make orders taking effect instanter and may give reasons for the order subsequently. That is, of course, done not infrequently by this Court. No error is involved in it so doing. Indeed, after an order has been pronounced, it and the reasons (if any) then given for the making of it may be changed before the order is formalised by entry …"

159 In ***Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd*** (2001) 4 VR 28 Chernov JA (with whom Charles and Vincent JJA agreed) held (at 36, 42) that there is no common law requirement for a judge of the Supreme Court to give reasons contemporaneously with pronouncing judgment. His Honour said, at 43:

> "Judges are frequently requested to grant relief as a matter

> > > of urgency. Many such applications raise difficult issues and call for complex reasons for the decision to grant or refuse the remedy sought. If the court were to wait before making the appropriate orders in such applications until the reasons have been formulated to the point where they can be published, the delay may defeat the whole purpose of seeking the order in the first place. It is not uncommon, therefore, in appropriate cases, for judges to grant the relief sought and to deliver reasons for it later."
>
> His Honour went on to give 13 examples, in both the High Court and the Supreme Court of Victoria, where that practice had been followed. He concluded, at 44:
>
> > "… although courts recognise the desirability of judges of superior courts delivering reasons for their decisions contemporaneously with pronouncing them, there is no obligation on them to comply strictly with the requirement so that mere failure to do so would constitute error. Where the interests of justice require it, a court may properly pronounce judgment and give reasons for it later."
>
> I respectfully agree.

160 Of course, if the power to make orders and give reasons later were to be exercised, care would need to be taken that it was quite clear on what day the orders had been made (as that is the date on which they take effect unless the Court otherwise orders - Rule 36.4(1).) As well, if a judgment or order were to be given, and notified to the parties in advance of reasons, it would usually be appropriate to ensure that both parties received notification of the orders simultaneously. In the present case, after I had reserved my decision and at a time when I had decided what orders to make my Associate contacted each of the legal representatives who had appeared. She informed each that I proposed to make orders in Chambers, to notify each of them by fax of those orders, and to deliver reasons later, but that I would adopt that course only if they both consented. Both legal representatives stated their consent. After the second of them to be contacted had given his consent, the orders were made in Chambers and notified to the two of them by a facsimile addressed to them both, and sent to each of them simultaneously. Only later did Mr Knaggs raise the present concern about this way of proceeding.

161 As it happened, these particular orders were made orally in Chambers. However it would not have made any difference if they were made by signing a minute of orders in Chambers. Signing a minute of the orders is the way in which orders are frequently made in business conducted in Chambers like adoption and protective matters, and if a judge makes orders in Chambers on an ex parte application.

162 In deciding whether to adopt a procedure like this, a court would also,

of course, take into account the principle that the usual way of conducting the business of the Court in contentious matters is in open Court, and whether the type of case was one where there was a prospect that a party might want to lodge an immediate appeal and have it heard urgently, for which reasons would be needed at the time of the making of the orders.

163 In the present case, having now reconsidered the procedure which I adopted, I am satisfied it was correct. If I had come to a different view, it would have been an easy enough matter to remedy – I could have simply revoked the earlier orders, listed the matter for handing down of judgment in open court, and made the orders again in the same terms at the time of delivering the reasons.

164 It would have been unfortunate though, if the result of my reconsidering the procedure was to find that it was not possible for the Court to adopt the procedure which I adopted. That procedure recognised the realities that the case listing procedures of the Court force judges to write reasons in whatever odd corners of time are left over from their other duties, and that typing, checking, proofreading and photocopying of reasons for judgment needs to be done before they can be delivered in written form. As well, that procedure enables the parties to know where they stand as soon as a decision has actually been made. In the present case, where interest was running at an unusually high rate and a challenge to the validity of charging that rate of interest had failed, it seemed to me to be particularly important that the parties know this as soon as possible. The procedure adopted provides the parties with the reasons for that decision (as must be done to comply with the basic judicial duty to provide reasons for decisions on substantive matters), and saves the parties from incurring the unnecessary expense of an extra appearance at Court. As well, the reasons for judgment are available to the public by being posted on the Court’s internet website promptly after being notified to the parties.

****

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.