SOME REMEDIES OF BANKS AS SECURED CREDITORS

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In this paper, I will explore some of the remedies available to banks as secured creditors. Necessarily the treatment must be brief, and focus only on the major remedies.

I hope that it is still true to say that banks regard the realisation of securities as a last line of defence. "To lend money against security, knowing full well that one is likely to have to realise that security, is bad banking practice." [1] Part of the reason for that is, of course, that enforcing a security can be lengthy, expensive and complicated. I expect therefore that in ordinary circumstances, banks would not lend unless satisfied of a borrower's capacity to repay. Unexpected events may nevertheless compel recourse to securities which have been taken.

It seems to me that in respect of the enforcement of securities, the Courts have been vigilant to protect the rights of the borrower, and, as far as possible, to require reasonableness of the creditor. In this atmosphere, it is obviously essential that banks enforce their securities in the manner leaving them least vulnerable to challenge. By this paper, I hope to signal some potential pitfalls.

I will concentrate on what I understand to be the three especially popular bank securities: the registered real property mortgage, the company debenture, and the guarantee. A guarantee is not a security in the strict sense with which we are familiar. (The law regards a security as an interest in a debtor's property, which the debtor gives to his creditor. From a security, the creditor derives rights over the property to satisfy an obligation owed to the creditor by the debtor or someone else. [2]) The ordinary guarantee gives the creditor no more than the surety's personal promise. Nevertheless, bankers usually regard guarantees as amongst their stable of securities, so I include them within the scope of this paper.

The remedies available to secured creditors may usually be discerned from the terms of the security document. Undoubtedly, however, the lawyer who had to read the document to realise the remedy would be far too expensive for the client. The text of many securities, like much legislation, makes very bad reading.

The point was illustrated by Stephen J. in graphic language in National Bank of Australasia Limited v. Mason. [3] The High Court there considered the extent of a guarantor's obligation to pay moneys "now owing", the definition of which extended to contingent debts. His Honour pointed out that the whole of the relevant definition must be read, a task which he said was "not easy, consisting as it does, of one unpunctuated sentence of over 450 words of small print which is presented to the reader in 25 closely set lines, each of excessive length. There the resolute and persevering may find, in the midst of much else, the phrase 'and whether contingently or otherwise'." There is of course nothing novel about that implicit admonition, so I will not dwell on it. Lawyers must be resolute and persevering enough to read these convoluted provisions, to be sure of any qualifications that may impose upon the ordinary mode of exercising the remedy. Fortunately, perhaps, the form of the security documents used by banks is standard. I am not concerned today with the particular language of bank securities, but the principles generally applicable to the enforcement of them.

The major remedies open under such securities are an action for debt founded on the personal covenant to pay, and, accruing more particularly by force of the security, the right to enter into possession of the subject property, the power of sale, the power to appoint a receiver of the subject property, and the right of foreclosure. Before coming to these remedies in detail, I will mention two particular features of bank securities which bear importantly on their enforcement. Those features tend to distinguish bank securities from those taken by other lenders.

"All monies" Securities

In the first place, bank securities are usually "all monies" securities. Money clauses in bank securities are extremely widely drafted, to embrace all amounts for which a customer may become liable to the bank in the course of a continuing relationship. I surmise that these standard, comprehensive securities are drafted generally in order to secure any type of financial accommodation which the bank may provide to any type of customer. Such drafting also assumes that the needs of the customer may vary, and that the granting of additional finance, or variations to existing accommodation, should, desirably, not necessitate the recasting of the securities. [4] Now some Courts may find such drafting distasteful, but all would I expect recognise its commercial object. Expressions in such provisions are interpreted as bearing their normal commercial meanings. Hence, for example, the term "further advances" was construed by the Privy Council to mean a sum in fact advanced in addition to the original principal sum, and not as including the case where there had been an extension of the agreed period for repayment of the original sum. [5] The expression "banking facilities" has been construed to include foreign exchange dealings or facilities. [6] The question once arose whether a clause in a bank mortgage, expressed to entitle the bank to charge the mortgagor's account with "all costs charges or expenses legal or

otherwise" in connection with, among other things, the attempted exercise of any remedy, extended to costs of litigation which had been unsuccessful. In view of the generality of the clause, the Court held that it did, subject only to the reservation that the costs must have been reasonably incurred. [7] These wide, all embracing clauses should not, in other words, be read down, but rather, read in accordance with natural meanings and ordinary commercial usages.

Payment "on demand"

The second particular feature of bank securities is the usual provision for payment "on demand". It has been considered that on ordinary contractual principles, the amount of a loan repayable "on demand" is continuously recoverable - at all times from the commencement of the loan, and that a writ would constitute a sufficient demand. [8] This can however no longer be said without qualification in relation to bank securities requiring payment on demand, with no other time limitation on recovery favourable to the borrower. Qualification is necessary in light of the decision of the High Court in Bunbury Foods Pty. Ltd v. National Bank of Australasia Limited. [9] Bunbury had given a bank a debenture securing loans. Clause 1 provided that the loans were repayable on demand. The bank, having made demand without receiving payment, appointed a receiver. The customer challenged the appointment. One of its contentions was that a term should be implied into the security, to the effect that the bank had to give reasonable advance notice before making demand, so that Bunbury would have time to rearrange its finances. The High Court readily rejected that contention: such a term would be clearly inconsistent with the obligation to repay on demand. However the Court did say that in such a case, the security holder, before resorting to its remedy, should allow the debtor a reasonable time to comply with the demand for payment. The Court said this: [10]

> "... the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realise the security ... In determining whether the debtor has had such an opportunity it will be relevant to take account of the debtor's knowledge, lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor."

This decision makes it clear that secured creditors cannot arbitrarily enforce their securities without allowing their borrowers a reasonable time to comply with a demand for payment. What is a "reasonable" time for payment will depend on the circumstances of the particular case. In Bunbury, the bank demanded payment on 5th April and appointed a receiver on 8th April. The Court held that Bunbury had been given a reasonable time. The Court said this: [11]

> "... the events of 8 April 1982 are relevant. On that day a letter giving details of the debt was handed to a responsible officer of the company who replied that Bunbury could not pay, as was indeed the case. There was therefore no question of allowing Bunbury any further time in which to get the money and the bank was accordingly entitled to appoint the receiver and manager immediately. As we have seen, it matters not that the letter of 8 April incorrectly stated the amount of the debt."

It is impossible to lay down generally applicable rules as to what will be considered a reasonable time in this context. Recognising that, I would still think correct what Blackburn J. said in 1862 [12] that "a debtor who is required to pay money on demand ... must have it ready, and is not entitled to further time in order to look for it".

I turn now to the enforcement of mortgages over registered real property.

Mortgages

(i) Action for moneys owing

A mortgage commonly contains an express covenant by the mortgagor to pay the amount secured. In the event of default by the mortgagor, the mortgagee can sue on that covenant, or it can sue for any deficiency remaining after exercising the power of sale. In most cases, it will be pointless to sue for the amount owing before selling the land. Unsecured creditors sue debtors who fail to pay, but usually in the realisation that a judgment will facilitate execution against the debtor's property. A secured creditor already has a measure of control over the debtor's property. The only point in suing a defaulting debtor, before proceeding to sell his land, may be to obtain a judgment to found a bankruptcy notice. The threat of bankruptcy may encourage a wealthy but obtuse debtor to pay, without compelling the bank into the more complicated exercise of realising its security.[13] This I suppose involves the theory that many are cold but few are frozen. Experience shows that litigation may help to thaw even the frozen.

(ii) Sale

With real property, sale of the land is the most common method of enforcing the security. At common law, a mortgagee had no power of sale, so an express provision was generally inserted into the mortgage deed. That is no longer necessary, because the relevant statutes accord a power of sale. I instance s.83(1)(a) of the Queensland Property Law Act, 1974. The statutes also regulate the exercise of the power of sale. I will, for convenience, refer to the Queensland provisions.

In considering such provisions, one should bear in mind that the mortgagee's right of sale has been called a very drastic

remedy, necessitating strict observance of the conditions of its exercise. [14] Section 84 of the Queensland Act requires, before sale, that there should have been default by the mortgagor, service of a notice on him requiring that he remedy that default, and continuance of the default for 30 days from service of the notice. It will ordinarily have been necessary to serve a demand for payment earlier, and, depending on the form of the security, to allow a reasonable time to elapse, in order to establish default to found a notice under s.84.

The Queensland Full Court recently considered the form of notices under s.84. In Clarke v. Japan Machines (Aust.) Pty. Ltd. [15] it was held that a notice under s.84, based on default in payment of moneys due under the mortgage, must specify a definite amount as payable. Clearly, an object of the notice is to give the mortgagor a last chance to pay, so there may be a real point in reminding him of the amount payable. Perhaps generously to the creditor, some error will however be forgiven. In Clarke it was put this way: [16]

> "The position may be summarized as follows. Where a default in the payment of principal and interest (or both) is relied on, s.84(1) requires an amount to be specified. An error in specification of the appropriate sum will not be the end of the matter. A question of fact and degree is involved in every case. The most relevant factors in determining validity will be the extent of the error, and the capacity of the notice to give the mortgagor a reasonable opportunity to do what he is obliged to do. ... In the present case, there is uncertainty as to whether there has been an acceleration; there is an error with an enormous scope; the mortgagor was not given any clear lead on the nature of the obligation which the mortgagee was asserting, or any clear apprehension of what it would achieve by paying a sum that bore no direct relationship to the sum it owed the mortgagee. I am satisfied that the notice was invalid."

In short, overstatement of the amount due will not invalidate a notice, provided the extent of the overstatement is not substantial.

A less arid topic is the way in which the mortgagee should bring about the sale. It may often be desirable to obtain vacant possession of the property before selling. With vacant land, there should be no difficulties. Occupied dwellings may however pose problems. The bank will often have to sell business premises which are let, subject to the existing tenancies. Where the customer is in possession, and refuses to leave, the bank will usually have to commence an action in the Supreme Court to recover possession. It will have a right to possession under the terms of the mortgage. If the mortgage contains an attornment clause, the resultant tenancy should first be terminated. [17] Self-help is an alternative to Court proceedings, but may not be advisable, or, with this character of creditor, appropriate. In

cases of clear default, a writ should be followed up promptly with an application for summary judgment.

What is the nature of the duty on a bank when selling as mortgagee? While it is true to say that a mortgagee is not a trustee of its power of sale for the mortgagor, it does owe duties to the mortgagor when selling.

In England, a mortgagee is obliged to take reasonable precautions to obtain the market value of the property. [18] In Australia, apart from statute, it is uncertain whether the obligation extends beyond a duty to act in good faith: such duty, it has been said, requires only that the mortgagee act without fraud and without wilfully or recklessly sacrificing the interests of the mortgagor. [19] Apart from statutory duties, judges in Australia have generally [20] not required the more extensive obligation to take reasonable precautions. In Queensland, however, the debate has been settled statutorily, by s.85(1) of the Property Law Act, which obliges the mortgagee "to take reasonable care to ensure that the property is sold at the market value". That is substantially the duty applied in England.

One obviously could not exhaustively list the situations which would, or would not, satisfy such a test. Whether the duty is met must depend on the circumstances of the particular case. There are, however, a number of matters of general application which may be mentioned. [21] First, it may reasonably confidently be said that once the power of sale has arisen, the mortgagee may sell at any time. The mortgagee need not, for example, nurse the property through unfavourable market conditions in the hope of improvement. The mortgagee may delay a sale, and will not be answerable if the market deteriorates in the meantime. Unlike a trustee, a mortgagee need not act as would a prudent person in relation to his own property. However, once the property is on the market, the statutory duty to take reasonable care to ensure sale at market value would require that, for example, a reasonable time be allowed to publicise the proposed sale, and allow inspection and consideration by potential purchasers. Usually public advertisement will be necessary, especially with proposed sale at auction. The advertisement must be framed to encourage sale at market value. Deficient, or should I say, less than meticulous, forms of advertisement have recently led to findings of breach against mortgagees. [22] The advertisement should be framed to reach the sort of person or entity who might be interested in purchasing; it should include all pertinent details relating to the property, and be included in newspapers circulating throughout the area of likely purchasers. A prudent mortgagee will, before selling, obtain a written valuation of the property from a qualified valuer, preferably a valuer with no financial interest in effecting a sale for the mortgagee. Clearly, a mortgagee should be wary of selling at less than the amount of the valuation. Valuation expenses will be recoverable from the proceeds of sale. The question sometimes arises whether a mortgagee should spend money on a property, to increase its market value. For example,

must the mortgagee seek a rezoning, or restore a building on the land, where the value will be substantially enhanced, by an amount exceeding the outlay? The short answer is no. Likewise, the mortgagee need not, as a rule, consult with his mortgagor, although sometimes consultation about the sale and proposed purchasers may be prudent. Let me say in conclusion on this aspect that a mortgagee should preferably sell to a completely independent entity. If a mortgagee sells to some related entity, it runs the risk of infringing the common law principle that such a sale should be a totally independent bargain. A sale to an associate will arouse suspicions which are obviously better avoided. [23] Sales in such circumstances have led to major litigation in the past. [24]

One High Court Judge has said that the duty under the Queensland s.85 is more easily discharged by experienced large financial institutions than by small investors. [25] It goes without saying that institutional lenders like banks should have devised check-lists of standard procedures to be gone through, and carefully documented, to ensure, first, that the statutory duty is discharged, and second, that the prospect of a successful challenge is minimised by the retention of documentary proof that all which should have been done has been done. Challenges are of course mounted by disappointed mortgagors, especially in economically unfavourable times, either by claiming for injunctions to restrain sales in advance, or by accounting type actions after sales at alleged under-values. Such proceedings by mortgagors, if brought in advance of a sale, can seriously jeopardise the creditor's exercise of the power of sale. The view has traditionally been held that a sale will not be restrained at the suit of a mortgagor except on condition that the mortgagor bring into court the amount owing under the mortgage. There is authority for the view that this condition is inappropriate where the mortgagor is challenging, not the proposed manner of exercise of the power of sale, but the existence of the power of sale. [26] That aside, there have been recent instances where that ordinary prerequisite for such an injunction was not required of the mortgagor, because it was thought that to require it would not be fair and just. I will express my own view in this area to the extent of emphasising that payment into Court by the mortgagor is an extremely important safeguard which should ordinarily be exacted, and that such challenges by mortgagors to mortgagees' sales must be brought to trial with the very minimum of delay.

(iii) Foreclosure

So much for sales. With regard to mortgages, I propose finally to mention the remedy of foreclosure. Foreclosure is the procedure whereby the mortgagor's equity of redemption is extinguished, and the mortgagee becomes the virtual owner of the property, subject only to prior mortgages. The procedure, in Queensland at least, is somewhat complex. The mortgagee first obtains an order nisi. This provides that if the mortgage debt is repaid within a certain time - usually, 6 months, the mortgage

will be discharged. If, when the period expires, the amount is still outstanding, a foreclosure order absolute is made, and the property becomes that of the mortgagee. Banks seldom foreclose. Theoretically, it is a potentially valuable remedy. A mortgagee owed $20,000 might, by foreclosure, gain ownership of a property worth double that. The advantage is largely theoretical, however, because the borrower would usually in such a case be able to obtain alternative finance from which to repay the mortgagee threatening to foreclose. It seems that this remedy is largely of only historical interest. [27]

I turn now to a brief consideration of the enforcement of debentures given by companies in favour of banks.

Debentures

A debenture in favour of a bank usually creates a fixed charge on certain company assets, and a floating charge over the remainder. The fixed charge would often cover such things as goodwill, uncalled capital, freehold and leasehold property, and fixed plant and machinery. The company would therefore be prevented from disposing of those assets without the bank's consent. The floating charge over the rest would leave the company free to deal with the assets in the ordinary course of business, selling them, for example, and using the proceeds to purchase fresh assets which would be subject to the floating charge. [28] The Companies Codes provide for registration of such debentures, which may crystallise, or become enforceable, in a variety of situations, including, for example, default in payment of moneys on demand, the presentation of a winding-up petition against the company, assignment of the company's fixed assets without consent, failure to observe covenants, and so on. These things are well understood, so I will not dwell on them.

The usual method of enforcing a debenture in favour of a bank is by the appointment of a receiver. The directors of a company in financial difficulties, acknowledging those difficulties, may sometimes invite the appointment of a receiver. More usually directors would resist such an appointment. Anxious to continue to trade, they will press the bank to continue to honour cheques, especially wages cheques. Refusal to do that would ordinarily lead to closure of the company's business. On the other hand, honouring cheques may serve only to increase the company's losses. Banks would usually be encouraged to appoint a receiver in such circumstances, especially if other creditors were proceeding against the company. [29] An alternative to appointing a receiver would be for the bank as mortgagee to enter into possession of the property through an authorised agent.

It is instructive to spend a moment comparing the creditors' positions on appointing a receiver on the one hand, and on the other, entering into possession as mortgagee. Receivership has usually been preferred because, since the receiver is usually agent of the company, the bank, by appointing a receiver, avoids assuming the perceived higher duty of a mortgagee in possession.

We have already seen that in Queensland at least, a mortgagee exercising power of sale, for example, owes a duty to the mortgagor company to exercise reasonable care - a duty which surpasses an obligation merely to act in good faith. Generally, a mortgagee in possession is liable to account to his mortgagor for rents and profits on the footing of "wilful default", that is to say, he must account not only for the sums he receives, but also for those sums which, but for his own default, he might have received. The risks in taking possession may however be exaggerated: they should be minimal if the mortgagee exercises common sense. Receivers have always been considered subject to a duty to the debtor company, but not as liable for losses caused by their negligent performance of bona fide acts. [30] Now however, because of s.229 of the Companies Codes, receivers, as "officers" of companies, are statutorily obliged to exercise a reasonable degree of care and diligence in exercising their powers in discharging their duties. In terms of acting free from interference, a receiver is perhaps in a slightly better position, because a receiver usurps the board's power to manage the company, whereas the directors may still act with a mortgagee in possession. But they can act only subject to the rights of the debenture holder, so that little may turn on this in practise.

I embarked on this comparative analysis in light of the suggestion, in a recent article in the Law Institute Journal, that there has been a movement away from receivership towards the debenture holder's exercising the powers conferred upon a receiver, but by itself as mortgagee in possession. [31] The author, Mr Andrew Marks, says that the trend has, in the case of medium to large administrations, been the result of a wish to avoid the operation of s.221P of the Income Tax Assessment Act. Under that section, the trustee of a company's property is liable to pay to the Commissioner of Taxation, in priority over all other debts whether preferred secured or unsecured, tax previously deducted by the employer company from wages but not remitted to the Commissioner. "Trustee" is defined to include a receiver. [32] The provision would however seem inapplicable to a mortgagee in possession, which is not a trustee by character, and is not defined as such for the purposes of the Income Tax Assessment Act. Preferably, therefore, before appointing a receiver, a bank should ensure that tax deducted has been remitted. One way would be first to inspect the company's books of account, a task for accountants which would ordinarily be authorised by the terms of the debenture. In a case where there is a substantial unpaid liability to the Commissioner, a bank may be well advised to enter into possession as mortgagee, rather than to appoint a receiver. As my earlier analysis suggests, there may be no great practical disadvantage in taking that course.

I turn now to the enforcement of guarantees.

Guarantees

A guarantee is an accessory contract, by which the surety undertakes to be answerable to the creditor for a present or future debt or liability of a principal debtor. The surety's liability is a secondary liability, accruing on default in payment by the principal debtor. In Queensland, the enforceability of a guarantee depends upon its being in writing. [33]

The usual form of guarantee gives the bank a right of action against the guarantor as soon as the customer has made default and the bank has served a written demand upon the guarantor. As has been seen, in view of the decision of the High Court in Bunbury, the bank will often have had to allow the customer a reasonable time following service of the demand before concluding that he has defaulted. By parity of reasoning, the guarantor should be allowed a reasonable time to comply with the demand on him before the bank commences proceedings.

It is often said that guarantees are strictly construed, and favourably to the surety. The cases do show that creditors are not allowed any particular latitude beyond that expressly accorded by the terms of guarantees. That is not unusual in contract. Perhaps the consequences in this area give a marked impression of favour to the surety. Be that as it may, the holder of a guarantee may unwittingly jeopardise his rights against the surety if he is not careful and thoroughly familiar with the terms of the instrument, and careful to avoid, for example, alteration to his relationship with the principal debtor which is material to the surety's obligation and which the instrument of guarantee does not authorise. Hence the decision of the Privy Council to which I earlier referred, [34] that a guarantee had been discharged by the creditor's increase of the interest rate payable by the principal debtor from 9% per annum to 16% per annum. The guarantee authorised the creditor to grant the borrower time or other indulgence without affecting the liability of the guarantor. There being no particular "indulgence" in an increased interest rate, their Lordships found that provision inapplicable, and the creditor lost its right of recourse to the surety.

The enforcement of a guarantee involves, in the absence of earlier payment in response to a demand, an action in debt in the court brought by the creditor against the surety. Now sureties are of course usually most reluctant defendants to Court proceedings. Banks and other creditors have frequently been denied early judgment by a wide variety of ingenious defences raised by guarantors: with greater frequency, it seems, in times of general economic hardship. Such defences do not invariably fail at trial. Notably the High Court recently in Commercial Bank of Australia Limited v. Amadio [35] upheld a ruling that a guarantee should be set aside because, as the majority held, it had been induced by unconscionable conduct on the part of the bank in making inadequate disclosure to the guarantors, who were

persons under special disability, as to the state of the principal debtor's relationship with the bank. In view of the decision in Amadio, which reaffirmed previously established principles of equity, banks would be well advised, when taking guarantees, to give the proposed surety details of the financial position of the principal debtor, as known to the bank, and details of the transaction to be guaranteed, and obtain an acknowledgment, preferably in writing, that the information has been provided and understood. In potentially troublesome situations, it would be advisable to have an independent solicitor present, and obtain a similar acknowledgment from him, and from the guarantor to the effect that he had taken independent legal advice. Such steps would minimise the prospect of such a defence being raised, let alone its being run-up to trial, with the resultant inconvenience and expense to the bank. [36]

Conclusion

In conclusion, may I say this. Parties to contracts who act honestly and reasonably have a natural interest in preserving the sanctity of their contracts. With holders of registered securities, the drive for a "black and white" charter of rights and obligations, clearly understood from the outset, is even more understandable.

Legislatures have imposed some controls on the exercise by secured creditors of their remedies. Most of those controls mirror the common law, and for the most part are well established, understood and manageable. Parties should know precisely in advance of default the risks they run.

The enlargement of existing judicial discretions to relieve defaulting debtors of the consequences of their default, for example, or to impair further, reliance by creditors on the full rights prima facie accorded by their securities, would in my view be an undesirable thing. There is still a sanctity about securities which should not be further disturbed.

I say "further" disturbed in recognition of such provisions as s.85 of the Family Law Act. That provision gives the Family Court of Australia power, in certain circumstances, to set aside dispositions entered into by parties to its proceedings, a power interpreted [37] to extend, for example, to extinguishing securities obtained by third parties, including banks, by means of otherwise legally unimpeachable transactions. It is trite to say that banks must be able to take securities and enforce them in the knowledge that the security accords them particular rights and subjects them to certain duties. Those rights and duties should not be further blurred.

Footnotes

[1] Holden: The Law and Practice of Banking, (vol. 2) 6th ed., (1980), p. 14.

[2] Sykes: The Law of Securities, 3rd ed., (1983), p. 11.

[3] (1975) 113 C.L.R. 191, 203.

[4] Gaunt and Winney: "Bank Securities", Law Society Journal, September, 1985, p. 573.

[5] Burnes v. Trade Credits Ltd. (1981) 1 W.L.R. 93.

[6] 57 A.L.J. 114 (note).

[7] Inglis v. Commonwealth Trading Bank of Australia (1973) 47 A.L.J.R. 234.

[8] Ogilvie v. Adams (1981) V.R. 1041.

[9] (1983-4) 153 C.L.R. 491.

[10] Supra, p. 504.

[11] Supra, p. 504.

[12] Brighty v. Norton (1862) 3 B. & S. 305; 122 E.R. 116.

[13] cf. Holden: supra, pp. 79-80.

[14] Hunter v. Hunter [1936] A.C. 222, 247, 253.

[15] [1984] 1 Qd.R. 404.

[16] Supra, pp. 413-4 per Thomas J.

[17] cf. Inglis, supra, p. 236.

[18] Cuckmere Brick Co. v. Mutual Finance Ltd. [1971] Ch. 949; Tse Kwong Lam v. Wong Chit Sen [1983] 1 W.L.R. 1349.

[19] Forsyth v. Blundel (1973) 129 C.L.R. 477, 493.

[20] See, however, Commercial & General Acceptance Ltd. v. Nixon (1982-3) 152 C.L.R. 491, 516 per Aickin J.

[21] See, generally, Duncan and Vann: Property Law and Practice, p. 893 ff.

[22] Cuckmere Brick Co. v. Mutual Finance Ltd. supra; Nixon v. Commercial & General Acceptance Ltd. [1980] Qd.R. 153.

[23] Duncan and Vann, supra, pp. 897-8.

[24] For example, Australia & New Zealand Banking Group Ltd. v. Bangadilly Pastoral Co. Pty. Ltd. (1976-7) 139 C.L.R. 195.

[25] Commercial & General Acceptance Ltd. v. Nixon, supra, p. 503 per Mason J.

[26] Harvey v. McWatters (1948) 49 S.R. N.S.W. 173, 177.

[27] See, generally, Holden: supra, pp. 85-6.

[28] cf. Holden: supra, pp. 370-1.

[29] cf. Holden: supra, p. 383.

[30] Expo International Pty. Ltd. v. Chant [1979] 2 N.S.W.L.R. 820, 835.

[31] A. Marks: "The Enforcement of Bank Securities", Law Institute Journal (October, 1984) p. 1187.

[32] It has been held to include a receiver and manager: Commissioner of Taxation v. Barnes (1976) 50 A.L.J.R. 382.

[33] Section 59 Property Law Act.

[34] Burnes v. Trade Credits Ltd., supra.

[35] (1982-3) 151 C.L.R. 447.

[36] cf. Marks, supra, pp. 1193-4.

[37] Heath v. Heath (1984) F.L.C. 91, 517.