BALANCED SECURITIES LTD v BIANCO and Others

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J FORREST J

16, 17, 19 March, 12, 14, 21 May 2010
[2010] VSC 162; [2010] VSC 201

Mortgages — Torrens title — Indefeasibility — Exceptions — Competing interests — Mortgagee — Tenant in possession — Tenancy granted after mortgage created but before registration — Mortgagee entitled to possession — Transfer of Land Act 1958 (No 6399) ss 42(2)(e), 77, 78.

Damages — Tort — Trespass to land — Measure — Mesne profits — *Hungerfords* damages — Market rent — Loss of commercial opportunity — Compensatory damages.

Section 42(2) of the Transfer of Land Act 1958 ("the Act") provided that, notwithstanding anything in s 42(1) of the Act (which provided for the indefeasibility of the registered proprietor's title), the land included in any folio of the register or registered instrument was subject to "(e) the interest (but excluding any option to purchase) of a tenant in possession of the land".

Section 77(4)(a) of the Act provided that, upon the registration of any transfer pursuant to a mortgagee's sale under the section, all the estate and interest of the mortgagor would vest in the purchaser as proprietor by transfer, freed and discharged from all liability on account of such mortgage and (except where such a mortgagor was the purchaser) of any mortgage charge or encumbrance recorded in the register subsequent thereto except a lease to which the mortgagee had consented in writing or to which the mortgagee was a party.

Section 78 of the Act conferred on the mortgagee, upon default in payment of the principal sum or interest or any part thereof respectively at the due time, the right to recover possession of the mortgaged land by receiving the rents and profits thereof or by an action of ejectment to recover the land, and provided that the mortgagee of leasehold land after entering into possession of the land or the receipt of the rents and profits thereof was, during such possession or receipt and to the extent of any benefit rents and profits which were received, to be subject to and liable for the payment of the rent reserved and the performance and observance of the covenants contained or implied in the lease on the part of the lessee.

In August 2003, the registered proprietor of a residential unit mortgaged the unit to secure repayment of a loan from the mortgagee. Without obtaining the mortgagee's consent to the lease, the mortgagor let the unit to a tenant in October 2003 and the tenant sub-let it in November 2003. The mortgage was not registered until December 2003. The mortgagor defaulted and the mortgagee issued proceedings against the tenant and sub-tenant in 2008 to recover possession of the unit and for mesne profits and damages.

Claim for possession

Held, upholding the claim for possession: (1) Absent consent of the mortgagee, the interest of a tenant acquired after the date of creation of the mortgage was precarious and able to be defeated by the mortgagee upon the exercise of its rights under either s 77 or s 78 of the Act. [75], [112].

Corbett v Plowden (1884) 25 Ch D 678 followed.

(2) The relevant time to assess the competing interests under the Act as between tenant and mortgagee was the time of creation of the mortgage, not its registration. A tenant taking possession subsequently did so subject to the mortgagee's rights. Such rights, however, in the context of the Act, could only be exercised upon registration of the mortgage. [77]–[106].

Barry v Heider (1914) 19 CLR 197; *Commonwealth v Orr* (1981) 37 ALR 653; 58 FLR 219; *Haslam v Money for Living (Aust) Pty Ltd* (2008) 172 FCR 301 followed.

Burke v Dawes (1938) 59 CLR 1; *Downie v Lockwood* [1965] VR 257; *Mayer v Coe* [1968] 2 NSWR 747 distinguished.

Independent Order of Oddfellows Victoria Friendly Society v Telford (1991) V ConvR ¶54-419; *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589; *Maher v Commonwealth Bank of Australia* [2004] FCA 248; *Apollo 169 Management Pty Ltd v Pinefield Nominees Pty Ltd* [2010] VSC 40 considered.

Claim for mesne profits and damages

(3) In an appropriate case, there may be ways of measuring the loss caused by a trespass other than mesne profits. Damages pursuant to the *Hungerfords* principle were compensatory and, therefore, could be awarded if the facts supported such an allowance. [16].

Hungerfords v Walker (1989) 171 CLR 125; *Lollis v Loulatzis* [2007] VSC 547; *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 applied.

(4) The mortgagee in this case was entitled to mesne profits (subject to a deduction for unreasonable delay) to 30 June 2006, and *Hungerfords* damages for the period 1 July 2006 to 30 June 2007 for the loss of the commercial opportunity to invest the net proceeds of sale it would otherwise have received at a mortgagee sale in July 2006 (subject to a discount for commercial risks). [27], [33].

Garroway Metals Pty Ltd v Comalco Aluminium Ltd (1993) 114 ALR 118 distinguished.

Action

This was a mortgagee's claim against a tenant for possession of Torrens title land, and mesne profits and damages. The facts are stated in the judgment.

W W Coady for the plaintiff.

D F Hyde for the defendants.

Cur adv vult.

12 May 2010 — [2010] VSC 162

J Forrest J.

Introduction

1 On 1 August 2003, the plaintiff, HG & R Finance Ltd (now Balanced Securities Ltd) ("HGR") provided $5.2m to International Investments and Development Pty Ltd ("IID") secured by mortgages given by IID over 18 units in a residential development in High St, Prahran.

2 IID is in default of the loan and HGR seeks possession of one of the units currently occupied by the first defendant, Mr Antonio Bianco, and his sub-tenant Ms Nicole Joakim, the third defendant.[1]

3 Although HGR's mortgage was executed in August 2003, it was not registered until December 2003 after Mr Bianco entered into a residential tenancy agreement with IID and occupied the unit.

4 The defendants' primary contention is that as Mr Bianco was a tenant in possession of the unit prior to the registration of the mortgage then such tenancy is protected by s 42(2)(e) of the Transfer of Land Act 1958 ("TLA") against HGR's claim.

Factual background

5 In December 2001, Allmart Properties Pty Ltd ("Allmart") commenced the development of the property. Twenty-four residential units varying in size were constructed.

6 On 20 June 2003, consequential upon the plan of subdivision being approved, Allmart became the registered proprietor of each of the units.[2]

7 In 2003, Mr Roman Gomez and his wife Morgina investigated the possibility of purchasing the development through their company IID (Mrs Gomez is a director and Mr Gomez is the secretary of IID).

8 Mr Joakim, the second defendant, has been involved in residential real estate for many years.[3] He does not hold a real estate agent's licence, but knows the industry well. His stepdaughter is the sole director of Asset Equity Pty Ltd ("Asset Equity") and he has acted as a special project manager for that company.[4] He has, for many years, been friendly with Mr and Mrs Gomez.

9 Mr Bianco and Mr Joakim have been friends and business associates for a long time. Mr Bianco has been very successful commercially, operating for many years a women's footwear business.[5]

10 In June 2003, HGR was approached by Mr Gomez on behalf of IID for finance to enable it to complete a contract with Allmart for acquisition of 18 of the 24 units, the other six having been sold by Allmart.[6] Earlier that year, Mr Joakim had been asked by Mr and Mrs Gomez to help with the sale of the units and in mid-July Mrs Gomez contacted Mr Joakim to help with additional funding of the purchase.[7]

11 On 24 July 2003, HGR gave approval for the provision of funds of up to $5.2m to be secured by a first mortgage over the 18 units. Mr Gomez appears to have accepted the offer of finance on 25 July and agreed to execute a form of registrable mortgage.[8] Both Mr and Mrs Gomez were guarantors of the loan.

1. The second defendant is Ms Joakim's father, Mr Nicos Joakim. The defendants were jointly represented at the trial. Where applicable I have referred to Mr Bianco, Mr Joakim and Ms Joakim collectively as "the defendants".
2. Exhibit P4, No 19 and 20.
3. T190.
4. T182.
5. T125.
6. Trevor John Wilson witness statement [4].
7. T193, 194; Ex D3 [27].
8. Exhibit P4, No 21.

12 At around the same time, Mr Joakim agreed to lend $210,000 to Mr and Mrs Gomez. By a deed dated 31 July 2003 ("the deed"), IID purported to borrow $210,000 from Mr Bianco. I shall refer in a little more detail to the provisions of the deed, but it suffices to note that it purported, in the event of default by IID in making payments, to give Mr Bianco the right to lease unit 9 (and to then sub-lease) and to purchase it for $400,000. Mr Joakim provided $10,000 in cash to Mr Bianco,[9] who, in turn, provided it to Mr Gomez. The balance of $200,000 was forwarded to IID either late in the afternoon of 31 July or early the next morning by direct debit from an account controlled by Mr Joakim.[10]

13 On 1 August 2003, the purchase by IID from Allmart of the 18 units was settled. Allmart's interest in each of the units, including unit 9,[11] was transferred to IID. The consideration for unit 9 was $567,755. The HGR loan funds were applied to the purchase as, I infer, were Mr Joakim's funds. IID executed mortgages in favour of HGR over each of the units on 1 August 2003.[12] The memorandum of common provisions of the mortgage provided as follows:

> 2.e.ii. The moneys hereby secured shall, if not otherwise due and payable, at the option of the Mortgagee become immediately due and payable if the Mortgagor without the prior consent in writing of the mortgagee leases, grants any tenancy of or parts with the possession of or grants any licence affecting the land or any part thereof;
>
> (15) If the mortgagor defaults in performing or observing any covenant or agreement to be performed:
>
> (3) Upon giving seven days notice … of its intention to exercise the power given by this sub-clause … the mortgagee may … enter upon and take possession of the land … and may in addition thereto … if it thinks fit
>
> (b.i.C.) appoint a receiver appoint a receiver and the receiver may grant a lease of the land.
>
> (c.i) with or without entering into possession … the mortgagee may accept the surrender of any lease … and make such arrangements with any lessee or occupier of the land … on such conditions as the mortgagee thinks proper.

14 Neither the transfer of the unit nor the mortgage to HGR was registered pursuant to the provisions of the TLA at that time.

15 Also on 1 August, as part of securitisation documentation provided to HGR, Mrs Gomez, in her capacity as a director of IID, completed a statutory declaration which declared that IID had "not sold, offered for sale nor granted any option over the property or any part thereof and will not do so prior to any advance under the mortgage loan from HG & R Finance Limited".[13]

16 Subsequent to settlement, HGR took possession of the instruments of transfer and duplicate certificates of title for each of the units; it already held the mortgages executed by IID.[14]

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9. T135.
10. Exhibit P4, No 29.
11. Exhibit P4, No 28.
12. Exhibit P4, No 27.
13. Exhibit P4, No 26.
14. T109.

17 On 19 October 2003, one day after the due date for the payment of interest on the loan, Mr Bianco signed a letter, prepared by Mr Joakim, addressed to the directors of IID, demanding payment of the sum of $210,000 plus interest on the basis of IID's default in repayment of interest on the loan.[15]

18 Consistent with the terms of the deed, a contract of sale was entered into on 20 October 2003, by which IID sold unit 9 to Mr Bianco for $400,000. The deposit of $105,000 was, pursuant to the deed, taken to have been paid out of the loan of $210,000.[16]

19 On the following day, 21 October 2003, a caveat[17] was lodged over unit 9 by Ms Andriana Agrotis, solicitor, on behalf of Mr Bianco claiming that he had an equitable estate and fee simple in the property with the grounds "As purchaser of a property pursuant to contract of sale 20 October 2003 between International Investment Developments Pty Ltd (ABN 098 873 995) and Tony Bianco".

20 By a residential tenancy agreement of 27 October 2003, IID let unit 9 to Mr Bianco.[18] The lease stipulated a commencement date of 27 October 2003 with rental payable at $1950 per calendar month. Its termination date was as follows:

> The term of the lease shall expire upon the settlement being effected in relation to the purchase of the property herein or such time as the principal and interest outstanding on the agreement dated 1 July 2003 is paid in full to the lender.

21 On 1 November 2003, Mr Bianco sub-let the unit to Susan Youssef for a period of two years at a rental of $2145 per month.[19]

22 Both the retail tenancy agreement and the sub-lease were prepared by Mr Joakim and signed by Mr Bianco.

23 On 5 November 2003, Messrs Herbert Geer & Rundle, solicitors acting on behalf of HGR, wrote to Mr Gomez in relation to IID's failure to pay the interest due on 1 November 2003.[20]

24 On 10 December 2003, HGR lodged with the Office of Titles the transfer of unit 9 from Allmart to IID and the mortgage executed by IID in favour of HGR.[21] The delay in effecting registration was explained, to some extent, by Ms Gray, a law clerk employed by Mr David Geer. She said that there were problems with the levying of stamp duty fees and it was necessary for discussions to be had with the State Revenue Office to resolve that issue.[22]

25 On 12 December 2003, Land Victoria sent a notice to Mr Bianco, care of Ms Agrotis, pursuant to s 90(1) of the TLA in relation to the 21 October 2003 caveat. No action was taken and the caveat lapsed in January 2004.

26 On 19 January 2004, Herbert Geer & Rundle gave a notice to pay to IID pursuant to s 76 of the TLA.[23] There was no compliance by IID within the statutory period of one month and, by virtue of s 77 of the TLA, HGR acquired a power of sale over the units.

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15. Exhibit P4, No 33.
16. Exhibit P4, No 34.
17. Exhibit P4, No 35.
18. Exhibit P4, No 36.
19. Exhibit P4, No 40.
20. Exhibit P4, No 42 T68.
21. Exhibit P4, No 27 and 28.
22. T108.
23. Exhibit P4, No 52.

27 Mr Trevor Wilson, the credit manager for HGR, inspected the units on 26 February 2004. To his surprise, and presumably chagrin, he became aware that a number of the units were occupied.[24] He instructed Herbert Geer & Rundle to write to the occupiers of the units advising of HGR's rights as mortgagee in possession.[25]

28 At some time in February/March 2004, Mr Wilson received a phone call from Mr Bianco. His record of the conversation confirms his evidence[26] that Mr Bianco told him that the unit had been sold for $400,000 pursuant to a contract of sale and that $230,000 had been lent by Mr Bianco to "Roman", presumably Mr Gomez. It also notes that "Tony [Bianco] has leased the unit (takes possession). Put tenants in … rent offsets interest".[27]

29 On 29 March 2004, Ms Agrotis wrote to Herbert Geer & Rundle advising that she acted for Susan Youssef, the sub-tenant.[28]

30 On 19 May 2004, Mr Wilson responded to Ms Agrotis' letter, re-affirming HGR's position that as mortgagee in possession the rent should be paid to it and, absent the payment of the rent, it proposed to take action under the Residential Tenancies Act 1997.[29] On the same day, Mr Wilson wrote to Mr Bianco, re-affirming the intention to sell the property and asking that rental payments be forwarded to Bennison McKinnon, the agent appointed by HGR.[30]

31 On 29 April 2005, Bennison McKinnon initiated proceedings at the Victorian Civil and Administrative Tribunal on behalf of HGR pursuant to s 344 of the Residential Tenancies Act, seeking possession of the premises. That application was dismissed on 6 May 2005.[31]

32 On 15 June 2006, Herbert Geer & Rundle wrote to the occupant of unit 9 advising that it intended to take steps to obtain vacant possession of the unit. A copy of the letter was sent to Mr Bianco care of his solicitors.[32] A more detailed letter was sent to Mr Bianco reiterating HGR's position that it was entitled to possession as the mortgagee.

33 On 12 July 2006, an email[33] was sent by Mr Kuperholz, the solicitor for Mr Bianco, setting out in detail his client's contention that his equitable rights, and particularly his right as a tenant in possession, trumped the mortgagee's right to possession under s 78 of the TLA.

34 On 12 May 2007, a sub-lease of the unit was entered into between Mr Bianco and Ms Joakim for a period of five years — to 12 May 2012.

35 IID has now been deregistered. The contract of sale of 20 October 2003 has not been completed.

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24. T80.
25. Exhibit P4, No 55.
26. T79.
27. Exhibit P5.
28. Exhibit P4, No 60.
29. Exhibit P4, No 64.
30. Exhibit P4, No 65.
31. Exhibit P4, Nos 66, 67 and 68.
32. Exhibit P4, No 73.
33. Exhibit P4, No 74.

36 On 10 July 2008, HGR issued proceedings seeking possession and damages in the form of mesne profits. It subsequently amended its claim to include a claim for *Hungerfords* damages.[34]

The circumstances surrounding the advance of $210,000 to IID

37 The deed, which bears the date 31 July 2003, describes Mr Bianco as the lender, and the borrowers IID, as the registered proprietor of the units; it was drawn up by Mr Joakim with assistance from friends with legal experience.[35]

38 The deed provides for a loan of $210,000 with interest at a rate of 15% per annum. It contains the following clauses in relation to default on the part of IID:

> 3. The Borrower agrees that if the Borrower defaults in payment of the Principal Sum or the Agreed Interest, then in addition to any other remedies available to the Lender, the Borrower shall sell Unit 9/300–302 High Street, Prahran to the Lender for the sum of $400,000.00 inclusive of GST payable as follows:
>
> (a) The deposit will be in the sum of $105,000.00 which amount will be deducted from the principal sum owed by the Borrower to the Lender. The principal sum of the loan will, therefore, be reduced to $105,000.00.
>
> (b) The interest payable on the principal sum owed by the Borrower to the Lender will be offset by the Borrower granting to the Lender a lease of Unit 9/300–302 High Street, Prahran and also the right to sublet the premises. The rental will be set at $1,950.00 per calendar month commencing on the date of sale of Unit 9/300–302 High Street, Prahran.
>
> 4. The amount of $1,950.00 per calendar month will be offset against the interest payable to the Lender by the Borrower up to and including the date of settlement for the purchase of Unit 9/300–302 High Street, Prahran.
>
> 5. The term of the Lease shall expire upon the settlement of the sale of Unit 9/300–302 High Street, Prahran or such time as the principal and interest pursuant this Deed is paid in full.
>
> 6. Any amount owing by the Borrower to the Lender as at the date of settlement will be deducted from the sale price for the purchase of Unit 9/300–302 High Street, Prahran.

39 It is necessary to mention one other paragraph: cl 9(a):

> The Borrower acknowledges and agrees that in the event that it commits any breach of its obligations pursuant to its borrowings with the First Mortgagee, shall be deemed to constitute a breach of the Borrower's obligations under this Deed.

40 In closing submissions, counsel for HGR contended that the date of execution of the deed was false and that the circumstances surrounding its execution were highly suspicious. However, there was no cross-examination directed to either Mr Bianco or Mr Joakim on this issue and while I accept that one may be sceptical, to an extent, about the date of execution of the deed, there is no reason not to accept the evidence of Mr Bianco and Mr Joakim that the deed was in fact entered into on the date it bears — 31 July 2003.

41 The defendants filed a joint defence. In it, they asserted, consistent with the terms of the deed, that there was a loan from Mr Bianco to IID and pleaded the terms of the deed. They also pleaded that on 1 August, Mr Bianco advanced the amount of $210,000 to IID as borrower pursuant to the terms of the deed.[36]

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34. *Hungerfords v Walker* (1989) 171 CLR 125.
35. T147–8.
36. At [23], [24], [27] of the defence.

42 The evidence in chief of both Mr Joakim and Mr Bianco was given by adoption of documents referred to as "substance of evidence". In effect, they were witness statements. This procedure was not satisfactory. Mr Bianco's statement simply adopted that of Mr Joakim which contained a detailed version of his account of the various transactions. Mr Bianco swore to those matters as being true and correct as far as he could attest to them. In a case such as this, the use of witness statements or an epitome of the evidence to be given by the witness is fraught with hazards, as I should have appreciated.

43 In any event, Mr Bianco, in his outline of evidence, simply adopted what had been said by Mr Joakim; counsel for the defendants then chose to call Mr Bianco first, notwithstanding that it was clear, particularly given Mr Joakim's statement, that he was the prime mover behind the transactions. It is necessary to refer now to parts of Mr Joakim's outline of evidence adopted in evidence in chief by Mr Bianco.

44 At para 7(f), Mr Joakim said:

> I decided that I would lend money to the Directors of IID but that I would do this through Tony. I prepared a deed to protect our position which gave an option to purchase Unit 9 and to rent it out and sublease it if anything went wrong with the repayment of the loan made to the Directors of IID.

Then in para 7(k):

> The deed provides that the money to be lent to IID would come from Tony. In fact it came from me (for reasons explained below). I lent that sum to Tony so he could lend it to IID. That loan from me to Tony is described in the amended defence and counterclaim in this proceeding as "the Joakim-Bianco loan".

In para 7(l):

> Tony had lent the amount of $210,000 to IID which was paid as to $10,000 in cash on 31 July and $200,000 by bank transfer on 1 August 2003.

And finally in para 7(n):

> The loan Tony made to IID under the deed was intended to be short term financing only. The money had to be paid back by 18 October 2003.

45 For reasons which I hope will become clear, I do not accept that there were two separate loans. The evidence of Mr Joakim that there was a loan by him to Mr Bianco and then a further loan to IID cannot be accepted. The money was provided by Mr Joakim via Mr Bianco to IID. The idea that there were separate loans fell apart once Mr Bianco was cross-examined. I also reject the submission that Mr Joakim can be characterised as an undisclosed principal with Mr Bianco as his agent.

46 Mr Bianco said that, as a result of a call from Mr Joakim, he went with him at some time in 2003 to inspect the units, which, at that time, had been completed.[37] He said that he was interested in purchasing unit 9, although this seems something of a red herring if, indeed, it be correct. He initially described the arrangement in relation to the provision of funds as follows:[38]

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37. T126–8.
38. T129.

> Well, we — Nick lent me Mr Gomez — there was something, he needed some money, right, and Nick wanted to give me the money to lend to Mr Gomez right, and at that time he wanted — Nick told me that he wanted $210,000 and I said okay.

Mr Bianco could not remember when he signed the deed.[39] He thought that the deed was drafted so that Mr Joakim would get his $210,000 back.[40] The reality of the arrangement was described by Mr Bianco in an answer as to his understanding of the deed:[41]

> That I — Nick gave me the $200 — the $210 I gave him the — Mr Gomez $210,000 he was supposed to pay in a certain date at 15% and that was it.

47 Mr Bianco's evidence was that the negotiations for the provision of the funds were solely between Mr Gomez and Mr Joakim, as was the fixing of the figure of $400,000 as the value of the unit in the event of default.[42]

48 The $10,000 cash was given to Mr Bianco by Mr Joakim in denominations of hundreds and fifties. Both Mr Bianco and Mr Joakim gave evidence, which I accept, that the funds were provided by Mr Joakim.[43] The balance was paid to IID from a Joakim account.

49 Mr Bianco did not receive any payments of interest from IID.[44] Once the lease and sub-lease had been entered into, he did not receive any payment of rent; it went to Mr Joakim.[45] He gave this evidence in relation to a question concerning the charging of rent to Ms Joakim:[46]

> A — No. In my mind the money wasn't mine. In my mind I was used as a front bloke, but I had no rights to the rent because the rent was his. I had no rights to any rent or anything else, really.
>
> Q — So when you signed the contract to purchase the property at $400,000 —? A — Yes.
>
> Q — They weren't your rights either? A — Well at the time he gave me the contract we signed the contract I knew the money wasn't mine right he lent them the $210,000 so really I was acting on his behalf.
>
> Q — So when you carried it through into a contract to purchase and a lease, that was really his benefit as well? A — No that wasn't, there was no benefit to me. It was only whatever he's done and the dealing he's done with Gomez. I have nothing to do with it.

50 Mr Bianco correctly described himself as a "front bloke" for Mr Joakim. On his evidence, there was never a loan by Mr Joakim to him. Rather, he was asked to be a party to the various contractual arrangements as a cipher for Mr Joakim. The thrust of his evidence was that he simply did what he was asked by Mr Joakim. There was no loan agreement, either oral or written, as between Mr Joakim and Mr Bianco. No demand has ever been made by Mr Joakim for the return of funds from Mr Bianco — none is owed. The rental from the sub-lease of the unit has all been paid to Mr Joakim.[47] Mr Joakim has been responsible for

39. T134.
40. T144.
41. T143.
42. T152.
43. T147, T224.
44. T153.
45. T153.
46. T154.
47. T236.

the maintenance and the leasing of the unit. All this is inconsistent with a loan by Mr Bianco to IID, but consistent with the use of Mr Bianco as Mr Joakim's puppet.

51 Indeed, when Mr Joakim came to be cross-examined he abandoned any reliance upon the purported loan arrangement:[48]

> Q — When do you intend to ask Mr Bianco to pay you $210,000? A — Mr Bianco did not borrow directly the money, I used Mr Bianco as the person to represent me. So it was my money.
>
> Q — Do you accept that if the money does not come back you will bear the loss and you will not seek to recover $210,000 from Mr Bianco? A — Mr Bianco never owed me the money, the Gomez' and ID [sic] owed me the money.

and finally after the contents of the defence were put to him:[49]

> Q — Did Mr Bianco seek to borrow from you the sum of $210,000? A — I used Mr Bianco to be the front person, me lending the money so—

52 The description of a loan by Mr Bianco in the deed is a sham, as is the reference in the pleading of the "Joakim-Bianco loan" in the defence filed on behalf of the defendants.

53 Although it is not critical to my determination of this case, I have real reservations about the explanation provided by Mr Joakim for using Mr Bianco as his cipher. He said that he did so because he had a personal relationship with Mr and Mrs Gomez and that on a previous occasion he had difficulty obtaining repayment of a loan to them. He said that Mr Bianco was deployed in case it was necessary to put pressure on Mr and Mrs Gomez.[50]

54 I turn now to the question of Mr Bianco and Mr Joakim's knowledge of HGR's involvement in the provision of finance (and its mortgage to IID).

55 In general, I accept Mr Bianco's statement that he did not know of HGR's role, nor of the motive of the funding of the purchase by IID, other than the provision of $210,000 — for good reason — he was simply doing a favour for Mr Joakim by putting his name to the various contractual documents.

56 Mr Joakim swore that he did not know of HGR's involvement as a mortgagee until February/March 2004 when Mr Wilson took steps to alert the occupiers of unit 9, among others, to HGR's rights under its mortgage.[51] I reject this account and, for the following reasons, conclude that Mr Joakim was aware of HGR's role at the time that he had Mr Bianco enter into the deed.

57 First, he was an experienced residential real estate agent who worked with his stepdaughter as well as being involved in his own property dealings. The 18 units were purchased for a sum in excess of $7m. The Gomezs were friends, and it is inconceivable, in my view, that he did not discuss with them the financing of the units, particularly when they were seeking additional funds from him. He was, as his evidence demonstrated, loquacious and prepared to state his mind, and it affronts commonsense to think that a man with his experience being asked to provide a sum of around $200,000 would not inquire as to the other source of funds to finance the purchase. This is particularly so when on his account he had

48. T182, T183.
49. T185.
50. T185–6.
51. T195, T203, T207, T210, T228.

difficulty extracting a loan repayment from them previously.[52] Such an inference is consistent with Mr Bianco's evidence that Mr Joakim told him that $210,000 was needed to "settle" the development.[53]

58 Second, the deed was drawn up by him with the assistance of several of his colleagues in the real estate business.[54] Clause 9(a), which I have set out at [39], not only refers to IID as the registered proprietor but also to the existence of "the first mortgagee". The first mortgagee was HGR and, as I have said, the deed was drawn up under the instructions of Mr Joakim. I regard it as highly likely that the reference to the first mortgagee was, contrary to Mr Joakim's evidence, a reference to HGR and reflects his knowledge of its involvement at that time.

59 Third, on 19 November 2003, Mr Joakim wrote a letter on Australian Asset Realty letterhead to Mr Somasandaram, a solicitor at Wantrup & Associates, the solicitors for IID. In it, he advised that a number of units had been sold, including unit 9, and a number reserved. He also advised that "There are several other parties interested and I am awaiting to make a suitable time for them to inspect the property". He went on to write: "Thank you for your assistance in this matter and I am sure that you will convey the good news to Herbert Geer & Rundle." I infer that the only reason for him to mention Herbert Geer & Rundle was that he was aware that the solicitors (or any associated company, such as HGR), had a direct financial interest in the prospective sales of the units and had been involved in arranging finance for the purchase. Such finance, as he must have known given his experience, could only have been secured by a mortgage over the property. His explanation for referring to the role of Herbert Geer & Rundle was unsatisfactory.[55]

60 Fourth, and in my view significantly, there is the evidence given by him on oath at VCAT in May 2005.[56] At the hearing before Member Phillips, Mr Joakim and Mr Bianco appeared on the application brought by HGR to obtain possession of unit 9. Although Mr Bianco was the nominated tenant and the principal of the sub-tenancy, Mr Joakim conducted the case on Mr Bianco's behalf and on behalf of the sub-tenant. He made the following statements on oath, which I will set out in some detail:[57]

> MS NADDAF [Bennison McKinnon Carmichael representative]: Part of it have. I think there's 24 units or something in the block.
>
> MR JOAKIM: There's 24 in the block and at the time when Mr Bianco was there it was only — apparently he'd sold all of them and then that's when we went to Herbert Geer and Rundle to try and get a loan, my understanding, in the early piece prior to July or something, some marketing group had sold all — when they came to settlement, Mr Chairman, apparently there was only six so there was 18 still available.[58]
>
> …
>
> MR JOAKIM: If I can go through — yes there is. There is a caveat. Unfortunately because of the notice that was given their solicitor couldn't appear for Mr Bianco but

52. T194.
53. T141–2.
54. T192–3.
55. T203.
56. T228.
57. Ms Naddaf was from Benison McKinnon Carmichael and had instructions on behalf of HGR.
58. I accept that the reference to "we" was either a transcription error or a mistake. In all likelihood, it refers to Mr Gomez — "he".

because I know the whole story I'm here with your permission to be able to explain the whole story from start to finish so you can see where this gentleman's position is and its been jeopardized.

Prior to July when the 24 weren't able to be settled and there was only six, I got a phone call from Mr Gomez to say, "Since you know me, would you be able to help me. I need to settle this urgently and I'm short of 200 odd thousand dollars", and I said, yes, and "Will you be able to sell the units for me or try to. I've given it to other agents and they weren't able to." I said, Roman, I don't want to. I'm not really doing that but I will get as much as I can for you. I'll help you whatever I can, speak to my network, and see how many we can get rid of for you.

I spoke to Mr Bianco because he was a client of mine. I sold a major property for him, and he decided that he would lend them the $200,000 plus $10,000 in cash so a total of $210,000 for a period of three months and they were supposed to pay him interest because they couldn't settle apparently, obviously. *Herbert Geer and Rundle were going to pay the original owners who were the builders. So the 210 that Mr Bianco was giving was going to be able to be combined with Herbert Geer Rundle Mortgages to pay — let's say you're the builder and you owned it before and International then becomes the registered owner.*

That happened on the 31st of July. An agreement was drafted then indicating that Mr Tony Bianco will lend them money on the basis of that they will pay him in three months' time or he had the right to lease and sub-lease the property until they paid him the money, one of the two and it was agreed that he could buy the property at a nominated price and he wasn't going to pay the nominated — the price that was marketed at the time because doing him a favour he wanted a favour back, Mr Chairman, so for example, I'll buy that at $400,000 less the money that I've paid you and that was agreed and the documentation is here. (Indistinct) and McKinnon would have got down the track the documents from all the kafuffle went on so did Herbert Geer and Rundle. [Emphasis added.]

61 Those parts of the evidence given by Mr Joakim that the funds were provided by Mr Bianco were, to put it neutrally, incorrect. His description of Herbert Geer & Rundle's involvement from the outset was completely at odds with his stated position in this court: that he did not know of HGR's involvement until February/March 2004. His explanation that his account,[59] in May 2005 at VCAT, was a reconstruction based upon facts which were then known to him is, in my view, a convenient and unacceptable explanation for the matters he described in his evidence. That version, on its face, was chronological and was not qualified by any mention of acquired information. Moreover, it sits comfortably with what commonsense would indicate that he knew from discussion with Mr and Mrs Gomez — namely, that extra funds were needed to "top up" the amount obtained from HGR.

62 Finally, there is the general question of Mr Joakim's credit. He referred throughout the portion I have extracted, as well in other parts of his evidence which I have mentioned, to Mr Bianco lending the money to the Gomezes. That was the artifice that he created. In truth, the loan moneys came from him and no-one else.

63 In summary, I reject Mr Joakim's evidence that the first he knew of the HGR loan and mortgage was in February/March 2004. I infer from the account given at VCAT by Mr Joakim as well as the other matters I have referred to that at the time immediately leading up to the execution of the deed in July 2003, he was

59. T228.

aware of HGR's role in providing finance for the acquisition of the units by IID. I conclude on the basis of that evidence (and particularly the reference in the deed itself to the first mortgagee) that he also knew that such an arrangement necessarily involved the Gomezes through IID providing security in the form of a mortgage over the property to HGR.

The residential tenancy agreement between IID and Mr Bianco

64 I have set out the relevant parts of the residential tenancy agreement at [20]. I was urged by counsel for HGR (as was the case with the deed), to conclude that it was not executed on 27 October 2003. Neither Mr Joakim nor Mr Bianco were challenged on this point. The purpose of the deed, as I follow it, was to provide Mr Joakim with the ability to occupy the unit until IID was in a position to settle on the purchase. There can be little doubt that the contract of sale was entered into on 20 October 2003, given the lodging of the caveat on the following day.

65 The signing of the lease on 27 October 2003 is consistent with Mr Joakim attempting to take steps to follow through on the terms of the deed. I accept that the lease was executed on the date it bears.

66 That takes me to the next point — the tenure of the tenancy of the unit of Mr Bianco. It was common ground that IID is, in a practical sense, defunct; it is now and has been for some time deregistered. In a practical sense there is no prospect of it either paying out the loan and thus terminating the tenancy or, alternatively, being in a position to complete the settlement by accepting the balance of the purchase price from Mr Bianco.[60]

67 No argument was addressed to me by HGR that the lease itself was void for uncertainty.[61] Accordingly, it is highly likely (particularly as IID has been deregistered now for some three years) that the Joakim/Bianco occupation of the unit is indefinite, absent an order of this court.

The relief sought by HGR

68 In the amended statement of claim HGR seeks possession of the unit and damages.

69 In *Commonwealth Bank of Australia v Jackson*[62] Tadgell J, in dealing with a mortgagee's claim to possession (against mortgagors in possession) under s 78 of the TLA, said:[63]

> The circumstances being as they have been proved, that is to say default having been made in the way I have indicated, and no demand being necessary under the mortgages as a prerequisite to the mortgagee's entitlement to possession, s 78 of the Transfer of Land Act made the mortgagee's task a comparatively simple one. It merely needed to allege in the statement of claim and prove upon an application for summary judgment the execution of the mortgages, the advances, default by the failure of the mortgagors to pay anything under the mortgages, and that the defendants as mortgagors were in possession.

70 There was no issue as to the efficacy of the mortgage or the default of IID under the terms of the loan by HGR. Nor was it an issue that Ms Joakim is presently occupying the unit pursuant to a sub-lease from Mr Bianco.

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60. As Mr Joakim said "IID cannot settle for various legal reasons": Ex D3 [10].
61. See the discussion in *Greco v Swinburne Ltd* [1991] 1 VR 304.
62. (1992) V ConvR ¶54-447.
63. At 65,225.

71 I am satisfied that Mr Bianco as the nominal tenant and Ms Joakim have been and are currently in possession of the unit. I am also satisfied, given my findings as to Mr Joakim's role in this enterprise, that he has exercised a real degree of control over the premises, since its occupation by Ms Youssef in late 2003. If such occupation is unlawful, then Mr Joakim is, as submitted by HGR, a joint-tortfeasor in the occupation of the unit.

72 If HGR is successful in establishing that its rights prevail over those of the defendants then it is entitled to possession of the unit and the ejectment of Ms Joakim pursuant to s 78 of the TLA.

Does the existence of the tenancy agreement prior to the registration of the mortgage, but after its creation, give the tenant the ability to resist the mortgagee's claim for possession?

73 It may be of assistance if I summarise what are either uncontested facts or my findings of fact relevant to the determination of this issue:

(a) The deed was entered into on 31 July 2003;[64]
(b) The IID mortgage to HGR was entered into on 1 August 2003;[65]
(c) At no time did HGR, after the execution of the mortgage, consent to the IID lease of the premises to Mr Bianco;[66]
(d) The residential tenancy agreement between IID and Mr Bianco was entered into on or about 27 October 2003;[67]
(e) By 5 November 2003, IID was in default in repayment of interest to HGR;[68]
(f) The IID mortgage to HGR was registered on 11 December 2003;[69]
(g) On 19 January 2004, HGR gave notice to pay to IID pursuant to s 76 of the TLA;[70]
(h) On or about 19 February 2004, IID, by virtue of the TLA, acquired a power of sale over the unit;[71]
(i) The unit has been occupied by Mr Bianco as the nominal tenant and sub-tenants since November 2003.

74 Unlike a general law mortgage, a TLA mortgage involves no transfer of the legal estate; rather it creates a charge over the land.[72]

75 It is also settled under the general law that, absent the consent of the mortgagee, the granting of a lease by a mortgagor after the creation of a mortgage gives the lessee no right to resist a claim for possession as against the mortgagee. In *Corbett v Plowden*,[73] the Earl of Selborne LC said:

> If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the

64. At [40].
65. At [13].
66. This was accepted by each of the parties. See also the evidence of Mr Wilson T84.
67. At [20].
68. At [23].
69. At [24].
70. At [26].
71. Section 77(1) of the TLA.
72. *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589 at 598 ("*Baranyay*").
73. (1884) 25 Ch D 678 at 681; see also *Taylor v Ellis* [1960] Ch 368; *Dudley & District Benefit Building Society v Emerson* [1949] Ch 714.

lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them.[74]

76 This principle was referred to by Sheppard J in *Commonwealth v Orr*:[75]

> Under the general law a mortgagor may lease — in the case of leasehold land, sub-lease — the land the subject of the mortgage. The lease may not bind the mortgagee but it is effective to bind the lessor and the lessee.

77 But here, the parties' rights are determined by the TLA, and the defendants argue that this distinguishes the position under the general law from that under the TLA. Mr Bianco took his tenancy while the mortgage remained unregistered and this, it is contended, makes all the difference. It is said that the indefeasibility provisions of s 42 of the TLA mean that a mortgagee only takes paramount title upon the registration of the mortgage and subject then, and only then, to any existing tenancy. In other words, the defendants' contention is that HGR's interest as a mortgagee ranks behind that of Mr Bianco as tenant (and consequently Ms Joakim as sub-tenant). If this is correct, the end result is that, absent an argument that the lease is void for uncertainty (which, as I have noted, was not mounted), then Mr Bianco will remain, in a practical sense, indefinitely in possession of the unit.

78 Section 42, the key provision, provides for indefeasibility of title, save in the case of fraud, upon registration of an interest — "absolutely free from all other encumbrances whatsoever". There are, however, other exceptions set out both in s 42(1) and (2). In particular, s 42(2)(e) provides as follows:

> Notwithstanding anything in the foregoing the land which is included in any folio of the register or registered instrument shall be subject to—
>
> …
>
> (e) the interest (but excluding any option to purchase) of a tenant in possession of the land.

79 A "tenancy" protected by s 42(2)(e) has been given wide interpretation in this State. Any person in actual occupation of the land falls within its scope.[76] It was not in issue that the occupation by Mr Bianco and Ms Joakim constituted a tenancy within the meaning of the subsection.

80 An examination of the TLA should not be confined to the indefeasibility provisions. Section 77(4) provides that:

> Upon the registration of any transfer under this section all the estate and interest of the mortgagor … shall vest in the purchaser as proprietor by transfer, freed and discharged from all liability on account of such mortgage … and (except where such a

74. The argument in *Corbett* was the opposite of that in this case. The mortgagor held a 25 year lease with the tenant. The mortgagee endeavoured to hold the tenant to a lease he had entered into with the mortgagor. The mortgagee had insisted upon payments being made directly to him. It was held that such notice did away with the agreement between the mortgagor and the tenant, who then became a year to year tenant, of the mortgagee and was entitled to give notice of termination of the lease on the basis of that tenancy — not the 25 year lease with the mortgagor.

75. (1981) 37 ALR 653 at 661; 58 FLR 219 at 229 ("*Orr*"). See also *Wilson v Kelly* [1957] VR 147.

76. *Burke v Dawes* (1938) 59 CLR 1 at 17–18 ("*Burke*"); *McMahon v Swan* [1924] VLR 397; *Black v Poole* (1895) 16 ALT 155. See also Bradbrook, "The Scope of Protection for Leases under the Victorian Transfer of Land Act" (1988) 16 *MULR* 837.

mortgagor … the purchaser) of any mortgage charge or encumbrance recorded in the Register subsequent thereto except—

(a) a lease … to which the mortgagee … has consented in writing or to which he is a party;

81 Section 78 is also relevant and provides:

(1) The mortgagee … upon default in payment of the principal sum or interest or any part thereof respectively at the due time—

(a) may enter into possession of the mortgaged or charged land by receiving the rents and profits thereof; or

(b) may bring an action of ejectment to recover the land, either before or after entering into the receipt of the rents and profits and either before or after any sale of the land as aforesaid.

(2) A mortgagee of leasehold land after entering into possession of the land or the receipt of the rents and profits thereof shall, during such possession or receipt and to the extent of any benefit rents and profits which are received, be subject to and liable for the payment of the rent reserved and the performance and observance of the covenants contained or implied in the lease on the part of the lessee.

82 Implicit in the submission of the defendants is, I think, the contention that HGR acquired no interest in the unit until registration of the mortgage at which time its rights "sprung up" subject to the provisions of the TLA, in particular s 42(2)(e).

83 This proposition cannot be accepted. In *Barry v Heider*[77] Griffith CJ said of an argument that an unregistered dealing was incapable of creating any right in relation to land under the Torrens system (in that case a transfer of land):[78]

It is now more than half a century since the Australian colonies and New Zealand adopted, in substantially the same form but with some important variations, the system sometimes called the "Torrens" system, which is now in New South Wales embodied in the Real Property Act 1900. With the exception of one decision in South Australia, soon after overruled, the contention of the appellant has never been accepted in any of them …

His Honour went on to say:[79]

In my opinion equitable claims and interests in land are recognised by the Real Property Acts.

It follows that the transfer of 19 October, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognised by the law. I think that also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest.

84 In endeavouring to make good their argument as to the priority of the interests of the tenant and sub-tenant over the mortgagee, the defendants referred to a number of authorities dealing with the application of s 42(2)(e) and the protected rights of a tenant in possession under that provision.

85 Counsel for the defendants described the decision of the High Court in *Burke* as a "convenient starting point" and referred to the following passage in the judgment of Dixon J:[80]

77. (1914) 19 CLR 197.
78. At 205–6.
79. At 208. See also *Great West Permanent Loan Co v Friesen* [1925] AC 208.
80. At 17–18 (emphasis added).

> *In Victoria these words have received an interpretation and an application as a result of which any person in actual occupation of the land obtains as against any inconsistent registered dealing protection and priority for any equitable interest to which his occupation is incident, provided that at law his occupation is referable to a tenancy of some sort, whether at will or for years.* Thus, a purchaser under a contract of sale, who at law is in possession as tenant at will of the vendor, has been held protected in respect of his equitable ownership as purchaser (*Robertson v Keith*; *Sandhurst Mutual Permanent Investment Building Society v Gissing*); a lessee in respect of an option of purchase contained in his lease (*McMahon v Swan*) and a wife in respect of an equitable life interest claimed under an unsigned separation agreement made with her husband (*Black v Poole*). a'Beckett J decided the last named case in deference to previous decisions and against his own opinion, which he stated to be that "those words were intended to refer to a tenancy as ordinarily understood arising out of an agreement under which the person in possession was allowed to occupy in consideration of some kind of rent or service of which the proprietor was to have the benefit". The cases are collected and criticised by the late Dr Donald Kerr in his work *The Australian Lands Titles (Torrens) System* (1927), at pp 75 et seq. But the interpretation has stood for nearly 70 years, and it would, I think, be most undesirable now to undertake the re-examination of its correctness.
>
> For the purposes of our decision, I accept the view that under sec 72 the respondent's occupation of the land confers upon her equitable life estate a protection against the paramount effect otherwise produced by an inconsistent dealing under the registration system.

86 This extract, however, needs to be considered in context. The case involved a contest between the interests of a mortgagee and that of a beneficiary under a will who had been in possession of the property since the death of the deceased. Importantly, the beneficiary was in possession of the land at the time when the mortgage was given[81] and had exclusive occupation of the land.[82] The question of priority, as identified by Dixon J was as between the equitable tenant for life in possession under the will and the registered proprietor of the mortgage given by the executor of the will.[83] His Honour said as follows:[84]

> Her claim [to retain possession of the land] rests primarily upon the fact that at the time when the appellants took their mortgage from Dawes she was in actual possession of the land.

It can, therefore, be readily seen that *Burke* did not involve consideration of the issues that arise in this case. Indeed, it would seem implicit that his Honour and the parties regarded the relevant time to assess the competing interests under the TLA as between tenant and mortgagee to be the time of creation of the mortgage, not its registration.

87 *Downie v Lockwood*[85] was decided by Smith J of this court who said as follows:[86]

> As appears from the cases the exception in s 42(2)(e) is to be widely construed; and it is to be treated as producing the result that "any person in actual occupation of the land obtains as against any inconsistent registered dealing protection and priority for

81. At 6.
82. At 6, 15.
83. At 14.
84. At 16.
85. [1965] VR 257.
86. At 259 (citations omitted).

any equitable interest to which his occupation is incident, provided that at law his occupation is referable to a tenancy of some sort, whether at will or for years".

Here it is clear that immediately before the defendants became registered the plaintiff's occupation was at law referable to a tenancy.

88 The case turned on a determination of the status of the asserted tenant and the priority of his interest as against that of the registered proprietor; the question of the competing interests of a mortgagee and subsequent tenant was not considered.

89 The decision of *Mayer v Coe*[87] (cited with approval by the Court of Appeal in *Macquarie Bank Ltd v Sixty Fourth Throne Pty Ltd*[88] and also by the High Court in *Farah Construction Pty Ltd v Say-dee Pty Ltd*[89]) was also relied upon by the defendants. In that case, Street J said as follows:[90]

> These would be true proceedings in personam. But once the memorandum had been registered its efficacy as a mere forged document became translated to a statutory operation as a registered instrument. Mr Coe's statutory rights under the Real Property Act derived from the fact of registration and not from an event antecedent thereto. Consistently with the Privy Council's decision in *Frazer v Walker* [[1967] 1 AC 569], supra, it became immaterial that the instrument which had led to his being registered was void. That of itself would not give rise to any personal equity against Mr Coe.

90 It will be observed that his Honour's statement of principle was directed to the efficacy of a forged mortgage upon registration and not the question of the intersecting rights of the holder of an unregistered mortgage and a subsequent tenant. Clearly, *Mayer* is authority for the proposition that a mortgagee is unable to exercise any of the powers available under the TLA until registration when the statutory rights spring up. However, it says nothing about the competing rights of an unregistered mortgagee and a subsequent tenant in the period prior to registration.

91 Finally, I should mention what is said in the most recent edition of Voumard, *The Sale of Land*,[91] in relation to s 42(2)(e):

> (e) The interest (but excluding any option to purchase) of a tenant in possession of the land.
>
> Certain English decisions prompt an enquiry as to the point of time at which a "tenant" must take possession in order to become entitled to the benefit of this provision.
>
> …
>
> Although these decisions afford some assistance as to the effect of s 42(2) of the Transfer of Land Act, any similar question arising in this State will depend upon the construction of this provision having regard to the context in which it is found. The reference in this subsection to land included in any registered instrument suggests that, in order to obtain protection, it is sufficient if the "tenant" is already in possession at the time of the lodging for registration of the instrument under which a claim adverse to the tenant is made.

87. [1968] 2 NSWR 747.
88. [1998] 3 VR 133.
89. (2007) 230 CLR 89 at 170, [193].
90. At 754.
91. 5th ed, Law Book Co.

The defendants rely upon the observations contained in the last sentence. However, it is to be noted that there is no reference to a number of recent decisions on this issue which I will turn to in a moment. Moreover, I was told by counsel for HGR that this extract from Voumard had not been altered since the third edition published in 1978.[92]

92 The specific question of the competing rights under the TLA of a mortgagee as against that of a tenant in possession has been considered on a number of occasions by judges of this court and the Federal Court. In each case, the court recognised (implicitly or explicitly) that the rights of the mortgagee as against the tenant, contrary to the argument of the defendants, arise at the time of the creation of the mortgage and that a tenant taking possession subsequently does so subject to the mortgagee's rights. Such rights, however, in the context of the TLA, can only be *exercised* upon registration of the mortgage.

93 In *Independent Order of Odd Fellows of Victoria Friendly Society v Telford*,[93] the registered mortgagee sought possession. Subsequent to the registration of the mortgage, the mortgagor executed a lease to the defendant Mr Telford. He argued that s 42(2)(e) of the TLA was unqualified in effect, and that the interest of a tenant-in-possession was paramount in all cases, notwithstanding the time at which the tenant went into possession.

94 Having considered the terms of s 42(2), Gobbo J said as follows:[94]

> The remaining sections of the *Transfer of Land Act*, in my view, do not support that reading of the provision. In the first place, s 66 has a limited reference to leases, but by analogy the reference in s 66(1) and (2), which provides for power to lease any land, for any term exceeding three years, and provides further that such lease shall not be varied against the mortgagee unless he has consented in writing, lends no support for the view that a lease made without the mortgagee's consent in writing may still be effective to amount to a paramount interest. But the most relevant and particular provision is s 77, which controls the effect of the exercise of powers of sale by a mortgagee. *In that section, in particular in subs (4), it is clear, in my view, that, upon the registration of any transfer, all the stated interest is freed and discharged from all liability on account of such mortgage or charge and in respect of any mortgage, charge or any encumbrance, registered or notified in the register book except a lease to which the mortgagee has consented in writing. The plain intent of that section, in my view, is to enable the mortgagee to effect a sale that is free from subsequent dealings; that is, dealings subsequent to the creation of the mortgagee's interest, in this case the mortgage, unless he has consented in writing to the creation of such lease, easement or restrictive* covenant. In my view, those provisions in s 77, combined with the indirect assistance given by the presence of s 66, lead one to the conclusion *that s 42(2) is referring to an interest of a tenant in possession of the land at the time of the creation of the original interest of the mortgagee, and not at any point subsequent to that*, such as the time when the power of sale is exercised. [Emphasis added.]

95 In *Baranyay*, the bank sought to exercise its power of sale as mortgagee. Subsequent to the registration of the mortgage but prior to its execution of a contract of sale with a purchaser, the mortgagor agreed to lease the property to Mr Baranyay. He argued that his interest as tenant in possession was protected by s 42(2)(e). The mortgagee having not consented to the lease contended that its

92. Indeed, it is in the same form, as a footnote, in the fourth edition published in 1986.
93. (1991) V ConvR ¶54-419 ("*Telford*").
94. At 64,993.

interest prevailed. Hayne J concluded that the mortgagee's interest had priority and after referring to s 77(4) of the TLA said:[95]

> I consider that it is clear that the intent of the section is to enable a mortgagee exercising a power of sale to pass an unencumbered title to the purchaser. That being so, it follows, as Gobbo J noted in the *Independent Order of Odd Fellows Case*, that the reference in s 42(2) to an interest of a tenant in possession of the land preserves (as against the mortgagee) interests of tenants in possession of the land at the time of the *creation of the original interest* of that mortgagee — not any interest of a tenant in possession at the time when the mortgagee exercises his power of sale.

96 Pausing for a moment here, counsel for the defendants made the point that the decisions in *Telford* and *Baranyay* did not deal specifically with the precise issue, here, namely the creation of a tenancy between the time of the execution of the mortgage and its registration and contended that therefore those decisions could be put to one side. I beg to differ. Gobbo J was, I think, clearly giving consideration to an argument concerning the effect of a lease whenever it may have been entered into (albeit that the subject lease in that case was entered into after the registration). Given that the central plank of Mr Telford's argument turned upon s 42(2)(e) and the effect of registration, if his Honour had regarded the time of registration as being the time at which the mortgagee's interest was created then his Honour would, I think, have said so in terms. His Honour's reference to the creation of the original interest of the mortgagee must be taken as a reference to the execution of the mortgage and the creation of the accompanying equitable interest. There is nothing, I suggest, in Hayne J's remarks, which endorse those of Gobbo J, to suggest that his Honour was confining his remarks to the facts before him. It was, as I read it, a statement of general principle concerning the rights of a mortgagee under the TLA once the mortgage had been created. I do not accept the contention that reference to the creation of the mortgagee's interest is, in some way, to be equated with the creation of an interest upon registration.

97 I should also mention the recent decision of Emerton J in *Apollo 169 Management Pty Ltd v Pinefield Nominees Pty Ltd*,[96] in which her Honour said as follows in relation to a mortgage executed in October 2006:[97]

> The effect of the provisions of the Transfer of Land Act relied upon is that a mortgagee exercising a power of sale can pass title to a purchaser unencumbered by interests that did not exist at the time the mortgage interest was created. *The lease or "a" lease in relation to Lot 15 did not exist when the mortgage was created in October 2006.* The plaintiff was not incorporated until October 2007. Section 42(2) does not assist the plaintiff.

98 Decisions of the Federal Court accord with those of this court.

99 In *Orr*, Sheppard J, having stated the general principle which I extracted earlier, went on to say:[98]

> These principles of the general law apply not only to land under common law title but also to land under Torrens title: see *Baalman's Torrens System in New South Wales* (2nd ed, 1974) p 265 and s 53(4) of the Real Property Act 1900 (NSW) which acknowledges

95. [1993] 1 VR 589 at 599 (emphasis added).
96. [2010] VSC 40.
97. At [77] (emphasis added).
98. (1981) 37 ALR 653 at 661–2; 58 FLR 219 at 229–30.

that a mortgagor may grant a lease. All it is concerned to do is provide that no such lease will be valid and binding against the mortgagee unless it is consented to by him. A similar provision is contained in s 84 of the Real Property Ordinances 1925 (ACT). The provision applies in terms to leases but I would construe it so as to apply to sub-leases as well.

100 In *Maher v Commonwealth Bank of Australia*,[99] Mr Maher claimed possession of a property under a lease from the registered proprietor, Mr Taylor. The bank held a mortgage from Mr Taylor and had not consented to the lease. Although the case involved consideration of matters other than that of possession of the property (eg the lease was executed during the course of the mortgagor's bankruptcy), Finkelstein J said as follows in relation to Mr Maher's rights as against the bank:[100]

> Following Mr Taylor's default and the service of the requisite notice under s 76 of the Transfer of Land Act the bank was entitled to eject Mr Taylor, and any person claiming through him, without any further notice to quit or demand for possession. The reason for this is that after default Mr Taylor was at most a tenant at sufferance to the bank who could be treated, at the bank's election, as either a tenant or as a trespasser. *Moreover while a mortgagee may be bound by a tenant of the mortgagor holding a lease granted before the mortgage* (see s 42(2)(e) of the Transfer of Land Act), *the mortgagee may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor granted after the mortgage and without the consent of the mortgagee.* The reason is obvious. A tenant to the mortgagor whose tenancy does not predate the mortgage cannot be in a better position than the mortgagor himself.

101 I do not accept the defendants' submission that his Honour, in referring to a tenancy, which pre-dated the mortgage, was implicitly referring to the registration of the mortgage rather than the date of creation of the mortgage. The point that his Honour makes in the last sentence militates against such an implication being drawn.

102 Finally, there is the recent decision of Middleton J in *Haslam v Money for Living (Aust) Pty Ltd*.[101] This case was one of a number involving retirement plans under which the retirees having sold the family home to an organisation known as Money for Living received, in addition to a payment of cash and the promise of ongoing payments, the right to occupy their property for the remainder of his or her life pursuant to a lease. Each retiree continued to occupy his or her property; Money for Living became the registered proprietor and mortgaged the properties to a financier, Perpetual, which after default by the mortgagor sought to take possession of the retirees' properties.

103 Two of the retirees' rights were governed by s 42(2)(e) of the TLA and two others by a similar provision of the Land Titles Act 1980 (Tas).

104 Middleton J specifically addressed the question of the priority of the mortgagee's interest over that of a tenant after the creation of the mortgage. Relevantly, the issue of priority where a lease was entered into subsequent to the execution of the mortgage but prior to its registration was dealt with under the heading "Creation of leases after the creation of mortgages":[102]

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99. [2004] FCA 248.
100. At [24] (references and citations omitted; emphasis added).
101. (2008) 172 FCR 301 ("*Haslam*").
102. At 322, [45]–[47] (references and citations omitted; emphasis added).

> *I accept Perpetual's argument that MFLPH was unable to grant a future lease, whether registered or not registered, after the creation of the mortgage without Perpetual's consent. The time of the creation of the mortgage is the time the mortgages are entered into, not registered. Once the mortgage is registered, it would take priority over any tenancy, but necessarily only a tenancy entered into after the mortgage was created.*
>
> *Therefore, in this proceeding, if the leases came into existence after the creation of the mortgages, Perpetual would be entitled to priority because the title of the mortgage would prevail over the interests of the retirees, Perpetual not consenting to the leases.* If the leases were created prior to the creation of the mortgages, then only if they fell within the exceptions to the indefeasibility principles would the leases be able to take priority in circumstances where the mortgage was subsequently registered.
>
> I should say something more about this conclusion I have reached as to the relevant time for considering the competing claims and the creation of the mortgage. *It is important to keep in mind that in this proceeding we are concerned with a competition between a lease and a mortgage, which necessarily brings into operation the principles discussed in Baranyay, cl 8 of the common provisions of the mortgage, and the provisions of the TLA and LTA dealing with mortgages and leases.* If one were dealing with a competition between a lease and, say, a registered proprietor of the property, the relevant time to consider may be the time of lodgement or registration of the relevant interest. This is because the registered proprietor would not be able to rely upon cl 8 of the common provisions, and the statutory provisions relating to mortgages and leases and their priority, and the focus would be only upon the operation of s 42(2)(e) of the TLA and s 40(3)(d) of the LTA.

105 I adopt the analysis of his Honour on this issue which, it seems to me, conforms with statements of principle (implicitly and explicitly stated) in a number of the other authorities to which I have adverted.

106 As I have said, counsel for the defendants relied upon many statements of principle concerning indefeasibility of title, and the primacy of s 42, particularly in the context of the competing interests of a registered proprietor and a tenant. The correctness of those authorities could not be doubted. I repeat that here, however, the question is different and involves the determination of the rights of the mortgagee and subsequent tenant not confined solely to the terms of s 42, but also taking into account the other provisions of the TLA, as was recognised, I suggest, in *Telford*, *Baranyay* and *Haslam*.

107 This analysis of the interaction of s 42 and other provisions, particularly s 77, of the TLA accords, I suggest, with modern principles of statutory construction. In *Project Blue Sky v Australian Broadcasting Authority*,[103] the High Court (McHugh, Gummow, Kirby and Hayne JJ) said:[104]

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. *The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"*. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

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103. (1998) 194 CLR 355.
104. At 381–2, [69]–[70], see also 390–1, [93]; *Federal Commissioner of Taxation v Futuris Corp* (2008) 237 CLR 146 at 156–7, [23]; *Adams v Lambert* (2006) 228 CLR 409 at 419–20, [28]; *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.

108 So when the question of a mortgagee's interest arises, a provision such as s 42 is not to be viewed in isolation; rather it is to be looked at in the wider context of the whole of the TLA, particularly those provisions relevant to the mortgagee's right to possession and the exercise of a power of sale by a mortgagee (ss 78 and 77).

109 The interpretation of ss 42 and 77 in the manner described by Gobbo J in *Telford*, Hayne J in *Baranyay*, and Middleton J in *Haslam*, is consistent, I respectfully suggest, with this approach. It promotes the harmonious operation of the provisions of the Act, and advances the overall objectives of the TLA. Any other result would lead to a capricious outcome, as I think the facts in this case demonstrate. First, as Finkelstein J noted in *Maher*, the tenant would be placed in a stronger position than the mortgagor in resisting the exercise of the power of sale or a claim for possession. This is particularly relevant here as the tenant, Mr Bianco, effectively insists that he has a tenancy which in practical terms may never be terminated. In other words, the mortgagee's statutory power of possession and sale will, for the foreseeable future, be frustrated.

110 Second, there is commercial reality. A mortgagee may for a variety of reasons delay registering a mortgage. If the defendants' argument be correct, then notwithstanding the common provisions,[105] a mortgagor may (as has happened here), subsequent to executing the mortgage, let the premises and in doing so delay or frustrate the rights of a mortgagee upon registration of the mortgage. It would be an affront to mercantile practice in this State to place an unregistered mortgagee, with an equitable interest in the property from the date of creation of the mortgage, at the mercy of a subsequent tenant of the mortgagor whose actions place that tenant in a preferential position to that of the mortgagee.

111 Third, to give a tenant priority over the mortgagee's interest would be in contradiction of the longstanding position under the general law and, I think as intended, the TLA — a position that makes abundant good commercial sense and does not turn upon the timing of the registration but rather permits a mortgagee to consent to a lease and then, and only then, be liable to the exercise of the rights of the tenant. The converse, of course applies and makes equal good sense — at the time that the mortgagee enters into the mortgage he or she does so subject to any existing tenancy.

112 Accordingly, I am of the view that absent consent of the mortgagee the tenant's interest was, to use the words of the Earl of Selborne, "precarious"[106] and able to be defeated by the mortgagee upon the exercise of its rights under either s 77 or s 78.

113 It follows that, once IID defaulted on its repayments to HGR, it was entitled to possession pursuant to s 78 of the TLA, and once the statutory period had elapsed, it was also capable of exercising its power of sale under s 77 of the Act. No priority was by virtue of s 42(2)(e) conferred on Mr Bianco and/or the sub-tenants by reason of s 42(2)(e).

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105. See at [13].
106. See at [75].

Comparison of competing equities

114 If I am wrong and Mr Bianco and Ms Joakim's interests fall within the protection of s 42(2)(e) as against HGR, the question then arises as to the effect of such protection.

115 Counsel for HGR essentially relied upon his submissions concerning the application of s 42(2)(e) and did not deal with this issue specifically. In any event, I adopt what was said by Middleton J in *Haslam*:[107]

> My view is that if the retirees come within the terms of s 42(2)(e) … then no comparison of the competing interests is required of the type suggested by Perpetual.

116 Accordingly, if (contrary to my conclusion) Mr Bianco is afforded protection against HGR's interest pursuant to s 42(2)(e), it is not necessary to examine the question of competing interests further.

117 If, however, the case does turn on the question of competing equities, I think that the interest of HGR prevails over that of Mr Bianco for the following reasons which I shall briefly state.

118 The defendants rely upon an asserted equitable interest created by the deed which pre-dated by one day the execution of the mortgage.[108] I am prepared to accept that the deed did in fact provide Mr Bianco with an equitable interest at the time that it was entered into and therefore is first in time.[109] However, I am satisfied for reasons that I have set out earlier that Mr Joakim was aware both that HGR was a lender to IID and that the security provided to HGR was a mortgage from IID over the property (including the unit). I am also satisfied that, by the time that the residential tenancy agreement with IID was entered into with Mr Bianco as the nominal tenant, it was known to Mr Joakim that HGR had a mortgagee's interest in the property (unit 9).

119 In other words, Mr Joakim, the moving force of the arrangement, was aware of HGR's interest in the unit prior to the deed being entered into and during the period of time that the mortgage remained unregistered.

120 In these circumstances, fairness and justice requires that the earlier equitable interest be postponed.[110] This is particularly so given that Mr Bianco's interest as evidenced by the deed is a sham designed to disguise the true interest of Mr Joakim in the provision of funds to IID and the occupation of the unit.

Conclusion

121 Section 42(2)(e) does not provide Mr Bianco or Ms Joakim with any right over that of HGR. Rather, HGR's interest as mortgagee prevails.

122 HGR is entitled to an order for possession of the property and, if necessary, an order for the ejectment of Ms Joakim.

123 As agreed between the parties, the question of damages flowing from the unlawful occupation of the unit (as I have concluded exists) was to be deferred until I delivered my judgment on the question of possession. The parties will now

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107. (2008) 172 FCR 301 at 330, [83].
108. I do not need to decide whether HGR's interest arose at the time of execution of the mortgage or at the time of default as submitted by counsel for the defendants.
109. See *Avco Financial Services Ltd v White* [1977] VR 561.
110. See *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326 at 341; *Lapin v Abigail* (1930) 44 CLR 166 at 204.

have the opportunity to consider these reasons, and then make any further submissions they wish on the question of damages.

21 May 2010 — [2010] VSC 201

J Forrest J.

Introduction

1 On 12 May 2010, I determined that the plaintiff, formerly HG & R Finance Ltd ("HGR") (now Balanced Securities Ltd) was entitled to possession of a unit in Prahran currently occupied by the first defendant, Mr Antonio Bianco, and his sub-tenant, Ms Nicole Joakim, the third defendant. I also determined that Mr Nicos Joakim, the second defendant, was a joint tortfeasor with Mr Bianco in the unlawful occupation of the unit.

2 The unit has been occupied by Mr Bianco and his sub-tenants since October 2003. HGR's entitlement to possession arose at the time of default in a loan repayment by International Investments and Development Pty Ltd ("IID") which occurred on or about 1 November 2003.[1]

3 HGR, however, did not register the mortgage until 10 December 2003.[2] Its right to enter into possession under the Transfer of Land Act ("TLA") arose as of that date.[3]

4 It was agreed between the parties that Ms Joakim would cease occupation of the unit by 28 May 2010. The question that now has to be determined is that of the quantum of the damages payable as a result of the unlawful occupation of the unit by Mr Bianco and Mr Joakim. HGR did not seek relief in the form of damages from Ms Joakim.

The issues

5 The primary issue is the manner in which damages are to be assessed. Usually in such cases damages are measured by an award of mesne profits.[4] However, HGR also seek, for a portion of the period during which the unit has been unlawfully occupied, damages in accordance with the principles enunciated in *Hungerfords v Walker*.[5] If decided in favour of HGR then the question arises as to whether, in the circumstances, such an award is appropriate. A secondary but important issue arises concerning two substantial periods of procrastination on the part of HGR in bringing this proceeding and the effect of such delay on the quantum of damages.

The submissions of the parties

6 HGR contended that it was entitled to a mix of mesne profits and damages. It sought mesne profits from 1 July 2004 to 30 June 2006 in the sum of $44,400. It argued that, but for the occupation, the unit would have been sold by mortgagees' auction by 1 July 2006 and, thereafter, it said that it was entitled to damages on a *Hungerfords* basis from 1 July 2006 to 28 May 2010, totalling

1. (2010) 27 VR 599 at 603, [23].
2. At 603, [24].
3. At 616, [90] and 617, [92].
4. *Wilson v Kelly* [1957] VR 147 at 152. "Mesne profits" are an ancient remedy traditionally accompanying recovery of possession or ejectment by the owner of the property.
5. (1989) 171 CLR 125 ("*Hungerfords*").

$237,943. HGR relied upon the evidence of Mr Clayton, a valuer, to establish the market value of the rental of the unit and its capital value. It also adduced evidence from Mr Trevor Wilson, its general manager, and Mr Peter Wilkinson, a forensic accountant, to make out its claim for *Hungerfords* damages. To meet the argument raised by the defendants as to its delay in bringing this proceeding, HGR contended that an allowance of two years of mesne profits and thereafter calculation on a *Hungerfords* basis met such a complaint. Its alternative argument, based solely upon mesne profits, is for a total amount of approximately $141,000, being the rental foregone.

7 The defendants submitted that the appropriate measure of damages is mesne profits. While the defendants put no specific argument to the contrary, it was implicit in their contentions that *Hungerfords* damages should not be permitted in a claim for trespass. They also argued that the nature of the loss alleged under the *Hungerfords* principles constituted a business loss and as such was not claimable. Counsel for the defendants placed considerable reliance upon the delay of HGR in prosecuting the claim against his clients, contending that this should result in a significant reduction in the amount of damages available to HGR, whichever basis was chosen for the purpose of assessment.

Is it open to HGR to claim *Hungerfords* damages?

8 A claim pursuant to *Hungerfords* principles arises out of a party's deprivation of money which would have been available to it and utilised for commercial purposes (such as an investment with interest or to reduce existing indebtedness) but for the wrongful act of the other party. Those principles were explained in the joint judgment of Mason CJ and Wilson J, who, having noted that the fundamental principle where a plaintiff establishes a claim for damage for breach of contract is an entitlement to restitutio in integrum, went on to say:[6]

> According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss. In principle he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence. Judged from a commercial viewpoint, the plaintiff sustains an economic loss if his damages are not paid promptly, just as he sustains such a loss when his debt is not paid on the due date. The loss may arise in the form of the investment cost of being deprived of money which could have been invested at interest or used to reduce an existing indebtedness. Or the loss may arise in the form of the borrowing cost, ie, interest payable on borrowed money or interest foregone because an existing investment is realized or reduced.
>
> The requirement of foreseeability is no obstacle to the award of damages, calculated by reference to the appropriate interest rates, for loss of the use of money. Opportunity cost, more so than incurred expense, is a plainly foreseeable loss because, according to common understanding, it represents the market price of obtaining money. But, even in the case of incurred expense, it is at least strongly arguable that a plaintiff's loss or damage represented by this expense is not too remote on the score of foreseeability. In truth, it is an expense which represents loss or damage flowing naturally and directly from the defendant's wrongful act or omission, particularly when that act or omission results in the withholding of money from a plaintiff or causes the plaintiff to pay away money.

6. At 143–4 (emphasis added).

Their Honours concluded as follows:[7]

> But we see no reason for allowing the reluctance of the common law to extend to cases where the defendant's breach of contract or negligence has caused the plaintiff to pay away or the defendant to withhold money and, as a result, the plaintiff has been deprived of the use of the money so paid away or withheld. The recovery of compensation for the loss may be ascribed to the operation of the second limb in *Hadley v Baxendale*. *However, we would prefer to put it on the footing that it is a foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort.*

9 It is to be noted that there was no suggestion by the High Court that a claim for *Hungerfords* damages is limited to any particular form of tort — notwithstanding that *Hungerfords* itself was a professional negligence claim and that most claims determined subsequently applying its principles arise out of negligence or breach of a statutory obligation.

10 Recently, the Court of Appeal in *St George Bank Ltd v Quinerts Pty Ltd*[8] dealt with an argument by a bank for *Hungerfords* damages said to flow from breach of contract, negligence and misleading and deceptive conduct on the part of a valuer engaged by it in relation to a mortgaged property. Nettle JA (with whom Mandie JA and Beach AJA agreed) said as follows:[9]

> … In my view the judge's analysis on this point was correct. The decision of the High Court in *Hungerfords v Walker* established that expenses incurred and opportunity costs arising from money being paid away or withheld as a result of a negligent breach of contract are able to be recovered as pecuniary losses suffered by a plaintiff as a result of the defendant's conduct. But as the High Court later explained in *Commonwealth v Amann Aviation Pty Ltd*, such damages are simply manifestations of the principle that a party who has sustained loss by reason of a breach of contract is entitled to be placed in the same position, so far as money can do it, as if the contract had been performed. Consequently, the incurrence of such losses must be proved. It is not enough for a party like the bank simply to assert that, because it is in the business of lending money, it must follow that it has suffered a loss equal to the return on funds which it might have achieved if it had entered into a successful transaction at the same rate of return as the failed transaction. *At best, the opportunity forgone represents a loss of a chance to invest in a more successful transaction and, depending on the facts of a case, the value of the loss may have to be discounted significantly to allow for the vicissitudes of chance*.

11 In *Lollis v Loulatzis*,[10] Kaye J conducted a scholarly and extensive analysis of the principles associated with an award of damages for trespass. Two of the authorities considered by his Honour merit repetition in the context of this application.

12 In *Swordheath Properties Ltd v Tabet*,[11] a leading authority on an allowance for mesne profits, Megaw LJ said:

> It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he

7. At 149 (citations omitted; emphasis added).
8. (2009) 25 VR 666.
9. At 675, [25] (emphasis added).
10. [2007] VSC 547.
11. [1979] 1 WLR 285 at 288 (emphasis added).

> could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; *and in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages.*

It will be noted that his Lordship was not limiting the measure of damages solely to mesne profits, but rather making the observation that this was the usual form of assessment in a trespass case.

13 Subsequently, in *Inverugie Investments Ltd v Hackett*,[12] the Privy Council said:

> It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends on how widely one defines the "loss" which the plaintiff has suffered … In *Stoke-On-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 Nicholls LJ called the underlying principle in these cases the "user principle". The plaintiff may not have suffered any *actual* loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

14 I should now return to the judgment of Kaye J in *Lollis*. His Honour described the law relating to assessment of damages for trespass as being well settled:[13]

> Damages awarded for trespass to land are sometimes described as "mesne" profits. The usual measure of such damages is constituted by the value of the market rent for the premises which the trespasser should have paid during the period of the trespasser's occupation of the premises. In order to prove an entitlement to such damages, it is not necessary for the plaintiff to establish that the property has been damaged, or that the plaintiff would have been able, or indeed willing, to lease the premises during the period of the trespass.

However, his Honour went on to say as to the principle underpinning such an award:[14]

> Similarly, to the extent to which damages in a case such as this may be compensatory, *it is basic that, in an action for tort, damages are awarded as compensation, in order to restore the plaintiff to the position in which the plaintiff would have been, had the tort not occurred.*

15 There is no suggestion, as Kaye J noted, that basic compensatory damages principles are not applicable to a claim in trespass. It must follow, I think, that there is no inherent limitation on a claim for trespass to damages solely in the form of mesne profits.

16 In light of the above, I think the following can be concluded:

(a) Damages for trespass are to be treated in no different way to damages in respect of any other form of tort. In so far as such damages are compensatory, they endeavour to restore the plaintiff to the same position which he or she would have been in, but for the wrong;

12. [1995] 1 WLR 713 at 717–18.
13. [2007] VSC 547 at [219] (citation omitted). See also *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17.
14. At [230] (emphasis added).

(b) The usual measure of damages for trespass is by an award of mesne profits, being the value of the market rental for the premises during the period of the trespasser's occupation;
(c) However, given that the damages sought by HGR in this case are compensatory in nature, their evaluation is not limited to mesne profits, but rather, may be determined by the application of general principles relevant to an award of compensatory damages;
(d) Accordingly, in an appropriate case there may be ways of measuring the loss caused by the trespass other than mesne profits. Damages pursuant to the *Hungerfords* principle are compensatory and, therefore, may be awarded if the facts support such an allowance — that is to say that it is open to HGR to make a claim for the loss of the commercial opportunity to invest the putative funds, realised from the hypothetical mortgagees' sale, in other investments or transactions.

Over what period should HGR's loss be calculated?

17 As I have said, HGR contended that its loss should be measured from 1 July 2004 to 28 May 2010, by which time Ms Joakim will have vacated the premises. The defendants argue that the dilatory nature of HGR's conduct in prosecuting its claim for possession of the premises is such that it is unreasonable to allow a claim for the whole of the period. Although no argument of mitigation of loss had been pleaded, it was clear from the outset of the trial (as demonstrated by the cross-examination of Mr Wilson) that the question of HGR's procrastination was a live issue.

18 Any award of damages against the defendants is, of course, for a sum that is fair and reasonable and a court, even without a plea of mitigation, may examine the plaintiff's conduct to determine whether the defendants' actions were, in truth, a cause of HGR's loss or part thereof.

19 In *Kewside Pty Ltd v Warman International Ltd*,[15] French J said of loss or damage suffered in contravention of s 52 of the Trade Practices Act 1974 (Cth) ("TPA"):[16]

> The causal connection is not that of the strict logician, but is to be understood according to common sense concepts. Selection principles influenced by policy and not merely logic operate. Concepts such as contributory negligence and mitigation have no role as such in this process but analogous notions may apply to decide whether or not a claimed loss was truly caused by the contravention in question.

20 Subsequently, in *Henville v Walker*,[17] McHugh J said, in relation to a case also brought under s 52 of the TPA:[18]

> Nothing in the common law in ss 52 or 82 or in the policy of the Act supports the conclusion that a claimant's damages under s 82 should be reduced because the loss or damage could have been avoided by the exercise of reasonable care on the claimant's part. There is no ground for reading into s 82 doctrines of contributory negligence and apportionment of damages. *No doubt, if part of the loss or damage would not have*

15. (1990) ATPR 41-012.
16. At 51,281 (citation omitted). See also *Mehta v Commonwealth Bank of Australia* (unreported, NSW Supreme Court, 27 June 1990).
17. (2001) 206 CLR 459.
18. At 505, [140]. See also *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1993) 118 ALR 565 at 575 (emphasis added).

> *occurred but for the unreasonable conduct of the claimant, it will be appropriate in assessing damages under s 82 to apply notions of reasonableness in assessing how much of the loss was caused by the contravention of the Act.* But that proposition is concerned with the items that go to the computation of the loss. As I have pointed out, nothing in the judgments of the courts below shows that there was any unreasonable conduct on the part of Mr Henville in incurring costs or raising revenue.

21 It follows, I think, that if it is determined that HGR's conduct in the prosecution of proceedings for possession was unreasonable, then any loss of HGR attributable to that conduct is not recoverable against the defendants.

22 In February 2004, Herbert Geer & Rundle wrote to the occupiers of the units advising that HGR was entitled to possession. By the commencement of April 2004, it was aware that Mr Bianco held the tenancy agreement with IID. While a number of letters were forwarded to the sub-tenant, the first demand that I have been able to identify upon Mr Bianco for possession was on 19 May 2004.[19]

23 No further step was taken by HGR to obtain possession for nearly a year. On 29 April 2005, it initiated proceedings at VCAT which were dismissed on 6 May 2005. Apart from a burst of correspondence between itself and the defendants' solicitors in June and July 2006, HGR did nothing until 16 June 2008, when it issued a proceeding for summary possession under O 53, and then this proceeding on 10 July 2008. The time between initiation and judgment in these two proceedings (combined) is just short of two years.

24 Mr Wilson candidly explained the delay when asked what happened after the flurry of correspondence in July 2006:[20]

> I'm not exactly sure, Mr Hyde, but again, this was a problem that was, you know, continually put to the bottom of the drawer of being one of those hard ones that you had to deal with, and you know, this was one of the — we had other things to do and had dealt with all the other units, this was one that we just had to get around to dealing with, and it was procrastination from my part, dealing with the harder things last.

25 I accept that HGR acted reasonably in bringing proceedings initially at VCAT prior to issuing the O 53 proceeding or this proceeding.

26 I am also prepared to accept, with considerable hesitation, that the delay of one year between the claim for possession and the initiation of the VCAT application was reasonable even though there was nothing complex in the application and it was able to be heard within weeks of its initiation. A mortgagee should be afforded the opportunity to effect a consensual departure from the premises of an unlawful occupant. Of more significance is the delay after the defeat of the VCAT application in May 2005. Taking no steps of any sort until HGR issued proceedings for summary possession in June 2008 was patently unreasonable. It should, after defeat at VCAT, have issued proceedings in this court promptly — in June 2005 — which it can be assumed would have taken two years to resolution.

27 If HGR had acted reasonably, I think it would have obtained an order of possession in this court in about June 2007 — three years after the approximate date upon which it became entitled to possession. Subsequent to that point of time there is, in my view, no entitlement to damages on the part of HGR: its own conduct severed the degree of connection between the unlawful occupation and

19. Exhibit P4, 65.
20. T92.

damage at that point. True it is that Mr Joakim will have obtained a windfall in relation to his collection of rent for nearly three years subsequent to that putative date. On the other hand, HGR's claim is for compensatory, rather than restitutionary, damages and having determined on that course,[21] it can hardly complain.

The measure of HGR's loss

28 The claim for damages on the basis of the deprivation of a commercial opportunity relied upon the evidence of Mr Wilson and Mr Wilkinson. There was no challenge mounted to their evidence on this aspect of the claim.

29 The substance of their combined evidence is as follows. HGR is a public company which, at the relevant time, accepted investor funds, and then by use of those funds, together with available capital and retained earnings, made loans over real estate, secured by a first mortgage. Those funds not applied to the real estate business are invested at interest until deployed as loan funds in the mortgage business. This evidence was not challenged.

30 I have set out the principles relevant to a *Hungerfords* claim at [8]–[10] above.

31 The defendants relied upon the decision of Heerey J in *Garroway Metals Pty Ltd v Comalco Aluminium Ltd*[22] as authority inimical to HGR's claim for loss of commercial opportunity. In that case, his Honour refused to allow a claim for damages on a *Hungerfords* basis assessed by reference to the trading profits that would have been earned if the money had not been withheld wrongfully by the defendant. However, as I read his Honour's reasons, the case turned upon the evidence relating to the use of the moneys which had been wrongly withheld. His Honour posed the question:[23]

> On the assumption that money wrongfully withheld by a defendant would have been "put into the business" by a plaintiff, to what use would the money be put?

His Honour concluded that it was speculative to endeavour to determine how the withheld funds would have been applied in the running of the business. Here the position is different. HGR conducted a mortgage lending practice and derived its income from two modes of investment to which the funds would have been applied. Provided it is accepted that the loss claimed is one of commercial opportunity which must, notwithstanding the reliance upon a retrospective analysis, involve a degree of speculation then there is, I think, no difficulty in such a claim being pursued provided the evidence underpins the claim. Interestingly in *Garroway*, *Hungerfords* damages were, in fact, awarded by his Honour on the basis that the funds wrongfully withheld would have progressively eliminated the applicant's overdraft and any surplus would have been invested in bank bills.

32 Finally, it might be observed that in *St George Bank* the bank failed in its argument based on loss of commercial opportunity not by reason of the question of principle (which was accepted), but by its failure to adduce evidence of the type produced in this case relevant to the investment of the funds.

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21. See *Ministry of Defence v Ashman* [1993] 2 EGLR 102.
22. (1993) 114 ALR 118.
23. At 132.

33 Returning now to the factual substratum of the claim by HGR, I accept that HGR's primary business is the investment of funds either in its mortgage practice or in interest bearing deposits. Mr Wilson gave no evidence as to the likely sale or disposition of the proceeds of the sale of the unit by HGR pursuant to s 78 of the TLA. However, I am prepared to infer that the funds from the sale of the unit would have been re-invested in the HGR business as described by Mr Wilkinson in para 4 of his report.[24] If the defendants had vacated the unit, as they should have, HGR was entitled to possession in approximately July 2004. It is reasonable to allow, in the context of the mortgagee sales of the number of units, a staggered sale and, I think, to conclude that it would have been in receipt of the funds from the sale of the unit on or about 1 July 2006. This is consistent with Mr Wilson's evidence that between 21 September 2004 and 2 June 2006 the remaining units were sold.[25]

34 On the basis of the undisputed calculations of Mr Clayton, the rental loss from 1 July 2004 to 30 June 2005 was $21,840 and from 1 July 2005 to 30 June 2006, $22,360, a total of $44,200.[26]

35 The calculations made by Mr Wilkinson, the forensic accountant, are based upon an analysis of the annual rate of return achieved by HGR for the financial years ended 30 June 2006 to 30 June 2009 using:

- The average value of mortgage loans, other receivables, cash and cash equivalent investments; and
- The gross operating cash inflows (that is interest, fees and other income).

36 Mr Wilkinson calculated the rates of return on invested funds for the financial year ended 30 June 2007 of 15.62%, which I accept. I also accept Mr Clayton's valuation of the unit in June 2006 of $450,000[27] and, as I have said, that such a sum would have been available for investment in July 2006. Mr Wilkinson has calculated the loss on $450,000 invested at 15.62% at $70,290 to 30 June 2007,[28] being the date upon which the defendants ceased to be liable to HGR.

37 I do not, however, accept the argument of HGR that such a sum should be allowed, in effect, without any discount. As Nettle JA demonstrated in *St George Bank*, the claim here is for loss of commercial opportunity which invariably must be subject to a degree of discount. Admittedly, in this case, HGR can rely upon evidence of an established return over a particular period in the past which makes the task considerably easier. However, there are two other relevant considerations in assessing the loss of the commercial opportunity. First, Mr Wilkinson's estimates did not take into account the unit's selling costs as he assumes such costs would have been recoverable from the mortgagor, IID, at the time of the sale. No evidence was led by HGR as to whether such costs were in fact capable of being recovered from IID, or had been recovered in other mortgagee sales of the IID units. Indeed, on the evidence adduced (that is the inability of IID to meet a payment of interest within months of taking out the loan and its subsequent deregistration), one could well surmise that there would have been, even with a timely sale, little prospect of IID contributing to HGR's costs of such a sale.

24. Exhibit P7. See also Wilson's evidence at para 3 of Ex P1.
25. Exhibit P1.
26. Exhibit P8 — IRC4.
27. Exhibit P8 — IRC4.
28. Paragraph 6.3 of report annexed to Exhibit in P7.

Secondly, there is the question of improvident investment of the funds realised from such a sale. A ready example of such an investment is the loan to IID itself which, I infer, resulted in forced sales of the units at amounts which would not have satisfied in total the principal amount advanced, let alone interest.[29] While I accept that Mr Wilkinson's calculations probably take into account losses resulting from bad debts or imprudent investments, there was always the risk that the particular funds realised from the putative mortgagee's sale of the unit would have had a similar misfortune when invested.

38 In my view, an appropriate discount on the figure of $70,290 is 20% which reflects the two contingencies I have adverted to. This produces a figure of $56,230 approximately.

Conclusion

39 HGR is entitled to damages assessed as follows:

(a) Mesne profit—	
1 July 2004–30 June 2006	$ 44,200
(b) Loss of commercial opportunity—	
1 July 2006–30 June 2007	$ 56,230
Total:	$100,430

40 Subject to counsel's submissions, the following orders should be made:

(a) An order for possession in favour of the plaintiff.

(b) That there be judgment for the plaintiff in the sum $100,430 against the first and second defendants.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Herbert Geer Lawyers*.

Solicitor for the defendants: *Nathan Kuperholz*.

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29. See Ex P2 — a table which shows the differences between the valuation figures and the sale price of other units.