

# ***PROPERTY LAW GUIDEBOOK***

## ***SECOND EDITION***

CHRIS DAVIES

### **CHAPTER 9**

#### **PROBLEM QUESTION 4**

Frank was an executive for a large corporation who had bought a \$3.5 million bayside mansion in 2006. However, he became a victim of the global credit crisis and lost his job in January 2009. He was given a redundancy package that enabled him to keep up with the mortgage repayments until 30 June. Unable to secure another job, he then fell two months behind on his mortgage repayments. The Aqua Bank, with which he had a mortgage, informed him by letter of his default on 31 July. After a further month without any repayments it informed Frank that it wanted to exercise its power of sale on 1 October. An auction was therefore arranged to take place in an inner city hotel at 12 pm on Wednesday 30 October. An advertisement was placed in the metropolitan paper every Saturday in the weeks leading up to the auction, which was also advertised on the Internet. October proved to be unseasonably cold and wet, which meant that not many people attended the open day inspections, and those who attended did not see the location at its best. At the auction a reserve of \$3 million was placed on the property on the advice of the bank's property valuers. Ten bidders participated in the auction with the best offer being \$2.8 million from an interstate investor. This was accepted by the Aqua Bank, which considered this a good price in the economic climate. It meant that Frank still owed the bank \$500 000. Frank now wants to have the sale set aside on the grounds that the Aqua Bank has not fulfilled its statutory power of sale properly. He claims that the bank did not advertise the auction properly; that the auction was held at a bad time; that it should have held at the house, not at a city hotel; and that due to the unseasonable weather, the auction should have been postponed for a month to allow people to see it at its best.

Discuss.

## SUGGESTED ANSWER

The issue in this particular problem is whether Aqua Bank has fulfilled all the requirements in regard to a power of sale.

A mortgage involves a contract to repay a loan that uses the property as security for that loan, and if there are defaults in the repayment then the mortgagee has a number of remedies, including the power to sell the property. However, before this power can be enforced, the relevant statutes (*Real Property Act 1900* (NSW) ss 109, 111; *Property Law Act 1974* (Qld) ss 77, 83–84; *Real Property Act 1886* (SA) ss 6, 47–48; *Land Title Act 1980* (Tas) ss 21–22; *Property Law Act 1958* (Vic) ss 86, 101–103; *Transfer of Land Act 1893* (WA) ss 57, 59) require notice of the default that continues for a period of 30 days to be given. The facts in this problem indicate that this has occurred as Frank was notified he was behind on the repayments on 30 July and the bank then waited until the 1 October to exercise its power of sale.

Under the common law, as well as *Property Law Act 1974* (Qld) s 85 and *Transfer of Land Act 1958* (Vic) s 77, there is a requirement that reasonable care be taken to ensure that the property is sold at market value. In *Spencer v Commonwealth* it was stated that the test for value of land was to be determined by asking the question: 'What would a man desiring to buy the land have to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' This indicates that the sale must not be a forced one but must be a voluntary bargain between the vendor and the purchaser.

In the present case, Aqua Bank sold the property by auction. *Latec Investments v Hotel Terrigal* also involved an auction sale, with the sale being overturned on the grounds that it was not held on a suitable day, and that the property was sold below market price to a wholly owned subsidiary of Latec Investments. Similarly, in *ANZ Bank v Bangadilly Pastoral*, property was sold at an auction that was held on 23 December after being advertised only once in the metropolitan paper. Further, the mortgagees told the auctioneers to set the reserve price at \$250 000 and Bangadilly Pastoral were successful with a \$265 000 bid. The sale was set aside as it was not the result of an independent bargain since the transaction came about primarily through the deciding minds of the mortgagees, with the auction not being timed and advertised to best attract potential buyers. It was also sold to a close associate of the vendors, with Bangadilly Pastoral having been set up just eight days before the auction.

In the present case Aqua Bank advertised over a four-week period. The fact that the buyer came from interstate indicates that the advertising was successful in reaching potential buyers, unlike in *Latec Investments* and *ANZ v Bangadilly Pastoral*. There were also ten bidders, which indicates there was a competitive tendering process, unlike in *Jovanovic v Commonwealth Bank* where the bank was in breach of its obligations as it had been sold by private tender and there was effectively just one bidder. There also seems to be no reason why a Wednesday auction in late October in a city hotel was not a suitable time and place, unlike the day before Christmas Eve, which is when the auction in *ANZ v Bangadilly Pastoral* took place. The fact that October was an unseasonably cold month was out of the control of the bank and there is no reason why the sale should be overturned because of this. The fact

that it was bought by an interstate investor also suggests that it was not sold to a close subsidiary of Aqua Bank. Therefore *Latec Investments* and *ANZ v Bangadilly Pastoral* can be distinguished on the facts.

In conclusion, it would appear that Aqua Bank has fulfilled its obligations in regard to the power of sale and has done all that can be reasonably expected in trying to obtain market value for the property, with the sale having been a voluntary transaction between the vendor and the purchaser. The fact that it was below what Frank had paid for it a number of years earlier was simply a reflection of the downturn in the market. Frank appears unlikely to be able to have the sale set aside and would also remain liable under the mortgage contract for the money still outstanding, namely the \$500 000.

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#### COMMENTS ON THE ANSWER

This problem has one main issue with a number of components, which could be considered sub-issues. These sub-issues, for example, whether the bank sufficiently advertised the auction, could have been listed at the beginning of the answer. However, these can also be left to be raised when addressing the main issue, as has been done here. The other main feature of the answer is that there were a number of cases on point that could also be distinguished on the facts. These need to be discussed with sufficient detail in regard to the facts in order to show that they can be distinguished.