SUPREME COURT OF QUEENSLAND

CITATION:	*CVC Private Equity Limited v Suncorp-Metway Limited & Anor* [2009] QSC 342 *Drapac Management Limited v Glennington Pty Ltd & Anor* [2009] QSC 342
PARTIES:	**CVC PRIVATE EQUITY LIMITED (ACN 059 092 198)** (plaintiff) **v** **SUNCORP-METWAY LIMITED (ACN 010 831 722)** **(**first respondent) **GLENNINGTON PTY LIMITED (ACN 099 473 284)** (second respondent)
FILE NO:	**BS 7209/09**
PARTIES:	**DRAPAC MANAGEMENT LIMITED (ABN 50 103 431 223) as Trustee for the Le Boulevard Trust** (applicant) **v** **GLENNINGTON PTY LIMITED (ACN 099 473 284) (IN RECEIVERSHIP)** **(**first respondent) **CVC PRIVATE EQUITY LIMITED (ACN 059 092 198)** (second respondent)
FILE NO:	**BS 11733/09**
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2009
JUDGE:	Martin J
ORDER:	**SUNCORP AND DRAPAC ARE TO BRING IN APPROPRIATE MINUTES OF ORDER.**
CATCHWORDS:	CONVEYANCING – REMOVAL OF CAVEAT – APPLICATION FOR – MORTGAGES – REDEMPTION – SALE UNDER POWER – Where property subject to mortgages - Where mortgagees also lent money to entity related to property owner – Where property owner provided

guarantee & indemnity for loan to related entity - Where property owner entered contract to sell property to third party – Where related entity defaulted on mortgage repayments – Where first mortgagee refused to release mortgage on basis that contract price was below market value – Where completion of contract did not occur but contract remains on foot - Where first mortgagee obtained possession of property and sought to exercise power of sale to a separate party for a higher price – Where property owner lodged a caveat over property – Where second mortgagee lodged a caveat over property - Where second contract of sale due for completion - Where first mortgagee brought urgent application for removal of caveat – Where second prospective purchaser brought urgent application for removal of caveat – Where dispute about the validity and extent of an 'all moneys' guarantee given by property owner – Where first mortgagee contends that the property owner's guarantee extends to debt's beyond those of the property - Where property owner claims representations of first mortgagee give rise to an estoppel – Where property owner alleges first mortgagee refused to accept offer of tender to redeem mortgage – Whether the property owner's guarantee to the first mortgagee extended to the debts of the related entity – Whether the mortgagee's representations give rise to an estoppel – Whether there was an offer to redeem – Whether the first mortgagee refused a tender - Whether there are serious questions to be tried – Whether the balance of convenience favours the removal of the caveats.

ASIC v GDK Financial Solutions Pty Ltd (In liquidation) (No 4) [2008] FCA 1071
Challenge Bank Ltd v Hodgekiss [1996] ANZ ConvR 364
Hickson v Darlow Armour Coatings (Marketing) Pty Ltd (1978) 17 SASR 259
Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161
Macquarie Bank Limited v Lin [2005] QSC 221
R v Registrar of Titles, ex parte Watson [1952] VLR 470
Rhodes v Buckland (1852) 16 Beav 212; 51 ER 759
Shanemist Pty Ltd v Denmac Nominees Pty Ltd [2003] QSC 373

COUNSEL:

BS 7209/09
B O'Donnell QC for the applicant/first respondent
L F Harrison QC and D Marks for the respondent/plaintiff
K S Howe for the respondent/second defendant
P J Favell for Education Corporation of Australia seeking to be made a party
BS 11733/09
P J Dunning SC and D Thomae for the applicant
K S Howe for the first respondent

L F Harrison QC and D Marks for the second respondent
P J Favell for Education Corporation of Australia seeking to be made a party

SOLICITORS: **BS 7209/09**
Allens Arthur Robinson for the applicant/first respondent
Short Punch & Greatorix for the respondent /plaintiff
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BS 11733/09
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Short Punch & Greatorix for the second respondent
Short Punch & Greatorix for Education Corporation of Australia

[1] This is an ordinary application made urgent by the unexplained delay of the applicants in bringing the matters before this Court. A consequence of the urgency is that these reasons are not as compendious as they might otherwise have been.

[2] In each of these matters there is an application – one by Suncorp-Metway Limited ("**Suncorp**"), one by Drapac Management Limited ("**Drapac**") – seeking an order for the removal of a caveat lodged with respect to land situated at The Esplanade, Surfers Paradise. The improvement on the land is a low rise, retail shopping centre and office block called Le Boulevard.

[3] The registered proprietor is Glennington Pty Limited ("**Glennington**"). The caveators are Glennington and CVC Private Equity Limited ("**CVC**"). There are five registered mortgages on the property. The first four are held by Suncorp-Metway Limited ("**Suncorp**"). The fifth is held by CVC, which had lent Esdaile Investment Pty Ltd ("**Esdaile**") $5,000,000. CVC is, in effect, a second mortgagee.

[4] CVC's caveat is based on its interest as a mortgagee and what is described in the caveat as "its interest as such a mortgagee in [Glennington's] contingent interest in the purchaser's beneficial interest … under a contract of sale … to Education Corporation of Australia" ("**ECA**").

[5] In December 2005, Suncorp provided finance facilities to Esdaile (which, like Glennington, is a wholly owned subsidiary of Raptis Group Ltd ("**Raptis**")) for a total of $14,479,000 in order to allow it to refinance its existing facilities. A number of securities were required to support the new facility. They included a guarantee and indemnity from Glennington and Raptis and a mortgage from Glennington. At a later time Suncorp lent a considerably larger sum to Esdaile for what was called the Iluka project.

[6] One of the issues in contention in this application is whether or not the guarantee contained a valid "all moneys" clause which would extend Glennington's liability under the guarantee to other debts incurred by Esdaile with Suncorp, namely the Iluka project debt.

[7] In January 2006, three other mortgages over Le Boulevard were transferred to Suncorp thus giving it the first four mortgages.

[8] On 19 September 2008, Glennington entered into a contract of sale with Education Corporation of Australia Pty Ltd ("ECA") for the sale of the subject land for a contract price of $15,000,000. It was a term of the contract that CVC would retain its mortgage over the property and there was an agreement whereby CVC would cede priority to ECA's financier.

[9] In October 2008, Glennington sought Suncorp's consent to that sale. That consent was not given as Suncorp wanted to value the property, among other things.

[10] On about 1 November 2008, Esdaile defaulted in repayments to Suncorp. On 7 November 2008, Suncorp served notices of demand on Esdaile and Glennington, requiring payment of $195,076,83 with respect to both the Le Boulevard and Iluka loans.

[11] Robert Gannon (the Manager, Credit Recovery for Suncorp) deposes in his affidavit as follows:

> "22. In or about November 2008, I received a telephone call from an employee at Short Punch & Greatorix seeking Suncorp's confirmation that it would release the mortgage and the transferred mortgages upon receipt of the proceeds from the settlement of the sale of the Education Contract of Sale. I responded that, based on the Landmark White valuation of the land, I considered the purchase price under the Education Contract of Sale to be less than the market value of the land and, in those circumstances, Suncorp would not release its Mortgage and the Transferred Mortgages to enable the Education Contract of Sale to be completed."

[12] On 8 December 2008, the solicitors for ECA wrote to the receivers of Glennington, informing them that the sale contract was to be completed on 9 December 2008. They received a letter from the solicitors for Suncorp in the following terms:

> "We act for the receivers of Glennington Pty Ltd and we are instructed to respond to your facsimile dated 8 December 2008.
>
> Our client is informed by Suncorp-Metway, the mortgagee of the property at 2 Elkhorn Avenue, Surfers Paradise known as 'Le Boulevard' that it views the price at which your client proposes to purchase the said property pursuant to the contract dated 19 September 2008 as a significant under value to the market value and has advised that it will not release its security for the contract price. On that basis, Glennington Pty Ltd is not in a position to complete the contract."

[13] The sale to ECA did not complete but it is still on foot.

[14] On 8 December 2008, ECA lodged a caveat. This was later removed by consent.

[15] Suncorp served a notice of exercise of power of sale on Glennington on 11 February 2009 and, on 10 March, entered into possession.

[16] The caveat by CVC was lodged on 9 April 2009 and the caveat by Glennington was lodged on 22 April 2009.

[17] On 28 July 2009, Suncorp entered into a contract of sale for the Le Boulevard property with Drapac. That contract is due to complete on 30 October. It is a term of that contract that if Suncorp cannot give good title, then it may either terminate the contract or extend the date for completion by up to three months.

[18] Although Suncorp has known of the existence of these caveats since, it would appear, at least the time it entered into the contract with Drapac, it has waited until a week before that contract is due to complete to bring this application. Mr O'Donnell QC, who appeared for Suncorp, had no instructions on the reasons for the inordinate delay. Similarly, Mr O'Donnell QC had no instructions on what Suncorp would do should the caveats not be removed. In other words, whether Suncorp would terminate the contract or extend it for a further three months was something which Suncorp had either not determined or declined to inform the court about.

What must be established?

[19] The principles applied on applications such as these are well known:

(a) The onus is on the caveator to persuade the court that the caveat should be maintained.

(b) The caveator must demonstrate that there is a serious question to be tried about its entitlement to caveat.

(c) The caveator must also show that the balance of convenience favours the retention of the caveat.

[20] It is also the general practice to require a caveator to give an undertaking as to damages as the price for retaining the caveat on the title.

Serious question

[21] The following are the matters advanced by the caveators as constituting serious questions to be tried:

(a) Does the guarantee by Glennington extend beyond the debt associated with the Le Boulevard property? More particularly, do the terms of the guarantee work to secure the further debt incurred by Esdaile? Separately, do the representations alleged to have been made on behalf of Suncorp to Glennington allow for an estoppel by convention? If there is such an estoppel, can CVC claim its benefit also?

(b) Did Suncorp act in such a way that Glennington could assume that Suncorp would not accept any tender to redeem the mortgage?

(c) Could Suncorp exercise its power of sale in light of the conduct alleged against it, that is, "the offer" to redeem the mortgage?

Extent of Glennington's liability to Suncorp

[22] The submission by CVC on this point was that an all moneys clause will not secure a debt of a fundamentally different character from the debts specifically contemplated by the parties at the time they entered into the contract.[1] CVC and Glennington also rely on representations alleged to have been made on behalf of Suncorp to persons representing, among others, Glennington, that investment

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1 *ASIC v GDK Financial Solutions Pty Ltd (In liquidation) (No 4)* [2008] FCA 1071 at [77] and [111]

properties were quarantined from, and not cross-collateralised with, development funding. There was no debate about whether or not the debt incurred by Esdaile with respect to Le Boulevard and the later debt incurred by it with respect to the Iluka property could be distinguished , the former being an investment property, and the latter being for development. Glennington says that it acted on those representations and entered into numerous business transactions with Suncorp and, also, entered the transaction which led to CVC's obtaining the "second" mortgage. The alleged representations were not that the security documents did not affect a cross-collateralisation but that the securities would not be cross-collateralised. The representations are said to have occurred at various times from 1995 onwards. Suncorp did not seek to gainsay any of the evidence with respect to those representations and, for the purposes of this application, I will assume that they were made.

[23] Glennington asserts that the circumstances set out above are sufficient for an estoppel to be created, which prevents Suncorp from asserting a claim to any money other than that directly associated with the Le Boulevard property. CVC submits that it can rely on an estoppel by convention with respect to the loans beyond the Le Boulevard property.

[24] So far as an estoppel by representation is concerned, in order for such an estoppel to arise, the person seeking its benefit must demonstrate that the assumption under which the party claiming the estoppel operated was reasonable.[2]

[25] Mr O'Donnell QC submitted that if there was reliance on the representations, then it was unreasonable. He pointed to the documents provided by Suncorp to Glennington on this matter. In a letter of offer of 13 December 2005, it is noted that:

> "The Bank's security documents contain an 'all accounts' clause. This means that whenever any security is provided to the Bank for moneys owed by the borrower it will secure any amounts due by the borrower or the security provider to the Bank either presently or in the future. Amounts owing under this facility will therefore be secured by any such securities whether or not they have been previously provided or will be provided in the future. A security provider may be the borrower, a guarantor or any mortgagor."

[26] Glennington was, of course, both a guarantor and mortgagor. In the credit facility deed to which Glennington was a party, there was a reference to the moneys secured including all moneys which have or may become due, owing or payable by the borrower now or in the future.

Estoppel

[27] The submissions by CVC were to the effect that it was entitled to the benefit of an estoppel by convention. On the arguments presented to me, I cannot find that there is a serious question to be tried on this point at least. In order to demonstrate such an estoppel, it must be shown that there was a common assumption between the person claiming the benefit and the person bound by the estoppel. The relevant principles

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2 See the cases collected. *Macquarie Bank Limited v Lin* [2005] QSC 221 at [258].

were discussed by Chesterman J in *Shanemist Pty Ltd v Denmac Nominees Pty Ltd*[3] as follows:

> "[37] The principle was described by Denning MR in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* (1982) QB 84 at 121 in a passage approved by the full court of this court in *Queensland Independent Wholesalers Limited v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40 at 45. The Master of the Rolls said:
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> > 'If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it – on the faith of which each of them – to the knowledge of the other – acts or conducts their mutual affairs – they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to enquire whether their particular interpretation is correct or not – or whether they were mistaken or not – or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and it cannot be allowed to go back on it. To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v Great Boulder Proprietary Gold Mines Pty Ltd* (1937) 59 CLR 641, 657, 677, the parties by their course of dealing adopted a "conventional basis" for the governance of the relations between them and are bound by it'."
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> [38] McPherson J (in whose judgment Andrews CJ and Demack J agreed) noted :
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> > '… The principle invoked first requires that evidence be identified which establishes the conventional basis for the assumption relied upon. The word "conventional" in this context carries connotations of agreement, not necessarily expressed but to be inferred, or at least a demonstrable acceptance of a particular state of things, as the foundation for the dealings of the parties. There must ... be acts or conduct which impinge upon … "their mutual affairs'.
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> [39] The judgment makes it clear that the acts relied upon as giving rise to the convention must be unequivocally referable to it. Activities which are explicable by reference to some assumption other than the alleged convention will not establish that the parties accepted the convention as the basis of their relationship. In particular if the matters relied on to prove the assumption are in accordance with the express terms of a written agreement made between the parties an attempt to establish that their conduct proves a variation to that contract will fail."

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3 [2003] QSC 373

[28] Mr O'Donnell QC, though, says that this question need not be determined because the amount which owed on the Le Boulevard property was more than the amount being "tendered" for redemption.

Was there an offer to redeem?

[29] As I have noted above, there was a singular lack of information from Glennington as to what was actually said or proposed to Suncorp with respect to payment from the contract between Glennington and ECA. Suncorp knew of the terms of the contract because it had been asked to consent to it. It knew that the sale price was $15,000,000. It had the settlement statement.

[30] The settlement statement which was provided to Suncorp by ECA showed a net payment to be made by ECA to Glennington of $14,542,000. At that time the debt owed to Suncorp was $15,020,000. Mr Harrison QC pointed out that there was a deposit of $500,000 which, presumably, would also have been available. Thus, Mr Harrison said, there would have been $15,042,000 available. It may be, though, that that would have been reduced by an amount owing for land tax of $173,000 and which would have taken the total available to less than the amount owed to Suncorp. It was suggested in argument that CVC or another party would have, in order to redeem the mortgage, provided the additional amount necessary to pay out the debt. There was, though, no such accommodation offered at the relevant time.

[31] The proposal referred to in [11] above came from solicitors acting for ECA. ECA has provided no evidence by way of affidavit or diary note as to what was said in the telephone conversation.

[32] Thus, the mortgagor and CVC labour under a lack of detail as to what was actually proposed in order to redeem the mortgage. According to Mr Gannon the request made was not to release the mortgage on payment of the total amount owing but on receipt of the proceeds of sale. According to Suncorp's argument, that would be at least $100,000 less than the amount owing. Whatever the actual figure, the only offer made to Suncorp came from ECA, rather than Glennington, and was not, in terms, an offer to pay Suncorp out. Rather, it was expressed as an offer of the proceeds of sale.

Did Suncorp refuse a tender?

[33] A mortgagee will be restrained from exercising the power of sale if the amount owed by the mortgagor is tendered or paid into court.[4] To show dispensation from requirement to tender it must be established by the mortgagor that, on the balance of probabilities, had the tender been made, it would have been refused.[5] In this situation, I have to consider whether there is a serious question to be tried about this question. I do not accept that the evidence of what was suggested on behalf of ECA amounted to a tender or was sufficient to demonstrate that there is a serious question to be tried on that point.

[34] Where, as in this case, the mortgagor claims that the amount demanded is excessive because the mortgage did not secure the additional debt incurred by Esdaile, then it should still tender or pay the amount which is owing on the mortgage as it contends

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4 *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161

5 *Challenge Bank Ltd v Hodgekiss* [1996] ANZ ConvR 364

it should be construed.[6] If a payment or tender is made before the mortgagee enters into a binding contract of sale, then it is open to the court to stop the sale. It is when the contract is entered into that the power of sale is actually exercised. I need not consider whether the entry into such a contract extinguishes once and for all the right a mortgagor has to redeem. Some commentators say that "as … binding contracts for sale are prone to go off or suffer the fate that a condition is not fulfilled, it may be more accurate to say that an equity of redemption is only suspended while a binding contract is in force. On the failure of such a contract, the right to redeem will revive".[7]

[35] Whether it is suspended or extinguished is not, for the purposes of this case, important. Certainly, there is authority that a valid contract of sale, once entered into by a mortgagee, extinguishes the mortgagor's right to redeem.[8]

[36] It was also argued by Mr Harrison QC that a mortgagee cannot thwart an attempted redemption by exercising the power of sale after the mortgagor has set in train the process of redemption by, in this case, asking Suncorp to consent to the contract of sale going ahead and confirm that it would release the mortgage and transfer the mortgage on settlement of the ECA contract of sale. That is not quite what Mr Gannon said took place but for the purposes of this consideration it is close enough.

[37] Reliance was placed on *Rhodes v Buckland*[9] which, it was argued, stands for the proposition set out in the head note: "A puisne encumbrancer offered to pay off the first mortgagee, which, being declined, he filed a bill to compel a transfer. The first mortgagee having afterwards proceeded to sell the property, was restrained from transferring the first mortgage and parting with the legal estate and title-deeds." That was an interlocutory hearing in which the relevant mortgagees, "being contented with the securities" they held, instructed their solicitors to decline to receive the principal money and interest secured by those mortgages and to dispute the right to redeem. In that case, the refusal to accept payment clearly amounted to a rejection of any tender which might occur.

[38] As I have held there has not been a tender nor has there been the conduct necessary to demonstrate that any tender would be refused nor has there been a payment into court of the amount said by the mortgagor to be owing. The facts in this case bear some similarity to those in *Duke v Robson*.[10] They appear sufficiently in the head note:

> "The first and second defendants were owners of a house subject, inter alia, to a charge by way of legal mortgage to the third defendants. In March 1972, after contracting to buy the second defendant's beneficial interest, the first defendant contracted to sell

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6 *Hickson v Darlow Armour Coatings (Marketing) Pty Ltd* (1978) 17 SASR 259

7 *Law of Mortgage,* Fisher and Lightwood, 2nd Australian ed Lexis Nexus Butterworths 2005 [20.37].

8 In *R v Registrar of Titles, ex parte Watson* [1952] VLR 470 Herring CJ considers the history of the legislation relating to the creation of statutory mortgages and says, at 447:

> "The object of this power of sale, as of the express power in mortgages under the general law, was to destroy the right of redemption, … For once a valid contract of sale has been entered into it is too late for the mortgagor to come in and redeem."

9 (1852) 16 Beav 212; 51 ER 759

10 [1973] 1 WLR 267

> the freehold to the plaintiffs. The third defendants took possession of the property on September 28, 1972, and on October 9 the plaintiffs registered their contract to purchase as a class C (iv) land charge. On November 7, in exercise of their power of sale as first mortgagee, the third defendants contracted to sell the property to the fourth defendant."

[39] Lord Justice Russell said:[11]

> "It is perfectly plain that the information given on October 10 or 11, 1972, to the mortgagees' solicitors that the plaintiffs were prepared to put (up to a ceiling of £26,000) the total due to the three incumbrancers into the joint names of solicitors could not be described as equivalent to a tender or payment of what was due under the incumbrances, which would be necessary if someone was to say on that ground that the mortgagees no longer had their power to sell available to them. Crossman J. in *Lord Waring* v. *London and Manchester Assurance Co. Ltd.* [1935] Ch. 310 indicated that that was what was required if an injunction was to be obtained against a mortgagee purporting to exercise his power to sell by proposing to enter into a contract for sale thereunder. The reason for that, of course, is that tender or payment into court would be the equivalent of redemption, and if there was redemption, no longer would the power to sell be exercisable at all."

[40] Dealing with a broader argument and one which, with respect, appears to be similar to that advanced by CVC, Russell LJ said[12]:

> "It was further sought to be argued (though the facts here are not in accordance with it) that if such information as to a contract is given before the mortgagee purports to exercise his power to sell, and in particular when the proposed purchaser from the mortgagee has notice (owing to the registration of the land charge), then neither that purchaser nor the mortgagee is in a position to complain if the contract provided for enough purchase price to satisfy all the incumbrances. **I should not be prepared to accept that proposition even if it fitted the facts of this case (which it does not), because it cannot possibly be said that a mortgagee is deprived of his power to sell by the fact that there is a contract which may be specifically enforceable, may be for enough to pay off all the incumbrances, but which is still in the field of contract and may not come to the stage of completion.** I see no ground in principle or equity for saying that this would deprive a mortgagee of the right to exercise a power to sell: and so a fortiori if the only contract of which the mortgagee is given information is one which does not on the face of it provide a sufficient purchase price for the payment off of the incumbrances.
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> …

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11 At 273-274

12 At 274-275

> In short, it seems to me that a contract for sale by a mortgagor of the equity of redemption has no possible effect on the rights and powers of a mortgagee, and in particular the rights and powers of a mortgagee to exercise his power to sell, any more than can an actual conveyance by a mortgagor, unless of course the mortgage is in the course of completion redeemed, in which case no question of a subsequent exercise of power to sell by contract by the mortgagee will arise." (emphasis added)

[41] Mr Harrison QC argued that, as a matter of practice, the mortgage would have been redeemed in the course of completion. But that can only occur where there is sufficient to redeem the mortgage and a mortgagor is not required, in circumstances like these, to wait and see if there will be sufficient and, at the same time, be prevented from exercising the power of sale.

[42] Further, to say that there has been a tender which works to prevent a mortgagee from exercising its power of sale, when the mortgagee's claim is for over $195,000,000 and all that is offered is about $15,000,000, identifies the caveators' problem. As both Glennington and CVC dispute Suncorp's assertion of cross-collateralisation, then the proper course for them was to pay the amount Glennington admitted it owed into court, claim that as a tender and seek to restrain Suncorp from selling the property.

Exercise of power of sale

[43] There is no suggestion in this case that the mortgagee has acted in bad faith or improperly in any relevant way. The sale price of the contract between Suncorp and Drapac is substantially higher in cash terms than that of the contract between Glennington and ECA. Suncorp could be assured that it would be paid out in full so far as the moneys relating to the Le Boulevard are concerned.

Serious questions?

[44] The caveators have not established that there is a serious question to be tried.

Balance of Convenience

[45] In light of what I have held, it is not necessary to consider this but, as it was argued in some detail, I will deal with it briefly.

[46] Suncorp argues that there can be no prejudice to the caveators in removing the caveats because Suncorp is willing to undertake that, upon completion of the sale to Drapac, it will place the proceeds into trust, to the extent that they exceed the amount then outstanding in respect of the Le Boulevard facilities, pending resolution of the dispute in each proceeding as to whether Suncorp's mortgages also secure additional amounts.

[47] It was also submitted that Suncorp has expended a substantial amount on the marketing campaign which resulted in the sale to Drapac and that the contract purchase price of $18,550,000 is better than the sale price by Glennington to ECA.

[48] Of course, CVC argues that the sale by Suncorp will effectively replace its mortgage with a right to the balance of the Drapac contract sum if it succeeds in showing that there was no cross-collateralisation of securities.

[49] Drapac argues that it has a potential loss in the order of $6.5 million should it not be able to complete its contract. This is based on the amount which it has spent so far in renovating and refurbishing the property (about $1,000,000) and its expectations of loss of profits on forward contracts it has already entered into.

[50] I do not doubt that Glennington does not have the financial ability to meet an order for damages had it been required to give such an undertaking and had Drapac's fears eventuated. The extent of CVC's capacity to meet an order for damages was in dispute but I tend more to the view that it has the capacity to obtain access to funds of some millions of dollars but I cannot, on the material, make a finding as to the exact amount that could be available to it. CVC argues that the contract between Glennington and ECA allows it to retain its mortgage and thus be able to recover all that is owed to it when ECA, as it is proposed, on-sells the property.

[51] In weighing up the various factors, I have concluded that the balance of convenience tips in favour of Suncorp and Drapac. There is certainty to the loss that Drapac would incur of at least $1,000,000, whereas CVC can only say that it has the prospect of recovering all moneys owed to it should the Glennington contract go ahead.

Orders

[52] During the proceedings I ordered that Education Corporation of Australia be made a party in each matter. I will make orders removing both caveats. Suncorp and Drapac are to bring in appropriate minutes of order. I will hear the parties on costs.