Court of Appeal
Supreme Court

New South Wales

Case Name:	Cini v First Mortgage Capital Pty Ltd
Medium Neutral Citation:	[2023] NSWCA 53
Hearing Date(s):	10 March 2023
Date of Orders:	27 March 2023
Decision Date:	27 March 2023
Before:	Gleeson JA at [1] Kirk JA at [2] Basten AJA at [67]
Decision:	(1) The appellant’s motions dated 26 October 2022 and 28 February 2023 are dismissed. (2) The appeal is dismissed. (3) The appellant is to pay the respondent’s costs of the appeal, including on the appellant’s motions, on an indemnity basis.
Catchwords:	LAND LAW — Co-ownership — Statutory trust for sale — Whether primary judge erred in ordering statutory trust for sale — Baseless contentions that court has no jurisdiction over the appellant or that the law does not apply to him — Baseless allegations of forgery and fraud — No issue of principle
Legislation Cited:	Conveyancing Act 1919 (NSW), ss 66F, 66G Supreme Court Act 1970 (NSW), ss 22, 23, 75A
Cases Cited:	Foundas v Arambatzis [2020] NSWCA 47 Searle v Commonwealth of Australia (2019) 100 NSWLR 55; [2019] NSWCA 127
Category:	Principal judgment

Parties:	John William Cini (Appellant) First Mortgage Capital Pty Ltd (Respondent)
Representation:	Advocates: John William Cini (Appellant in person) A Djurdjevic (Respondent) Solicitors: Summer Lawyers (Respondent)
File Number(s):	2022/00226932
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Equity
Citation:	None
Date of Decision:	4 July 2022
Before:	Darke J
File Number(s):	2021/00286634

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **GLEESON JA:** I agree with Kirk JA.

2 **KIRK JA:** The appellant appeals from orders made by Darke J on 4 July 2022 under s 66G of the *Conveyancing Act 1919* (NSW). The orders provided for the vesting of land in trustees for sale and for the payment of part of the proceeds

of sale to the respondent, First Mortgage Capital Pty Ltd, in satisfaction of a loan in respect of which the appellant was a guarantor.

3 The appellant now denotes himself as “John-William.:Cini”, although he signed relevant loan documents in 2019 in which he is described as “John William Cini”, and that is how he is named in the respondent’s summons which commenced this proceeding. He represented himself both in this Court and in the Court below.

4 The appeal raises a large number of grounds, most of which raise no meaningful legal issue within Australian law. The others disclose no error in the reasoning and conclusion of the primary judge. The appeal should be dismissed with costs.

5 I address the grounds of appeal in turn below, along with two notices of motion that were filed by the appellant. Before doing so it is appropriate to explain the context in which they are raised.

Background

6 On about 12 April 2019 the respondent loaned $712,366 to a company named Turba Trium Pty Ltd. That loan occurred pursuant to a number of contractual documents. First, there was a “Formal Letter of Offer for Mortgage Loan”. That document records that the loan was to be secured by way of a mortgage over a certain parcel of land in Queensland, and by guarantee. The three guarantors listed were Mr Shane Beard, Mr Marcel Ligthart and the appellant, all three of whom seem to have been directors of Turba Trium. The acceptance page of the offer document was signed Mr Ligthart on behalf of Turba Trium and by the three guarantors in their capacities as such.

7 A mortgage form was executed on 3 April 2019 by Mr Ligthart and Mr Beard on behalf of Turba Trium as mortgagor. The latter followed his signature with the words “All Rights Reserved”. The form was not executed by the respondent as mortgagee. Mr Blake Palmer, a solicitor employed by the solicitors for the respondent (Summer Lawyers), explained in an affidavit in the Court below that upon review of the file he understood that his firm was instructed by the respondent that it required Turba Trium to re-execute a further mortgage as a result of Mr Beard’s reservation of rights.

8 A further mortgage form was executed on 5 April 2019 by Mr Ligthart and the appellant on behalf of Turba Trium as mortgagor. Ms Kathryn Brann, a solicitor, executed the document on behalf of the respondent on 12 April 2019. The document also lists Mr Ligthart, Mr Beard and the appellant as guarantors. It was registered in Queensland on 3 May 2019. Its terms and conditions are recorded as including "Document Reference 718188316", which is the registered number in Queensland of a set of Mortgage Common Provisions (**the Common Provisions**).

9 A further document referred to as "Schedule A" is incorporated into the mortgage agreement between the parties. A footnote at the bottom of Schedule A stated that it was Schedule A to the "Summer Lawyers 2017 Memorandum", which was the Common Provisions document. The schedule is signed by Mr Beard and Mr Ligthart as directors of Turba Trium as "Borrower 1/Mortgagor". Mr Ligthart also signed the document as "Guarantor 1/Mortgagor", the appellant signed as "Guarantor 2/Mortgagor", and Mr Beard signed as "Guarantor 3/Mortgagor". All signatures were witnessed. The document is not dated. The first page of the Schedule has, under the heading "Parties", the word "Mortgagors", across from which are the words "Borrower(s) and Guarantor(s)". All three directors were thus designated as "Mortgagors" by virtue of having signed the Schedule as a "Guarantor/Mortgagor".

10 In the Common Provisions, "Mortgagor" is defined as meaning the person named as such in Schedule A. The three directors were thus treated as mortgagors for the purposes of the mortgage.

11 By clause 2.2 of the Common Provisions "[t]he Mortgagor agrees that this Mortgage is over all of the Mortgagor's present and future estate or interest in … the Mortgaged Property". Mortgaged Property is defined to include the "Charged Assets", which, in turn, are defined as follows:

> **"Charged Assets"** means all of the Debtor's property wherever located, including without limitation all real estate chattels, personal property, cash, privileges, rights Permits, Claims and other assets, whether:
>
> > (a) owned by the Debtor at the date of this Mortgage or owned after the date of this Mortgage;
> >
> > (b) held by the Debtor legally or beneficially at any time;

> (c) held jointly or severally by the Debtor with another Person;
>
> (d) held by the Debtor as trustee including any right of indemnity over the trust assets; or
>
> (e) held in any of the combinations referred to in paragraphs (1) to (d) above.

12 "Debtor" is defined to include the "Mortgagor" which, as noted, here included the appellant. The encompassing definition of "Charged Assets" was broad enough to extend to real property in this State owned by appellant, as a "Mortgagor".

13 Summer Lawyers received instructions from the respondent to issue a default notice to Turba Trium on 19 March 2020 and then again on 22 April 2020. The respondent commenced proceedings against Turba Trium in Queensland for possession of the property in that State referred to on the mortgage form. The respondent succeeded and an appeal was unsuccessful. The property was sold, and the respondent received $1,146,590.46 from the sale proceeds, which left $236,442.86 still owing to the respondent. There was evidence that the amount outstanding on the loan as at 29 June 2022, shortly before the matter was heard in the Court below, was $369,056.05 (interest having continued to accrue).

Respondent's claim against the appellant

14 The respondent sought to recover the balance from the appellant, as one of the guarantors. The appellant is a registered proprietor of a parcel of land in Maimuru, near Young in New South Wales. He and Mr Ken Attenborough own the Maimuru property as tenants in common, each holding a half share. The respondent filed a summons in the Equity Division of the Supreme Court on 8 October 2021 seeking an order under s 66G of the *Conveyancing Act* for the vesting of the Maimuru property in trustees for sale, and for the application of half of the proceeds of sale towards paying down the amount still owed to the respondent, with any residue of that half to go to the appellant.

15 The summons was served on both the appellant and Mr Attenborough. The latter was the second defendant below. He was represented by solicitors for a time, but a notice of intention of ceasing to act was filed on 4 May 2022 and a

notice of ceasing to act then filed on 29 June 2022. He was not present at the hearing below.

16 Section 66G(1) reads:

> Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners, appoint trustees of the property and vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.

17 Section 66F defines "co-ownership" and "co-owner" as follows:

> ***Co-ownership*** means ownership whether at law or in equity in possession by two or more persons as joint tenants or as tenants in common; and ***co-owner*** has a corresponding meaning and includes an incumbrancer of the interest of a joint tenant or tenant in common.

18 The respondent contended below that, by reason of the mortgage and the appellant's guarantee, it is an incumbrancer of the appellant's interest in the Maimuru property and therefore a co-owner for the purposes of s 66G.

19 The principles applicable to the making of orders under s 66G are well-established. In *Foundas v Arambatzis* [2020] NSWCA 47, at [63], White JA explained:

> Although an order under s 66G is discretionary, such an order is almost as of right, unless on settled principles it would be inequitable to make the order. An order may be refused if the appointment of trustees for sale would be inconsistent with a proprietary right, or the applicant for the order is acting in breach of contract or fiduciary duty, or is estopped from seeking or obtaining the order (Re McNamara and the Conveyancing Act (1961) 78 WN (NSW) 1068 at 1068; Ngatoa v Ford (1990) 19 NSWLR 72 at 77; Williams v Legg (1993) 29 NSWLR 687 at 693; Hogan v Baseden (1997) 8 BPR 15,723 at 15,726-15,727; Tory v Tory at [42]). Hardship or general unfairness is not a sufficient ground for declining relief under s 66G (Hogan v Baseden (1997) 8 BPR 15,723 at 723; Ferella v Official Trustee in Bankruptcy at [36]-[40]).

Judgment below

20 After explaining the provisions of the various documents referred to above, the primary judge concluded that the respondent had an entitlement as co-owner to seek an order under s 66G. His Honour then proceeded to deal with six matters that he understood the appellant had sought to raise.

21 The first of these was the appellant's contention that there was some irregularity or impropriety involved in the execution of the mortgage by reason

of the mortgage form having been executed on both 3 April 2019 and 5 April 2019 in the manner disclosed by the evidence addressed above. The primary judge was satisfied with the explanation of Mr Palmer set out above as to the issue taken with Mr Beard's purported reservation of rights.

22 The second matter concerned the fact that the mortgage form itself made no reference to the Maimuru property. The primary judge noted that he had explained how the mortgage extended to that property.

23 The third matter concerned a caveat lodged by the respondent over the appellant's land. The appellant complained that the caveat was only lodged after Turba Trium had defaulted on the mortgage. The primary judge unsurprisingly saw no issue with that. The appellant also complained that the caveat had been lodged despite there being no caveatable interest. The primary judge said that, by reason of the mortgage, the respondent had a caveatable interest in the Maimuru property in the nature of a charge.

24 The fourth matter concerned a document tendered below as Exhibit 1 and titled "Judgement of the Native Assessor/s". It purports to be a judgment in a matter between the appellant and respondent and is dated 10 November 2021. Much of the document is difficult to comprehend. Parts of it challenge the jurisdiction of Australian and New Zealand courts and parliaments over the appellant. The primary judge explained:

> I do not propose to deal with this submission other than shortly because it is quite plain that this case is concerned with land that is land under the *Real Property Act 1900* (NSW) and it is undoubtedly the case that this Court has jurisdiction to make orders with respect to such land, including orders made under s 66G of the *Conveyancing Act*. Any suggestion that this Court lacks such jurisdiction is rejected.

25 The fifth matter was a complaint that the respondent had introduced into the mortgage documents a document which was not included at the time of execution. That document is a form titled "General Request", and records a request by Summer Lawyers lodged with the Queensland Titles Registry to register its standard terms document, being the document referred to in this reasons as the Common Provisions. The impugned page constituted part of a document which Mr Palmer explained as follows:

> Exhibited at pages 31 to 71 of Exhibit BP-1 is a copy of a dealing number 718188316 lodged with the titles office on behalf of [the respondent], being the memorandum of common provisions referred to in the Mortgage (MCP).

26 Mr Palmer did not describe the document nor the impugned page as something provided to the appellant, but merely as the actual dealing lodged with the Queensland Titles Registry. The request is dated 7 July 2017, and is stamped (implicitly as having been received) on 2 August 2017, thus well prior to entry into the mortgage at issue here in April 2019.

27 The primary judge disposed of that matter as follows:

> Whether that document was part of the documents provided to the company, or the guarantors, prior to the execution of the mortgage, seems to me to be neither here nor there. The terms of the mortgage that was executed plainly refer to the incorporation of the common provisions contained in various registered forms, including that registered under the Queensland legislation. In short, the common provisions were readily available to be examined. In any case, I did not understand it to be submitted that the common provisions themselves were not made available at the time. I might add in this context that it is apparent from the evidence that the first defendant signed a number of documents in relation to the transaction, including a guarantor's advice declaration signed in the presence of a solicitor who acted as a witness. I note further that the solicitor signed an Australian legal practitioner's certificate in respect of the first defendant to the effect that the first defendant was provided with an explanation in respect of the guarantee and its terms and legal effect.

28 The sixth matter, which the primary judge described as "difficult to understand", was discussed by the primary judge as follows:

> It appears to be suggested that in some way, an order for mandamus has been made which has the effect of converting what is said to be the "pretend title" of the property into a customary or native title. The submission was, essentially, unintelligible. In any case, as I have said, it is quite clear that the title in respect of the Maimuru property is title under the *Real Property Act 1900*. There is no substance in the argument.

29 The primary judge explained that none of these arguments demonstrated that it would be inequitable to make an order under s 66G. His Honour thus made orders as sought by the respondent.

The proceedings in this Court

30 The appellant challenges the orders made by Darke J on the basis of 14 grounds of appeal listed as "a" to "n" in his Amended Notice of Appeal. Of these, there are five grounds, "e" to "i", which make comprehensible if misconceived challenges to the orders below. The other nine grounds might

loosely be characterised as challenging the jurisdiction of the Court below or the applicability of Australian law to the appellant.

31 The appellant provided two folders of material to this Court. The first, a green folder, is labelled "Submissions, Facts and Evidence". It is comprised of a mix of submissions, material in the nature of evidence which was not before the Court below, and some evidence which was before the Court below. The second, a red folder, is described as "Court Book 2". It seems to reproduce the court book below, although with some apparent annotations, as well as some other court documents, including the transcript of the hearing below.

32 The appellant also filed two notices of motion in this Court. The first, dated 26 October 2022 and filed in November 2022, seems to be an application to rely on evidence that was not before the Court below. A second notice of motion, dated 28 February 2023 and accepted for filing on 3 March 2023, seeks "a vexatious order of proceedings that are an abuse of Court process".

33 There were various further documents provided to this Court in the form of affidavits. The respondent objected to these being received. The Court indicated that they would be treated as submissions. To the extent these sought to adduce further evidence they are addressed below.

34 I will address the two notices of motion first before turning to the grounds of appeal.

The notices of motion

Application to adduce additional evidence

35 The motion dated 26 October 2022 seeks "[a]dministration correction as per Order Table to correct the Record Tabled and dismiss the claim". It seems it is meant to be an application to rely on further evidence in this Court that was not put before the Court below, and that is how I will treat it.

36 The notice of motion was accompanied by a document titled "Sworn Statement of Fact" which is in the form of an affidavit. The deposition merely reads:

> 1 #I am the Appellant
>
> 2 I John-William.:Cini am filing by email Notice of Motion Transmission of Interlocutory Order to Her Magesties Queen High Court of AUSTRALIA for enforcement

37 The second paragraph conveys no meaning. Annexed to the document are a number of further documents. The first is titled "Transmission of Interlocutory Order to Her Majesties Queens High Court of AUSTRALIA tor Enforcement". The document purports to be the creation of the "Native Assessors Tribunal TE KOOTI MARAE" and contains what appear to be purported orders which are substantially incomprehensible. The next document is titled "Consent Judgment/Order", but includes nothing beyond the mere recording of the names of the parties, the file number of the case and similar information. A further document titled "Judgement of the Native Assessor/s" is also annexed to the statement. It seems to be the same document as Exhibit 1 which was tendered below, as referred to at [24_Ref129682151] above.

38 In the green folder provided to the Court and described "Submissions, Facts and Evidence" there appear a number of affidavits or further "Sworn Statements of Fact".

39 This Court has power to receive further evidence on appeal, although, aside from where the evidence concerns matters occurring after the trial or hearing, the Court will not do so unless special grounds for doing so are established: s 75A(7)-(9), *Supreme Court Act 1970* (NSW).

40 No attempt was made to show that the evidence annexed to the "Sworn Statement of Fact", or in the green folder, related to matters occurring after the hearing. Nor was any attempt made to show that there were special grounds for receiving the evidence. There is nothing to suggest that the materials could not have been obtained with reasonable diligence for use at the trial, nor that the evidence is credible, let alone that there would be a high degree of probability that there would be a different verdict if the material was now admitted: cf *Searle v Commonwealth of Australia* (2019) 100 NSWLR 55; [2019] NSWCA 127 at [169]-[175]. The onus on the appellant to establish grounds for relying on the material has not been discharged.

41 This motion should be dismissed with costs.

Further application relating to "a vexatious order"

42 By the notice of motion dated 28 February 2023 the appellant applies for what he calls "a vexatious order of proceedings that are an abuse of Court process".

The application is accompanied by submissions which are largely nonsensical and similar in nature to other documentation provided by the appellant, both in this Court and below, and which contain challenges to the jurisdiction of this Court. The submissions also complain about the mortgage transactions and about the way in which the respondent has gone about recouping the monies owed to it.

43 The effect of the order sought is unclear and the appellant has established no basis for making any such order. This motion, too, should be dismissed with costs.

The grounds of appeal

Grounds "a" to "d" and "j" to "n"

44 The nine grounds of appeal which I characterised above as challenging the jurisdiction of the Court below or the applicability of Australian law to the appellant are as follows:

> a. That the Judge failed to acknowledge the Customary Law of the land and as such the order impugned is liable to be set aside.
>
> b. However, the Impugned Order lacks legality as it fails to consider the factual circumstances surrounding the execution of the mortgage deed as the Judge fails to consider the question which arises as to how a dead man can sign a contract and thereby the Judge breached the rule of law.
>
> c. That the Judge erred in law in passing the impugned order by not considering the fact that the Maori Customary Land had already heard the case and the Judge comprehend the jurisdiction by passing the impugned order of Mandamus Writ.
>
> d. That the Judge failed to acknowledge the fact that it had no jurisdiction to pass the impugned Order of Writ Mandamus in the present case as the Court is not actually a true court but rather a Corporation Court as per the provisions of the Maori/Maori Land Act 1993. …
>
> j. The Judge erred in rule of law that he failed to carry out the wishes of the equity orders of the Tikanga orders in the case Noting that he had "NO JURISDICTION".
>
> k. The Judge erred in the case by not acknowledging the fact that John-William is a living man and that there were no facts no elements of facts presented in any of the documents note common law precedent WENZEL V R.
>
> l. That the Judge erred in law by passing the impugned order by not acknowledging the holding in "no. TK 2021-442 dated 10th of Nov 2021" whereby it was held that John William is Diplomatically immune against their laws and against the jurisdiction of their court.
>
> m. That the Judge had erred in law by not acknowledging that it has been held in case vide no. TK 2021-44 dated 10th of Nov 2021" that it has no jurisdiction

> and it is not a court of legal not it is a court of law. The courts according to their law, according to the law of England, and particularly in reference to the creation of courts are found in "Earls of Halsbury vol 9, ed, and 8 and eighth edition "courts are created by the King who is the fountain of Justice".
>
> n. The Judge has erred in Law by not acknowledging the Land Patent that the Crown has no treaty with the living man John-William or any other aboriginal native man Therefore cannot exercise the Land Act of 1900 or any legislation.

45 As to "a", there was no occasion for the primary judge to consider customary law. The case called for an orthodox application of statute law in the form of s 66G of the *Conveyancing Act*. That is what his Honour did.

46 As to "b", there is no evidence that any relevant person was dead at any relevant time. If by this ground it is meant to suggest that the respondent, as a company, was "dead" and thus not known to the law then that ignores centuries of law recognising bodies corporate as having legal personality. If it is meant to suggest that the applicant was dead, his appearance before us undermines that argument. If it is meant to suggest that he is a different person because he now denotes himself differently, then that is misconceived. A person cannot evade their legal responsibilities by changing their name.

47 By ground "c" it is alleged that "the Maori Customary Land had already heard the case". It may be that this ground is meant to refer to the purported "Native Assessor/s" said to have authored the Exhibit 1 document. No such court or tribunal exists in Australia. There is no evidence of the status of any such bodies within any other legal system. Even if there was such evidence that would not provide a basis for the Supreme Court of New South Wales to decline to apply the laws of Australia, including New South Wales statutes.

48 Ground "d" attacks the Supreme Court as being a "Corporation Court", whatever that means, under the "Maori Land Act 1993", and not a "true court". The New South Wales Supreme Court was established in 1824 by letters patent and was continued by s 22 of the *Supreme Court Act 1970* (NSW). Section 23 grants the Court "all jurisdiction which may be necessary for the administration of justice in New South Wales". The allegation that it is not a "true court" or lacks jurisdiction is inconsistent with basic legal principle.

49 Ground "j" challenges the decision of the primary judge on the basis that he did not "carry out the wishes of the equity orders of the Tikanga orders in the case

Noting that he had ‘NO JURISDICTION’”. This seems to be another reference to the document marked Exhibit 1 below. The ground is baseless and fails for the same reasons given with respect to grounds “c” and “d”. Grounds “l” and “m” also appear to rely on the Exhibit 1 document and fail for the same reasons.

50 Ground “k” suggests that the primary judge “erred in the case by not acknowledging the fact that John-William is a living man”. As his Honour referred in his judgment to various submissions the appellant made whilst representing himself, it is safe to infer that he accepted that the appellant was alive. This ground also refers to a decision of the New Zealand Court of Appeal, *Wenzel v R* [2010] NZCA 501, which is a criminal matter under New Zealand law of no apparent relevance to the issues at hand.

51 As to “n”, the suggestion that the law of Australia does not apply to the appellant because he is a person with whom Australia has not entered into a treaty represents an inane attempt to say that he is above the law of the land.

52 None of these grounds raise any meaningful legal issue within Australian law.

Grounds “e” and “f”

53 Ground “e” complains about the authenticity of the mortgage form. The ground reads:

> That the Appellant claims that the document of Mortgage deed dated 5th of April, 2019 is nothing else but a forged document. The document was signed by Shane Beard on 8th of April 2019 and the Solicitor verified his signature.

54 Ground “f” does not appear to proffer a separate basis for overturning the decision below, but merely adds to ground “e”. It reads:

> That the Appellant requested the solicitor by email to send a copy of the signed documents and it is sufficiently visible that the document of mortgage deed was not signed by the Appellant or Marcel on the date of 8th of April 2019. A copy of this email has been attached as “Annexure B”.

55 The allegation that the “document of Mortgage deed” was forged is a grave one, and a court would require clear evidence to make a finding to this effect. No evidence was before the primary judge that any of the contractual documents were forged. These grounds may echo the first and fifth matters addressed by the primary judge, as referred to above at [21_Ref129686961]

and [25_Ref129686964]-[27_Ref129686966]. No error is apparent in the way his Honour addressed those matters.

Ground "g"

56 Ground "g" also goes to the authenticity of the mortgage document. It reads:

> That page number 2 of the document was falsely inserted and the same was not signed by the Appellant and has been misused by the Respondent to forge the document and by misrepresenting the face that the document was signed by the Appellant.

57 The rest of the ground repeats, in substance, ground "e". Again, this ground seems to raise the first matter addressed by the primary judge.

58 Page number 2 of the mortgage form is simply the page on which appear the signatures of Mr Ligthart and the appellant. As with ground "e", there was no evidence before the primary judge to justify a finding as serious as that which is sought by ground "g".

59 Moreover, the allegation that the second page was not signed by the appellant is in conflict with his own evidence below. The second page of the mortgage form was exhibited to his "Sworn Statement of Fact" of 27 June 2022, and is identical to the document provided by Mr Palmer, save that the version he exhibited had not (yet) been executed on behalf of the respondent. In the "Sworn Statement of Fact" the appellant says "[a]lso included is page 2 of the mortgage document *signed by myself* and clearly showing it was dated 5th April 2019 but not in my handwriting and appears to [be] added at a later date without my knowledge" (emphasis added). He also said, in reference to this document, "[s]ee Exhibit JWC-2 page 9 with *my signature* and dated by someone else on 5th April 2019" (emphasis added).

Ground "h"

60 Ground "h" challenges the respondent's right to obtain an order for sale under s 66G on the basis that it only enjoys "a pre-emptive right to the fruits of the sale as and when affected by the Appellant". This misunderstands the provision. Section 66G confers a discretion on the Court to order statutory trusts for sale on application by co-owners. Co-owners are defined to include "an incumbrancer of the interest of a joint tenant or tenant in common" in s 66F(1). By reason of the Common Provisions, including Schedule A, the

respondent was an incumbrancer of the appellant's interest as tenants in common in the Maimuru property and so could seek an order under s 66G. Absent any successful argument as to the inequitable nature of such an order, the primary judge was right to decide as he did.

Ground "i"

61 Ground "i" concerns a caveat lodged over the property by the respondent. It reads:

> That the absolute caveat filed by the Respondent only prevents interests from being registered on the property. The operating word in laws of caveat is "interest". As per the holding in *Re Victorian Farmers' Loan and Agency Co Ltd* (1898) 22 VLR 629 only the interest of a mortgagee can be protected by filing a caveat. This filing of caveat will not entitle the Mortgagee to affect a sale of the property under the caveat.

62 This ground repeats in substance the argument made in the Court below about the caveat. The basis of the orders made by the Court below was s 66G. The orders did not depend on there being a caveat.

Trust claim

63 Although not raised in any ground of appeal, in his oral submissions to this Court the appellant claimed that he held the Maimuru property on trust for his daughter. He implicitly queried how the property could be sold when his daughter has a caveat on the property. There is evidence suggesting that a "Debbie Joanne Mills" has a caveat on the property.

64 The appellant accepted that he had not raised this issue before the primary judge and the issue is not before this Court. The trustees appointed by the Court to effect the sale of the property may no doubt need to grapple with the caveat.

Orders

65 The respondent sought indemnity costs based on its contractual right to such under the Common Provisions. As costs had been sought on that basis in the respondent's summons commencing the proceedings, were ordered on that basis below, and no argument was made against them on appeal, such an order should be made.

66 The orders of the Court should be as follows:

(1) The appellant's motions dated 26 October 2022 and 28 February 2023 are dismissed.

(2) The appeal is dismissed.

(3) The appellant is to pay the respondent's costs of the appeal, including on the appellant's motions, on an indemnity basis.

67 **BASTEN AJA:** I agree with Kirk JA.

****