

High Court's decision highlights danger in transferring mortgages

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ON 15 NOVEMBER 2007 the High Court, in *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53, held that a registered transfer under Torrens system legislation did not operate to transfer anything more than the rights expressly set out in the mortgage. Where the mortgage secures obligations under extraneous documents (such as a deed of loan), the obligations in those extraneous documents are not automatically transferred.

The court was asked to determine whether a transfer of a mortgage under s.62 of the *Land Title Act 1994* (Qld) transferred the obligations under the separate deed of loan which was secured by the mortgage. Judgment was given by Kiefel J with whom Gleeson CJ, Gummow, Hayne, Heydon and Crennan agreed.

The court noted that since s.62 was materially identical to s.52(1) of the *Real Property Act 1900* (NSW), s.46 of the *Transfer of Land Act 1958* (Vic), s.151 of the *Real Property Act 1886* (SA), s.83 of the *Transfer of Land Act 1893* (WA), s.60 of the *Land Titles Act 1980* (Tas), s.62 of the *Land Title Act* (NT), and s.78 of the *Land Titles Act 1925* (ACT), the ratio can therefore be taken as applying to all Australian Torrens legislation.

The mortgage relied for its efficacy on a clause under which the mortgagor covenanted to "pay each amount included in the secured moneys to the mortgagee". The "secured moneys" were defined as all moneys owing or which will become payable on any account. This is a classical moneys mortgage which essentially incorporates, by

reference, a separate facility agreement not forming part of the register.

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Kiefel J held (at 55) that the purpose of the section was to effect the transfer of the rights in rem, that is those rights that expressly, and on the face of the register, bind the land.

The wording of s.62 was not concerned with transferring other agreements between the mortgagor and original mortgagee. Kiefel J noted (at 56): "The words of the section are plain. Neither the historical reason for the provision nor its purpose, of effectuating a transfer of both the security interest and the right to moneys arising from the mortgage transaction, supports a construction which extends the section to obligations arising otherwise than under the terms of the mortgage. It is no part of the purpose and function of a statute such as the *Land Title Act* to rewrite the bargain between transferor and transferee."

Her Honour further observed (at 57) that in most instances "when a mortgage is transferred, the debt arising from a separate loan agree-

ment will be transferred with it ... that is a consequence of the agreement, express or implied, between the parties, not of the operation of s.62".

This case further highlights the vulnerabilities of so-called all-moneys mortgages. There has recently been a string of decisions, commencing with *Perpetual Trustees Victoria Limited v Tsai* [2004] NSWSC 745, and including *Printy v Provident Capital Limited* [2007] NSWSC 287, *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694 and *Sabah Yazgi v Permanent Custodians Limited* [2007] NSWCA 240, which have drawn clear attention to the vulnerability of mortgages which rely for their efficacy on the integrity of extraneous documents (usually a deed of loan). Lenders have been slow to update their documents and the majority of mortgages used in NSW are still all-moneys mortgages.

The effect of these cases and the decision of the High Court in *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53 is to demonstrate that an all-moneys mortgage is an empty shell, ineffective to bind the land if something should interfere with the efficacy of the separate deed of loan (for example, fraud or failure to transfer it).

In conclusion, although the separate deed of loan will often be impliedly transferred, this is not always the case. Practitioners transferring mortgages should adopt the prudent course of ensuring the obligations contained in the separate deed of loan are expressly transferred. Thought should also be given to avoiding the use of all-moneys mortgages wherever practical to ensure clients benefit from the indefeasibility provisions of the *Real Property Act*. □