HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH J, GUMMOW, CALLINAN AND HEYDON JJ

MARIE MARGARET THEODORE APPELLANT

AND

MISTFORD PTY LTD & ANOR RESPONDENT

Theodore v Mistford Pty Ltd
[2005] HCA 45
1 September 2005
B75/2004

ORDER

1. *Set aside order 2(b) of the orders of the Court of Appeal of the Supreme Court of Queensland made on 2 April 2004.*

2. *Appeal otherwise dismissed with costs.*

On appeal from the Supreme Court of Queensland

Representation:

K D Dorney QC with N R Jarro for the appellant (instructed by North Coast Law)

H B Fraser QC with F W Redmond for the respondents (instructed by Klar and Klar)

CATCHWORDS

Theodore v Mistford Pty Ltd

Mortgages – Equitable mortgage by deposit of a certificate of title – Third party security – Contract provided for sale of business by respondents to third party guaranteed by appellant's son – Sale contract provided for deposit by guarantor with vendors' solicitors of instrument of mortgage of certain land owned by appellant together with duplicate certificate of title – Guarantor obtained appellant's authority to release duplicate certificate of title as security for purchase – Guarantor deposited duplicate certificate of title with vendors' solicitors four days prior to settlement – No insistence by vendors upon provision of instrument of mortgage – Whether equitable mortgage created by deposit of duplicate certificate of title – Whether duplicate certificate of title held by vendors' solicitors on account of purchaser or on account of vendor – Whether *Land Title Act* 1994 (Q), s 75 precludes creation of third party securities by way of deposit of a certificate of title – Whether deposit of a certificate of title must be made contemporaneously with the advance to be secured.

Land Title Act 1994 (Q), s 75.
Property Law Act 1974 (Q), ss 5, 11, 59.

1 GLEESON CJ, McHUGH, GUMMOW, CALLINAN AND HEYDON JJ. This appeal requires some consideration of the principles governing equitable mortgages by deposit of a duplicate certificate of title. The principles governing the creation of an equitable mortgage by deposit of title deeds were developed by the English courts of equity with respect to old system conveyancing. This appeal concerns their application in the Torrens system, in particular to the deposit of the duplicate certificate of title to land under the provisions of the *Land Title Act* 1994 (Q) ("the Act"). Section 75 of the Act states:

> "(1) An equitable mortgage of a lot may be created by leaving a certificate of title with the mortgagee.
>
> (2) Subsection (1) does not affect the ways in which an equitable mortgage may be created."

2 The statute law in Queensland thus stands in marked contrast to the present position in England established by the decision in *United Bank of Kuwait plc v Sahib*[1]. In that case, the Court of Appeal held that the principles respecting the creation of an equitable security by deposit of title deeds were inconsistent with the requirements which had been introduced by the *Law of Property (Miscellaneous Provisions) Act* 1989 (UK)[2].

3 In Queensland, the predecessor of s 75 of the Act, s 30 of *The Real Property Act* 1877 (Q) had declared that:

> "an equitable mortgage or lien upon land or any estate or interest in or security upon land under the provisions of this Act or any instrument affecting any such land may be created by deposit of the instrument of title and such deposit shall subject to the provisions hereinafter contained have the same effect on the estate interest or security sought to be charged as a deposit of title deeds would have had before the passing of this Act".

Before the enactment of s 30, the Supreme Court of Queensland held in *In re Wildash and Kenneth Hutchison, Ex parte Miskin*[3] that an equitable mortgage

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1 [1997] Ch 107.

2 Section 2 provides that a contract for sale or other disposition of an interest in land "can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each". Previously, s 13 of the *Law of Property Act* 1925 (UK) had affirmed "the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land". See *White and Tudor's Leading Cases in Equity*, 9th ed (1928), vol 2 at 70.

3 (1877) 5 QSCR 46.

might be created by deposit of the duplicate certificate of title, although, as Lilley J put it[4], unless protected by caveat "its practical value as a security is very doubtful, and it is not to be commended as a mode of investment". That warning notwithstanding, the subsequent legislation in Queensland and decisions in Victoria[5] confirmed the adaptation of this species of equitable security to Australian conditions.

4 It should be added that the *Property Law Act* 1974 (Q) ("the Property Law Act") applies to land under the provisions of the Act. Section 5(1)(b) of the Property Law Act so provides. The Property Law Act contains various provisions whose origins may be traced to the *Statute of Frauds* 1677 (Eng)[6]. Two are presently significant. Section 11(1)(a) of the Property Law Act provides that subject to that statute, with respect to the creation of interests in land by parol:

> "no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent lawfully authorised in writing, or by will, or by operation of law".

Section 59 states:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised."

It will be necessary to refer to s 11 and to s 59 later in these reasons.

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4 (1877) 5 QSCR 46 at 50; cf *Breskvar v Wall* (1971) 126 CLR 376.

5 See *Tolley and Co Ltd v Byrne* (1902) 28 VLR 95 at 100-101; *Ryan v O'Sullivan* [1956] VLR 99 at 100; *Re Nairn's Application* [1961] VR 26 at 28.

6 29 Car 2 c 3.

The Litigation

5 By majority (McMurdo P and Philippides J; Jerrard JA dissenting), the Queensland Court of Appeal[7] made a declaration (order 2(a)) to the effect that Mr Glen Theodore, with the authorisation of his mother, Mrs Marie Theodore, on 18 July 1996 had deposited the duplicate certificate of title to a parcel of land at Buderim ("the Buderim land") with Klar and Klar, the solicitors to the respondents (Mistford Pty Ltd and Mr and Mrs Vines) and thereby secured by equitable mortgage the amount owing under a contract of sale dated 22 July 1996 ("the Sale Contract").

6 The parties to the Sale Contract were the respondents as vendors, Mobile Lab Pty Ltd ("Mobile Lab") as purchaser and Mr Glen Theodore as guarantor. Mobile Lab was a shelf company acquired by Mr Theodore. The Sale Contract was in a standard form with schedules containing details and special conditions. Clause 37 of the standard conditions set out the terms of the guarantee deemed to have been given by Mr Theodore. The subject-matter of the transaction was a business conducted under the name "Air Monitoring Services", together with certain plant and equipment.

7 The Sale Contract stipulated that the purchase price was $66,500. The deposit was $100, and the balance, as to $19,900, was payable on completion. The remaining $46,500 was payable by three instalments over two years with interest at 8 per cent per annum. Clause 4.3 of the special conditions obliged the purchaser, Mobile Lab, in support of the guarantee by Mr Theodore, to procure on or before completion the lodgment with the respondents' solicitors of the duplicate certificate of title to the Buderim land and an instrument of mortgage thereof in favour of the respondents, to be unregistered while Mobile Lab complied with its obligations under the Sale Contract.

8 The Sale Contract was completed on the date it bears, 22 July 1996, and a bank cheque for $20,000, described by the parties as a deposit, was provided by Mr Theodore from moneys furnished to him by Mrs Theodore. As Jerrard JA pointed out, cl 4.3 contained no reference to the provision of a guarantee by Mrs Theodore. However, at the settlement at the offices of Klar and Klar, Mr Theodore was furnished by Mr Peter Klar with and took away a draft guarantee by his mother in favour of the respondents of the balance of the purchase moneys owing by Mobile Lab under the Sale Contract and a draft

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7 *Theodore v Mistford Pty Ltd* [2004] QCA 90.

mortgage of the Buderim land by Mrs Theodore in support of that guarantee. Mr Klar requested that Mr Theodore have these instruments signed by his mother and returned for holding without registration provided the terms of the Sale Contract were complied with.

9 On 9 August 1996, Mrs Theodore took these draft instruments to her solicitor and received advice as to her position. She never executed the guarantee and mortgage. Hence the reliance by the respondents upon the alleged equitable mortgage by reason of the deposit of the duplicate certificate of title on 18 July 1996, several days before completion of the Sale Contract.

10 By the time the Court of Appeal made its orders, Mrs Theodore had sold the Buderim land and the proceeds of sale had been deposited in the trust account of the solicitors for the respondents. The Court of Appeal held that the respondents were entitled to have paid to them from those proceeds the amount owing to them under the equitable mortgage, with the balance, if any, returned to Mrs Theodore.

11 The reduction of the Buderim land to a fund held pending the outcome of the litigation has a further significance. There is no occasion now to consider questions considered by Dean J in *Ryan v O'Sullivan*[8] respecting the adaptation to equitable mortgages of Torrens title land of the remedies of foreclosure and sale.

12 In this Court, Mrs Theodore seeks the setting aside of the orders of the Court of Appeal and a declaration that no equitable mortgage was created by the deposit of the duplicate certificate of title to the Buderim land.

13 The litigation commenced with a claim instituted by Mrs Theodore in the District Court of Queensland in which she sought a declaration that the respondents held the duplicate certificate of title "as constructive trustees" and for her benefit. By counterclaim, the respondents sought against Mrs Theodore orders giving effect to their contention that an equitable mortgage had been created over the Buderim land in their favour. At trial before Robertson DCJ, Mrs Theodore's claim was dismissed and relief was given to the respondents on their counterclaim. That relief then was varied on appeal by Mrs Theodore to the Court of Appeal to achieve the outcome described above.

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8 [1956] VLR 99. See also the remarks of Kitto J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In liquidation)* (1965) 113 CLR 265 at 274-275.

The Factual Findings

14 The primary judge found that on 12 July 1996 Mr Glen Theodore had advised Mr Peter Klar that he was ready to proceed with the purchase of the Air Monitoring Services business. He said that he had borrowed $30,000 from his mother and that he wanted to utilise $20,000 of that money for a deposit. Mr Klar told Mr Theodore that there would be a requirement by the respondents that the duplicate certificate of title to the Buderim land be deposited with his firm. Mr Theodore told him that, while the Buderim land was in the name of his mother, he was the beneficial owner. That was untrue.

15 On 18 July 1996, Mr Theodore attended the offices of Allan Taylor & Associates, Mrs Theodore's solicitors. He produced to them a handwritten authority evidently composed by him. It had been signed by Mrs Theodore and authorised her solicitors to release to Mr Glen Theodore the duplicate certificate of title to the Buderim land. On the same day, Mr Glen Theodore obtained possession of the duplicate certificate of title, deposited it with the respondents' solicitors and obtained their letter of acknowledgment addressed to him. This stated that the certificate of title was "to be held in safe custody on your behalf as security on account of the purchase from M & V Vines of the business, Air Monitoring Services". Up to the time of the settlement of the Sale Contract on 22 July 1996, neither the respondents nor their solicitors had any direct dealings with Mrs Theodore.

16 Before the settlement, Mr Klar advised his clients that the holding of the certificate of title was insufficient security for payment of the balance of the purchase price without the support of an executed guarantee and mortgage. Notwithstanding that advice, the respondents, who wished urgently to settle, instructed Mr Klar to proceed. As a result, there was no insistence upon full compliance with the requirements of cl 4.3 of the Sale Contract. Those requirements had included provision on or before settlement not only of the duplicate certificate of title but also of a mortgage of the Buderim land in favour of the respondents.

17 The primary judge commenced his consideration of the evidence given by Mrs Theodore as follows:

> "Her evidence is in short compass. She said that she was aware in 1996 of the son's interest in the business. She authorised the son to obtain the title deed from Mr Taylor. I find that this occurred on the 18th July 1996. This is the date of the hand written authority signed by her and is the same date that the title deed was delivered to Mr Klar by the son.

> [Mrs Theodore] strenuously denies any prior knowledge that her son was going to deliver the deed to Mr Klar, or any authority from her for him to deal with the deed in this way. This is the essential factual issue in the case."

18 At the time of the trial, Mrs Theodore was aged 71 years. She had been a widow for 10 years. Her husband had been an Area Manager with the ANZ Bank and she said that her "whole life [had] been tied up with the ANZ Bank". Her husband had told her never to give a guarantee and she was adamant in refusing to do so. Mr Glen Theodore was one of her four children. Mr Glen Theodore had been divorced in 1992 and, at the relevant time, was living at home with his mother. Mrs Theodore's case was that she had agreed only to the delivery of the deed to the ANZ Bank at Maroochydore as security for a loan which Mr Glen Theodore proposed to obtain from that Bank.

19 Mr Theodore had sought unsuccessfully to arrange finance from the ANZ Bank. On 18 July, he had attended the Maroochydore branch with Mrs Theodore but the Bank declined his application for an advance of $60,000. Mrs Theodore had already received advice from her accountant that a purchase of the respondents' business at that price was not a viable proposition.

20 Mrs Theodore's evidence was that she had decided not to assist her son at all in the matter but that she relented and lent him $30,000, of which $20,000 was for the initial payment under the Sale Contract and $10,000 for his purchase of a van.

21 The primary judge introduced his conclusions respecting the credibility of Mrs Theodore by saying that she had impressed him as a highly intelligent, astute and alert witness. His Honour continued:

> "She was not in the least overborne by cross-examination despite her obvious physical difficulties resulting from her distressing condition. I do not think she is a liar, however I regret to say that on the balance of probabilities, I do not accept her evidence that she did not know of her son's plans to deal with the deed as he did on the 18th July 1996. I think it more probable than not that at the time of purchase of the business by the son, she did act with her heart and not her head; and that she has now convinced herself that she did not give him authority to deal with the deed, when in fact she did. ... In my opinion, it is more probable than not that she was aware, after the failure to obtain finance, that the son was going to hand over the deed as security to enable him to complete the sale of the business."

His Honour added that, although Mr Glen Theodore had not given evidence, he was satisfied that he was manipulative and probably dishonest.

General Principles

22 The respondents support the declaratory relief in their favour given by the Court of Appeal by reliance upon a basic proposition. This may be stated in the terms used by Maitland in the thirteenth of his "Lectures on Equity". He said that the Court of Chancery had enabled people to create equitable mortgages without any writing at all and added[9]:

> "An equitable mortgage (enforceable by an order for foreclosure or for sale) can be made by a deposit of title deeds if they were deposited with intent that the land which they concern shall be security for the payment of a debt."

23 In the present case, there were no direct dealings between the appellant and the respondents but, the respondents submit, this provides no fatal objection to their case. They say the findings of fact establish two sufficient planks for their case. First, Mrs Theodore had the necessary intention to deposit the duplicate certificate of title as security for her son's indebtedness under the Sale Contract and, secondly, to effectuate that intention she conferred an actual authority on her son, in broad terms encompassing his subsequent dealing with the duplicate certificate of title to procure settlement of the Sale Contract. These submissions should be accepted and the appeal dismissed. We turn to explain why this is so.

24 Several preliminary matters are to be noted. First, given the findings as to the intention of Mrs Theodore, this is not a case which tests the proposition in some of the leading English texts[10] that from a relationship of debtor and creditor and the delivery of title deeds the court will presume an intention to create a security, a presumption to be rebutted only by proof that the deposit was made on

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9 Maitland, *Equity*, rev by Brunyate, (1949) at 198.

10 Coote, *A Treatise on the Law of Mortgages*, 9th ed (1927), vol 1 at 86; Waldock, *The Law of Mortgages*, 2nd ed (rev) (1950) at 51. See also *In re Wallis and Simmonds (Builders) Ltd* [1974] 1 WLR 391 at 395; [1974] 1 All ER 561 at 564 and cf *Sun Tai Cheung Credits Ltd v Attorney-General of Hong Kong* [1987] 1 WLR 948 at 950.

other grounds. However, it may be noted that this proposition does have the formidable support of Lord Macnaghten. In delivering the reasons of the Privy Council in *Bank of New South Wales v O'Connor*[11] Lord Macnaghten said:

> "It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a Court of Equity would undoubtedly have restrained the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court if there be any conflict the rules of equity must prevail."

25 Secondly, the term "equitable mortgage" is not used in the texts and the authorities with any single denotation. The nature of the security created must turn upon the intention of the party dealing with the assets to be subjected to the security and the nature of those assets. So it is accepted that a mortgage of an equitable interest, being an equity of redemption, can only be by way of an equitable mortgage, although described as a second mortgage of the land in question.

26 In respect of a legal interest, under the general law an agreement to give a legal mortgage is described as an equitable mortgage. Subject to compliance with any statutory formalities, it may be treated in equity as if a legal mortgage had been granted and therefore as carrying with it the remedies, including foreclosure, incident to a legal mortgage[12]. Hence the statement that while in theory the equitable mortgagee may call for a legal mortgage, in the great majority of cases the mortgagee rests upon its equitable rights[13]. Lord Eldon LC said of the Court of Chancery that "an equitable title to a mortgage is here as

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11 (1889) 14 App Cas 273 at 282-283; cf the treatment of the above situation as "the most extreme case" by Phillips LJ in *United Bank of Kuwait plc v Sahib* [1997] Ch 107 at 143.

12 *Carter v Wake* (1877) 4 Ch D 605 at 606 per Jessel MR.

13 Megarry and Wade, *The Law of Real Property*, 6th ed (2000) §19-039.

good as a legal title"[14]. In this way, by looking at the intent rather than the form, equity is able to treat as done that which in good conscience ought to be done[15].

27 However, in the present appeal, debate as to whether the factual findings were consistent with an agreement between the appellant and the respondents that she would execute a legal mortgage (ie, a memorandum of mortgage in registrable form) would have been misplaced. The trial judge found that authority had been given by Mrs Theodore for her son to furnish the duplicate certificate of title as the immediately effective security required by the respondents for their completion of the Sale Contract on 22 July 1996. Their case thus is not to be approached as one of an agreement, supported by deposit of the title deeds, to give a legal mortgage. It was a transaction of this nature which was discussed by Knox CJ in *Cooney v Burns*[16], to which reference was made in argument. Further, the respondents accept that, there being no such agreement and no personal covenant by the appellant, their remedy is limited to recoupment from the sale proceeds, with no judgment against the appellant upon a personal liability to pay moneys.

28 The principles respecting part performance developed in cases where s 4 of the Statute of Frauds was pleaded in answer to a suit for specific performance of an oral land sale contract. These principles were treated, at least by analogy, as applying to the enforcement of agreements to create legal and equitable securities[17]. The analogy was imperfect for at least two reasons. First, as Lord Eldon LC complained, the deposit of title deeds by itself was an equivocal act, being referable also, for example, to a pledge only of those chattels[18]. Secondly, as Higgins J later explained in *Cooney v Burns*[19], the nature of the acts

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14 *Ex parte Wright* (1812) 19 Ves Jun 256 at 258 [34 ER 513 at 514].

15 Pomeroy, *A Treatise on Equity Jurisprudence*, 5th ed (1941) vol 2, §378.

16 (1922) 30 CLR 216 at 224-225. See also *World Tech Pty Ltd v Yellowin Holdings Pty Ltd* (1992) 5 BPR 11,729 at 11,732.

17 *Maddison v Alderson* (1883) 8 App Cas 467 at 480.

18 *Ex parte Whitbread* (1812) 19 Ves Jun 209 at 212 [34 ER 496 at 497]. See, more recently, the remarks of Bryson J in *Arnick Holdings Ltd v Australian Bank Ltd*, unreported, New South Wales Supreme Court, Equity Division, 4 December 1987.

19 (1922) 30 CLR 216 at 242-243.

which suffice for part performance differ in the two situations. Given the nature of the respondents' case which does not found upon an executory agreement by the appellant to provide security, the matter of part performance need not further be considered.

29 The appellant correctly submitted that a consequence of the respondents' fixing upon her intention to create a security immediately effective upon completion is that attention is required not to s 59 but to s 11(1)(a) of the Property Law Act. Section 59 is concerned with contracts, and s 11(1)(a) with dispositions. Here, there was no writing satisfying par (a) of s 11(1)[20].

The Issues on the Appeal

30 The appellant did not select as a battleground for the appeal the general assertion that in the face of s 11(1)(a), the provision respecting dispositions rather than contracts, there was no scope for equity to effectuate an intention to create an equitable mortgage of the Buderim land. The ultimate question, rather, was whether in the circumstances as found at trial, the respondents having completed the Sale Contract on the faith of the provision of the duplicate certificate of title, the appellant had been entitled in equity to the return of that instrument (or, as it happened, to the full proceeds of sale) without satisfying the secured indebtedness.

31 This approach to s 11 of the Property Law Act and other Statute of Frauds descendants is consistent with what was said by Hope J in *Last v Rosenfeld*[21]. His Honour observed:

> "No sooner had the *Statute of Frauds* been enacted in 1677 than the courts set about relieving persons of its effect in cases where it was thought that the legislation could not have been intended to apply. In general terms, it was said that the courts would not allow the *Statute of Frauds* to be made an instrument of fraud, and that it did not prevent the proof of the fraud. No doubt, as was said by Selborne LC in *Maddison v Alderson*[22] in relation to one of the principles that was developed in this

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20 cf *Re Nairn's Application* [1961] VR 26.

21 [1972] 2 NSWLR 923 at 927.

22 (1883) 8 App Cas 467 at 474.

> way, namely, the doctrine of part performance, this summary way of stating the principle, however true it may be when properly understood, is not an adequate explanation, either of the precise grounds, or of the established limits, of the relevant doctrine. The general approach indicated by this summary statement did, however, spread into a number of fields where a statute requires writing".

32 Counsel for the appellant pointed to features of the evidence which might have supported findings other than those adverse to the appellant which were made at trial but, in the end, did not challenge that outcome. However, counsel submitted that several aspects of the law respecting this species of equitable mortgage dictated the conclusion that no such security had been created here.

33 Counsel for the appellant emphasised the circumstance that the deposit of the duplicate certificate of title with Klar and Klar on 18 July 1996 (a Thursday) was made in advance of the completion of the Sale Contract on the following Monday, 22 July. At the time of that deposit the purchaser, Mobile Lab, had incurred no indebtedness to the respondents for the balance of the purchase moneys. The appellant thus relied upon authorities suggesting that the deposit must be to secure an advance made at that time, or in some circumstances made antecedently[23], and upon general propositions that equity does not order specific performance of a contract to make or take a loan of money, whether the loan is to be on security or not[24]. The unpaid balance of the purchase price under the Sale Contract for this purpose is treated as if it were a loan at an interest rate of 8 per cent per annum.

34 There is no occasion to consider the implications of these submissions. The distinction between 18 and 22 July is indecisive of any issue in favour of the appellant. There was but one business day between the receipt of the duplicate certificate of title by Klar and Klar on 18 July and settlement on 22 July. The respondents correctly submit that there was a change in the nature of the dominion over the duplicate certificate of title on 22 July. Before settlement the solicitors held it in safe custody on account of the appellant; thereafter, in effectuation of the appellant's intention found at trial, the duplicate certificate of title was held as security for the balance of the purchase moneys.

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23 See *White and Tudor's Leading Cases in Equity*, 9th ed (1928), vol 2 at 83.

24 *Western Wagon and Property Company v West* [1892] 1 Ch 271 at 275; but cf the judgment of Kearney J in *Wight v Haberdan Pty Ltd* [1984] 2 NSWLR 280.

35 The presumption described above and said to arise from the delivery of title deeds may not readily accommodate what thereafter is alleged to be a third party security where the depositor is not the principal debtor. The present appeal concerns a third party security. But the respondents do not rely solely upon any such presumption in their favour. There thus is no occasion here to decide whether, as Templeman J considered in *In re Wallis and Simmonds (Builders) Ltd*[25], such a "general rule" or "general presumption" applies to a deposit of title deeds securing debt owing by a third party.

36 Templeman J said in *Wallis and Simmonds*[26] that in logic there could be no distinction between deposits to secure a first and third party indebtedness. The appellant criticised that statement. But, putting aside the question of a presumption, evidence of the dealings between the parties may lead to the conclusion that, as in this case, a third party security was provided. In *Wallis and Simmonds* itself there was detailed consideration of the evidence and Templeman J relied upon the presumption he favoured in order to resolve the issue of intention in favour of the giving of security. In the present case, no such reliance is necessary for the respondents to succeed. On the other hand, the close analysis by Bryson J of the evidence in *Arnick Holdings Ltd v Australian Bank Ltd*[27] led him to conclude that the delivery of the title documents to the bank was for the limited purpose of an overall credit assessment of the account of the third party customer.

37 Finally on this point, the terms of s 75 of the Act do not foreclose the possibility of the provision of third party security by deposit of title deeds. It was accepted in the nineteenth century that a surety might take security for its obligations to the principal creditor, by deposit with the surety of title deeds by the party for whose benefit the guarantee was given[28]. There is nothing in the terms of s 75 to limit the nature of the obligations secured by an equitable mortgage by deposit of a certificate of title.

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25 [1974] 1 WLR 391 at 398, 401; [1974] 1 All ER 561 at 567, 569-570.

26 [1974] 1 WLR 391 at 398; [1974] 1 All ER 561 at 567.

27 Unreported, New South Wales Supreme Court, Equity Division, 4 December 1987.

28 *Sporle v Whayman* (1855) 20 Beav 607 [52 ER 738].

38 It should also be noted that s 75(2) indicates that there is no limitation placed by s 75 upon the creation of equitable mortgages other than by deposit of a certificate of title. One such species of equitable mortgage is that considered in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales*[29], where an overdraft was continued on the security of the provision of an unregistered memorandum of mortgage accompanied by deposit of the duplicate certificate of title. The memorandum of mortgage, even while it remains unregistered, gives the equitable mortgagee the benefit of a personal covenant to pay and other contractual rights[30]. Such an arrangement was proposed by Mr Klar in the present case, but, as has been noted, not perfected.

39 Two points remain among those argued by the appellant. First, it is not critical that the deposit was made when Mr Theodore rather than his mother dealt with Klar and Klar. The express authority which Mrs Theodore conferred upon her son was in terms apt to permit that step being taken on her behalf.

40 Secondly, the circumstance that had the respondents relied only upon a presumption, there would have been credible evidence to rebut it, is not determinative. The critical findings, detailed earlier in these reasons, were adverse to the appellant, without any need to rely upon a presumption.

Orders

41 Order 2(b) of the orders made by the Court of Appeal fixed an interest rate of 5 per cent per annum. This order may have reflected an implied obligation to pay interest where there was no agreement on the point and to have thus fixed upon 5 per cent[31]. But the Sale Contract stipulated 8 per cent. Further, in any event, the terms of the declaration in order 2(a), described earlier in these reasons, are, the respondents accept, apt to include within the moneys secured the interest obligation of Mobile Lab under the Sale Contract.

42 Order 2(b) of the orders of the Court of Appeal should be set aside. Otherwise, the appeal should be dismissed with costs.

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29 (1971) 125 CLR 546 at 549.

30 Weaver and Craigie, *The Law Relating to Banker and Customer in Australia* (1975) at 572-573.

31 *Ryan v O'Sullivan* [1956] VLR 99 at 101.