HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

QUEENSLAND PREMIER MINES PTY LTD & ORS APPELLANTS

AND

WALTER MURDOCH FRENCH RESPONDENT

Queensland Premier Mines Pty Ltd v French [2007] HCA 53
15 November 2007
M54/2007

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

C L Pannam QC with M S Goldblatt for the appellant (instructed by Oakley Thompson & Co)

B W Walker SC for the respondent with P J Bick QC for the respondent (instructed by Norton Gledhill)

CATCHWORDS

Queensland Premier Mines Pty Ltd v French

Real property – Torrens title – Transfer of mortgage – Separate mortgage and loan agreements – Debts or obligations secured by mortgage – Whether s 62 of the *Land Title Act* 1994 (Q) ("the Act") operated to vest in transferee of the mortgage the right to recover monies under the loan agreement – Relevance of the historical and legislative purpose of s 62 of the Act – Relevance of connection of the loan to the mortgage – Whether a right to recover monies under the loan agreement was a right "to recover a debt or enforce a liability under the mortgage" within the meaning of s 62(4) of the Act.

Statutes – Interpretation – Meaning of "under the mortgage" in s 62 of the Act – Whether a right to recover a debt or enforce a liability under the mortgage includes a right to recover a debt or enforce a liability secured by the mortgage.

Words and phrases – "under the mortgage".

Land Title Act 1994 (Q), s 62.

1 GLEESON CJ. I have had the advantage of reading in draft form the reasons for judgment of Kiefel J. I agree with the order proposed by her Honour, and with her reasons for that order.

2 GUMMOW J. The appeal should be dismissed with costs. I agree with the reasons of Kiefel J.

3 KIRBY J. The problem presented by this appeal is not without difficulty. It arises in an appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria[1]. That judgment reversed the orders made by the primary judge in the Commercial and Equity Division of the Supreme Court (Dodds-Streeton J)[2].

4 The point in issue derives from what the primary judge described as "fundamentally different constructions"[3] of s 62 of the *Land Title Act* 1994 (Q) ("the Act"). That section appears in substantially the same form in the Torrens title legislation in force in all of the States and Territories of Australia[4].

5 It was common ground between the parties that no decision of this Court, or of any other Australian appellate court, authoritatively decides the question presented by the appeal[5]. Given the provenance of the disputed provision, its long history and the multitude of cases on so many other aspects of the Torrens title legislation, the absence of governing authority is curious. Especially so because of the many cases that must arise each year involving the registration of an instrument of transfer affecting rights in relation to a mortgage of Torrens title land, executed against the background of collateral loan agreements.

Two arguable views of s 62 of the Act

6 There are arguments both ways concerning the meaning and operation of s 62 of the Act. So much will appear from a reading of the careful reasons of the primary judge. She held[6]:

> "In my opinion, the terms of s 62, according to their plain or ordinary meaning, do not indicate that only rights to recover debts or liabilities primarily created by the terms of the instrument of mortgage will vest in the transferee. The terms of s 62(4) indicate that the second limb includes subject-matter which is additional to the subject-matter of the first limb,

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1 *French v Queensland Premier Mines Pty Ltd* [2006] VSCA 287.

2 *French v Queensland Premier Mines Pty Ltd* [2004] VSC 294.

3 [2004] VSC 294 at [73].

4 *Real Property Act* 1900 (NSW), s 52(1); *Transfer of Land Act* 1958 (Vic), s 46(1); *Real Property Act* 1886 (SA), s 151; *Transfer of Land Act* 1893 (WA), s 83; *Land Titles Act* 1980 (Tas), s 60(2); *Land Title Act* (NT), s 62; and *Land Titles Act* 1925 (ACT), s 78.

5 [2006] VSCA 287 at [34].

6 [2004] VSC 294 at [157]-[158].

> rather than constituting a mere illustration or sub-category of it. Section 62(4) indicates that a transferee will acquire the right to recover a debt or to enforce a liability under the mortgage … irrespective of whether the debt could be recovered, or the liability could be enforced, by suing on the terms of the mortgage.
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> If the reference to 'under the mortgage' in the second limb of s 62(4) were held to mean, 'originally or primarily created by terms included in the mortgage', the second limb would, as [the appellants] contended, have no effective independent operation."

7 In disposing of associated proceedings brought before the Court of Appeal of Queensland (and in refusing an application to vary that Court's earlier orders by having the words "and the debts secured thereby" inserted in those orders) Williams JA, for that Court, remarked[7]:

> "Once registered section 62 of the *Land Title Act* 1994, which supplants sections 65 and 66 of the 1861 *Real Property Act* and which is mirrored in legislation in other States, would have effect. Consequent upon section 62 there is an assignment of the right to sue to recover the debt."

8 Given that the Queensland Court of Appeal made these remarks at the same time as it refused to become involved in the issue in the present case which, by then, was before the Victorian courts, the last-stated observation is scarcely conclusive. However, especially when read with the earlier decision of the Queensland Court of Appeal in *Julong Pty Ltd v Fenn*[8], it suggests that different intuitive understandings may arise as to the operation of s 62 of the Act. By the time problems of statutory construction reach this Court, it is rare to find a case in which there is nothing to say for the losing interpretation[9].

9 Nevertheless, in the end, like other members of this Court, I have come to the conclusion expressed by Kiefel J in her reasons.

An interpretation conforming to the statutory text

10 The interpretation of s 62 of the Act, favoured by Kiefel J, is the one preferred by Professor Peter Butt and his colleagues in their respected text on the

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7 *Marminta Pty Ltd v French* [2004] QCA 8 at 3 per Williams JA (Jerrard JA and Philippides J concurring).

8 (2003) Q ConvR ¶54-586; cf reasons of Kiefel J at [36].

9 cf *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42] per McHugh J.

Torrens system[10]. The authors there conclude that registration of a transfer of mortgage will not automatically vest in the transferee the right to sue on a separate agreement that underlies the mortgage, if the obligations are not comprised in the mortgage document itself. They instance a separate loan agreement or a facility agreement. They note that the Queensland Court of Appeal had held that the right to sue on such a separate agreement automatically "runs" on registration of a transfer of the mortgage, referring to the decision in *Julong*[11]. But they noticed the subsequent decision of the Victorian Court of Appeal, now before this Court. They expressed preference for the reasoning in the latter. The reasons offered for this preference are persuasive[12]:

> "[The Victorian Court of Appeal] takes as its starting point that where the borrower signs a mortgage and a separate loan agreement, there are two covenants to pay, one under each document. Under the Victorian equivalent to [s 62 of the Act] on the transfer of a mortgage there is also transferred the right to recover any money payable 'thereunder' (that is, 'under the mortgage') … [R]egistration of a transfer of mortgage does not automatically vest in the transferee the right to sue under a (separate) loan agreement or facility agreement. Rights under those agreements would need to be separately assigned."

11 The foundation of the preferred view identified by Professor Butt and his co-authors is the text of provisions in the Queensland and New South Wales legislation. The interpretation is consistent with the definition of "rights" provided by s 62(4) of the Act. That word is expressly defined by reference to the "terms of the mortgage" and to enforcement of a liability "under the mortgage". As such, the interpretation now preferred by this Court has a strong textual foundation in the language of the Act.

12 Adhering to such a foundation generally represents a sensible approach, particularly in this area of the law. Conveyancers, once instructed on what s 62, and its equivalents, require, where the object is to transfer rights and obligations arising under a separate loan agreement, will proceed (where such is the intention of the parties) to provide expressly for that result. The fact that (as here) the parties to the loan agreement may not necessarily coincide exactly with the

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10 Butt, Ticehurst and Hughes, *Woodman & Nettle: The Torrens System in NSW*, 2nd ed at 12104-12105 [52.60].

11 (2003) Q ConvR ¶54-586.

12 Butt, Ticehurst and Hughes, *Woodman & Nettle: The Torrens System in NSW*, 2nd ed at 12105 [52.60].

parties to the mortgage is a practical reason for adopting the interpretation favoured by the Victorian Court of Appeal[13].

An interpretation consistent with the Torrens system

13 This Court should also keep in mind the necessity, so far as possible, to resolve the present question of statutory construction bearing in mind the fundamental purposes of Torrens title legislation, such as the Act. Loan agreements *inter partes* neither purport to be, nor of their nature are, dealings in an estate or interest in land.

14 One of the fundamental purposes of the Torrens system (and of provisions such as s 62 of the Act, read in its context) is to give effect to an important public policy. That policy is that the land title register should be sufficient of itself to inform those concerned about the nature and extent of any outstanding interest in relation to the land. The Torrens system deals with matters of underlying title. It is not concerned about side contractual agreements[14]. In *English Scottish and Australian Bank Ltd v Phillips*[15], Dixon, Evatt and McTiernan JJ remarked[16]:

> "Under the system of registration governing the present case, the statutory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security. Like a lease, it is a separate interest in land which may be dealt with apart altogether from the fee simple or other estate or interest mortgaged. But, like a lease, it involves, or usually includes, personal obligations. It is impossible to treat the personal obligations in the same way entirely as the interest in land is treated by the registration system. The register cannot be made the source of information as to the fulfilment or performance of such obligations, and the question what rights they continue to confer may depend upon such matters. Thus, although a proposing transferee of a mortgage may rely upon the register for the existence and validity of the mortgage, he may be unable to depend upon anything but inquiries from the parties to ascertain how much of the principal sum secured remains unpaid".

15 It follows that s 62 of the Act reflects the important public policy that lies at the heart of the Torrens system of title by registration. There is to be a register

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13 [2006] VSCA 287 at [85] per Callaway JA.

14 cf *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45 at [38].

15 (1937) 57 CLR 302.

16 (1937) 57 CLR 302 at 321-322.

open to the public which will record, with the detail required by such sections as ss 73 and 74 of the Act, the nature of a specified interest which, in this case, is the mortgage. An inspection of the register should reveal all about the title. What parties thought or did "on the side" should not be relevant. Fulfilling that public purpose suggests that, without very clear statutory language, courts should resist importing into the Act consequences that are interstitial or implied from the description of the rights that are subject to registration. Because the personal obligations that derive from the loan agreement are legally separate and distinct from the obligations arising, as such, "under the mortgage", they are not automatically transferred with the mortgage that is registrable. Unless included in the mortgage instrument itself, to be transferred they require separate and specific agreement by those who are parties to the loan agreement.

An interpretation compatible with commercial sense

16 Contrary to the submission for the appellants, it has not been demonstrated that this interpretation of the Act lacks commercial sense. I have not overlooked the argument that it might sometimes be convenient, from a commercial point of view, to have all "collateral" agreements run with the mortgage. The transferee could then say, in effect: "When I take a transfer of a mortgage I will get all of the benefits that the transferor/mortgagee had under the mortgage. If the mortgage is registered, then, on registration of the transfer, I get the whole package." This was essentially the policy argument for the appellants. Undoubtedly it could sometimes have advantages for commercial investors.

17 However, as Callaway JA pointed out in the Court of Appeal, in the instant case, the transfer of the mortgage without more served the useful commercial purpose of effectively disencumbering the land[17]. No attempt was made at trial or in the Court of Appeal to demonstrate that the interpretation now preferred would in some way cut across a settled practice of conveyancers, the common practice of mortgagees or their ordinary expectations. The fact that Professor Butt and his co-authors have preferred the approach of the Victorian Court of Appeal suggests that there are no such practical difficulties. A clear rule is preferable and will be observed by conveyancers. The text and central purpose of the Torrens title legislation favour the respondent. So do the expert commentators on the legislation. So should this Court.

18 With these additional comments, I therefore agree in the reasons of Kiefel J.

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17 [2006] VSCA 287 at [86] per Callaway JA.

Order

19 It follows that I agree in the order that Kiefel J has proposed.

20 HAYNE J. I agree with Kiefel J.

21 HEYDON J. I agree with Kiefel J.

22 CRENNAN J. I have had the advantage of reading in draft the reasons for judgment of Kiefel J. I agree that the appeal should be dismissed with costs, for the reasons given by her Honour.

23 KIEFEL J. This appeal raises the question whether the registration of a transfer of a Torrens title mortgage effects an assignment of the right to recover the moneys owed under a separate agreement for loan, that obligation being secured by the bill of mortgage. The appellants' contention is that that result is achieved upon registration of the transfer by reason of s 62 of the *Land Title Act* 1994 (Q) which provides:

> "Effect of registration of transfer
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> (1) On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
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> (2) Without limiting subsection (1), the registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
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> (3) …
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> (4) In this section—
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> ***rights***, in relation to a mortgage or lease, includes the right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease."

24 In 1989 Seventeenth Febtor Pty Ltd loaned the sums of $410,000 to Queensland Premier Mines Pty Ltd ("QPM") and Mr and Mrs Beckinsale and $560,000 to QPM under two loan agreements. The purpose of the loans was to enable QPM to acquire and develop land at Yeppoon in Queensland as a shopping centre. The agreements are in similar terms. Pursuant to the first loan agreement, payment of the principal sum by QPM and Mr and Mrs Beckinsale was due on 21 January 1990, and under the second agreement the due date for payment by QPM was 21 February 1990. In each case interest was to be paid at the rate of 24 per cent. The loans were to be collaterally secured by mortgages over specified land.

25 The mortgages were granted by QPM in favour of Seventeenth Febtor in November 1989 and September 1990 and registered. The Beckinsales were not a party to them. Each of the schedules to the bills of mortgage contained a covenant by QPM, as mortgagor, to "pay each amount included in the Secured Moneys to the Mortgagee … on the date fixed for payment of that amount under any Facility Agreement" and charged the lands with repayment of those sums. The "Mortgagee" was defined as Seventeenth Febtor, its successors and assigns; "Secured Moneys" as all moneys owing or which will become payable on any account; and "Facility Agreement" to include the provision of finance on any agreement pursuant to which moneys are lent by the mortgagee to the mortgagor. It was provided that nothing contained in the mortgage would merge, lessen or

otherwise prejudice any facility agreement with respect to the moneys secured under the mortgage.

26 By a deed dated 18 December 1992 Seventeenth Febtor assigned its rights and interests in the mortgages and the loan agreements to Mr Rusty French.

27 No moneys were repaid by QPM and the Beckinsales. In December 1999 Mr French wrote to Mr Beckinsale concerning his proposal to sell the land the subject of the mortgages. The outstanding principal and interest due under the loan agreements as at January 2000 were in the order of $4 million. On 5 January 2000, following some further correspondence, Mr French accepted Mr Beckinsale's offer, on behalf of Marminta Pty Ltd, to pay $950,000 to "buy back" the mortgages. A dispute subsequently arose between Marminta and Mr French concerning the agreement.

28 In 2002 QPM agreed to sell the development site, which included the land the subject of the mortgages, to Unison Properties Pty Ltd for $2.44 million. Marminta brought an action in the Supreme Court of Queensland for specific performance of the agreement for the sale and purchase of the mortgages. Mr French brought the proceeding the subject of this appeal in the Supreme Court of Victoria in January 2002, in order to recover the balances due under the loan agreements from QPM and the Beckinsales.

29 Marminta was initially unsuccessful in its claim for specific performance, but on 5 December 2003 the Queensland Court of Appeal ordered that "the agreement by which Marminta Pty Ltd agreed to purchase from Rusty French the mortgages …" be specifically performed and that Mr French do all things necessary to enable Marminta to become registered as proprietor of the mortgages[18]. On 14 January 2004 a transfer of the mortgages by Mr French to Marminta, Marminta's release of mortgage and a transfer of the estate in the lands to Unison Properties Pty Ltd were registered. The instrument of release of mortgage stated that Marminta released the mortgages in question as a charge on the land. No written assignment of Mr French's rights under the loan agreements to Marminta is in existence. Marminta initially claimed that it was part of the agreement for the sale of the mortgages, but abandoned that contention at trial.

30 On 5 February 2004 the Queensland Court of Appeal heard an application by Marminta and QPM for a variation of its earlier orders by adding, after the reference to the mortgages the subject of the agreement for sale and transfer, the words "and the debts secured thereby". In the course of the hearing the effect of s 62 was raised but the Court declined to adjudicate upon its operation as the issue had been raised in the Victorian proceedings.

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18 *Marminta Pty Ltd v French* [2003] QCA 541.

31 In those proceedings Mr French had defensively alleged that it was Marminta's contention that the right to sue upon the terms of the mortgages, and to recover any debt under them, vested in it upon registration of the transfer of the mortgages to it, as a consequence of s 62. It became, and Mr French ceased to be, the creditor of QPM and the Beckinsales of any sums due and owing pursuant to the loan agreements. He sought negative declarations. Marminta repeated the first contention in its counterclaim and sought a declaration to that effect.

32 On 18 August 2004 Dodds-Streeton J of the Supreme Court of Victoria dismissed Mr French's claims under the loan agreements and made declarations in the terms sought by Marminta[19]. The Victorian Court of Appeal (Maxwell P, Callaway and Redlich JJA) allowed an appeal from that decision and gave judgment for Mr French for the balance owing by QPM and the Beckinsales under the loan agreements, and for the amounts claimed with respect to rates and taxes on the land which he had been obliged to pay[20].

33 Three decisions of this Court were analysed by her Honour the trial judge: *Consolidated Trust Co Ltd v Naylor*[21]; *Measures v McFadyen*[22]; and *English Scottish and Australian Bank Ltd v Phillips* ("*ES&A Bank v Phillips*")[23]. Although the cases were not directly in point, her Honour considered that statements of general principle in *Consolidated Trust v Naylor* and *Measures v McFadyen* provided guidance as to the construction of s 62. Her Honour reasoned that the "consistent decisive factor" in the approach of the cases, as to whether the benefit of covenants was transferred upon registration, was whether the relevant covenant "affected, touched and concerned, defined or was intimately connected with, the estate or interest in land constituted by the mortgage"[24]. In her Honour's view all covenants to pay which are secured by a mortgage satisfy this description[25]. The cases did not draw any distinction between rights created by the mortgage itself and those created by external

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19 *French v Queensland Premier Mines Pty Ltd* [2004] VSC 294 at [246].

20 *French v Queensland Premier Mines Pty Ltd* [2006] VSCA 287.

21 (1936) 55 CLR 423.

22 (1910) 11 CLR 723.

23 (1937) 57 CLR 302.

24 [2004] VSC 294 at [150].

25 [2004] VSC 294 at [151].

transactions[26]. In *Measures v McFadyen* Isaacs J appeared to contemplate that the person whose obligations were transferred could be any party who owed a debt secured by the mortgage[27]. The decision in *ES&A Bank v Phillips* contained observations that the plan of legislation such as the *Land Title Act* is to enable transfer, not only of the interest in the land, but of all the accompanying personal obligations incident thereto[28].

34 Her Honour held that, in their plain and ordinary meaning, the words of s 62 do not indicate that only rights to recover debts and liabilities primarily created by the terms of the mortgage will vest in the transferee. The "second limb" of s 62(4) includes subject-matter in addition to that of the "first limb". Section 62(4) indicates that a transferee will acquire the right to recover a debt, or to enforce a liability under a mortgage or a lease, irrespective of whether the debt could be recovered, or the liability could be enforced, by suing on the terms of the mortgage[29]. Her Honour concluded that s 62 will ordinarily apply to vest in the transferee the underlying debts and liabilities secured under it. The section therefore extended to debts and liabilities owed by third parties[30].

35 The starting point in the reasoning of Maxwell P, with whom the other members of the Victorian Court of Appeal agreed, was the independence, conceptually and contractually, of the mortgage security and the obligation to pay contained within it[31]. In the present case there were two separate and distinct covenants to pay: that contained in the loan agreement, which is freestanding and enforceable in its terms, and that under the mortgage. The covenant under the mortgage merely contained a further promise to pay in accordance with the terms of the loan agreement[32]. In his Honour's view, the fact that the mortgage covenant imposed an obligation to pay amounts due under the loan agreement was not to the point. The relevant right was to sue for and recover moneys under the loan agreement and did not arise *under* the mortgage, as s 62(4) required[33].

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26 [2004] VSC 294 at [150].

27 [2004] VSC 294 at [153].

28 [2004] VSC 294 at [156].

29 [2004] VSC 294 at [157].

30 [2004] VSC 294 at [165].

31 [2006] VSCA 287 at [13].

32 [2006] VSCA 287 at [20].

33 [2006] VSCA 287 at [26].

The section transferred only rights arising pursuant to the mortgage itself. The three cases considered by the trial judge were distinguishable since they concerned covenants within the instrument the subject of transfer. The mortgage covenant, whilst valid and enforceable by Marminta, was empty. QPM was at no time indebted to Marminta. Following the assignment the mortgage secured nothing and was liable to be discharged, which is what occurred[34].

36 Maxwell P observed that his view of s 62 did not appear to accord with that of the Queensland Court of Appeal in *Julong Pty Ltd v Fenn*[35]. In that case Atkinson J stated that s 62 applied to vest the debts of individual mortgagors who were jointly liable with a corporate debtor under a facility agreement secured by a mortgage over their property, as well as transferring the mortgage security for that debt and cited *Consolidated Trust v Naylor* as support for that conclusion[36]. Maxwell P was unable to agree[37].

37 *Measures v McFadyen*[38] was concerned with a transfer of a lease governed by s 52 of the *Real Property Act* 1900 (NSW) which has a like purpose to s 62[39]. The statute remains in force. The lease contained a covenant to effect improvements which had been breached by the lessee. Griffith CJ held that the section was not intended to transfer choses in action with respect to past and completed breaches of covenant[40]. Isaacs J referred to those rights existing independently of the continuance of the obligation under which they arose and of the land under which they were originally secured[41]. It will be observed that the case is not directly relevant to the question which arises here. Nevertheless the respondent relies upon it in the event that this Court holds that s 62 applies to the covenants in the loan agreements. The respondent points out that the borrowers had been in default of both agreements since 1989 and the principal sums and

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34 [2006] VSCA 287 at [63].

35 (2003) Q ConvR ¶54-586 per McMurdo P, Williams JA and Atkinson J.

36 (2003) Q ConvR ¶54-586 at 60,921 [40].

37 Duncan and Dixon, *The Law of Real Property Mortgages*, (2007) at 158-159 prefer the view of the Victorian Court of Appeal.

38 (1910) 11 CLR 723.

39 Also see *Transfer of Land Act* 1958 (Vic), s 46; *Real Property Act* 1886 (SA), s 151; *Transfer of Land Act* 1893 (WA), s 83; *Land Titles Act* 1980 (Tas), s 60; *Land Title Act* (NT), s 62; *Land Titles Act* 1925 (ACT), s 78.

40 (1910) 11 CLR 723 at 731.

41 (1910) 11 CLR 723 at 737-738.

interest were immediately payable at the option of the lender without notice, under the terms of the agreements.

38 *Consolidated Trust v Naylor* holds that a transfer of a mortgage does not give the transferee the right to sue a surety on a guarantee contained within the mortgage. At issue in *ES&A Bank v Phillips* was whether the personal covenant to pay contained within a mortgage is extinguished when the same person is both mortgagor and registered proprietor of the mortgage at a point in time.

39 None of these cases were concerned with the question whether a covenant to repay in an agreement separate from the mortgage, but secured by it, is transferred upon registration by operation of the statute. *Measures v McFadyen* and *Consolidated Trust v Naylor* do contain discussion about the purpose of s 52 of the *Real Property Act* 1900 (NSW) and the general concern of legislation such as the *Land Title Act*.

40 Section 52 is in terms similar to s 66 of the Queensland *Real Property Act* of 1861, the predecessor to s 62. The Act of 1861 introduced the Torrens system of land registration into Queensland[42]. Section 52 provides:

> "(1) By virtue of every such transfer, the right to sue upon any mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof.
>
> (2) Nothing herein contained shall prevent a Court from giving effect to any trusts affecting the said debt, sum of money, annuity, or damages, in case the transferee shall hold the same as a trustee for any other person."

41 Isaacs J in *Measures v McFadyen* said that the words "(notwithstanding the same may be deemed or held to constitute a chose in action)" were the real key to the section[43]. The common law had refused to recognise the assignment of a chose in action and the transfer of a debt often required the assent of the debtor, in effect a novation. As Windeyer J later observed in *Norman v Federal*

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42 As to earlier provisions in the other States see *Real Property Act* 1862 (NSW); *Real Property Act* 1862 (Vic); *Real Property Act* 1858 (SA); *Transfer of Land Act* 1874 (WA); *Real Property Act* 1862 (Tas).

43 (1910) 11 CLR 723 at 737.

Commissioner of Taxation[44], the coming into effect of the *Judicature Act* 1873 rendered unnecessary previous strategies, and simplified assignments, but it did not simplify the law surrounding them. In *Measures v McFadyen* Isaacs J went on to say[45]:

> "Sec 52 was intended to put an end to all this, and to perfect, even in regard to legal procedure, the simplicity and directness which otherwise characterise the Statute."

42 A similar object to that to which s 52 is directed is achieved with respect to old system land by statutes such as the *Conveyancing Act* 1919 (NSW). It provides that a memorandum of transfer indorsed upon a mortgage operates as a deed of assignment of the mortgage debt and as a deed of conveyance of the estate and interest of the mortgagee[46].

43 Isaacs J explained in *Measures v McFadyen* that the object of the section is "only to perfect the transaction effected by the statutory transfer" and said[47]:

> "With respect to personal obligations the Act primarily concerns itself with their security upon land for their fulfilment, and having provided a statutory transfer of the benefits of the obligation as between the transferor and the transferee, proceeds in this section to completely effectuate the transfer by affecting the third person, the obligor also. To this end it transfers the right to sue and recover whatever debt, sum of money, annuity or damages (that is, right to damages) has been *thereunder* transferred."

44 These aspects of his Honour's reasons, to which the trial judge had regard, serve to explain the historical background to provisions such as s 62. The legal problem to which they were directed identifies what was necessary to be effected by them. That effect remains the same despite the removal of the words "notwithstanding the same may be deemed or held to constitute a chose in action" in later statutes such as the *Land Title Act*. Section 62 effects an assignment of both the mortgagee's interest in the land and the mortgagee's right of action with respect to moneys which become due under the mortgage. To that end it was necessary to extend the operation of the statute to the person whose obligation it was to pay the moneys, as the law would otherwise require their

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44 (1963) 109 CLR 9 at 28-29.

45 (1910) 11 CLR 723 at 737.

46 *Conveyancing Act* 1919 (NSW), s 91(4).

47 (1910) 11 CLR 723 at 737.

express agreement to pay the transferee. Isaacs J did not say that the statute extended to any person whose obligation to pay is secured by the mortgage the subject of the transfer. His Honour's reasons assume that the debt transferred is that owed to the transferor. That is to say, the "obligor" is the mortgagor. His Honour's emphasis of the word "thereunder", which appears in s 52, identifies the mortgage as the source of the debt. It may be inferred that his Honour drew attention to the mortgage in that case, because it had been argued that the transfer was effective to pass rights to damages which were complete and independent of it. This does not detract from what his Honour said about the intended operation of the section.

45 The discussion in *Consolidated Trust v Naylor* confirms such an approach. Speaking of s 52, and by analogy of s 91 of the *Conveyancing Act*, Dixon and Evatt JJ identified as the concern of the statute dealings in land[48]. Their Honours explained that it is only because the mortgage involves such a dealing that the statute concerns itself with the transaction in its entirety. It extends to the personal liability of the mortgagor for the mortgage debt "because that liability is intimately connected with the rights of property arising out of the mortgage transaction".

46 In *ES&A Bank v Phillips* Dixon, Evatt and McTiernan JJ[49] pointed out that a statutory charge described in a mortgage, under the equivalent South Australian legislation[50], is a distinct interest, which may itself be dealt with, but which usually includes personal obligations. Latham CJ observed that a mortgage as a security could exist without a covenant to pay[51]. The majority said that, whilst it was not possible to treat the personal obligations in the same way as the interest in land is treated by the registration system, "nevertheless, the plan of the legislation is to enable the proprietor to transfer by registration not only the interest in the land, but all the accompanying personal obligations normally incident thereto"[52], referring to *Consolidated Trust v Naylor*.

47 In *Consolidated Trust v Naylor* Dixon and Evatt JJ concluded on the topic[53]:

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48 (1936) 55 CLR 423 at 434.

49 (1937) 57 CLR 302 at 321-322.

50 *Real Property Act* 1886 (SA), s 151.

51 (1937) 57 CLR 302 at 308.

52 (1937) 57 CLR 302 at 322.

53 (1936) 55 CLR 423 at 435.

> "In relation to transfers of mortgage secs 51 and 52 should be understood as dealing only with rights, powers, privileges, debts and sums of money affecting the mortgage transaction as between mortgagor and mortgagee."

48 A surety's obligation, albeit one arising from a covenant contained within the mortgage, was regarded by their Honours as merely collateral to the mortgage transaction, not directly or indirectly affecting the land, and not part of the dealing contemplated by the legislation.

49 Neither *Consolidated Trust v Naylor* nor *ES&A Bank v Phillips* provides support for the view of the trial judge that any liability secured by the land is the subject of the statutory transfer. To the contrary of the inference her Honour drew from statements in those cases, the only liability which would qualify as intimately connected to the property interest created by the mortgage transaction is that of the mortgagor. Whilst the question in this case is different from those dealt with in those cases, in each case the reasons identify the dealing with which the statute is concerned as the mortgage transaction. The liability to pay which arises under it is part of that dealing. So understood, the statutory provision for the transfer of a mortgage has no application to rights arising under an agreement independent of it, as is here the case.

50 The effect of the operation given to s 62 by the trial judge would be to give to Marminta benefits under an agreement to which it was not a party, benefits which had not been the subject of an assignment to it, and, even more remarkably, the right to debts owed by third parties to the mortgage. This is so regardless of the fact that it is unlikely that Marminta was ever concerned with the recovery of the debts owed by the Beckinsales or QPM. Its purpose in those proceedings was to prevent Mr French doing so.

51 *Groongal Pastoral Co Ltd (in Liquidation) v Falkiner*[54] makes plain that legislation such as the *Real Property Act* 1900 (NSW) is not intended to interfere with the ordinary operation of contractual relations or with the effect of instruments at law[55]. The purpose of the Act is to simplify and facilitate dealings with land, including mortgages. The Court referred to statements by Isaacs J in *Barry v Heider*[56]:

> "They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of

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54 (1924) 35 CLR 157.

55 (1924) 35 CLR 157 at 163.

56 (1914) 19 CLR 197 at 213 and 216.

> registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them. …
>
> The *Land Transfer Act* does not touch the form of contracts. A proprietor may contract as he pleases, and his obligation to fulfil the contract will depend on ordinary principles and rules of law and equity, except as expressly or by necessary implication modified by the Act."

52 No other decision referred to in argument has a bearing on this case. The respondent sought to distinguish *Julong v Fenn* on the basis that the mortgage in that case did not contain a "no-merger" provision, as do the mortgages here in question. A possible result is that the simple contract debt arising under the Facility Agreement in that case may have merged when the security was created for that debt between the same parties[57]. In that regard an instrument of mortgage under the *Land Title Act* operates as a deed upon registration[58]. If that were so, the obligation under the Facility Agreement may have gone. It is not, however, apparent that these matters informed the statement in *Julong v Fenn* about the operation of s 62. The full contextual setting for it is not apparent from the reasons and it is not otherwise explained.

53 The decision in *PT Ltd v Maradona Pty Ltd*[59] says no more than that the benefit of the personal covenant within a mortgage passes to the assignee upon registration of the transfer of the mortgage. Insofar as *Gilmour v Pyramid Building Society (in liq)*[60] holds that the statutory assignment includes the covenants in a guarantee, because it forms part of the mortgage document, it would appear to be contrary to *Consolidated Trust v Naylor*.

54 The decisions in *Measures v McFadyen* and *Consolidated Trust v Naylor* contain useful discussion of the historical need for, and intended operation of, statutory provisions such as s 62, in the context of land registration statutes. The extent of the operation of s 62 is, however, to be derived by a process of construction, by reference to the words of the section[61].

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57 *Coote's Treatise on the Law of Mortgages*, 8th ed (1912), vol II at 1470; *Fisher and Lightwood's Law of Mortgage*, 2nd Aust ed (2005) at [36.13].

58 *Land Title Act* 1994 (Q), s 176; see also *Real Property Act* 1900 (NSW), s 36(11).

59 (1992) 25 NSWLR 643 at 681.

60 (1995) 6 BPR 13,979; (1995) NSW ConvR ¶55-747.

61 *Weiss v The Queen* (2005) 224 CLR 300 at 305 [9].

55 A reading of the section provides no support for Marminta's contentions. The primary concern of the Act, as reflected in s 62(1), is to convey the rights of the transferor in relation to their interest in "the lot", which is defined to mean land. In the case of a mortgage that interest arises from the instrument of mortgage. Sub-section (4) should be read with sub-s (1), since it is intended to further define the "rights" there referred to. It may then be inferred that it is concerned with rights arising from the instrument which creates the interest in land the subject of statutory transfer. The instrument of mortgage is the source of that interest and of the rights to sue for and recover moneys owing under it. The latter is confirmed by the words "under the mortgage" in sub-s (4). The word "under", with respect to an obligation "under this lease", has been held to refer to an obligation created by, in accordance with, pursuant to, or under the authority of the lease[62]. Likewise the words "under a contract" in a statute may direct attention to the source of the obligation in question[63]; and a decision "under an enactment" to the statute to which the decision sought to be reviewed owes, in an immediate sense, its existence[64]. The two rights, to sue for and to recover a debt, arise from the same source. The words of the section provide no warrant for a construction which extends it to the right to recovery of a debt merely collaterally secured by the mortgage.

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.

57 The circumstances of this case are not usual. More commonly, when a mortgage is transferred, the debt arising from a separate loan agreement will be transferred with it. As Callaway JA observed[65], that is a consequence of the agreement, express or implied, between the parties, not of the operation of s 62. In the present case the concern of Marminta, and the Beckinsales, was to acquire the mortgages, for what a purchaser would otherwise pay Mr French, and then to effect their release in order to sell the land, along with the balance of the development site, for commercial advantage.

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62 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249.

63 *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 537 [42].

64 *Griffith University v Tang* (2005) 221 CLR 99 at 128 [80].

65 [2006] VSCA 287 at [85].

58 During the course of argument on the appeal the question as to whether Marminta had any interest in the loan agreements, following its release of the mortgages, was raised. The question assumed Marminta was correct in its contention that it acquired that interest upon the transfer of the mortgages to it. Section 81(3) of the *Land Title Act* provides that a mortgage is discharged and the lot is released to the extent shown in the instrument of release, upon its registration. Some difficulty may sometimes attend the question whether the personal covenant to pay was discharged upon release. Much depends upon the terms of the release[66]. The parties appear to have conducted the proceedings upon the basis that the instrument operated only as a release of the security. The terms of Marminta's release are equivocal with respect to the mortgagors' obligations. On the view I have taken as to the outcome of the appeal it is not necessary to further consider this question. For present purposes it may be observed that Marminta's lack of expression of its intention, as to whether any obligation to pay was discharged, may be explained by its lack of any interest in that subject.

59 The terms of the claim and cross-claim in these proceedings have tended to distract attention from the fundamental point that there was no agreement to assign the benefit of the loan agreements to Marminta. It is for that reason that it sought, impermissibly, to resort to s 62. It was not necessary for Mr French to raise the appellants' contention, that upon registration of the transfer of mortgage he ceased to be a creditor of QPM and the Beckinsales. Their counterclaim, for a declaration that all the rights of a mortgagee including those to recover moneys pursuant to the two loan agreements vested in Marminta, implies but does not expressly allege, that Mr French no longer had any rights under the loan agreements. Had there been such an allegation, attention would have focussed upon how it was said they came to be lost, given that there had been no assignment and no merger was alleged.

60 The simple facts are that the debt sought to be recovered by Mr French arose under the loan agreements, not under the mortgages. Mr French was the assignee of the right to recover the moneys owing under the loan agreements; Marminta was not an assignee from him. He retained the right to sue for and recover those moneys from QPM and the Beckinsales. Section 62 of the *Land Title Act* did not operate to vest those rights in Marminta.

61 During argument on the appeal the appellants sought to resile from a concession made that if s 62 was held not to apply, Mr French would also succeed to his claim under the loan agreements for moneys paid by way of rates

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66 See for example *Groongal Pastoral Co Ltd (in Liquidation) v Falkiner* (1924) 35 CLR 157.

and taxes. He may have a claim to them in any event, but it is not necessary to consider that question. The trial was conducted on the basis of the concession. The concession was given effect to in the judgment appealed from and the appellants should not now be permitted to withdraw it.

62 The appeal should be dismissed with costs.