

QUEENSLAND PREMIER MINES PTY LTD & ORS v FRENCH (M54/2007)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 14 December 2006

Date special leave granted: 24 April 2007

The first appellant ("QPM") acquired land in Yeppoon, Queensland in 1989 with a view to developing it into a shopping centre. The purchase of the land was financed by borrowings by QPM and the second and third appellants ("the Beckinsales"). There were two loan agreements, the first for \$410,000 and the second for \$560,000. The loans were secured by two mortgages. Those mortgages and the loan agreements were assigned to the respondent ("French") in 1992, and he became registered as mortgagee. For some years the Beckinsales and French tried to sell the land, but they were unsuccessful. French ultimately accepted an offer to purchase the land by Mr Beckinsale on behalf of the fourth appellant (Marminta), in early 2000.

A dispute arose between Marminta and French as to whether an agreement for the assignment of the mortgages had been concluded. Marminta sought specific performance of the agreement to assign the mortgages in the Supreme Court. French contended that the loan agreements were unaffected by the transfer of the mortgages and he sought to recover amounts due under the loan agreements. Dodds-Streeton J found for Marminta, holding that by operation of s 62 of the *Land Title Act 1994* (Qld) ("the Act") the registration of the mortgage transfers had the effect of vesting in it the rights of recovery under the loan agreements.

French's appeal to the Court of Appeal (Maxwell P, Callaway and Redlich JJA) was allowed. The principal issue on appeal was where a mortgage of Torrens land secures the repayment of advances made under a separate loan agreement, and the instrument of mortgage contains a covenant to pay the amounts due under the loan agreement, does the registration of the transfer of the mortgage vest in the transferee the right of recovery of the debt under the loan agreement. The resolution of the appeal turned on the construction of s 62 of the Act, which provides:

- (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.
- (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.
- (3) ...
- (4) In this section –
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."

The Court noted that there were two covenants to pay, one in the mortgage and the other in the loan agreement. Under s 62(4), rights vested in the transfer included the right to sue on the terms of the mortgage (the first limb) and the right to recover a debt or enforce a liability under the mortgage (the second limb). It was common ground that on registration of the mortgage transfer the right to sue on the mortgage covenant vested in Marminta. The critical question was whether the registration also had the effect of vesting in Marminta the right to sue on the agreement covenant. The Court found that the right to sue on the agreement covenant was not a right "to recover a debt or enforce a liability under the mortgage." It was a right to recover a debt under the loan agreement. They were separate covenants conferring distinct contractual rights, albeit in respect of the same loan amounts. To construe the second limb in that way was to give the statutory words their ordinary and natural meaning. There could only be a right to recover a debt or enforce a liability under the mortgage if the mortgage was the source of the debt or liability as the case may be.

The grounds of appeal include:

- The Court of Appeal should have held that section 62 of the Land Titles Act 1994 (Qld) upon its proper construction provides that upon registration of a transfer of mortgage all of the mortgagee's rights to sue for and recover a debt secured under the mortgage vest in the transferee.