SUPREME COURT OF QUEENSLAND

CITATION:	*Perpetual Trustee Co Ltd v Hodge & Anor* [2017] QSC 268
PARTIES:	**PERPETUAL TRUSTEE COMPANY LIMITED (ACN 000 001 007)** (plaintiff) **v** **DAVID ROSS HODGE** (first defendant) and **LYNETTE MARGARET HODGE** (second defendant)
FILE NO:	4288 of 2014
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	17 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 and 27 September 2017
JUDGE:	Daubney J
ORDER:	**1. Judgment for the plaintiff.** **2. I will hear the parties as to the form of orders necessary to give effect to these reasons for judgment.**
CATCHWORDS:	INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – where the defendants' company was advanced a loan under a principal deed – where as a condition precedent to the loan, the defendants executed a deed of guarantee and indemnity and a registered mortgage in the lender's favour as security – where the defendants' company was later wound up – where a new company was set up by the defendants, which assumed operation of the prior entity's business and continued to make repayments to the lender under the loan – where the defendants sought refinance and entered into a supplementary deed with the lender – where the supplementary deed named the new company as the borrower – where the defendants' company was subsequently wound up and the defendants defaulted on the loan – whether the defendants' guarantees and mortgage

done in relation to the principal deed extend to, and are available as security for, the indebtedness of the new company under the supplementary deed

ESTOPPEL – ESTOPPEL BY CONDUCT – GENERAL PRINCIPLES – where the lender entered into the supplementary deed of loan under certain assumptions – where the lender's assumptions arose from conduct on the defendants' part – whether it would be unconscientious to permit the defendants to depart from the assumption that the guarantee and the mortgage would be available as collateral security for indebtedness under the supplementary deed

Commonwealth v Verwayen (1990) 170 CLR 394
Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104

COUNSEL: C Conway for the plaintiff
The defendants appeared on their own behalf

SOLICITORS: Norton Rose Fulbright Australia for the plaintiff
The defendants appeared on their own behalf

[1] The plaintiff has sued the defendants for:

(a) money claimed to be owing to the defendants to the plaintiff under a guarantee; and

(b) recovery of possession of properties owned by the defendants and situated at 21 Sydney Street and 8-10 Brisbane Street, Mackay (collectively "the Property").

[2] The proceeding was listed for hearing on 26 September 2017. When the matter was called on for trial, the defendants' lawyers, who had been representing the defendants during all interlocutory stages, including considerable case management under the Case Flow List, sought and were granted leave to withdraw as solicitors on the record, leaving the defendants self-represented. I then stood the matter down to enable the defendants to consult with external advisers and to seek to negotiate with the plaintiff. This was not fruitful, and ultimately the defendants simply sought an adjournment of the hearing. In the *ex tempore* reasons I gave for refusing that adjournment application, I canvassed the history of the matter, and referred to the numerous orders which had been made preparatory for trial. I then said:

> "The bases for the defendants seeking an adjournment of the trial amounted to two matters. First, to enable them to seek to source alternative finance to enable them to engage in some settlement negotiations with the plaintiff; secondly, to engage legal representation.
>
> I have now stood the matter down on several occasions in the course of the day to enable the defendants both to consult with their finance broker and also to engage in discussions with the legal representatives for the plaintiff. It is now clear that there is no prospect of the matter resolving between the parties today or, indeed, at any time in the near future. That is because I was informed by the defendants from the bar table that the most recent advice from the finance broker with whom they've been dealing was to the effect that the value of the secured property was such that they would simply be unable to obtain sufficient funding to progress a settlement with the plaintiff of the magnitude of the debt claimed in the current proceeding.
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> The simple reality, as I have sought to point out to the defendants on numerous occasions, is that they have known for months that today is the day when the matter is set for trial. The defendants have confirmed, having consulted again with their former solicitor, that there is no evidence to be led in the case on their behalf and the matter is one of what they described as technical argument about the loan documentation.
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> Also, as I sought to make plain to the defendants, the fact that the matter has reached this stage is not a matter that is only of concern to them. The plaintiff has retained counsel. The plaintiff has prepared for trial. The plaintiff has incurred the costs associated with preparation for trial and is here ready to run the trial. In other words, to put it colloquially, it's not all about the defendants. I also need to take into account the interests of the plaintiff and also have proper regard to the requirements of rule 5 of the Uniform Civil Procedure Rules, which imposes an undertaking on all parties to litigation to proceed expeditiously and with a minimum of expense.
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> Were this a case in which I thought there would be any point in granting the defendants an adjournment, then I would certainly have given that appropriate consideration. With the defendants' understanding, as I explained to them in the course of argument, that had I been persuaded to grant them an adjournment, the inevitable cost of that would have been that they would be ordered to pay the plaintiff's costs thrown away by reason of the adjournment. The defendants indicated to me they understood that.
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> But, as will be clear from what I have said so far, it seems to me, with the very greatest respect, that there is no utility in granting an adjournment. The defendants have had more than ample opportunity to prepare themselves for the trial. The defendants have been on notice for months of today's trial date. The circumstances which lead them to being self-represented at trial are, with the greatest respect to them, of their own making. They, as was confirmed in argument, took a chance on being able to procure a settlement through the intervention of their broker. Unfortunately that didn't work out for them and they have landed in the situation in which they now find themselves, namely, that they are representing themselves in the hearing of this trial. And, as I've said, it seems to me that there is no utility in granting an adjournment and the application for an adjournment is refused."

[3] After I refused the adjournment, counsel for the plaintiff opened the plaintiff's case and tendered the documentation and affidavits which comprised the evidence in the

plaintiff's case. I then adjourned the proceeding overnight to give the defendants an opportunity to review that documentation. Towards the end of the hearing on the first day, I was asked by the male defendant whether there was any reason why the defendants had to return to Court the next day because they "don't really have anything to offer the case".[1] I told the defendants that it was a matter for them whether they appeared on the following day, and that I would be proceeding with the case whether they were there or not.

[4] When the matter resumed the next day, there was no appearance by the defendants. Accordingly, I proceeded to hear submissions from counsel for the plaintiff, and reserved to consider this judgment.

The case

[5] As at November 2000, the defendants were the directors and shareholders of Mackay Spare Parts (Trading) Pty Ltd ("Trading"). Through that company, they conducted a vehicle spare parts business in Mackay.

[6] In November 2000, Challenger Managed Investments Ltd ("Challenger") agreed to make available to Trading a cash advance facility up to $504,000. (Challenger subsequently changed its name to Fidante Partners Ltd) This facility was evidenced by a Deed of Loan dated 21 November 2000 between Challenger, as Lender, and Trading as Borrower.

[7] Clause 10 of the Deed of Loan specified a number of conditions precedent to the first drawdown under the facility, including:

- Execution of a Deed of Guarantee and Indemnity by the defendants, and

- Execution of a registrable stamped first mortgage over the Property in favour of "the Custodian" for the benefit of the Lender as security for "the Secured Moneys". (The "Custodian" was defined to be Permanent Trustee Australia Ltd.)

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[8] The defendants, as guarantors, executed a Deed of Guarantee and Indemnity dated 21 November 2000 ("the Guarantee") guaranteeing to Challenger the due performance by Trading under the Deed of Loan and agreeing to pay Challenger all moneys owing by Trading under the facility.

[9] On that same day, the defendants also executed a mortgage ("the Mortgage") over the Property in favour of Permanent Trustee Australia Ltd ("PTAL"). That mortgage, which was subsequently registered under Dealing No 704471780, was expressed to be for the purpose of:

> "… securing to the Lender the payment of all moneys which the Mortgagor and the Guarantor or the Borrower (whether alone or with any other person) is or at any time may become actually or contingently liable to pay to for the account of the Lender (whether alone or with any other person for any reason whatsoever including without … moneys at any time owing by way of principal, interest, fees, costs, guarantee, indemnities, charges, duties or expenses or payment of liquidated or unliquidated damages under or in connection with, or as a result of any breach of or default under or in connection with, any Transaction Document (as defined in the Facility Agreement or in this Mortgage) or any other document or agreement (the 'Secured Moneys') …"

[10] I should note in passing that, by the time of trial, there was no dispute between the parties with respect to these documents. Issue had previously been taken on the pleadings on behalf of the defendants because an earlier version of the statement of claim had incorrectly referred to "the plaintiff" as being a party to those agreements when it ought have referred to "Challenger" and "Permanent Trustee Australia Ltd". Those misnomers were corrected in the second amended statement of claim, to which no further amended defence was filed. Accordingly, any such issue as had been raised on behalf of the defendants effectively fell away.

[11] In April 2004, an order was made for the winding up of Trading, on the application of the Deputy Commissioner of Taxation.

[12] Prior to that, however, another company called Mackay Spare Parts Pty Ltd ("MSP") was set up. That company was incorporated on 31 October 2003, and the female defendant was its director. It is abundantly clear on the material before me that this new company, MSP, was operated by the defendants and simply assumed the complete

operation of the business which had previously been conducted under the name of Trading. I accept the submission by counsel for the plaintiff that this substitution and effective takeover of the business by MSP bore all the hallmarks of what is colloquially known as a "phoenix activity".

[13] It is also clear on the evidence before me that this effective transfer of the business from Trading to MSP was accompanied by an assumption by MSP of the ongoing obligations under the loan facility. That this is what occurred is to be readily inferred from the fact that, for years following the replacement of Trading with MSP, that latter company continued to make payments of interest under the facility.

[14] It is also apparent that no-one on the defendants' side of the equation informed the Lender or the Mortgagee about the liquidation of Trading and the effective takeover of the business by MSP. Rather, as I have said, MSP simply continued trading, and continued to meet the obligations under the loan facility.

[15] The term of the initial loan facility subsequently expired, and in early 2007 the defendants' finance broker prepared and submitted to Balmain Commercial (the relevant loan administrator) a Credit Submission dated 11 January 2007. This submission on behalf of the defendants named the borrower as MSP and sought a total loan of $1 million for a term of five years. The purpose of the loan was said to "refinance existing … loan of $504,000 and provide funds on Commercial Line of Credit facility for future investment purposes". Under the heading "Applicant Background", the submission stated:

> "David Ross and Lynette Margaret Hodge (Mackay Spare Parts Pty Ltd) have been Balmain Commercial & Challenger Howard clients since 2000. Their Challenger Howard facility (Loan Number MA85) recently expired and they are seeking a further five year term, however would like to convert to the AMAL-managed Challenger facility.
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> The Hodge's continue to own and operate their business Mackay Spare Parts, which is the largest provider of automotive and mechanical spare parts in Central Queensland. The business has been operating for over 20 years.
>
> In this application, the Hodge's are seeking to increase their existing $504,000 Challenger Howard loan to $1 million. The balance funds of $496,000 will be used for future investment purposes available on a Redraw facility."

[16] This submission on behalf of the defendants also listed as "Proposed Security" a registered first mortgage over the Property and a guarantee and indemnity from the defendants.

[17] Under the heading "Servicing Risk", the submission stated:

> "• The Borrowers have been Challenger Howard and Balmain Commercial clients for over 7 years and have maintained their facility in good order since this time
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> …
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> • The Mackay Spare Parts business has been operating for over 20 years."

[18] On 16 February 2007, Balmain Commercial issued a letter of offer to MSP, which included the following terms:

"PURPOSE OF LOAN	To transfer manager of existing loan facility to the AMAL Managed Produce, convert to a redraw loan, renew loan term for a further 5 years from settlement and increase facility limit to $1,000,000 for future investment purposes.
LENDER	Challenger Managed Investments Limited as responsible entity and Perpetual Trustee Company Limited as Custodian on behalf of Challenger Howard Mortgage Fund.
MORTGAGE ADMINISTRATOR	Balmain Commercial Loan Administration.
BORROWER	Mackay Spare Parts Pty Ltd
FACILITY LIMIT	One Million Dollars ($1,000,000.00) provided this amount does not exceed 45% of our assessment of the current market value of the security properties (see Property Valuation).
TERM	Five Years (5) commencing on the 1st day of the month following settlement. At maturity, we may be willing to renew the facility, subject to satisfactory conduct of the loan and our lending policy at that time. Repayment of the whole facility where the period between the repayment date and the loan maturity date exceeds 12 months shall incur 30 days additional interest on the facility limit. Should the period between the repayment date and the maturity date be equal to or less than 12 months

	then the borrower shall incur 30 days additional interest on the principal outstanding.
…	
SECURITY	A registered first mortgage over freehold/strata properties at 21 Sydney St and 8-10 Brisbane St MACKAY QLD 4740.
GUARANTORS	David Ross Hodge Margaret Lynette Hodge
…"	

[19] On 19 February 2007, a counterpart of that letter of offer was signed signifying acceptance of the offer. The counterpart was signed by the female defendant on behalf of MSP and also by each of the defendants individually as guarantors.

[20] Subsequently, on 17 April 2007, a Supplementary Deed of Loan was executed ("Supplementary Deed"). It is clear enough that the commercial intention of the parties was to execute this document in order to give effect to the agreement which had been reached as a consequence of the acceptance of the letter of offer of February 2007.

[21] The Supplementary Deed was expressed to be made between Challenger Managed Investments Ltd as Lender, MSP as Borrower, each of the defendants as mortgagor and each of the defendants as guarantors.

[22] The recitals to the Supplementary Deed stated:

> "A. The Lender is the responsible entity of the Challenger Howard Mortgage Fund and as such is the Trustee of that Trust.
>
> B. By Deed dated 21 November 2000 executed by the Borrower, the Lender made available to the Borrower a cash advance facility on the terms and conditions therein contained ("**Principal Deed**").
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> C. To secure the obligations of the Borrower pursuant to the Principal Deed the Borrower executed a mortgage in favour of the Lender over the property known as 21 Sydney Street and 8-10 Brisbane Street Mackay Qld 4740 being Mortgage No 704471780 ("**Mortgage**").
>
> D. Deed of Guarantee and Indemnity Dated 21 November 2000 between David Ross Hodge and Lynette Margaret Hodge as Guarantor, Challenger Managed Investments Limited the Principal and Mackay Spare Parts (Trading) Pty Ltd the Debtor.
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> E. Perpetual Trustee Company Limited A.C.N. 000 001 007 is appointed by the Lender as Custodian for the trust property of Challenger Howard Mortgage

> Fund and as mortgagee under the Mortgage holds the title, rights, interest and benefits of the mortgagee and the security created thereby as Custodian for the Challenger Howard Mortgage Fund.
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> F. The Borrower has requested the Lender to vary the Principal Deed which the Lender is prepared to do on the terms and conditions herein contained."

[23] It is obvious that the phoenix-like substitution of MSP for Trading had not been picked up by the financier. The recitals were erroneous insofar as they purported to refer to MSP as being the "Borrower" which executed the Deed in November 2000.

[24] The operative part of the Supplementary Deed then provided for agreed amendments to a number of clauses in the Deed of Loan which had been executed in November 2000, and further provided:

> "2. The Borrower, Mortgagor and the Guarantors hereby further covenant and agree with the Lender that the Principal Deed, Mortgage and Guarantee other than is hereby varied shall remain in full force and effect."

[25] That Supplementary Deed was duly executed by each of the defendants individually and by the second defendant on behalf of MSP. The Supplementary Deed also contained an express waiver by MSP, signed on its behalf by the second defendant, in the following terms:

> "We/I, Mackay Spare Parts Pty Ltd of 21 Sydney Street and 8-10 Brisbane Street, Mackay Qld 4740 hereby waive my right to legal advice. I understand and acknowledge the following:
>
> 1. That the total loan amount after the further advance of $496,000 will total $1,000,000.
>
> 2. The date for repayment of the total loan is due on 1 April 2012."

[26] In accordance with the accepted letter of offer of February 2007, a further sum of $496,000 was drawn down, with the total amount advanced by Challenger being $1 million. MSP continued to pay interest on the full amount of the moneys owed to Challenger.

[27] On 29 November 2011, Balmain Commercial wrote to MSP advising that the loan, which was due to mature on 1 May 2012, would not be extended, and that the Lender required full repayment of the loan at maturity.

[28] The loan was not repaid to Challenger on the maturity date of 1 May 2012, and on 3 May 2012 Balmain wrote to MSP advising that MSP was in default, demanding immediate repayment, and advising that the default interest rate was now being applied to the loan.

[29] On 12 September 2012, a notice of exercise of power of sale under s 84 of the *Property Law Act* 1974 (Qld) was served on the defendants in relation to the Property.

[30] On 26 August 2013, the defendants each signed a letter under the letterhead of MSP addressed to the solicitors for the mortgagee stating, amongst other things, that they had "formally mandated the Right Angle Group to arrange for the full refinance of the $1 million facility we currently have with Howard Mortgage Fund (Perpetual Trustee Company Ltd)."

[31] Then, on 24 January 2014, an order was made for the winding up of MSP on the application of the Deputy Commissioner of Taxation.

[32] For completeness, I should also record that the evidence discloses that, by a Custody Agreement dated 18 March 2005, Challenger (then called Fidante) appointed Perpetual Trustee Company Ltd ("PTCL") as Custodian in place of PTAL. By a transfer executed on 20 July 2005, PTAL transferred mortgages, including the mortgage over the Property, to the present plaintiff, PTCL. By a Sale Deed dated 27 June 2014, PTCL as Custodian of the Howard Mortgage Fund, together with Fidante in its capacity as Responsible Entity of the Howard Mortgage Fund, sold assets of the Fund (including the defendants' facility) to Nomura Special Investments Singapore ("NSIS"). By an Accession Deed dated 28 July 2014 between PTCL and Fidante and NSIS, NSIS assigned to Perpetual, in its capacity as trustee of the Argyle Capital Management Trust No 1, all of the rights of NSIS under the Sale Deed. In short, by this process, all of the rights in respect of the loan originally granted by Challenger and the mortgage originally held by PTAL, now rest in PTCL. The defendants and MSP were notified of the transfer of rights by notices dated 28 July 2014.

[33] The evidence also discloses that the defendants have repeatedly acknowledged their indebtedness. I have already referred to the letter signed by each of the defendants

under MSP letterhead dated 26 August 2013. That letter was relied on by the nominated broker, Right Angle Group, to seek refinance of the facility in 2013. Moreover, on 24 January 2014, the defendants signed a direct debit authority in relation to a higher interest payment as a consequence of default under the facility. In addition, on 19 September 2014, the male defendant sent an email to AMAL Asset Management Ltd, being the entity which provided loan administration services to PTCL in its capacity as trustee of the Argyle Capital Management Trust No 1. That email stated:

> "We have received advice that you have taken over our loan 12754 with Howard.
>
> The loan we have has passed its expiry date and we want to refinance it with you if possible."

Discussion

[34] It is clear from the above chronology that, by the beginning of 2007, MSP had effectively supplanted Trading as the principal debtor to Challenger. So much was obviously the case from the defendants' perspective – their company Trading had been wound up in 2004, yet they continued to utilise the original facility, and pay interest for the use of that original facility, in operating their business under their new corporate vehicle, MSP.

[35] The central issues in this case are whether the Guarantee dated 21 November 2000 and the Mortgage granted in November 2000, both executed by the defendants, extend to, and are available as security for, the indebtedness of MSP which arose as a consequence of the refinance in early 2007. Determination of that question calls for a consideration of the ambit of the contract made between the parties in early 2007, and the obligations which arose under that contract.

[36] It is as well, for that purpose, to recall the following observations by French CJ, Nettle and Gordon JJ in *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[2]:

> "[46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.

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2 (2015) 256 CLR 104 (omitting footnotes and citations).

> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be addressed by the contract.
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> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
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> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
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> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties we reoperating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations."
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> [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties … intended to produce a commercial result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.
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> [52] These observations are not intended to state any departure from the law as set out in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* and *Electricity Generation Corporation v Woodside Energy Ltd*. We agree with the observations of Kiefel and Keane JJ with respect to *Western Export Services Inc v Jireh International Pty Ltd*."

[37] By cl 2 of the Supplementary Deed, the defendants agreed, relevantly, that the Guarantee and the Mortgage would "remain in full force and effect". The relevant question is to what end, or for what purpose, those securities would remain in full force and effect. That question, it seems to me, can only properly be answered by having regard to the full context in which that Supplementary Deed was executed, the circumstances sought to be addressed by the Supplementary Deed, and the commercial purpose to be achieved by the Supplementary Deed.

[38] The context obviously includes the terms of the letter of offer of 16 February 2007, which was expressly accepted by the defendants. The purpose of the new facility was stated in the terms I have set out above. The borrower under the new facility was specified as MSP, security by way of first registered mortgage over the Property was particularised, and the defendants were nominated as guarantors for the new facility.

[39] The circumstance sought to be addressed by the Supplementary Deed was that it was to give legal effect to the terms of the refinance which had been agreed to under the accepted letter of offer. True it is that the recitals to the Supplementary Deed mistakenly referred to the Mortgage having been granted to secure the obligations of MSP, rather than Trading. But nothing turns on this mistake. What is important is that what was sought to be addressed by the Supplementary Deed was an effective extension of the collateral security comprised in the Guarantee and the Mortgage to the indebtedness of MSP under the refinance arrangements which the parties had agreed to. It is also clear that this was the commercial purpose of the Supplementary Deed. And, of course, the Supplementary Deed was expressly signed by the defendants as "guarantees".

[40] In my view, a reasonable businessperson in the circumstances of this case would have understood cl 2 of the Supplementary Deed to have the effect of extending the "full force and effect" of each of the Guarantee and the Mortgage to the indebtedness of MSP under the 2007 refinance arrangement.

[41] That conclusion means that the defendants are liable to the plaintiff under the Guarantee for the full amount of MSP's indebtedness. It also means that the plaintiff is entitled to have recourse to the Mortgage as security for that debt.

[42] Even if I am wrong in construing the Supplementary Deed in that way, I would have considered this an appropriate case in which to find that the defendants are estopped from denying the plaintiff recourse to the Guarantee and the Mortgage. It is unnecessary to rehearse the principles relating to estoppel by conduct, as explained by Deane J in *Commonwealth v Verwayen*.[3]

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[3] (1990) 170 CLR 394 at 444.

[43] It is quite clear, on the facts set out above, that Challenger entered into the refinance arrangement in early 2007 on assumptions that:

- MSP was the Borrower;

- the Guarantee previously given by the defendants extended to guaranteeing the obligations of MSP, and

- the Mortgage previously granted by the defendants extended to securing the debt of MSP under the refinance arrangements.

[44] It is also clear that these assumptions were founded on conduct by the defendants:

- The defendants initialled and signed the letter of offer of 16 February 2007 signifying their acceptance of the terms of the refinance arrangement;

- The letter of offer specifically referred to a guarantee and a mortgage;

- The letter of offer was accepted by the defendants expressly in their capacity as "guarantors";

- The defendants also expressly signed the Supplementary Deed as "guarantors";

- The terms of the proposal put on behalf of the defendants in seeking a refinance put beyond doubt the notion that the defendants were seeking to increase the existing facility, would be using the refinanced facility in the ongoing operation of their business and for future investment purposes, and proposed a mortgage over the Property and guarantees and indemnities by the defendants by way of security for the refinance.

[45] It would, in my opinion, have been unconscientious to permit the defendants to depart from the assumption that the Guarantee and the Mortgage would be available as collateral security for the indebtedness under the refinance arrangement.

Disposition

[46] For the reasons I have given:

(a) There will be judgment for the plaintiff against the defendants under the Deed of Guarantee and Indemnity dated 21 November 2000;

(b) There will be an order for the plaintiff to recover possession of the Property pursuant to the Mortgage granted on 21 November 2000.

[47] I will hear the parties as to the form of orders necessary to give effect to these reasons for judgment.