

# SUPREME COURT OF QUEENSLAND

CITATION: *Wilkes & Anor v D.C. Construction Services Pty Ltd* [2019] QSC 117

PARTIES: **CECIL ROBERT WILKES**  
(first applicant)  
**NORMA JILL WILKES**  
(second applicant)  
**v**  
**D.C. CONSTRUCTION SERVICES PTY LTD**  
ACN 145 552 558  
(respondent)

FILE NO: BS No 3518 of 2019

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 12 April 2019

JUDGE: Martin J

ORDER: **I will hear from the parties as to the appropriate form of order and costs.**

CATCHWORDS: MORTGAGES – MORTGAGE CONTRACT – LIABILITIES SECURED – OTHER PARTICULAR CASES – where the applicants entered into a contract with the respondent – where the contract provided for the undertaking of construction works for subdivision of the applicants’ land – where the applicants entered into a loan agreement with a third party for the purpose of undertaking the subdivision – where the loan was secured by a number of transactions, including a registered mortgage executed by the applicants over the land subject of the subdivision – where the construction works were carried out by the respondent and the respondent alleges that the applicants have not paid a sum due and payable under the contract for those works – where the loan agreement was assigned to the respondent – where the land was then sold and two sums, paid into court, are alleged by the respondent to be payable by the applicants to it in respect of the loan agreement and the contract – whether the registered

mortgage, in respect of which the applicants are mortgagors and the respondent is the assignee of the original mortgage, secures the pre-assignment liability under the contract alleged to be owing by the mortgagors to the assignee – whether money advanced under the loan agreement is so secured by the mortgage

*Property Law Act 1974, s 84*

COUNSEL: S Forrest for the applicants  
M Lawrence for the respondent

SOLICITORS: Behlau Murakami Grant ILP Pty Ltd for the applicants  
Priority Legal Services Pty Ltd for the respondent

- [1] The major issue in this matter is whether money said to be owing under a building contract is secured by a mortgage.
- [2] Mr and Mrs Wilkes bought land in Willowvale in 1988. They built their home there. In 2012 the Gold Coast City Council approved their application to subdivide the land into five lots. Four years later they formed Willow Road Developments Pty Ltd (WRD) for the purpose of carrying out the subdivision.
- [3] In May 2017 WRD entered into an agreement with the respondent (D.C. Construction) called the “Minor Works Contract”, which provided for the undertaking of a “subdivision plus existing house for watermain, electrical and civil works” for a contract sum of about \$716,000.
- [4] In January 2018 WRD entered into a loan agreement with PMA Holdings Pty Ltd (PMA) for the sum of about \$1.475 million for the purpose of undertaking the subdivision. The loan was secured by a number of transactions: a registered mortgage executed by the applicants in favour of PMA over the land at Willowvale, personal guarantees, a general security agreement and a “Building Contract Tie In Deed”. The Tie In Deed effectively gave PMA the ability to obtain some control over the Minor Works Contract. D.C. Construction undertook the civil works for the subdivision between February and September 2018 and was paid approximately \$760,000.
- [5] The lots, other than the lot on which the applicants’ home was built, were sold in November 2018 and the proceeds applied to reduce the balance of the sum owing from WRD to PMA. A balance of about \$188,000 was outstanding.
- [6] On 28 December 2018 WRD was served with a notice from PMA that the loan agreement had been assigned by it to D.C. Construction. A transfer of the mortgage, from PMA to D.C. Construction, was registered on 7 January 2019.
- [7] On 16 January 2019 D.C. Construction sent a letter to the applicants claiming that the sum of \$187,794.91 was immediately due and payable under the loan agreement and requiring payment from them, as guarantors, within seven days. On the same day, D.C. Construction sent the applicants what purported to be a notice of exercise of power of sale pursuant to s 84

of the *Property Law Act 1974*. That notice specified the total amount owing to be \$187,794.91 and a further amount of \$385 in costs was claimed.

- [8] On the following day, the applicants' solicitors sent an email to D.C. Construction's solicitors which, among other things, contained the following:

"Please advise whether, on payment of the amount demanded in those notices, that a Form 3 Release of Mortgage will be made available to the borrower."

- [9] On 18 January 2019 D.C. Construction's solicitor responded:

"The mortgagee claims the amounts due under the building contract in addition to the amounts claimed in the notices. These amounts will be quantified in due course."

- [10] The reference to the "amounts due under the building contract" was a reference to a claim that had been made by D.C. Construction against WRD for additional payments said to be owing by WRD under the Minor Works Contract. That claim is disputed by WRD.

- [11] On 15 February 2019 the applicants entered into a contract to sell the lot on which their home had been built for \$750,000 (the sale contract).

- [12] On 26 February 2019 the applicants' solicitors wrote to D.C. Construction's solicitors advising that they had an offer to purchase the lot and seeking confirmation that the respondent would "accept the sum of \$187,794.91 plus accrued interest to the date of sale at settlement of the sale of the contract in full and final settlement of the alleged debt the subject of the Notice."

- [13] No substantial response to that request was received until 27 March 2019 when D.C. Construction's solicitors sent a letter which, among other things, said:

"As previously advised to Woods Hatcher Solicitors in January 2019, our client claims additional amounts owing under a building contract between our respective clients, which form part of the Secured Moneys, as defined in the mortgage.

The additional amounts claimed are yet to be finally quantified.

In those circumstances, our client elects to adopt the sale contract, and complete the sale as mortgagee of the land. Our client will receive all net proceeds from the sale on settlement, and account to your client after settlement."

- [14] On 10 April 2019 D.C. Construction quantified the additional claim in the amount of \$201,366.69. The liability for that sum is said to have been incurred no later than September 2018, some three months before the assignment of the loan agreement and the transfer of the mortgage.

- [15] Various actions then took place which are not relevant to this application. The outcome, though, was that the lot was sold and from the settlement funds two amounts were paid into court:

- (a) \$97,392.75 representing a disputed sum alleged by D.C. Construction to be payable by the applicants to it in respect of the loan agreement, and
- (b) \$239,477.96 representing a disputed sum alleged by D.C. Construction to be payable by the applicants to it in respect of the Minor Works Contract.

**Are either of D.C. Construction's pre-assignment debts secured by the mortgage?**

- [16] D.C. Construction asserts that it was entitled to refuse to release the mortgage until it was paid both the balance of the outstanding loan and the amount said to be due under the Minor Works Contract. The latter amount, on D.C. Construction's case, became due to it before the mortgage was assigned.
- [17] The gist of the argument is that five contracts were entered into in January 2018 and, for the purposes of this application, they had the effect that two separate classes of debt were secured over the property and guaranteed by the applicants. The first class of debt was the money advanced by PMA to WRD. The second class was the liability under the Minor Works Contract which was secured by the Tie In Deed. It is the second class which is disputed.
- [18] It will assist if the various transactions and the parties thereto are set out in one place:
  - (a) the Guarantee:
    - Mr and Mrs Wilkes are the guarantors,
    - PMA is the beneficiary,
    - WRD is the debtor
  - (b) the Mortgage:
    - Mr and Mrs Wilkes are the mortgagors,
    - PMA was the mortgagee at the time of execution,
    - WRD is the debtor
  - (c) the Loan Agreement:
    - WRD is the borrower,
    - PMA is the lender
  - (d) the Tie In Deed,
    - WRD is the owner,
    - PMA is the lender,
    - D.C. Construction is the builder,
  - (e) the General Security Agreement:
    - WRD is the grantor,
    - PMA is the secured party.

- [19] The argument advanced by D.C. Construction requires an examination of a number of terms used in various documents. As the mortgage is the document upon which D.C. Construction principally relies it will be examined first.
- [20] The primary exposition of security is found in cl 2.1 of the mortgage which provides:
- “The Mortgagor mortgages to the Mortgagee all the Mortgagor’s estate and interest in the Mortgaged Property to secure to the Mortgagee the due and punctual payment of the **Secured Moneys** and the due and punctual performance of **all other obligations of the Mortgagor** and/or **the Debtor** under this Mortgage, a **Collateral Security**, the **Transaction Documents** and any Loan Agreement.”  
(emphasis added)
- [21] D.C. Construction says that clause means that the mortgage secures the debt of WRD under the Minor Works Contract. As, under the Reference Schedule to the mortgage, the “Debtor” is WRD, that raises the question: does WRD have any obligations under the mortgage or a Collateral Security or the Transaction Documents or any loan agreement?
- [22] WRD has no primary obligations under the mortgage. I turn to the other defined terms.
- [23] The term “**Secured Moneys**”, is defined in cl 1.1 of the mortgage to mean:
- “(a) the Principal Sum;
  - (b) all Further Moneys;
  - (c) all other moneys intended to be secured under the terms of this Mortgage, Transaction Documents or a Loan Agreement; and
  - (d) interest accruing from time to time on all of the above moneys,
- irrespective of whether:
- (e) the security created by this Mortgage is or remains valid or is released or discharged;
  - (f) such amounts and liabilities are owing at a particular time or in the future, or whether they are owing actually, prospectively, contingently or otherwise; and
  - (g) any amount or liability is, at any particular time, ascertained or unascertained,
- and references to the “**Secured Moneys**” include the whole or any part or parts of such moneys;”
- [24] The relevant terms for examination are: principal sum, collateral security, transaction documents and loan agreement.
- [25] The “**Principal Sum**” is defined in the same clause to mean:
- “... the amount of the **loan or other financial accommodation** specified in the Reference Schedule or defined elsewhere in this Mortgage or a Loan Agreement,

or when no such expression is defined, the amount of the loan or other financial accommodation or consideration advanced or provided or intended to be advanced or provided under this Mortgage.” (emphasis added)

- [26] The amount of the loan set out in the Reference Schedule is \$1,475,878. The debtor is WRD and the loan is secured by the mortgage.
- [27] In the Reference Schedule to the mortgage the term “**Collateral Securities**” is defined to be:  
 “The securities defined in the Loan Agreement as the ‘Securities’.”
- [28] In the **Loan Agreement** the term “Securities” is defined as:
1. First registered mortgage over [the Willowvale land].
  2. Guarantee and Indemnity from Cecil Robert Wilkes and Norma Jill Wilkes.
  3. General Security Agreement granted by Willow Road Developments Pty Ltd ACN 616 450 107.
  4. Building Contract Tie In Deed granted by Willow Road Developments Pty Ltd ACN 616 450 107 and D.C. Construction Services Pty Ltd ACN 145 552 558.”
- [29] The Tie In Deed is between WRD, D.C. Construction and PMA. It defines “building contract” as the “Building Contract between the Builder and the Owner dated ... in respect of works on the Property”. The “Property” is the land at Willowvale and, although the copy of the deed exhibited to Mr Wilkes’ affidavit did not contain the date of the building contract, it was not in contention that the building contract is the Minor Works Contract referred to above. What are the obligations, if any, of the debtor – WRD – under the Tie In Deed?
- [30] The Tie In Deed does not impose any relevant obligations on WRD, in particular, it does not impose any obligation to pay the builder or the lender. One of the purposes of the deed which was referred to by D.C. Construction is that, by D.C. Construction giving its consent, it allowed WRD, as the owner, to charge the Minor Works Contract to PMA. But that does not create any obligation on the part of WRD. A purpose of the Tie In Deed is to allow the lender to substitute itself for the owner if, for example, the lender becomes entitled to enforce its securities.
- [31] The “**Transaction Document**” is defined in the Reference Schedule to the mortgage as the “Loan Agreement between the Debtor and the Mortgagee dated on or about the date of this mortgage.” That is, it refers to the loan from PMA to WRD.
- [32] The “**Loan Agreement**” is defined in cl 1 of the mortgage as the “agreement between the Mortgagee and the Debtor providing for the advance of the Principal Sum entered into contemporaneously (more or less) with this Agreement.”
- [33] Clause 2.3 of the loan agreement also provides that “each Security shall secure the Debt now or at any time secured or payable to the Lender under any of the Transaction Documents and/or any of the Securities.” “Debt” has the meaning ascribed to it in the Loan Agreement.

- [34] It is contended for D.C. Construction that because the Reference Schedule to the mortgage states that “Collateral Securities” refers to the “Securities defined in the Loan Agreement” it must follow that the mortgage should be construed to read as if it includes both the advance from PMA and any liability owing under the Minor Works Contract. It is further argued that the context of the security agreements repeats a consistent theme that one class of debt from one agreement is included in that of another and essentially secured together under the single security. But, the Minor Works Contract is not referred to in the definition of “Securities” in the Loan Agreement and it could not, in the absence of such a definition, be regarded as a security in the ordinary sense.
- [35] While the mortgage and associated documents were intended to secure the debt which was incurred through the loan they do not go as far as D.C. Construction contends. The only time the Minor Works Contract is referred to in those documents is in the Tie In Deed and that document is the means by which PMA can subrogate itself for WRD vis-à-vis D.C. Construction. It does not create a separate indebtedness of WRD to PMA or D.C. Construction.
- [36] I was not directed to any clause in the mortgage which referred to the Minor Works Contract either explicitly or implicitly. The terms used in the mortgage are those one might expect to see in a third party mortgage, for example, “loan”, “financial accommodation”, “loan agreement”, and “collateral securities”. That is not a surprise when the mortgage is designed to provide security for a loan and not, when D.C. Construction became a party by assignment, security for a building contract. In support of the construction which excludes the Minor Works Contract is cl 14 which sets out the events of default under the mortgage. One of those defaults is non-payment and that is defined as an event where “the Mortgagor and/or the Debtor fails to pay or repay on time Secured Moneys which are due and payable to the Mortgagee under this Mortgage, a Collateral Security, the Transaction Documents or a Loan Agreement.” Thus, failure to make a payment under the Minor Works Contract is not a default under the mortgage.
- [37] Payments due under the Minor Works Contract are not secured by the mortgage. Any money advanced under the loan agreement is secured.

#### **Section 84 Property Law Act 1974**

- [38] D.C. Construction served a notice purportedly pursuant to s 84 of the *Property Law Act 1974* on the applicants. If it was valid it would have allowed D.C. Construction to exercise a power of sale as mortgagee. As the property has been sold, this matter need not be resolved.

#### **Conclusion**

- [39] I will hear from the parties as to the appropriate form of order and costs.