SUPREME COURT OF QUEENSLAND

CITATION:	*Julong Pty Ltd v Fenn & Anor* [2002] QSC 026
PARTIES:	**JULONG PTY LTD ACN 061 146 325** (plaintiff) v **DAVID JAMES FENN and** **ISABEL FRASER CAMPBELL FENN** (defendants)
FILE NO/S:	SC1058 OF 1998
DIVISION:	Trial Division
PROCEEDING:	Action to obtain possession of property and monies due.
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 February 2002
DELIVERED AT:	Brisbane
HEARING DATES:	13 August 2001; 14 August 2001; 16 August 2001
JUDGE:	Douglas J
ORDER:	**1. Judgement for the Plaintiff** **2. That the defendants pay the plaintiff's costs of and incidental to the action.**
CATCHWORDS:	MORTGAGES- MORTGAGES AND CHARGES GENERALLY – The Mortgage – Rights and Liabilities of Mortgagor and Mortgagee – Default on Mortgage – Finance Facility Secured Mortgage over Property – Loan Agreement for Purpose of Repayment of Debt Owed by Defendants in order that Defendant's may Redeem the Mortgage over Property – Default on Loan Agreement – Non payment of Debt on Demand – Assignment of Mortgage – Breach of Finance Facility Agreement and Mortgage – Remedies – whether finance facility breached – whether there exists any indebtedness under the bill of mortgage owed by the defendants to the plaintiff – whether there exists an implied term or duty to provide account to the defendants – whether such a term or duty effects equitable or common law right to an account – whether failure to define interest rate discharges the defendant's obligations under the mortgage – whether conduct gave rise to equitable relief to set aside mortgage or common law right of rescission.

Land Title Act 1994 (Qld), s 62
Property Law Act 1974, s 47
Supreme Court Act 1995, s 47

Blomley v Ryan (1956) 99 CLR 362
Commonwealth Bank of Australia Ltd v Amadio (1983) 151 CLR 447
Dobbs v National Bank of Australasia Ltd (1935) 35 CLR 643
Golding v Russell [1983] Qd R 53
Jackson v Irvin (1809) 2 Cap 48, 50
Ogilvie v Adams [1981] VR 1041 at 1054
Penny v Foy (1828) 8 B&C 11
Re McCann [1985] 2 Qd R 381
Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102
Young v Queensland Trustees Limited (1956) 99 CLR 560

COUNSEL: GD Sheahan for the Plaintiff
N Thompson for the Defendants

SOLICITORS: Frangos Lawyers for the Plaintiffs
Gustafson's for the Defendants

[1] **Douglas J:** This is an action by Julong Pty Ltd ("the plaintiff") and David James Fenn and Isabel Fraser Campbell Fenn ("the defendants") to obtain possession of property situated at Ashmore in Queensland, and for the sum of $120,707.25 (One hundred and twenty thousand seven hundred and seven dollars and twenty five cents) being monies due and payable pursuant to a registered bill of mortgage and a finance facility and, alternatively, for an order that the defendants deliver possession of that property at Ashmore to the plaintiff.

[2] In October 1993 the defendants and/or a company, Lemadex Pty Ltd ("Lemadex"), were in default of their loan obligations to Park Avenue Nominees Pty Ltd ("Park Avenue") and were indebted to that company in the sum of $119,069.25. That debt was secured by a registered first mortgage over property known as Lot 426 on registered plan No 138155 in the County of Ward, Parish of Nerang being 45 Yangoora Crescent, Ashmore ("the property").

[3] On or about the 12 October 1993 the defendants and Lemadex entered into a written finance facility with Keradale Pty Ltd ("Keradale"). *Inter alia*, this finance facility was to provide for the repayment to Lemadex of a sum of money which secured the mortgage over the property.

[4] On 12 October 1993 the defendants, as mortgagors, executed and delivered to Keradale as mortgagee, a bill of mortgage ("the mortgage") over the property. On 11 October 1993 the plaintiff and Keradale entered into a written loan agreement whereby the plaintiff agreed to lend Keradale the sum of $130,000 for a term of twelve months at a rate of interest of 12% per annum. The purpose of this loan agreement was to allow Keradale to apply, or cause to apply, the loan funds towards the repayment of the debt owed by the defendants to Park Avenue in order that the defendants, and/or Lemadex, may redeem the mortgage over the property.

[5] On 11 October 1993 the plaintiff paid the sum of $130,000 to the solicitors for Keradale. Thereafter, and until about the 20 October 1993, Keradale advanced a total sum of $120,707.25 (One hundred and twenty thousand seven hundred and seven dollars and twenty-five cents) to the defendants, which sum was particularised. In essence, the majority of that sum $119,069.25 (One hundred and nineteen thousand and sixty nine dollars twenty five cents) was paid to Park Avenue to secure the release of the mortgage over the property.

[6] On 15 October 1993 the mortgage between Keradale and the defendants was lodged for registration and was recorded in the Registrar of Land Titles on 21 October 1993. That mortgage was subsequently assigned to the plaintiff because Keradale fell into default in the repayment of the said sum of $130,000. The transfer of the benefit of the mortgage to the plaintiff was lodged for registration on 31 August 1994 and was subsequently registered.

[7] The plaintiff, by its solicitors, gave notice to the defendants on or about 2 September 1994 that Keradale's interest in the mortgage over the property had been transferred to the plaintiff. By s 62 of the *Land Title Act* 1994 (Qld) ("the Act") all rights, powers, privileges and liabilities of Keradale under the mortgage as against the defendants became assigned to the plaintiff.

[8] On or about 4 September 1997 an application for the winding up of Lemadex was made which is alleged, pursuant to clause 16 (c) of the finance facility to constitute a breach thereof and consequently a default under clause 10.1 of the mortgage. It is suggested in the defence of the defendants that this winding up application was subsequently withdrawn. That does not appear to matter in the scheme of things.

[9] Clause 15(f) of the finance facility provides that if the defendants breach any term of that agreement, the lender may at its choice call in the balance of the sum lent outstanding at the date of the decision by the lender to call it in and any interest thereon. Pursuant to that clause the plaintiff, by its solicitors, on or about 20 January 1998, called in all outstanding monies advanced pursuant to the finance facility together with interest accrued. That finance facility was for a term of 60 months, which expired on 12 October 1998. At that time all monies owing pursuant to it would have become repayable to the plaintiff. At that date, therefore, the defendants were indebted to the plaintiff under the terms of the finance facility in the sum of $120,707.25 plus interest.

[10] In any event, by a certificate under clause 16 of the mortgage the plaintiff on 9 August 2001 demanded payment from the defendants of the monies owing under the mortgage. The monies have not been paid.

[11] By their further amended defence and counterclaim, the defendants allege that there is no indebtedness by the defendants to the plaintiffs in respect of the mortgage by reason of the facts that:

(a) the finance facility referred to in the bill of mortgage was terminated by the defendants because, in breach of the finance facility, Keradale failed to account to Lemadex or the defendants despite demand in respect of their control of Lemadex's accounts and trading and finance records as factor and agents;

(b) monies allegedly owing by the plaintiff were not advances pursuant to the finance facility because they were not payments to accounts of Lemadex to which the facility ("attached") or were not advanced by Keradale for the purpose of factoring in the borrower's invoices, the purchase of capital equipment, the replacement of stock or other purpose approved by Keradale from time to time in writing, as was approved in the finance facility and thus cannot be characterised as arising pursuant to the finance facility; and

(c) that there is no other indebtedness, or net indebtedness, under the bill of mortgage owed by the defendants to the plaintiff.

[12] Two other matters were raised by the defendants; the first is that there was an implied term in the factoring agreement with Keradale, or an implied duty on behalf of Keradale to provide an account to the defendants. Even if this was accepted (and I do not) at best the defendants would have an equitable or common law right to an account (see *Equity Doctrines & Remedies*, Meagher, Gummow and Lehane, 3rd edition, paras 2505, 2513). Such a right is not a legal right to money and, indeed, the defendants are unable, and made no attempt, to establish that they have discharged all monies owed to Keradale, advanced to them or for their benefit. It is trite to say that once the advances had been proved to have been made the defendants bear the onus of proving that they have been repaid: *Young v Queensland Trustees Limited* (1956) 99 CLR 560. On any view of the matter Keradale paid the defendants approximately $190,000 to $200,000 which included the sum of $120,000 paid out to discharge the Park Avenue mortgage debt, which is the sum sued upon.

[13] The second raises the conduct of Mr Bickell, the solicitor for Keradale in its transactions with the defendants. This allegation was first raised in correspondence (exhibit 19) on 19 October 1994 and replied to by Mr Bickell (exhibit 19) on 20 October 1994. Mr Bickell makes it plain in that correspondence, and in evidence, that he never was the solicitor for the defendants. He attended at their home purely because they were unable to attend at his office. They had previously been given a warning that they should obtain independent advice with respect to the transaction, and no fee was ever rendered by him to them. All fees were rendered by Mr Bickell to Keradale (exhibit 18).

[14] By their own evidence it is clear that the defendants knew of the terms of the mortgage and the finance facility. Mr Fenn acknowledged that there was no specific interest rate expressed in the finance facility, and both admit that they asked Mr Bickell a number of questions concerning the documents. They were experienced business people who had dealt with mortgage transactions before. I find that they understood all of the terms and conditions on both the finance facility and the mortgage.

[15] At no time have the defendants offered to repay the sum of $120,000 (approximately) advanced to them on 12 October 1993. Therefore *restitutio in integrum* is not possible. Rescission of the mortgage is now not available at common law: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 110-111.

[16] Therefore it follows:

(a) Clause 16 of the mortgage provides a vehicle for a certificate as to debt which is conclusive upon a mortgagor of the amount in existence of the principal debtors indebtedness: *Dobbs v National Bank of Australasia Ltd* (1935) 35 CLR 643;

(b) (i) At law mortgage carries with it a right to interest even if there is no express covenant providing therefore: *Hallsbury's Laws of England*, 4th edition, V32, paras 504 and 505;
(ii) Section 78(1) of the *Property Law Act* 1974 also implies an obligation to pay interest under an instrumental mortgage; and
(iii) The court is at liberty to substitute a rate for interest that it thinks fit for the period between when the cause of action arose and the date of judgment (*Supreme Court Act* 1995, s 47). This cause of action arose on 12 October 1993 as the monies advanced were repayable on demand (clause 1 of the mortgage).

(c) Pursuant to the All Monies clause (clause 25.1) it is clear that the sum advanced to the defendants was a sum of approximately $120,000. The mortgage was plainly security for that advance;

(d) The assignment of the mortgage entitles the plaintiff pursuant to s 62 of the Act to all of the rights, powers, privileges and liabilities of the transferor, and includes the right to sue on the terms of the mortgage to recover a debt or to enforce a liability under the mortgage or lease;

(e) As soon as the mortgagor (the defendants) has made default in payment of the mortgage debt, as in this case by non payment of the debt upon demand, the mortgagee is entitled to pursue any or all of the remedies against the debtor: Australian edition of *Fisher & Lightwood's Law of Mortgage*, para 16.7. The mortgagee may sue for payment and possession in the same proceeding, *ibid* p 318; and *Re McCann* [1985] 2 Qd R 381. If once the debt is proved to have existed, its continuation is presumed: *Jackson v Irvin* (1809) 2 Cap 48, 50; *Penny v Foy* (1828) 8 B&C 11. Therefore until the loan has been repaid or discharged the obligation to repay is presumed to continue.

[17] This case becomes clear. Demand was made and, indeed, the very bringing of this action is sufficient demand for monies repayable "upon demand": *Ogilvie v Adams* [1981] VR 1041 at 1054; and *Golding v Russell* [1983] Qd R 53.

[18] Finally, with respect to the allegations in respect of the failure to define an interest rate, and the conduct Mr Bickell, they can not have the effect of discharging the defendant's obligations under the mortgage. The only relevant question is whether their conduct gave rise to a right to equitable relief to set aside the mortgage or common law rights of rescission on the basis of actionable misrepresentation. An attempt was made to liken this case with cases such as *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. The difficulty the defendants find with such an argument is that they, or neither of them, were suffering from a disability of a type discussed in that case or in *Blomley v Ryan* (1956) 99 CLR 362. In any event without proffering any attempt or proof of repayment of any of the sums proven to have been advanced to them they are not entitled to equitable relief: *Vadasz*, supra at p 115.

[19] The simple fact is that the defendants were in difficulty with the Park Avenue mortgage and needed to have it paid out. They were dealing in a lending market

outside the ordinary in the sense of banks, building societies and the like. They were desperate. Notwithstanding this they knew, precisely, the nature of the transactions they were entering into.

[20] On my findings above there is nothing in the counterclaim which is brought claiming an entitlement to a discharge of the mortgage. It follows then that judgment should be entered for the plaintiffs. I shall hear submissions as to the form of order and an appropriate interest rate to be imposed. It follows that I should make an order that the defendants pay the plaintiff's costs of and incidental to the action. I shall hear submissions as to the basis upon which those costs should be assessed.