SUPREME COURT OF QUEENSLAND

CITATION:	*Julong P/L v Fenn & Anor* [2002] QCA 529
PARTIES:	**JULONG PTY LTD** ACN 061 146 352 (plaintiff/respondent) **v** **DAVID JAMES FENN** (defendant/appellant) **ISABELLA FRASER CAMPBELL FENN** (defendant/appellant)
FILE NO/S:	Appeal No 2657 of 2002 SC No 1058 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2002
JUDGES:	McMurdo P, Williams JA and Atkinson J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. The appellants pay the respondent's costs of the appeal to be assessed**
CATCHWORDS:	MORTGAGES – MORTGAGES AND CHARGES GENERALLY – THE MORTGAGE – LIABILITIES SECURED – where debts secured by two mortgages over residential property of the appellants – where third party company paid debts and took mortgage over residential property as security for the loan – where third party company transferred mortgage to respondent to secure a loan used to pay out the original debts – whether certificate of indebtedness was conclusive evidence of the debt – whether debtor bears onus of demonstrating the debt has been repaid CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where appellants and third party company entered into a debt factoring agreement – whether an obligation to account was an

implied term in the agreement – whether failure to account would render the contract void *ab initio*

Land Title Act 1994 (Qld), s 62(1)
Property Law Act 1974 (Qld), s 57

Ashenhurst v James 3 Atk 271; (1745) 26 ER 958, followed
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266, followed
Clarke v Tipping (1846) 9 Beav 284; 50 ER 352, followed
Consolidated Trust Co Ltd v Naylor (1936) 55 CLR 423, applied
Commonwealth Bank of Australia v Muirhead [1997] 1 Qd R, followed
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, applied
Noble v State of Victoria [2000] 2 Qd R 154, followed
Re Tahiti Cotton Co; Ex parte Sargent (1874) LR 17 Eq 273, followed
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, followed
Young v Queensland Trustees Limited (1956) 99 CLR 560, followed

COUNSEL: N J Thompson for the appellants
S L Doyle SC, with G D Sheahan, for the respondent

SOLICITORS: Gustafson Lawyers for the appellants
Frangos Lawyers for the respondent

[1] **McMURDO P:** I have had the benefit of reading the reasons for judgment of Atkinson J in which the facts and issues are set out.

[2] I agree with Atkinson J's reasons for concluding that the appellants failed to establish repayment of the mortgage debt and that, in the absence of such proof, the certificate of debt issued under cl 16 of the mortgage is sufficient evidence of the appellants' indebtedness.[1]

[3] I also agree with Atkinson J that the appellants' contention, that it is not liable under the mortgage because of Keradale's failure to account, also fails. It is unnecessary to decide whether the appellants' right to an account survives the transfer of the mortgage from Keradale to the respondent because, as Atkinson J explains, the appellants are liable to the respondent to pay the mortgage debt which accrued before the rescission of the contract.

[4] The appeal should be dismissed with costs to be assessed.

[5] **WILLIAMS JA**: I will not repeat unnecessarily relevant facts discussed in the reasons for judgment of Atkinson J. For my purposes it is sufficient to state very briefly the following material facts:

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[1] See Atkinson J's reasons at [50]-[52].

i. In July-August 1991 the appellants (David James Fenn and Isabella Fraser Campbell Fenn) purchased a commercial laundry business by acquiring the shares in Lemadex Pty Ltd ("Lemadex"). To settle that transaction the appellants borrowed $115,000 from Park Avenue Nominees on the security of a first mortgage over their residence at Ashmore and further gave the vendors a second mortgage over that property to secure payment of the balance of the purchase price, approximately $65,000;

ii. In November 1991 Lemadex entered into a Debt Factoring Agreement with Keradale Pty Ltd ("Keradale"). The terms of the written agreement provided for the calculation of amounts payable by Keradale to Lemadex for the acquisition by the former of debts. The agreement also created a charge in favour of Keradale over all present and future book debts of Lemadex;

iii. In September-October 1993 the appellants were in difficulty repaying the loan monies secured by the two mortgages over the Ashmore property. In September 1993 Park Avenue Nominees gave the appellants a Notice of Exercise of Power of Sale. That ultimately led to the appellants and Lemadex entering into a Finance Facility with Keradale; the formal document was dated 12 October 1993. That document provided for a maximum loan limit of $335,000. In the weeks leading up to the formal execution of that finance facility Keradale paid out the second mortgage over the Ashmore property and the amount so paid was ultimately treated as a loan pursuant to the finance facility. In order to pay out the first mortgage Keradale obtained funds from the respondent Julong Pty Ltd. The respondent lent Keradale $130,000 and of that $120,707.25 was used to pay out the debt secured by the first mortgage in favour of Park Avenue Nominees. In consequence of those transactions Keradale took a mortgage over the appellants' Ashmore property which became registered on 21 October 1993 as dealing L683706R. That mortgage was to secure the sum of $335,000, the maximum limit pursuant to the Finance Facility;

iv. On 1 November 1993 Keradale executed a transfer of that mortgage to the respondent to better secure repayment of the loan of $130,000 from the respondent to Keradale. That transfer was registered on 31 August 1994 and on 2 September 1994 the appellants were given written notice of the transfer and notice requiring them to make future payments to the respondent;

v. Though it was not formally a term of the Finance Facility from about the time that agreement was entered into Lemadex requested or permitted Keradale to keep all the books of account and records of the laundry business. It does not seem that either the appellants or Lemadex asked for or

obtained regular accounting information with respect to the business, though Keradale provided some such information from time to time;

vi. In May 1994 Keradale went into provisional liquidation and the person who was the principal of Keradale (Clarke) is now serving a lengthy gaol sentence for offences of dishonesty associated with that company;

vii. Clarke said in oral evidence at the trial that he did not believe that the appellants had paid any money to Keradale in discharge of the loans secured by the mortgage on the Ashmore property. Mr Fenn in evidence referred to monies paid by Lemadex to Keradale from time to time but his evidence was not specific that such payments were to discharge the loans secured by the mortgage in question;

viii. There was evidence from a director of the respondent (Savage) that none of the $120,707.25 had been repaid;

ix. There was a certificate as to debt issued pursuant to clause 16 of the mortgage certifying that the $120,707.25 was still outstanding.

[6] Against that background it is clear there is a registered mortgage securing payment of a debt and there is evidence (oral and derived from the certificate) that the debt has not been paid. There is no evidence to the contrary. In those circumstances the learned trial judge was correct in concluding that, as the appellants had not discharged the onus of proving the debt had been repaid, there had to be judgment for the respondent. The reasons of the learned trial judge and Atkinson J deal with the relevant authorities.

[7] Counsel for the appellants also contended that in the circumstances the appellants (and Lemadex) had a right to terminate the arrangements they had with Keradale and had in fact done so. But, in my view, the termination of the factoring agreement and finance facility would not affect an antecedent liability. That is particularly so where that liability had been transferred to a third party.

[8] In all the circumstances the appeal should be dismissed with costs.

[9] **ATKINSON J:** In June or July 1991, David and Isabella Fenn ("Mr and Mrs Fenn") purchased an interest in a commercial laundry business, Hi Rise Linen Service. To do so, they purchased shares in Lemadex Pty Ltd ("Lemadex") from Messrs Harris and others ("Harris") for the sum of $145,000. They did not have the capital to finance the purchase themselves so they borrowed money from Park Avenue Nominees Pty Ltd ("Park Avenue Nominees"), as well as from the vendors.

[10] In August 1991, Mr and Mrs Fenn borrowed $115,000 from Park Avenue Nominees. In order to borrow that sum they had to give security over their home. The loan was secured by a registered mortgage over their residence at 45 Yangoora Crescent, Ashmore, Queensland, more particularly described as Lot 426 on Registered Plan No 138155 being the whole of the property contained in Certificate of Title Volume 5192 Folio 136 County of Ward Parish of Nerang ("the Fenns'

home"). The interest rate was 17.5 per cent reducing to 12.5 per cent for prompt payment. The loan was to expire on 19 August 1993.

[11] In order to secure the vendor finance, Mr and Mrs Fenn offered a second mortgage over their home. In August 1991, Park Avenue Nominees consented to the registration of a second mortgage over the Fenns' home in favour of the original vendors ("Harris mortgage") to secure the vendor financing of the acquisition of Lemadex and the laundry business. The loan secured by the Harris mortgage was $65,000.

[12] However, it appears that the Fenns and their company needed further funds to run the business. On 14 November 1991, Lemadex therefore entered into a Debt Factoring Agreement (the "factoring agreement") with Keradale Pty Ltd ("Keradale"). Mr and Mrs Fenn guaranteed the debt under the factoring agreement. The principal of Keradale was one Donald Edward George Clarke, who was subsequently convicted of offences as a result of his actions as director of Keradale.

[13] The advantage of the factoring agreement was that Mr and Mrs Fenn and Lemadex received payment from Keradale, in exchange for selling the debts owed to them. Clause 2.1 of the factoring agreement provided that if Lemadex delivered to Keradale an acceptable invoice, as defined therein, addressed to a customer of Lemadex, such delivery would constitute an offer to sell that debt to Keradale for the purchase price. Keradale had four business days from receipt of the invoice to reject an invoice. Clause 5 of the factoring agreement provided that every invoice had to have attached to it a notice that the debt had been assigned to Keradale and that the invoice must be paid directly to Keradale. In spite of this, Mr Fenn said many customers continued to pay Lemadex direct so he immediately forwarded the payment on to Keradale.

[14] The factoring agreement, however, carried with it a number of significant financial disadvantages to the Fenns and Lemadex. The purchase price of the invoices was the face value of the debt reduced by the factoring fee. If the debt was not paid in full within the factoring period as set out in the agreement, then the purchase price would be further reduced by the overdue fee calculated on a daily basis from the end of the factoring period. Under the factoring agreement, Keradale was obliged to pay the reduced purchase price into a cash collateral account set up under clause 4 of the agreement. Under clause 4.4, Keradale held the balance of the moneys for the time being standing to the credit of Lemadex in the cash collateral account to apply in certain specified ways. None of those was for the payment of any debt other than the moneys owed pursuant to the factoring agreement. It could not, for example, be used to pay moneys owed by Mr and Mrs Fenn under the Park Avenue Nominees mortgage or the Harris mortgage. Clause 4.7 provided that notwithstanding the fact that the moneys in the cash collateral account were for the ultimate benefit of Lemadex, Keradale might use any moneys held in the cash collateral account for investment in its day to day business of factoring. Clause 7 gave Keradale the right to call upon Lemadex to repurchase the full amount of any purchase debt or part of the purchase debt remaining unpaid in certain circumstances.

[15] The fees and charges which Keradale could impose on Lemadex pursuant to the factoring agreement were also extremely onerous. Clause 9 dealt with the manner

in which Keradale could terminate the factoring agreement although it made no provision for Lemadex to terminate the factoring agreement. Clause 14 provided for prima facie certificates of indebtedness to be given by Keradale. The factoring agreement also created a charge to Keradale over all of the present and future book debts of Lemadex.

[16] On 3 January 1992 the factoring agreement was registered with the Australian Securities Commission (ASC) as a charge over the assets, property and present and future book debts of Lemadex. Lemadex received a weekly report from Keradale, listing Lemadex's debtors and details of payments made and overdue. Keradale progressively took over the management and control of all of the financial affairs and books and accounts of Lemadex including the payment of wages and creditors.

[17] In August 1992, Mr Clarke ceased being a director of Keradale after his conviction for falsifying accounts as a director and his sentence to two years' imprisonment. However, it appears that he continued acting as the principal of Keradale. His evidence was that he continued with the day-to-day management of the company even while he served the five months of his sentence which he was required to serve in custody. At the time of the trial of this matter in August 2001, Mr Clarke was in prison serving a nine year sentence imposed on 11 December 2000 for other offences of misappropriation to which he had pleaded guilty.

[18] It appears that Mr and Mrs Fenn and Lemadex were still in difficulty financially and could not pay the moneys owing under their mortgages. An arrangement was made for Keradale to pay out the Harris mortgage. There followed an exchange of correspondence between Mr Clarke, the solicitors for Keradale, and the solicitors for Harris regarding the outstanding amount of the loan. This correspondence suggested a balance owing of between $49,003.60 and $43,855.97, but Mr Clarke said in evidence that he believed approximately $70,000 was paid by Keradale to pay out the Harris mortgage. As far as he knew, those moneys had never been repaid by Lemadex, but as this amount was not the subject of a claim in these proceedings it need not be further considered.

[19] On 27 September 1993, a Notice of Exercise of Power of Sale and a Notice to Quit were served on Mr and Mrs Fenn who were then, as the learned trial judge found, in default under the Park Avenue Nominees' loan and mortgage. At that time the debt secured by that mortgage was $119,069 and the Fenns' home was valued at about $155,000. An arrangement was made to pay out the money owing on that mortgage. The arrangement was that the respondent, Julong Pty Ltd ("Julong"), would lend $130,000 to Keradale, which Keradale would in turn lend to Lemadex in order release the Park Avenue Nominees' mortgage. The loan would be secured by a mortgage over the Fenns' home, which Keradale asserted it held, in the amount of $335,000. Mr Clarke agreed in evidence that he had told Mr and Mrs Fenn that by refinancing with Keradale they could obtain a lower interest rate. Mr Fenn said that Mr Clarke told him that he could arrange a mortgage loan at 8 per cent interest rather than the 12½ per cent that he was paying to Park Avenue Nominees. In truth, the interest rate payable by Mr and Mrs Fenn pursuant to the mortgage with Keradale was even higher. Julong charged Keradale 12 per cent interest and Keradale charged the Fenns a higher rate to make a profit on the transaction.

[20] On 29 September 1993, Mr Clarke, on behalf of Keradale, wrote to Bickell & Mackenzie confirming an intention to pay out the Park Avenue Nominees' mortgage on behalf of Mr and Mrs Fenn on 12 October. Keradale wrote to Julong about the arrangement on 4 October 1993. In that letter, Keradale stated that it had instructed its solicitor, Bickell & Mackenzie, to act in the transaction for themselves, Mr and Mrs Fenn, Lemadex and Julong. Mr Clarke said in his oral evidence that Mr Tudor on behalf of Keradale suggested to Mr and Mrs Fenn and Mr Savage, a representative of Julong, at a meeting with them, that Mr Bickell act on behalf of them all in this series of transactions.

[21] Bickell & Mackenzie had acted for Mr and Mrs Fenn in some small matters in the past and Mr and Mrs Fenn could have been justified in thinking that the solicitors were acting for them as well as Keradale. Certainly Mr Bickell did not tell Mr and Mrs Fenn that he was not acting for them. Mr Clarke said in his evidence that Mr Bickell had said that it should be clearly understood that he was acting for all parties to keep the costs down. However it appears that Bickell & Mackenzie at all relevant times acted for, and in the interests of, Keradale alone. All fees were rendered by Mr Bickell to Keradale. Mr Bickell did not disclose to Mr or Mrs Fenn that Mr Clarke, who instructed him on behalf of Keradale, had, as Mr Bickell knew, in the previous year been convicted of falsifying accounts as a director. The learned trial judge found, however, that Mr and Mrs Fenn were experienced business people who had dealt with mortgage transactions before and understood all the terms and conditions of both the finance facility and the mortgage.

[22] The following steps were taken to give effect to the arrangement which had been made. On 11 October 1993, Julong entered into a loan agreement with Keradale whereby Julong loaned Keradale the sum of $130,000 for a term of 12 months at an interest rate of 12 per cent per annum. In the loan agreement, Keradale warranted that Julong would be provided with audited reports as to the status of the borrowed funds at least quarterly. The loan was effected by Julong depositing $130,000 into the trust account of Keradale's solicitors, Bickell & Mackenzie. A cheque was then drawn on that trust account from the moneys put into the account by Julong for an amount payable to Park Avenue Nominees to discharge Mr and Mrs Fenn's indebtedness to Park Avenue Nominees and to obtain a discharge of the Park Avenue Nominees' mortgage. $119,069.25 was paid by Bickell & Mackenzie to Park Avenue Nominees on 11 October 1993.

[23] On 12 October 1993, Mr and Mrs Fenn and Lemadex executed a finance facility agreement (the "finance facility") with Keradale providing for a maximum loan limit of $335,000 and a bill of sale in favour of Keradale. Mr and Mrs Fenn also executed a bill of mortgage over their home in favour of Keradale ("the Keradale mortgage").

[24] The finance facility was said to be "a come and go facility for the purpose of securing moneys advanced by [Keradale] from time to time for the purpose of factoring of the invoices of [Mr and Mrs Fenn and Lemadex], the purchase of equipment, replacement of Stock or any other purpose approved of by [Keradale] from time to time in writing". Clause 11 of the finance facility provided that if the agreement were terminated, any debit amount in the accounts set out in the first schedule, together with accruals, would be a debt owing by Mr and Mrs Fenn and Lemadex to Keradale. The debtor, Lemadex, would be in breach of the finance facility if, inter alia, an application was made for its winding up: Clause 16(c).

Clause 15(f) provided, that if Lemadex were in default, then Keradale could at its choice, inter alia, call in the balance of the money lent which was outstanding together with interest. Pursuant to clause 21 of the finance facility, a notice of demand signed by Keradale's authorised officer would be conclusive proof of the matters set out in it. Interest was to be charged by Keradale at such rate as it determined from time to time "in accordance with terms of the facility".

[25] The bill of sale was entered into between Mr and Mrs Fenn, Lemadex and Keradale, whereby Mr and Mrs Fenn and Lemadex assigned all the goodwill, trade and business of Hi Rise Linen and all leases and licences of the business to Keradale in return for the finance facility.

[26] Upon Keradale's instructions, the Keradale mortgage was to secure $335,000, which Keradale told its solicitors was the amount then owing to it from Mr and Mrs Fenn and Lemadex. Mr Bickell, the solicitor, gave evidence that he had no independent knowledge of the amount owing by Mr and Mrs Fenn or Lemadex to Keradale under the factoring agreement other than that the amount varied from time to time.

[27] In the Keradale mortgage, the financial consideration was said to include "[Keradale], at the request of [Mr and Mrs Fenn], giving to Lemadex Pty Ltd the financial accommodation referred to in an agreement dated the 12th October 1993 at the rate of interest set out in the agreement and repayable as required by the agreement". Clause 10.1 set out a number of occasions of default including default in performance or observance of any collateral agreement. Clause 16 of the mortgage provided that:-

> "A certificate under the hand of the Mortgagee or any person acting on behalf of the Mortgagee stating that the Mortgagor has made default hereunder or stating the amount of the moneys secured which is due and payable by the Mortgagor hereunder at the date mentioned in the certificate shall be prima facie evidence against the Mortgagor of such default and/or that the amount so stated is the amount of the moneys secured which is due and payable by the Mortgagor to the Mortgagee hereunder at the date mentioned in the said certificate".

Clause 25.1 of the Keradale mortgage is an all moneys clause.

[28] On 15 October, Keradale's solicitor lodged the Keradale mortgage for registration. He paid $1,340 to the Commissioner of Stamp Duties for the mortgage and $261 to the Registrar of Titles for the registration fees on two releases of mortgage and one bill of mortgage. On 20 October, the solicitor paid a $37 registration fee on the bill of sale. All of these amounts were paid from the moneys loaned by Julong.

[29] The Keradale mortgage was registered on 21 October 1993 and Keradale's solicitor paid $3,500 to Keradale from the moneys advanced by Julong.

[30] On 1 November 1993 Keradale's solicitor executed a transfer of mortgage to Julong ("the Julong mortgage") under a registered Power of Attorney for the consideration of $130,000. The documents were then held in escrow by Julong's solicitors. On 4 November, $5.00 stamp duty was paid on that transfer.

[31] It appears that at least from November 1993, Keradale had taken over the books and accounts of Lemadex pursuant to the fixed and floating charge in the factoring

agreement. From that time Lemadex had no detailed knowledge of the balance of moneys owing by it to Keradale although Mr Clarke said in evidence that Lemadex would have been provided with a weekly or monthly statement of account.

[32] On 16 November 1993 Mr Clarke says he sent a letter to Mr and Mrs Fenn as directors of Lemadex. An unsigned copy of the letter, which was in evidence, says:-

> "We confirm that with the payout to Park Avenue Nominees on the 12th October last your debt to this company is as follows:-
>
> | | |
> |---|---|
> | Transfer of the Pty Ltd Account to Mortgage Account | $153,487.31 |
> | Final pay out with accrued interest to Harris and Others. | $ 72,805.39 |
> | Legal Fees paid by Bickel and Mackenzie to settle Harris and Co | $ 550.00 |
> | Pay out to Park Avenue Nominees | $119,069.25 |
> | Stamp Duty Registrations and Legal Fees on new Mortgage | $ 3,930.75 |
> | Grand Total | $349,842.27 |
>
> We confirm we are holding a mortgage to $335,000 plus 2 Bills of Sale.
>
> Interest for the time being will be charged at the following rate:- 13% on the House Mortgage (i.e. payout to Park Avenue Nominees); 13% on the Harris and Others payout, 15% on the balance of the Pty Ltd Account. This averages out to 14%. This amount has been calculated for October and deducted from the November retentions".

[33] The letter of 16 November 1993 is said to be a certificate showing that $349,842.29 was lent by Keradale to Lemadex. However, because of the unsatisfactory state of Keradale's records, it has not been possible to determine the precise indebtedness of Lemadex to Keradale under the finance facility. Mr Fenn did however admit in answer to a question by the learned trial judge that he never paid back the sum borrowed to pay out the Park Avenue Nominees' mortgage.

[34] Mr Clarke explained that the first amount referred to of $153,487.31 was unsecured funds advanced to Lemadex outside the Factoring Agreement. It is not relevant to this litigation. In a letter apparently written by Mr Clarke to Mr and Mrs Fenn on 6 December 1993, the $119,069.25 paid to Boyce and Associates, the solicitors for Park Avenue Nominees, is said to have been made up as follows:-

> "Principal $115,000.00
> Balance June penalty interes [sic] (due on 19.6.1993 – paid 23.6.1993) $ 479.16
> September penalty interest $ 1,677.08
> Interest for period 20.9.1993 to 12.10.1993 at 17.5% $ 1,213.01
> Our professional costs and outlays in

respect of issuing Notice of Exercise of Power of Sale and Notice to Quit	$	450.00
Our professional costs and outlays in respect of preparing all necessary Release documents	$	250.00"

[35] On 2 December 1993, Keradale's solicitor paid $3,002.75 of the $130,000 advance by Julong to Keradale as the net balance and on 9 December 1993, paid themselves the balance of $3,785 in account of their costs and outlays.

[36] Mr Clarke said in oral evidence that he did not believe that any of the moneys paid to Mr and Mrs Fenn to discharge the Harris or the Park Avenue Nominees mortgages had been repaid by them. The financial records of Lemadex available to Mr Fenn at the trial of this matter show that Lemadex paid moneys to Keradale but there was no evidence that any of this was to discharge the moneys owing on the Julong mortgage. Mr Fenn was unable to say how much money Lemadex had repaid on the mortgage as Keradale kept the financial books, accounts and records of Lemadex and were responsible for all payments to be made by Lemadex including payment of the mortgage.

[37] Once it is proved that advances have been made then, as the learned trial judge held, the defendants bear the onus of proving that they have been repaid.[2]

[38] In about early 1994, Keradale ceased making repayments to Julong on the 11 October loan. No repayments of the principal were ever received and no payments of the interest due were made after March 1994.

[39] On 27 May 1994 a provisional liquidator was appointed to Keradale. On 28 May 1994, the ASC collected the documents and records of Keradale.

[40] On 31 August 1994, the transfer of mortgage from Keradale to Julong was registered and on 2 September 1994, Mr and Mrs Fenn were given written notice of the transfer of the mortgage and advised to make future payments to Julong. Keradale was entitled to so transfer the security with or without the concurrence of the Fenns.[3] Pursuant to s 62(1) of the *Land Title Act* 1994, all the rights, powers, privileges and liabilities of Keradale in relation to their mortgage over the Fenns' home then vested in Julong. A transferee of a mortgage, such as Julong, steps into the shoes of the transferor, and therefore is in no better or worse position than the transferor, Keradale.[4] The transfer effected a transfer of the debt owed by Mr and Mrs Fenn to Keradale as well as a transfer of mortgage security for that debt.[5] Julong is therefore entitled to claim the full amount of the debt owed by Mr and Mrs Fenn to Keradale but is bound by such equities and accounts as would bind the transferor, Keradale.

[41] On 6 September 1994, Gustafson's, solicitors acting for Mr and Mrs Fenn and Lemadex, wrote to the provisional liquidators of Keradale disputing the debts said to be owing by them to Keradale. On 19 October 1994, Gustafson's wrote to Keradale's solicitor complaining that the solicitor had also acted in the transactions

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2 *Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 566-568.

3 See *Re Tahiti Cotton Co; Ex parte Sargent* (1874) LR 17 Eq 273 at 279; *Elders Rural Finance Ltd v Westpac Banking Corporation* (1988) 4 BPR 9383 at 9385.

4 See *Ashenhurst v James* 3 Atk 271; (1745) 26 ER 958.

5 See *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423 at 434.

for Mr and Mrs Fenn and Lemadex and thereby put himself in a position of conflict. This was promptly denied by the solicitor who had acted for Keradale. This matter was not pursued on appeal.

[42] On 6 October 1995, Gustafson's, on behalf of Mr and Mrs Fenn, wrote to the provisional liquidators of Keradale complaining about the serious discrepancies in the books of account kept by Keradale and informing them that they had counsel's advice that the mortgage granted by Keradale was voidable due to the actions of Keradale's solicitor, Mr Bickell, and should be set aside. Mr and Mrs Fenn therefore rescinded the mortgage and had notified Julong's solicitors accordingly.

[43] On 13 June 1996, Keradale was deregistered by the ASC for failure to lodge an annual return. The company's registration was reinstated on 7 January 1997.

[44] On 23 June 1997, Gustafson's wrote to Keradale's provisional liquidators requiring full and proper accounts of the debt factoring facility operated in respect of Lemadex. If such accounts were not forthcoming, they said that Lemadex would regard itself as being at liberty to terminate any mutual obligations and contracts then subsisting between Lemadex and Keradale. No such accounts have ever been provided.

[45] On 22 July 1997, Mr and Mrs Fenn and Lemadex purported to terminate all contracts, including the factoring agreement, finance facility and mortgages between themselves and Keradale due to what was said to be the breach by Keradale of its fiduciary obligations to Lemadex. On 28 July 1997, Keradale's solicitor informed Julong's solicitor of the outlays made under the $130,000 advance from Julong to Keradale.

[46] On 4 September 1997 an application to wind up Lemadex was filed. That application was dismissed on 8 October 1997. However, this caused Lemadex to be in breach of clause 16(c) of the finance facility and therefore Mr and Mrs Fenn to be in breach of clause 10.1 of the Julong mortgage. On 19 December 1997, Corrs Chambers Westgarth, solicitors for Keradale's provisional liquidator, wrote to Gustafson's rejecting the right of Mr and Mrs Fenn or Lemadex to terminate any of the agreements but accepting what they described as their wrongful repudiation of those agreements. They then demanded the sum of $74,462.27 due pursuant to the finance facility and the factoring agreement. The letter said it enclosed a copy of a reconciliation of the account between Keradale and Lemadex but did not.

[47] On 4 February 1998 this proceeding was commenced in the Supreme Court of Queensland by Julong against Mr and Mrs Fenn. On 9 August 2001, Julong sent a notice entitled "prima facie certificate of default and indebtedness" to Mr and Mrs Fenn certifying pursuant to clause 16 of the Julong mortgage that they had made default under the mortgage in that:-

(a) they failed to pay the moneys secured under the mortgage on or since 12 October 1993; and

(b) they failed to pay the interest due on the monies secured from 12 October 1993; and

(c) Lemadex being a joint borrower with Mr and Mrs Fenn became subject of an application for winding up filed in the Supreme Court of Queensland at Brisbane under action no. 759/1997 which was filed on the 4 September 1997 and subsequently dismissed on the 8

October 1997 with an order that Lemadex pay the costs of the applicant under the winding up application.

The amount of the debt was certified to be $263,836.40 being $120,707.25 owing as at 12 October 1993 together with interest payable at 10.5 per cent per annum until 9 August 2001. The interest rate adopted was that allowed under the Supreme Court Act and its predecessor in the Common Law Practice Act.

[48] On 20 February 2002 judgment was given for Julong. His Honour ordered that Julong be entitled to possession of the Fenns' home and payment of $120,707.25 plus simple interest thereon from 12 October 1993 to the date of judgment. The learned trial judge found:

"(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 debts indebtedness: *Dobbs v National Bank of Australia Ltd* (1935) 53 CLR 643;

(b) (i) At law mortgage carries with it a right to interest even if there is no express covenant providing therefore: *Halsbury'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 [Land Title] 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."

[49] On hearing of the appeal, two grounds were pressed on behalf of Mr and Mrs Fenn:

(1) that the learned trial judge wrongly relied on the certificate of the respondent under clause 16 of the mortgage as conclusive evidence of the principal debtor's indebtedness contrary to s 57 of the *Property Law Act* 1974; and

(2) that the learned trial judge erred in finding that there was no obligation on Keradale to account to the appellant and therefore in not finding:

(a) that in the circumstances that in failing or refusing to provide an account that Mr and Mrs Fenn and/or Lemadex were entitled to terminate and did terminate any contractual obligation they had with Keradale; and

(b) in consequence that there was no indebtedness between Mr and Mrs Fenn and Keradale and therefore no indebtedness under the mortgage to Julong.

Certificate as to indebtedness

[50] The learned trial judge drew the conclusion that a certificate issued under clause 16 of the mortgage was conclusive of the amount of the indebtedness. His Honour did not refer to s 57 (1) of the *Property Law Act* 1974 which provides that:

> "a provision in a contract or instrument to the effect that a certificate … of any person shall be received as conclusive evidence of any fact in the certificate … shall be construed to mean only that such certificate … shall be or be received as prima facie evidence of that fact."

However, clause 16 of the Keradale mortgage does not provide that the certificate is conclusive. It merely provides that the certificate is prima facie evidence of default and the amount of indebtedness. Section 57(1) of the *Property Law Act* is not therefore needed to read it down. Although the certificate is only prima facie evidence of the debt or the amount of the debt, once this evidence of indebtedness is produced then the onus of proving repayment of the debt shifts. As the High Court held in *Young v Queensland Trustees*[6]*:*

> "… the law has always been that it lies upon a defendant to make out a defence of payment by way of discharge."

[51] This principle was recently applied by the Court of Appeal in *Noble v State of Victoria*[7] when the court refused to strike out a claim by plaintiffs who claimed to

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6 (1956) 99 CLR 560 at 562. See also *Commonwealth Bank of Australia v Muirhead* [1997] 1 Qd R 567 at 577.

7 [2000] 2 Qd R 154.

be descendents of two men, Mr Noble and Mr Owens, who were "black trackers" in the Queensland Native Mounted Police and volunteered to take part in an operation to apprehend members of the Kelly gang at Glenrowan in 1879. It was alleged that they were each allocated a nominated £50 share of the reward money but such monies were never paid to them. As McPherson JA held[8]:

> "Once this stage is reached, the two men had, on the face of it, a good claim in law to the amounts in question. In legal parlance, their claim would be characterised as arising in debt on an executed consideration, as to which the legal position is clear. It is, as the High Court said in *Young v Queensland Trustees Ltd*[9] :
>
> > "… speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration."
>
> The practical result is that, once an indebtedness if proved to have arisen, the onus shifts to the debtor to establish a valid discharge on other grounds sufficient in law to amount to an effective release of the debt. Subject to what follows, it would be for the first defendant Victoria to prove it discharged its indebtedness by paying the reward sums of £50 either to the government of Queensland as recommended or to the claimants themselves, and not for the plaintiffs to establish that Mr Nobel and Mr Owens were never paid."

[52] This is significant in this case as neither party can prove the precise amount of the debt outstanding which is secured by the mortgage. The mortgage secures an amount of $335,000. There is no doubt that Julong paid out $130,000 to discharge the Fenn's indebtedness under the Park Avenue Nominees mortgage. Mr and Mrs Fenn have been unable to demonstrate repayment of any or all of the amount of $120,707.25 claimed under the certificate. As the *prima facie* proof of debt and the amount of indebtedness has not been answered, it must stand as proof on the balance of probabilities of the amount of the debt. This ground of appeal must fail.

Failure to account

[53] The appellants submit that there was a contractual obligation, express or implied, that Keradale provide an accounting to Mr and Mrs Fenn of amounts received by it. While conceding a failure to account would usually give rise only to an equitable remedy, the appellants submit that the legal liability to repay any advances by Keradale must be regarded as mutual with the obligation to account so that a serious breach of the obligation to account gives rise to a right in the appellants to determine the contract.

[54] There is no such express term and so it would be necessary for the court to find that it was an implied term before considering whether the appellants have shown that it was breached and a breach of such a term is so fundamental as to give rise to a right to terminate the contract. A term will be implied in a detailed commercial contract which appears to contain all the agreed conditions only in certain limited circumstances. These circumstances were set out in the advice of the Judicial Committee of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings*

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8 At 158.

9 (1956) 99 CLR 560 at 570.

Shire Council[10] which was adopted by the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*:[11]

> "… for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[55] It is certainly reasonable and equitable for such a term to be implied. Lord Langdale MR observed in *Clarke v Tipping*:[12]

> "Among the most important duties of a factor, are those which require him to give to his principal the free and unbiased use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other persons."

Such a term is, in my view, necessary to give business efficacy to a factoring agreement, and it is obvious and capable of clear expression. It would appear that a term requiring Keradale to account should be regarded as an implied term in any factoring agreement unless there is a specific term to the contrary.

[56] However, if such a term be implied, what is the effect of a breach, if any, of such a term on the contract? Mr Fenn gave evidence, consistent with Mr Clarke's evidence, that he received a weekly report so it is doubtful that it was breached before Keradale went into provisional liquidation. The effect of a failure to keep and render just and true accounts would be, as is demonstrated in *Clarke v Tipping*, to give rise to a right in Mr and Mrs Fenn to call for an account against Keradale. This right has arguably survived the transfer of the debt and the mortgage security. It does not however mean, as was argued by the appellants, that they had the right to determine the contract and avoid any debt due under it. If the right to terminate did arise, then Mr and Mrs Fenn would still be liable for any debt which had arisen prior to the termination of the contract. The contract in such a case as this is not rescinded as from the beginning. Dixon J held in *McDonald v Dennys Lascelles Ltd*:[13]

> "Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired."

The appellants are liable to pay any debt which they accrued and which they cannot show they have repaid.

[57] As the appellants themselves submitted in this Court, there was no suit to rescind the mortgage. The issue was what moneys were secured by the mortgage. *Prima facie* evidence of that was found in the certificate issued under clause 16 of the mortgage. The appellants were unable to discharge the onus which lay on them of

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10 (1977) 180 CLR 266 at 283.
11 (1979) 144 CLR 596 at 605-606.
12 (1846) 9 Beav 284 at 292; 50 ER 352 at 356.
13 (1933) 48 CLR 457 at 476-477.

showing that any or all of $120,707.25 undoubtedly advanced to them had been repaid. It follows that judgment was properly entered for the respondent.

Orders:

1. Appeal dismissed.

2. The appellants pay the respondent's costs of the appeal to be assessed.