# SUPREME COURT OF QUEENSLAND

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| CITATION: | *MSW Property P/L v Law Mortgages Queensland P/L* [2003] QCA 487 |
| PARTIES: | **MSW PROPERTY PTY LTD** ACN 063 814 479<br>(plaintiff/respondent)<br>**v**<br>**LAW MORTGAGES QUEENSLAND PTY LTD** ACN 010 858 107<br>(defendant/appellant) |
| FILE NO/S: | Appeal No 7541 of 2002<br>SC No 891 of 2001 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 7 November 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 June 2003 |
| JUDGES: | McPherson and Jerrard JJA and Fryberg J<br>Separate reasons for judgment of each member of the Court |
| ORDERS: | **1. Allow the appeal by the defendant Law Mortgages Queensland Pty Ltd with costs, and set aside the declaration contained in paragraph 1 of the judgment given in these proceedings on 13 August 2002; in lieu:**<br>**2. Declare that on their true construction registered mortgage no 702565285 and a deed of guarantee and indemnity dated 19 February 1998 secure the money lent by the appellant Law Mortgages (Queensland) Pty Ltd to the respondent Wickham Developments Pty Ltd pursuant to a loan agreement dated 17 December 1997;**<br>**3. Set aside the order that the defendant pay the costs of MSW Property Pty Ltd of the proceedings in S892 of 2001; and**<br>**4. Order that the parties have 28 days within which to furnish written submissions on the costs of those proceedings**. |
| CATCHWORDS: | CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – INTERPRETATION OF CONTRACTS – OTHER MATTERS – ambiguity – whether term is capable of receiving |

a narrow meaning – whether 'commercial purpose' test applied – whether rectification can occur where no clear indication of changes to be made

*Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608, applied
*Fountain v Bank of America National Trust Savings Association* (1992) 5 BPR 11,817, Considered
*Pukallus v Cameron* (1982) 180 CLR 447, followed
*Richards v Commercial Bank of Australia* (1971) 18 FLR 95, distinguished

COUNSEL: S L Doyle SC, with M R Bland, for the appellant
P A Keene QC, with B J Clarke, for the respondent

SOLICITORS: Quinn & Box for the appellant
Plastiras Meredith Mohr for the respondent

[1] **McPHERSON JA:** The appellant Law Mortgages Queensland Pty Ltd made two loans to Wickham Developments Limited. One was of an amount of some $700,000 made under a loan agreement dated 17 December 1997 secured by registered mortgage 702464260 from Wickham Developments over land which it was acquiring at Brookfield Road, Kenmore. The other, in which the Loan Amount was $6 million, was made under a Loan Agreement of 3 March 1998. It was secured by registered mortgage 702565285 given by the respondent MSW Property Pty Ltd over land which it owned at Windermere Terrace, Jindalee, as well as by other securities including a guarantee and indemnity and a company charge from MSW Property over its assets. MSW Property is the trustee of a unit trust which on 30 November 1997 had entered into a written agreement in the nature of a joint venture with Wickham Developments in terms of which the latter was to act as manager of a project for developing the Windermere Terrace land at Jindalee by building townhouses on it. In the reasons for judgment appealed from it is called the Windermere Terrace land, but I propose to refer to it here as the Jindalee land and the related loan as the Jindalee loan.

[2] The first question in these proceedings is whether the securities, and in particular the mortgage, given by MSW Property over or in connection with the Jindalee loan and land are available to satisfy the indebtedness of Wickham Developments in respect of the Kenmore loan and the Kenmore land. The learned primary judge answered this question in the negative, and it is against her Honour's decision that Law Mortgages now appeals.

[3] The resolution of the question turns primarily on the proper interpretation of the deeds and other documents executed by the parties. The schedule to the Jindalee Loan Agreement of 3 March 1998 contains a number of "items" that identify various matters described in the definitions in cl 1.1 of the Agreement. The Borrower is Wickham Developments and the Lender is Law Mortgages. The **Loan Amount** is $6 million plus any further advances (Item 6). By cl 3.1 the Borrower undertakes to pay the total amount outstanding of the **Money Secured** on the date stipulated in Item 5, which is 18 months from the first advance. By cl 4.2 the Borrower acknowledges that the **Security** is charged with the **Money Secured**. **Security** is defined in cl 1.1 as meaning each document "which secures the payment of the **Money Secured** or the performance of the obligations of Security Provider

…". The security is identified in Item 9 of the Schedule as: (a) the Deed of Guarantee; (b) the mortgage executed by MSW Property over the Jindalee land; (c) the deed of company charge from Wickham Developments; and (d) the deed of company charge from MSW Property. **Security Provider** means each provider of the Security, including the Borrower (Wickham Developments), the Mortgagor (which is MSW Property) and the Guarantor (which under Item 11 includes MSW Property).

[4] As has been mentioned, one of the securities executed by MSW Properties was a guarantee contained in a Deed of Guarantee & Indemnity dated 19 February 1998 in favour of Law Mortgages. It incorporates definitions which for the most part are the same as those in the Loan Agreement, but with some incidental adjustments. Clause 1.1 identifies **Loan Amount** in Item 4, which is $6 million; and it also identifies **Secured Agreement** as meaning the document in item 5 of the schedule, which is the Loan Agreement between the borrower Wickham Developments and the lender Law Mortgages. **Security** is again defined to mean each document "which secures the payment of the money secured or the performance of obligations of the **Security Provider"** (which includes the borrower (Wickham Developments) and the guarantor (MSW Property) including the documents described in item 6. Item 6 identifies the **Security** as including: (a) the mortgage registered no 702565285 (as it came to be) from MSW Property over the Windermere Terrace land; (b) the charge executed by Wickham Developments; and (c) the charge by MSW Property over its assets. By cl 2.3 the Guarantor guarantees performance by the Borrower of all the terms of the security including payment of the **Money Secured**. Clause 20.1 requires that the guarantor MSW Property pay the lender Law Mortgages the **Money Secured** immediately on demand.

[5] In each of the Loan Agreement and the Deed of Guarantee the definition of **Security** means each document entered into from time to time which secures payment of the **Money Secured**. It is the latter expression that is critical to the determination of the question in this case. **Money Secured** is defined in cl 1.1 of the Loan Agreement and in cl 1.1 of the Deed of Guarantee as including: (a) the **Loan Amount** (which is the Loan Amount of $6 million advanced or to be advanced to Wickham Developments), as well as the items included in para (c) of that definition. So far as material for present purposes, para (c) of the definition of **Money Secured** is in the following terms:

> "(c) all money now or hereafter owing or payable to the Lender [Law Mortgages] by the Borrower [Wickham Developments] and/or the Security Provider [MSW Property] either alone or jointly with any other person now or in the future, whether directly or indirectly or contingently under any Security or on any other account whatsoever, and including all such money arising from:
>
> (i) any guarantee …
>
> …
>
> (v) all advances … whether made, created or given on or before the signing hereof or that may hereafter be made created or given by the Lender .. to for or on account of or at the request of the Borrower and/or the Security Provider;"

[6] The question for determination is whether these or other provisions of the security documents extend the **Money Secured** to include the money lent (some

$700,000) by Law Mortgages to Wickham Developments under the loan agreement dated 17 December 1997 relating to the Kenmore land. It is not easy to see why para (c) should not include that amount. At the date when MSW Property executed the Deed of Guarantee, it was "money now or hereafter owing or payable" to the lender Law Mortgages by the borrower Wickham Developments. It is true that the Kenmore loan came into existence before the Jindalee loan was made and before the relevant security documents were executed by MSW Property. But that makes no difference. Under para (c), it is enough that the Kenmore loan was money owing or payable by Wickham Developments as borrower "and/or" the Security Provider MSW Property whether directly or indirectly under any Security "or on any account whatsoever". Speaking of those words in *Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608, 613, Barwick CJ, Mason and Jacobs JJ said:

> "If it be owing upon another account, because it is owing by the mortgagor in its capacity as guarantor, it is none the less owing upon an account which falls within the words 'upon any account whatsoever'."

[7] The word **Security** is defined in the Deed of Guarantee to include "this Deed". If the money was, or was to be, owing or payable by MSW Property as guarantor under the Deed of Guarantee it would, of course, be owing or payable "under any Security" as defined, which would make it unnecessary to resort to the expression "any other account" in para (c). It was argued that, because it refers to documents entered into "from time to time", the definition of **Security** looked forward to documents to be executed in the future, and so excludes the earlier Kenmore loan or transaction. But the more narrowly **Security** is defined, the wider the ambit or content of "any other account" in para (c) becomes. It picks up anything that the definition of **Security** leaves behind.

[8] On appeal, something was sought to be made by MSW Property of the use of "and/or" in the phrase "Borrower and/or Security Provider" in para (c)(vi), and in para (c) itself. It was submitted that it meant *either* "borrower *and* security provider" *or* "security provider" alone. *Fowler's Modern English Usage* (3rd ed) remarks that "and/or" is a usage that "verges on the inelegant", for which the editor blames the legal profession, adding that the more comfortable way of expressing the same idea is to use "x *or* y *or both*"; or, in many contexts, just "*or*". Even if it were to be read here as meaning "borrower *and* security provider", or alternatively security provider alone, para (c) would still be apt to cover the liability of MSW Property as guarantor of the Kenmore loan for money payable by it on any other account whatsoever. This conclusion is not displaced or affected by para (c)(v), which is said to involve an element of prospectivity or futurity such that the Windermere Terrace loan would not be capable of including the Kenmore loan which preceded it. Even if para (c)(v) were to be interpreted in that way, it cannot be used to limit the plain words in the first part of para (c), to which it and the other subparagraphs of (c) are simply an extension or addition by inclusion, and not an exception to or qualification on the major premise of that part of the definition of **Money Secured**. It is different from the question considered in *Richards v Commercial Bank of Australia* (1971) 18 FLR 95.

[9] The real problem confronting MSW Property is that, although the Loan Agreement dated 17 December 1997 between Law Mortgages and Wickham Developments is primarily concerned with the Jindalee loan of $6 million, the

definition of **Money Secured** in cl 1, of the Deed of Guarantee expressly extends the liability of MSW Property to money payable to Law Mortgages not only on account of that security or loan but "on any other account whatsoever". In the face of this quite specific extension, it is not easy to discover in the other security documents any overriding term or provision that would operate to limit that liability to the Jindalee loan and exclude the Kenmore loan.

[10] The registered mortgage 702565285 from MSW Property does not do so. In item 5 of that instrument the debt or liability secured is described as the Money Secured "lent or advanced to or to be lent or advanced to" the mortgagor MSW Property or the borrower Wickham Developments. The juxtaposition and opposition of "lent or to be lent" make it clear that it extends to past as well as future loans. The contrary is, to my mind, not arguable. In item 6 the mortgagor charges the Jindalee land with repayment or payment of all sums of money referred to in item 5; and by cl 1 of the mortgage, MSW Property acknowledges:

> "(g) that this mortgage is collateral to and secures the same moneys and obligations as secured by the abovementioned Loan Agreement and Deed of Guarantee and Indemnity".

Granted that the "same moneys" are the Loan Amount of $6 million lent and secured by the Jindalee Loan Agreement, the problem for MSW Property remains that cl 1(g) does not in terms provide that those are the *only* moneys or obligations so secured. What is more important, cl 1(g) of the registered mortgage expressly declares that they are the same moneys and obligations as are secured by the Deed of Guarantee, which includes the extended definition in para (c). As we have seen, the definition of **Moneys Secured** in cl 1.1 of that Deed expressly incorporates in para (c) all money owing or payable to Law Mortgages by MSW Property "on any other account whatsoever". As a result, the security conferred by the registered mortgage extends to the obligation of MSW Property under the Deed of Guarantee to pay or discharge the liability of Wickham Developments to Law Mortgages arising out of the Kenmore loan.

[11] Then it is said that cl 4.4 of the Loan Agreement shows that the Money Secured is limited to the Jindalee loan and that it does not extend to the Kenmore loan. Clause 4.4(1) provides in effect that if the ratio between Money Secured and value of the Security exceeds a specified Facility to Security Ratio (the LVR), then Law Mortgages as lender may by notice in writing require MSW Property: (a) to reduce the Money Secured by paying an amount to make it accord with that Ratio; or else (b) to provide further security for the loan. The submission is that, for the purpose of applying these and other provisions of cl 4.4, it cannot have been intended that the amount of the Kenmore loan should be included; for, if that were to be done, Wickham Development and MSW Property would have been in default from the moment the Jindalee loan was made.

[12] Law Mortgages' response to this submission is that if the amount of the Kenmore loan were to be included for the purposes of ascertaining the ratio under cl 4.4, it would be necessary in accordance with that provision also to have regard to the value of the Kenmore land as security. If both debts are to be aggregated, then so are the values of both securities. There is in fact no evidence that, if this had been done, there would have been any default under cl 4.4. Alternatively, cl 4.4 might be a specific instance in which it was intended that the two loans be treated separately. Doing so would not for other purposes detract from the express extension of **Money**

**Secured** to include money payable "on any other account whatever", so as to incorporate MSW Property's liability under its Deed of Guarantee of the Kenmore loan as part of that money.

[13] Clause 4.4 admittedly presents a difficulty for Law Mortgages' argument that MSW Property's liability for the two loans were to be blended or, so it was said, "collateralised". However, the definitions to which reference has been made are all introduced by the words "unless the context otherwise requires", and cl 4.4 may well be an occasion for the application or operation of that provision. That interpretative aid would, of course, equally be available to support MSW Property's submission that the terms of the definition of **Money Secured** should be interpreted as excluding liability for the Kenmore loan. The difficulty there is that the provisions of para (c) including money payable on "any other account" are express, and it is scarcely possible to give them, or the other extensions in para (c), any effect that is more limited than their express meaning. The expression "unless the context requires" does not readily authorise outright rejection, as distinct from interpretation, of specific words or phrases. The words "on any other account whatsoever" do not lend themselves to being read as if they embodied the qualification or exception "except the Kenmore loan to Wickham Developments" or "except any other liability".

[14] This really is the crux of the problem in the present case. In holding that the security provided by MSW Property for the Jindalee loan could not be regarded as being available to satisfy the Kenmore loan, the learned primary judge applied a statement by Gleeson CJ (with whom Kirby P agreed) in *Fountain v Bank of America National Trust Savings Association* (1992) 5 BPR 11,817, at 11,819-11,820, in which his Honour accepted that the expression of a party's liabilities in wide terms:

> "must be confined in their operation by reference to the context in which they appear and by reference to the commercial purpose which they were intended to serve."

But, as Mr Doyle QC pointed out, his Honour then went on to say:

> "The critical question, it seems to me, is whether on the true construction of the document and in the events that have occurred the transaction of 1981 were within the purview of cll 3 and 4 of the 1976 agreement."

Meagher JA in a vigorous dissent held that the provisions of cll 3 and 4 of the agreement were dominated by the terms of cl 1, so as to limit it to a narrower field than might otherwise have been suggested by cll 3 and 4. The case was therefore one in which the majority of the court gave the relevant provisions their literal effect and not a more limited meaning derived from the supposed "commercial purpose" of the agreement. If the decision on the particular provisions in that case is of any assistance here, it tends to support the contentions of Law Mortgages rather than those of MSW Property.

[15] In any event, in judging the commercial purpose of the transaction it is not legitimate to look simply at the fact that the subject land and securities were provided in order to enable the Jindalee project to be carried out. That was no doubt MSW Property's purpose; but, as Mr Doyle QC submitted, viewed objectively the security documents themselves show that it was a purpose of Law Mortgages to

obtain security over the Jindalee land for other liabilities including the Kenmore loan. The definition of **Money Secured** makes it clear that it was not the Loan Amount of $6 million alone that was being secured. There is nothing to suggest that MSW Property was ignorant of that provision; or that, knowing that to be so, Law Mortgages took advantage of that ignorance. If that had been the case it would or might have given rise to the particular form of equitable estoppel or fraud illustrated by decisions like *Roberts v Leicestershire County Council* [1961] Ch 555 and *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225. Nothing of that kind was proved or even alleged in these proceedings. Paragraph 27 of the statement of claim does not go so far as to assert knowledge on the part of Law Mortgages of MSW Property's ignorance of that definition.

[16] Approached purely as a matter of interpretation there seems to be nothing sufficient to detract from or qualify the extended meaning given by the express wording of para (c) of the definition of **Money Secured** in the Loan Agreement and Deed of Guarantee; that is, as including all money owing or payable to the lender Law Mortgages by the borrower Wickham Developments or the Security Provider MSW Property on any other account. As such, it includes the Kenmore loan as well as the Jindalee loan both of which are secured by registered mortgage no 702565285 over the Jindalee land.

[17] A further or alternative claim made by MSW Property is that it is entitled to rectification of the mortgage so as to exclude from the money it secures all money other than that lent under the Jindalee Loan Agreement (statement of claim, para 28). Because of her Honour's view of the interpretation point, it was unnecessary for her to determine the issue of rectification at the trial and there is therefore no finding about it. The matter is, however, raised by MSW Property's notice of contention in this Court and it received some attention in the written outlines and oral submissions on appeal.

[18] The rectification claim is advanced on the footing that it was the common intention or assumption of the parties at the time of entering into the mortgage that it would secure only money advanced to Wickham Developments for the development project on the Jindalee land and not the Kenmore land. There are various obstacles to the success of the claim, of which the first is that at the trial it sought only rectification of the mortgage and not of the Loan Agreement or the Deed of Guarantee. Yet, as a memorandum dated 8 December 1997 from Watkins Stokes Templeman, solicitors, to their client Law Mortgages correctly pointed out, "MSW Property Ltd must be a guarantor of the facility to provide a link between the third party mortgage and the loan documentation". It does not seem possible to incorporate into the mortgage the limitation contended for without also rectifying the definition of **Money Secured** in both Deed of Guarantee and the Loan Agreement. Doing so would produce a conflict between the terms of that definition in each of those instruments and the terms of the mortgage as rectified. The Deed of Guarantee would say one thing and the mortgage another, which is scarcely demonstrative of a common intention on the part of all the parties. This may be why MSW Property's notice of contention on the appeal now for the first time claims rectification of the mortgage "and associated securities' including the Deed of Guarantee and the Loan Agreement.

[19] The negotiations leading up to the loan and the provisions of the guarantee and mortgage were tripartite, and involved correspondence between all three parties or

their solicitors, who in addition to Watkins Stokes, were Halletts for Wickham Developments, and GPS Spencer Woodward for MSW Property. Wickham Developments is not a party to the present proceedings, presumably on the basis (which appears not to be well founded) that it has no tangible interest in opposing rectification of the mortgage or, for that matter, the Deed of Guarantee in the way contended for. At the hearing no one was called to give oral evidence in support of the rectification claim. It was simply left to the court to draw inferences from the correspondence to the effect alleged that all three parties possessed the common intention that the various instruments or securities should be restricted to the Jindalee loan.

[20] When one turns to the correspondence itself, it seems to me to fall well short of achieving that outcome. In MSW Property's written outlines (para 24) there is a collocation of the letters or documents passing between the parties' solicitors that are said to demonstrate the requisite common intention. Having read them with some care, I am left with the firm impression that, although the Jindalee land was certainly intended to secure the Jindalee indebtedness, there is nothing to show that it was intended not to secure other liabilities such as the Kenmore loan. There are at most what Mr Keane QC for MSW Property on appeal described in argument as some "straws in the wind". There is a fax dated 18 December 1997 from Halletts seeking confirmation that their client Wickham Developments would not be required by cl 4.1(c) of the Loan Agreement "to provide additional security outside of the current security property". It related to the Kenmore loan. There is a similar letter from Halletts dated 23 February 1998 concerning the Jindalee loan. It seeks confirmation that cl 4 of the Loan Agreement and cl 3.2 of the mortgage (or any other provision in the security documentation) "cannot be relied upon so as to, in any circumstances, force our client to provide additional security in respect of any assets or property which are unrelated to the Secured Property". This, it was said, showed that the two transactions Kenmore and Jindalee were being kept distinct so far as concerned the provision of security. But it is a pretty oblique way of saying, if at all, that the Jindalee land was not to stand as security for the Kenmore loan; and it emanates not from MSW Property but from Halletts as solicitors for Wickham Developments (who refer to "our client"), which was not made a party to the primary proceedings or to the appeal. It was not "our client" Wickham Developments but MSW Property that would be providing "additional security" (if any) "in respect of any assets or property" (whatever that may mean) unrelated to the Jindalee land; and it was not being "forced" to do so. The definition of **Money Secured** specified what indebtedness was being secured, and there was no evidence from MSW Property or its solicitors that they were mistaken about the existence or the extent of that definition. For all we know from the evidence, they may have been aware of the definition and were content to see it included in the documents.

[21] The principle governing rectification of a contract requires, as Wilson J (with the assent of Gibbs CJ) said in *Pukallus v Cameron* (1982) 180 CLR 447, 452, proof that the written contract does not embody the final intention of the parties, and that the omitted ingredient be capable of such proof "in clear and precise terms". It must, as Brennan J added (180 CLR 447, 455) be reflected in precise form in the order for rectification that is made. See *Bradford v Romney* (1862) 30 Beav 431, 439; 54 ER 936, 959. Indeed the practice at one time was to indorse the terms of the order for rectification on the instrument itself: see *White v White* (1872) 15 Eq 247. There is good reason for observing that precaution at least in the case of the registered mortgage here, even if not also on the other instruments. There is nothing

in the pleadings here to show what parts of the definition of **Money Secured** ought, if rectification were allowed to take place, to be excised and what should remain. This is not a matter of form only, but tends to confirm the absence of any convincing proof in clear and precise terms capable of demonstrating that each of the Loan Agreement, the Deed of Guarantee and the instrument of mortgage did in fact depart from the common intention of the parties. In my opinion the claim for rectification must fail.

[22] This leaves for consideration a further complaint on the appeal by Law Mortgages, which is against her Honour's decision that the notice it gave to Wickham Developments on 31 August 1999 was inadequate and ineffective. The notice purported to be given under cl 4.4(a) of the Loan Agreement, which authorises the Lender to determine that the ratio between Money Secured and the value of the Security (the "LVR") exceeded the level specified in the Agreement, and to require the Borrower within seven days of service of the notice to reduce the Money Secured or to provide further security. Under cl 4.4(1) failure to comply with the notice constitutes an Event of Default entitling the Lender at its discretion to exercise its powers, rights and remedies under the Agreement. It is argued that her Honour should have found that such an Event was established.

[23] There are various defects in the notice given on 31 August 1999. In the first place, it does not require action to be taken within seven days of service of the notice or within any other stipulated time, but merely that the LVR be "brought back into line *without delay*". I agree with her Honour in regarding this as a fatal flow. Secondly, it is expressed as something "we *will* require" in the future and not as something being required now or within seven days. Thirdly, it is precatory in form; instead of insisting that action be taken, it asks only that Wickham Developments "please advise how and when" additional funds will be provided. It is no objection to a demand that is expressed in a polite but firm way; but, taken individually or in combination, these deficiencies are sufficient to deprive the communication sent on 31 August 1999 of the character of a notice complying with the requirements of cl 4.4. Having regard to the potentially serious consequences that may flow from an Event of Default under the Agreement, it is necessary that a notice under that provision will conform with the specifications of cl 4.4 strictly, rather than leaving the recipient in some doubt about what exactly is intended or required of it. In view of this conclusion, it is not necessary to consider the further claim of Wickham Developments that Law Mortgages is estopped by its conduct from relying on the purported notice of default dated 31 August 1999.

[24] In the result I would: (1) allow the appeal by the defendant Law Mortgages Queensland Pty Ltd with costs, and set aside the declaration contained in para 1 of the judgment given in these proceedings on 13 August 2002; in lieu, I would (2) declare that on their true construction registered mortgage no 702565285 and a deed of guarantee and indemnity dated 19 February 1998 secure the money lent by the appellant Law Mortgages (Queensland) Pty Ltd to the respondent Wickham Developments Pty Ltd pursuant to a loan agreement dated 17 December 1997; (3) set aside the order that the defendant pay the costs of MSW Property Pty Ltd of the proceedings in S892 of 2001; and (4) order that the parties have 28 days within which to furnish written submissions on the costs of those proceedings.

[25] **JERRARD JA:** In this appeal I have had the considerable advantage of having read the reasons for judgment of McPherson JA and His Honour's proposed orders.

While I respectfully disagree in part with those for the reasons given below, I gratefully adopt his careful description of the matters of fact described. In summary those are that the respondent MSW Property bought land at Jindalee ("the Windermere Terrace land") on which townhouses were constructed by a property developer, Wickham Developments Limited. Wickham Developments had agreed to do that by a development agreement with MSW Property. Wickham Developments had also, quite independently, earlier acquired land in Brookfield Road, Kenmore. In order to carry out the development of the Windermere Terrace Land, Wickham Developments obtained finance from Law Mortgages Queensland Pty Ltd ("Law Mortgages") pursuant to the Windermere Terrace loan agreement ("the loan agreement") with Law Mortgages.

[26] To secure repayment of the monies borrowed by Wickham Developments from Law Mortgages, MSW Property gave Law Mortgages a mortgage over the Windermere Terrace land ("the mortgage"). Those monies were also secured by a mortgage debenture which Law Mortgages took over the assets of MSW Property, and a Deed of Guarantee and Indemnity ("the guarantee") given to Law Mortgages by each of R.B.L. Wickham and MSW Property.

[27] In order to provide funds for developing its own land at Kenmore, Wickham Developments entered into a separate loan agreement with Law Mortgages ("the Kenmore loan agreement"), and repayment of those monies ("the Kenmore debts") were secured at least in part by a mortgage over the Kenmore land given by Wickham Developments to Law Mortgages. While two of the three intended stages of development of the Windermere Terrace land for MSW Property were completed by Wickham Developments, the development proposed by Wickham Developments of its own Kenmore land project did not proceed, although some $700,000.00 was advanced by Law Mortgages towards acquisition costs.

[28] In the events as they unfolded the critical issue ultimately emerging for decision by the learned trial judge and now this court is whether or not the monies owing (and unpaid) by Wickham Developments under the Kenmore loan agreement are secured by the mortgage, a result which the appellant submits follows from the terms of the mortgage, the guarantee, and the loan agreement. In essence the appellant's argument is that it can "cross collateralise" its securities, because the expression "Money Secured" in all three documents includes all the debts of Wickham Developments to Law Mortgages, and not just those of Wickham Development to Law Mortgages for the Windermere Terrace land development.

[29] In this appeal Law Mortgages asks the court to reverse the decision of the trial judge that the liability of MSW under the guarantee given by it and RBL Wickham to Law Mortgages does not extend to satisfaction of the obligations of Wickham Development to Law Mortgages under the Kenmore loan agreement. Likewise, the appellant wants to overturn the finding that the potentially wide liability of MSW, pursuant to the mortgage, was restricted by Clauses 1(f) and (g) in it to the monies and obligations secured by the loan agreement and the guarantee. The learned judge found that neither of those secured the Kenmore debt. The appellant argues that the mortgage did secure monies owing by Wickham Developments Ltd to Law Mortgages in respect of the former's separate borrowings of $700,000.00.

[30] Each of the three documents the loan agreement dated 3 March 1998, the guarantee dated in the schedule as 19 February 1998, and the mortgage dated 24 February

1998, refers to the other two documents. The mortgage in Clause 1(f) refers to the "Loan Agreement made on or about the date of this mortgage" and to "the Deed of Guarantee and Indemnity made on or about the date of the mortgage". The guarantee refers in item 6 to the "Mortgage intended to be executed and dated on the same date as this Deed", and in item 5 to the "Loan Agreement…intended to be executed and dated on the same date as this Deed". The loan agreement refers in its item 9 to the "Deed of Guarantee and Indemnity intended to be executed on the same date as this Agreement" and in similar terms to the Mortgage. Contemporaneous execution was certainly allowed for if not expected; and the documents must be read together.

**The Loan Agreement**

[31] It seems reasonable to regard the loan agreement as a primary transaction. It is between Wickham Developments as borrower and Law Mortgages as lender. The borrower is defined in it to be a "Security Provider", as are both R.B.L. Wickham and MSW Property, by reason of each of the latter being a Guarantor (Item 11), and MSW being a "Mortgagor", as defined in the loan agreement at AR 349.

[32] By Clause 3.1 the borrower is obliged to pay the lender the total amount outstanding of the Money Secured, on the date stipulated in item 5 or other agreed day. The schedule in item 5 provides that the date of the payment of the Money Secured is 18 months from the date on which the Loan Amount or part thereof is first advanced under the agreement. That loan amount is defined in the Interpretation Section by reference to Item 4 and described in item 4 as $6,000,000.00. Returning to clause 3, 3.2 obliges the borrower to pay interest on the Money Secured, to be computed from the day on which Law Mortgages made the first advance, and Clause 3.2(b) provides that it is to be calculated and charged on the daily outstanding balances on Wickham Development's account, with the first payment payable on the date set out in item 8 on account of the money secured, and subsequent payments on the days referred to in Item 8. Item 8 provides that Wickham Developments will without notice from MSW pay to it interest on the Loan Amount calculated in accord with the Clause 3, payable by calendar monthly instalments at the interest rate specified in items 6 or item 7 (10%). Clause 3.2(c) provides for the higher rate in the event of default, and 3.3 for the lower in the event of the compliance; the first payment is due one month after the loan amount or part thereof is advanced, and monthly thereafter.

[33] Senior counsel for Law Mortgages submitted that the obligation provided by item 8 to pay interest on the Loan Amount means that the expression Money Secured when used in 3.2(b) necessarily meant the Loan Amount; and the appellant did not challenge that submission. Instead, senior counsel for the appellant submitted in his reply (at transcript 61-62) that the expression "Money Secured" in the Loan Agreement had a different meaning from the same expression when used in the Mortgage; and his further submissions urged the same construction of the term in the guarantee as in the mortgage. I observe that the term appears to have the meaning "Loan Amount" throughout Clause 3 of the Loan Agreement, and this seems put beyond argument by Clause 3.5 of the Loan Agreement, which requires that Wickham Developments repay MSW the Money Secured and interest thereon by the number of instalments specified in item 8 and in such amount specified in item 8. Accordingly, I accept the submissions of senior counsel for the respondent and conclude that the obligation of repayment created by Clause 3 of the Loan

Agreement is to repay the Money Secured of $6,000,000.00, together with interest thereon.

[34] Clause 4.1 requires the provision for security as a condition of the loan, being (Clause 4.1(a)) the security specified in Item 9, and 4.2 provides an acknowledgement by Wickham Developments (not MSW Property) that the security is charged with payment of the Money Secured. Item 9 specifies the security on which the loan is conditioned to be the guarantee, the mortgage, and deeds of charge by Wickham Developments and MSW Property over their assets. Clause 4.1(b) makes a further condition that the Security be maintained as long as the Money Secured is outstanding. Clause 4.4 makes provision for what should occur if at any time the lender determines that the ratio between the Money Secured and the value of the security exceeds the Facility to Security Ratio. If that occurred the lender may require the borrower by notice in writing within seven days of service of that notice to reduce the money secured by paying such amount as will reduce that ratio.

[35] The Facility to Security Ratio is defined in the interpretation clause of the loan agreement to mean the maximum acceptable ratio, between the money secured and the value of the security, determined by the lender in its absolute discretion and expressed as a percentage as specified in Item 12. Item 12, the handwritten amendments to which reflect discussion and amendment, provides that the ratio is to be 67% from time to time, but at the time of the initial advance will be 50% of the current market value of the security, provided that it not increase to greater than 67% of the current value of the security as at the "Construction Completion Date". Item 13 provides a series of definitions identifying that Construction Completion Date as the date on which 54 town houses are constructed on the Windermere Terrace land.

[36] The Loan Agreement includes a more expansive definition of "Security" in the interpretation clause (1.1) than the security specified in Item 9 and upon which the loan is conditioned. That wider definition of security reads:

> "'Security' means each and every document, agreement or other security provided from time to time which secures the payment of the Money Secured for the performance of the obligations of the Security Provider in favour of the Lender, which may be executed or provided by the Security Provider or any other person (including this Agreement, those documents described in Item 9 and any additional security provided in accordance with Clause 4.1(c) hereof);"

There is accordingly an ambiguity in the meaning of "Security" in Facility to Security Ratio: it could be either that expanded meaning in 1.1 or the more limited and specific security listed in Item 9.

[37] I respectfully consider that the link provided by Item 12 between, on the one hand, the completion of development of the Windermere Terrace Land (possibly the most significant security specified in Item 9), and on the other, the facility to security ratio, makes it reasonable to construe "Security" in the Facility to Security Ratio as the Item 9 Security, on the provision of which the loan is expressly conditioned. I also consider that the term Security in Clause 4.1(b) refers to the Security described in 4.1(a); it seems logical to construe those two consecutive clauses as requiring

firstly that the specified security be provided, and then secondly that it be maintained.

[38] On that construction of Facility to Security Ratio which I prefer, other property of Wickham Developments is not available for calculation of that ratio. Therefore to make sense of the obligation on the borrower to maintain that ratio at those agreed levels, the Money Secured needs to be understood as the $6 million borrowed to develop those town houses, rather than as including whatever other debts Wickham Developments owed or might owe in future to Law Mortgages. If other debts to Wickham Developments were included, the results would be that Law Mortgages could be immediately entitled on execution of the Loan Agreement to demand the repayment after seven days of all or a portion of the moneys advanced in consequence of the agreement; and this would be completely inconsistent with the repayment provisions in Clause 3 and Item 8. Accordingly, I consider the proper construction of the two critical Clauses 3 and 4 of the Loan Agreement is that the expression Money Secured when used in those clauses is used in the same sense, and refers only to $6 million.

[39] The appellant did not submit otherwise in its argument on the hearing or in its written agreement. This is of interest as the expression as defined in the interpretation clause of the loan agreement is far wider. The interpretation clause commences with the words:

> "1.1 In this Agreement, unless the context otherwise requires: …
>
> …Money Secured includes:
>
> (a) the Loan Amount:
>
> (b) all moneys hereby deemed to be principal in arrears;
>
> (c) all money now or hereafter owing or payable to the Lender by the Borrower, and/or the Security Provider either alone or jointly with another person now or in the future, whether directly or indirectly or contingently under this Agreement or on any other account whatsoever, and including all such money arising from:
>
> (i) any guarantee, deed, indemnity, bond, account, document or other agreement in writing including the Security;
>
> (ii) interest payable on the Money Secured including interest which has been capitalised;
>
> (iii) interest on any judgment entered by the Lender against the Borrower, and/or the Security Provider in respect of the Money Secured;
>
> (iv) all costs, expenses or losses incurred or sustained by the Lender in relation to any failure by the Borrower or the Security Provider to comply with the terms of the Security;
>
> (v) all advanced, further advances, loans, credits or financial accommodations whether made created or given on or before the signing hereof or that maybe hereafter be made created or given by the Lender in its absolute discretion to or for on account of or at the request of the Borrower and so for the Security Provider;"

and there are further expanded expressions in that inclusive definition.

[40] Those inclusive definitions apply unless the context otherwise requires; and in my judgment the context of each of Clauses 3 and 4 do so otherwise require[1], such that money secured when referred to therein means the loan amount. If that be correct the provision of the security described in Item 9 of the loan agreement, the obligation to provide which security is a condition stipulated in Clause 4 of the loan agreement, and which security is (by Clause 4.1(b)) to be maintained for so long as the money secured is outstanding, was to be as agreed security for the repayment of the loan amount.

**The Deed of Guarantee and Indemnity**

[41] I have therefore concluded that the money secured which the borrower undertook to by clause 3 of the Loan Agreement to repay, and to secure the performance of which obligation the borrower undertook by clause 4 of the loan agreement to provide specified security charged with repayment of that Money Secured for so long as it was outstanding, was limited to the loan amount and did **not** include the wider meaning of "Money Secured" in Clause 1.1(c), (i.e.) "all money now or hereafter owing to the Lender by the Borrower". This conclusion is necessarily relevant to the construction of the term "Money Secured" in the relevant parts of the mortgage and the guarantee. Dealing with the guarantee, it contains in Clause 1.1 a definition of "Money Secured" near identical to that in the loan agreement[2]. Both definitions provide in 1.1(a) that Money Secured includes the loan amount, and relevantly each provides in 1.1(c) that it includes:

> "All money now or hereafter owing or payable to the Lender by the Borrower and/or the Security Provider either alone or jointly with another person now or in the future, whether directly or indirectly or contingently under any Security or on any other account whatsoever, …."

The other clauses in the extensive and inclusive definition in the guarantee are relevantly the same as in the loan agreement. The definition of Loan Amount in Clause 1.1 of the Guarantee provides that it has the "meaning ascribed to it in the Secured Agreement", and "Secured Agreement" is defined by Item 5 of the Schedule to the Guarantee[3]. The applicant's case necessarily is that the wider definition of "Money Secured" in the guarantee does apply, although inferentially conceding that those same terms when used in Clauses 3 and 4 of the loan agreement do not have that result.

[42] The guarantee, like the loan agreement, provides that those definitions in the interpretation section have those meanings unless the context indicates otherwise. The guarantee is expressed in terms capable of construction and understanding as a guarantee by R.B.L. Wickham and MSW Property (jointly and severally) of the obligations of Wickham Developments as borrower, to Law Mortgages as lender, of the $6 million loan amount lent pursuant to the loan agreement; but also capable of construction and understanding as a guarantee by them of the obligation of Wickham Developments to repay all its debts, whenever incurred, to Law Mortgages. That ambiguity entitles this court to look at the surrounding

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1 And the appellant's presentation of its case appears to have accepted that "Money Secured" in the loan agreement means the loan amount of $6,000.000.00.

2 The definition in the guarantee is at AR 328 and 239

3 At AR 338, as the Loan Agreement between the Borrower and the Lender intended to be executed and dated on the same date as this Deed. Obviously that is the loan agreement.

circumstances when these documents were executed, as well as the terms of all 3 documents. (*Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352, per Mason J).

[43] In Clause 2.2 it is provided that "the Guarantor requests the Lender to provide and/or continue to provide financial accommodation to the Borrower", and in 2.3 it is provided that that Guarantor unconditionally guarantees to the Lender the punctual performance and observance by the Borrower of all the covenants, terms, conditions, and other provisions of the Security, including without limitation the payment of the Moneys Secured by the Borrower at the time or times and in the manner provided for the Secured Agreement and/or the Security.

[44] By Clause 4, MSW Property as Guarantor agreed that:

> "This Deed is a continuing Guarantee and Indemnity notwithstanding any settlement of account, intervening payment or any matter, and will not be discharged so long as;
> (a) the Borrower is indebted or liable to pay moneys to the Lender; and
> (b) the Security continues;
> and will remain on foot until a form of discharge is delivered by the Lender to the Guarantor."

In Clause 20 the Guarantor agrees that it will upon demand immediately pay to the Lender the Money Secured, and in Clause 21 the parties agree that the Money Secured is Secured by the Security. The Security is defined by Clause 1.1 and Item 6 to be the mortgage, the guarantee, and the two deeds of charge earlier described.

[45] The Guarantee was stamped by the (then titled) Commissioner of Stamp Duties on 11 March 1998 as "Collateral to $.....6,000,000.00". That declaration made to the Commissioner is consistent with what I would in any event have held the proper construction of the guarantee, namely that the requirement evidenced by its terms that it be construed with the loan agreement, means that the expression "Money Secured" in the Guarantee is that $6 million, the agreed loan amount under the loan agreement. I consider that construction preferable to one which attributes to MSW Property an agreement to guarantee repayment of, and to itself accept liability to repay, all debts owing by Wickham Developments to Law Mortgages, when all that had been agreed in the loan agreement by Wickham Developments and Law Mortgages (on my construction) was that as a condition of lending the $6 million to Wickham Developments that would advance the interest of MSW Property, Law Mortgages would get a guarantee, mortgage, and deed of charge from MSW Property securing payment of that $6 million. Commercial documents should be construed so as to make commercial sense of them[4]. In *Hyde & Skin Trading v Oceanic Meat*[5] Kirby P (as he then was) wrote:

> "Whoever may be the parties to the agreement, it is the fundamental rule, that a court should give the words of a written agreement the natural meaning that they bear. Subject to that rule, in giving meaning to the words of an agreement between commercial parties,

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4 See *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Pty Ltd* (1990) 20 NSWLR 310 at 313-314; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771; *L Schuler AG v Wickham Machine Tool Sales Limited* [1974] AC 235 at 241.

5 Supra

> courts will endeavour to avoid a construction which makes commercial nonsense or is shown to be commercially inconvenient. This is because courts will infer that commercial parties would not themselves normally agree in such a way."

[46] That principle provides a useful guide when following the direction that the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in light of the surrounding circumstances. (*GR Securities v Baulkham Hills Private Hospital* (1986) 40 NSW LR 631 at 634). It would have commercial inanity for MSW Property to undertake all liabilities of Wickham Developments to Law Mortgages when that was more than Law Mortgages had required as a condition of advancing $6 million to Wickham Developments to complete MSW's Development; but an understandable commercial contract if its agreement in the guarantee was that it would guarantee the repayment of that $6 million, the lending of which would result in its development going ahead. That being the commercial construction, consistent with what was agreed in the loan agreement, and with the construction of the same term "Money Secured" in the loan agreement defined by the same words, and consistent with the amount stamped on the guarantee, that is the construction of it which I prefer.

**The Mortgage**

[47] The mortgage document describes on its face that the debt or liability secured is the Money Secured referred to in Document No 701964259 lent or advanced or to be lent and advanced to the Mortgagor or the Borrower. The Mortgagor is MSW Property and the Borrower is Wickham Developments. Page 2 of that mortgage includes the acknowledgement (by MSW Property as mortgagor) in Clause (f) that the loan agreement and guarantee are "Transaction Documents" (further reference is made to them in document 701964259, that document being a memorandum of the provisions of the mortgage); and in Clause 1(g) that:

> "This mortgage is collateral to and secures the same money and obligations as are secured by the above mentioned Loan Agreement and Deed of Guarantee and Indemnity."

[48] The memorandum of provisions, read with the description of the money secured and the charging clause on the first page of the Mortgage Document, is certainly capable of bearing the construction that MSW Property agreed thereby to mortgage its Windermere Terrace land to secure all of Wickham Development's indebtedness to Law Mortgages. This is because the definition of "Money Secured" in Clause 1.1 of that memorandum of provision defines that term as meaning, unless the context otherwise requires, "the Financial Indebtedness of the Mortgagor and/or the Borrower to the Mortgagee and includes all monies and damages:

> (a) which now or in the future are owing (whether actually or contingently), by the Mortgagor and/or the Borrower to the Mortgagee."

There then follows further specified meanings and some extensive inclusive meaning. Unlike the interpretation clause in either of the loan agreement or guarantee, there is no reference in the definition of "Money Secured" in the mortgage to the loan amount, nor is that term actually defined in that interpretation section in the mortgage.

[49] It follows that the mortgage is capable of bearing the construction for which the appellant contends, but it is one which would exhibit the commercial inanity earlier described. The mortgage contains no description of what indebtedness Wickham Developments has to Law Mortgages as at the date of its execution, and for which MSW Properties would be providing security. Nor would it help MSW Property to have known the figure, since future contingent debts of Wickham Developments were secured. There is a further point resulting from the appellant's construction, in that if it is correct, MSW Property agreed to guarantee (on my construction of the guarantee) the repayment of $6 million, but then executed a mortgage agreeing to secure the repayment of not only that amount, but an undefined and potentially far larger sum altogether; for no apparent commercial benefit to itself. If Wickham Developments had owed a large sum it could not repay at the date of execution of the Mortgage, Law Mortgages could immediately have had recourse to the Windermere Terrace land in satisfaction of that debt. The result could have been that the Windermere Terrace Land was sold to satisfy that other debt, and was not available as promised in the guarantee as security for the $6 million, borrowed to develop that land. Further, the land would remain charged with Wickham Developments' other debts even if the town houses were built; this would of course make considerable difficulties in selling them. Finally, if they were built and if the $6 million was repaid to Law Mortgages together with agreed interest thereon, the Windermere Terrace Land would still be charged with those other debts of Wickham Developments. These consequences make it necessary to examine very carefully the appellant's construction of that Mortgage.

[50] I think it important that the acknowledgement by MSW Property on the second page of the mortgage in Clause 1(g) is entirely unnecessary, if the appellant's construction is correct. That is, if all indebtedness of Wickham Developments is secured by the Mortgage, there is no point in the Mortgagor expressly agreeing that the Mortgage secures a specified and lesser debt and specified and lesser obligation. Reading the mortgage by itself, that Clause 1(g) is either otiose, or else it is inconsistent with Items 5 and 6 on page 1 of the same mortgage document, which by reference to document 701964259 describe the liability secured in "all monies" terms. While I respectfully agree with McPherson JA and the submission of senior counsel for the appellant that clause 1(g) does not expressly provide that is the **only** liability being secured by the mortgage, that is a construction clause 1(g) can bear.

[51] There is therefore an ambiguity in the description of what is secured, which ambiguity needs resolution. Construing all three documents together, as their terms require,[6] the obligation to avoid a commercial nonsense results in my judgment in Clause 1(g) identifying the Mortgagor's objectively ascertainable agreement, to the use of its property as security, as an agreement to the more limited use of it as security for the repayment of that $6 million. That narrow construction of Money Secured accords with construction of those words in the loan agreement and the guarantee; and I consider those other documents and their terms are part of the context in which "Money Secured" is used in the mortgage. Accordingly, I respectfully agree with the judgment of the learned trial judge that the potentially wide liability of MSW Property was restricted to the monies and obligations secured by the Loan Agreement and Guarantee, neither of which secured the Kenmore debt. I would dismiss the appeal, and agree with McPherson JA that the claim for

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6 See e.g. *Geelong Building Society (in Liquidation) v Encel* [1996] 1 VR 594.

rectification fails as does the appeal against the decision that the notice given by the appellant on 31 August 1999 was inadequate and ineffective.

[52] **FRYBERG J:** MSW Property was not a party to the loan agreement made in March 1998 between Wickham Developments and Law Mortgages, but for the reasons given by Jerrard JA that agreement must be read together with the guarantee and the mortgage to which it was a party. Under the guarantee MSW Property unconditionally guaranteed payment of the "Money Secured". The question is whether that term includes some $700,000 lent by Wickham Developments to Law Mortgages under an earlier agreement.

[53] As Jerrard JA demonstrates, there is an ambiguity in the meaning of "Money Secured" in the loan agreement. I agree with his Honour that in the context of cl 3.1 of that agreement, that term cannot bear its defined meaning, but must be limited to the loan amount. (For the reasons referred to by McPherson JA[7], I am unpersuaded that the same is true of cl 4.4.) Because the documents must be read together, that ambiguity infects the guarantee and the mortgage.

[54] Can that limited meaning be applied to the guarantee? Jerrard JA proposes that "it would have been commercial inanity for MSW Property to undertake all liabilities of Wickham Developments to Law Mortgages when that was more than Law Mortgages had required as a condition of advancing $6 million to Wickham Developments to complete MSW's development". What, if anything, Law Mortgages had sought by way of condition was not investigated as a question of fact at first instance. Its obligation to lend was conditional upon the provision of a guarantee "in such form and containing such provisions as are satisfactory to the Lender". Let it be assumed that this clause did not authorise Law Mortgages to select at random the amount to be guaranteed. Whether it was entitled to require that all of Wickham Developments' indebtedness to it on all accounts be covered by the guarantee cannot with respect be determined simply from the documents without either construing the loan agreement independently of the guarantee and the mortgage (which for reasons already stated cannot be done); or assuming the conclusion.

[55] Whatever might have been the position had it been demonstrated as a matter of fact that all that Law Mortgages had required was a guarantee limited to the amount of the loan amount, in the absence of such a finding it was not commercial inanity for MSW Property to undertake all liabilities of Wickham Developments. At the time the documents were signed Wickham Developments had already incurred a liability of some $700,000. It wanted to borrow another $6 million. In such circumstances it would make commercial sense for the lender to seek a guarantee of all outstanding monies.

[56] The respondent relied upon the decision of the High Court in *Ankar Pty Ltd v National Westminster Finance (Aust) Ltd*[8]. In that case, the majority wrote,

> "At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety."[9]

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7 Paras [12] and [13].

8 (1987) 162 CLR 549.

9 at p 561.

[57] On the other hand, in a passage cited by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[10], Knox CJ said,

> "… experience shows that the words of many, if not most, documents *inter partes* are reasonably capable of more than one meaning."

[58] The passage cited from *Ankar* should not be construed as if it were contained in a statute. In my judgement the words of the documents strongly suggest that the definition of "Money Secured" should not be applied to those words in cl 3.1 and if necessary, cl 4.4, of the loan agreement, rather than that they should be limited to the "loan amount" elsewhere in the documents.

[59] Subject to the foregoing, I agree generally with the reasons for judgment of McPherson JA. I concur in the orders proposed by his Honour.

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[10] (1982) 149 CLR 337 at page 348.