SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Independent Friendly Society Ltd v Derksen* [2003] QCA 525
PARTIES:	**AUSTRALIAN INDEPENDENT FRIENDLY SOCIETY LIMITED** ACN 087 649 198 (plaintiff/respondent) **v** **GRANT ERROL DERKSEN** (defendant/appellant)
FILE NO/S:	Appeal No 11322 of 2002 DC No 2447 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2003
JUDGES:	McMurdo P, Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	MORTGAGES – MORTGAGES AND CHARGES GENERALLY – where appellant is the joint owner of a home unit with a third party – where third party borrowed funds for the purchase of the property from the respondent pursuant to a loan agreement – where appellant is not a party to the loan agreement – where appellant provides a mortgage in favour of the respondent – whether appellant is obliged pursuant to the mortgage document to pay for the third party's obligation under the loan agreement *Property Law* Act 1974 (Qld), s 78
COUNSEL:	T C Somers for the appellant H J Zillman for the respondent
SOLICITORS:	Keller Nall & Brown for the appellant Bennett Carroll & Gibbons for the respondent

[1] **MCMURDO P**: I agree with Philippides J that the appeal should be dismissed with costs and with the reasons she gives.

[2] **DUTNEY J**: I agree.

[3] **PHILIPPIDES J**:

The issues

[4] The respondent, a mutual society and lender, commenced proceedings against the appellant in the District Court claiming an amount as due and owing by the appellant pursuant to a mortgage.

[5] The appellant is the joint owner of a home unit at Kooralbyn which was jointly purchased by him and Mr Hawkins on or about 6 November 1999. The bulk of the monies for the purchase of the said property were provided by Mr Hawkins, in the form of borrowings by him from the respondent in an amount of $46,000 as evidenced by the loan agreement between Mr Hawkins and the respondent. The appellant was not a party to that loan agreement, and was not named as a guarantor in respect of that loan agreement. However he did provide a mortgage in favour of the respondent.

[6] The question for determination is whether, pursuant to the mortgage document, the appellant is obliged to pay for the obligation of Mr Hawkins under the loan agreement. No evidence was called at trial for the appellant, who conducted the trial on the basis that the appellant was not a party to the loan agreement and argued that by the operation of clauses 1.1 and 5.1 of the mortgage, there were no secured moneys owing from the appellant to the respondent.

Background facts

[7] On 11 November 1999, the respondent received a "mortgage synopsis" for a loan application for funds for the purchase of a residential property, namely a townhouse at Kooralbyn. The document referred to Mr Hawkins as the borrower and to Mr Hawkins and the appellant as the mortgagors. It indicated that the security for the loan property would be a first registered mortgage over the property and that the loan was to be serviced from rental from the property. The document also stated the unit was being purchased in two names and that "the loan can be approved in joint names if preferred". Mr Hawkins and the appellant both signed a loan application which referred to the appellant as "co-borrower/guarantor 2".

[8] A loan agreement was subsequently entered into between the respondent and Mr Hawkins for an advance of $46,000. It described the security for the loan as "security mortgage" over the Kooralbyn property. The appellant was not a party to that agreement which specified the "mortgagor/grantor" as Mr Hawkins and the appellant. The advance was made by the respondent resulting in the purchase of the property. Both Mr Hawkins and the appellant became registered as joint tenants and executed a mortgage in the respondent's favour, which was registered over the property.

[9] Mr Hawkins defaulted under the loan agreement, causing the respondent to take possession and to seek to exercise its powers of sale under the mortgage. The respondent, being unsuccessful in selling the property, brought the present action against the appellant seeking to recover, pursuant to the mortgage, the moneys advanced to Mr Hawkins under the loan agreement.

The terms of the Mortgage

[10] The covenant of the mortgage signed by both Mr Hawkins and the appellant states:

> "The Mortgagor covenants with the Mortgagee in terms of:- document No L341914X[1] and charges the estate or interest in the land with the repayment/payment to the Mortgagee of all sums of money referred to in Item 5."

[11] Item 5 of the mortgage document states:

> "Description of debt or liability secured
> Refer Form 20 Schedule Annexed hereto".

[12] That schedule annexed provides:

> "Consideration: The consideration is the Mortgagee agreeing at the request of (inter alia) the Mortgagor (which request is testified by the Mortgagor's execution hereof), to make available a loan or credit facility and presently granting or affording advances or accommodation or facilities and/or at any time or from time to time hereafter granting or affording advances or accommodation to the Mortgagor (hereinafter also called "the Borrower") either alone or jointly with any person or to any person at the request of the Mortgagor and/or the Borrower and/or in consideration of the Mortgagee forbearing to make immediate demand for repayment of and/or to sue forthwith in respect of advances or accommodation or facilities already granted or afforded.
>
> Rate of Interest, Terms of Repayment/Payment etc: As set forth in Document L341914X.
>
> Sums of money the Repayment/Payment of which is charged: All those sums defined in Document L341914X as the "Secured Moneys"."

[13] Clause 5 of the mortgage document specifies the mortgagor's obligations as to the secured moneys as follows:

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[1] Number L341914X is the dealing number given by the Titles Office to the standard mortgage document executed here.

> "The Mortgagor shall pay to the Mortgagee the Secured Moneys:
>
> a. in accordance with the provisions contained or implied in any Agreement governing the manner of payment of Secured Moneys; or
>
> b. to the extent that there are no such provisions; upon demand by the Mortgagee and in cash at the address of the Mortgagee specified in this Mortgage or at such other address as may be notified by the Mortgagee to the Mortgagor."

[14] Clause 1.1 of the mortgage document defines "agreement" as follows:

> " 'Agreement' includes any contract, agreement, arrangement or undertaking (as amended, varied or replaced from time to time) at any time (before or after the date hereof) made between the Mortgagor and the Mortgagee (either alone or jointly with any other person) under which the mortgagee has provided or agreed to provide to or for the benefit or at the request or by the direction or under the authority of the Mortgagor (either alone or jointly with any other person) a cash, credit, or other finance facility or financial accommodation …".

[15] Clause 1.1 of the mortgage document also defines "Secured Moneys" as follows:

> 'Secured Moneys' means all moneys now owing or payable or hereafter to become owing or payable to the Mortgagee by the Mortgagor (either alone or jointly with any other person) in any manner or on any account whatsoever including (but without restricting the generality of the foregoing):
>
> 1.1.1 all moneys which the mortgagee has already lent, paid, made available or advanced, or may lend, pay, make available or advance or become in any way liable to lend, pay make available or advance (whether by way of loan …) to, for, or for the use or accommodation of, or on behalf or at the request or by the direction or under the authority of the Mortgagor (either alone or jointly with any other person);
>
> 1.1.2 all moneys which upon any account or in any manner whatsoever are at any time and from time to time:
>
> 1.1.2.1 presently owing and payable
>
> 1.1.2.2 owing but not then presently payable;
>
> ……
>
> to the Mortgagee by the Mortgagor (either alone or jointly with any other person);
>
> 1.1.3 all moneys which the Mortgagee may from time to time debit and charge the Mortgagor (either alone or jointly with another person) on any account or under any present or future judgement, order, agreement, understanding, arrangement, custom, practice, or right of the Mortgagee or for any other

reason, whether pursuant to the terms of this Mortgage, any Agreement or Collateral Security or otherwise;

1.1.4 all costs, charges, expenses (including legal fees on a solicitor and client basis), duties, charges, imposts, fines, penalties or taxes (excluding any tax levied on the gross income of the Mortgagee) which the Mortgagor shall pay or become liable to pay to any person in connection with:

1.1.4.8 any Event of Default under this mortgage or any Agreement or Collateral Security;

1.1.4.9 the exercise or attempted exercise of any right of the Mortgagee under this Mortgage or any Agreement or Collateral Security;

….

1.1.6 all loss or damage suffered by the Mortgagee which is caused or contributed to by any Event or Default or breach by the Mortgagor of any term of this Mortgage or any Agreement or Collateral Security or otherwise; and

1.1.7 interest on any of the proceeding moneys at such rate or rates as may be fixed from time to time in accordance with this mortgage or any Agreement or Collateral Security.

The decision at first instance

[16] The learned trial judge found that the mortgagor's covenant, which charged the property with the repayment to the mortgagee of the sums of money referred to in item 5, together with the description of the consideration referred to therein was sufficient to establish liability in the appellant for the claims sought.

[17] His Honour came to this conclusion in the following manner:

> "… The consideration referred to in item 5 specifically refers to an advance to another person ("to any person at the request of the Mortgagor".) Although there is no evidence of a request by the [appellant] that the advance be made to Mr Hawkins, his co-mortgagor, it is clear that the advance made was for the purchase of the property in which the [appellant] gained an interest. The money was expended in that way. There is no evidence before me as to any arrangements between Mr Hawkins and the [appellant] which explains how the [appellant] came to be registered as a joint tenant in the property. It is clear however that the amount loaned by the [respondent] to Mr Hawkins ($46,000) was a substantial part of the purchase price of the property ($61,360). The loan application … signed by the [appellant] as well as Mr Hawkins, showed that the [appellant] had no assets and that circumstance was also referred to in the "Private Mortgage Synopsis."

[18] His Honour found that the definition of "Agreement" in the mortgage document had application to the appellant, in that it extended to an agreement between the mortgagor and mortgagee, whereby the mortgagee provided an advance for the benefit of the mortgagor (either alone or jointly with another person). His

Honour held that the appellant had benefited from the loan, in that it had enabled the purchase of a property in which he had an interest. Further, the learned trial judge found that the term "secured moneys" in paragraph 1.1 of the mortgage document covered the appellant's position as moneys advanced were for the use of or on behalf of the appellant in acquiring the property in which he became a joint tenant.

[19] His Honour also touched on the application of the *Consumer Credit (Queensland)* Act 1994, finding that that Act had no application. On the hearing of this appeal it was common ground that that Act had no application

The submissions

[20] It was submitted by the appellant that, by signing the mortgage the appellant merely offered up his interest in the property in the event of default by Mr Hawkins, but did not otherwise offer, nor was he liable to pay to the respondent, the moneys owing to the respondent by Mr Hawkins under the loan agreement.

[21] It was argued that, given the absence of evidence of a "request" by the appellant that the advance be made to Mr Hawkins, the appellant was not "caught" by the definition contained in Item 5 of the mortgage. As to the learned trial judge's finding that the definition of "agreement" and "secured moneys" in the mortgage also had application to the respondent, it was contended that clause 1.1 of the mortgage limited the definition of "agreement" as being such an "agreement" made between the mortgagor and the mortgagee. Since the appellant was not a party to the loan agreement, it was argued that the term "agreement" had no application to the appellant. Similarly, it was submitted that, given that the appellant was not a party to the loan agreement, clauses 1.1 and 5.1 of the mortgage did not result in there being "secured moneys" owing from the appellant to the respondent. It was said that there was nothing in the mortgage that triggered any indebtedness between the appellant and the mortgagee respondent.

[22] The respondent argued that by virtue of clauses 5 and 1.1, the appellant was obliged to pay the moneys owing under the loan agreement by Mr Hawkins. In addition, reliance was placed on s 78 of the *Property Law* Act 1974, which implies in every instrument of mortgage an obligation on the part of the mortgagor to pay the principal money and interest secured. However, the appellant argued that that provision was of no assistance because the "principal money" was not identifiable pursuant to the terms of the mortgage.

The appellant's liability

[23] I do not consider s 78 of the *Property Law* Act 1974 to be of assistance in this case. That provision applies only if and as far as there is no contrary intention and takes effect subject to the terms of the mortgage. The critical question in this case concerns the construction of the obligation in cl 5 of the mortgage document and the meaning of the words "secured moneys" in cl 1.1 and the intention evinced by those provisions.

[24] In determining the extent of the liability of the appellant pursuant to cl 5 of the mortgage and in determining the meaning of "secured moneys" and "agreement" as defined in cl 1.1, it is relevant to consider the application of cl 1.1.8 of the mortgage. It concerns the interpretation of the mortgage document and provides in part:

> "In this Mortgage, unless the context otherwise requires:
> ….
> words importing the singular or plural number shall include the plural and singular number respectively;
> …
> if any party to this Mortgage consists of more than one person, any reference to the party in this Mortgage shall be a reference to any two or more of them jointly and to each of them severally, and any rights and obligations of the party under this mortgage shall be construed accordingly; …".

[25] "Secured Moneys" is defined in cl 1.1 as meaning "all moneys now owing or payable or hereafter to become owing or payable to the Mortgagee by the Mortgagor (either alone or jointly with another person) in any manner or on any account whatsoever" together with specified inclusive definitions. There is nothing in cl 1.1 to suggest that it requires an interpretation contrary to that in cl 1.1.8. The words in parenthesis in cl 1.01 do not indicate such an intention.

[26] Since the parties to the mortgage were both Mr Hawkins and the appellant, cl 1.1.8 indicates that the reference to "the mortgagor" must be read as including a reference to them jointly and to each of them severally; that is, to Mr Hawkins and the appellant jointly and to Mr Hawkins or to the appellant severally. It follows that the term "secured moneys" includes all moneys owing or payable to the mortgagee by the mortgagors (Mr Hawkins and the appellant) severally. Accordingly, the term "secured moneys" extends to include the moneys owing by Mr Hawkins as one of several mortgagors under the loan agreement.

[27] The term "agreement" in cl 5 includes by virtue of cl 1.1 any agreement made between the mortgagor and the mortgagee under which "the mortgagee has provided or agreed to provide to or for the benefit or at the request or by the direction or under the authority of the Mortgagor a … finance facility or financial accommodation". In the present case, there is no dispute that the respondent provided the advance for the benefit of Mr Hawkins. In the light of cl 1.1.8, the term "agreement" extends to an agreement between the mortgagee and the mortgagors severally and therefore extends to the loan agreement between the respondent and Mr Hawkins.

[28] The question then arises as to the meaning of "mortgagor" in cl 5, in particular whether the obligation of the appellant as one of several mortgagors extends to paying to the respondent moneys owed by another of the several mortgagors. It is difficult to understand why the extended meaning of mortgagor flowing from cl 1.1.8 does not operate in relation to cl 5, with the result that the mortgagors, being the appellant and Mr Hawkins jointly and either of them separately, are liable to pay moneys owing by them jointly *and* moneys owing by each of them severally, i.e. by Mr Hawkins under the loan agreement.

[29] It was submitted by the appellant that the mortgagor referred to in cl 5 should be interpreted as coinciding with the mortgagor in the definition of "secured moneys", so that the "mortgagor" is the same person or combination of persons. I am unable to accept that the words "and obligations of the party under this mortgage shall be construed accordingly" in cl 1.1.8 are to be construed as having the restricted operation that would confine the obligations of each mortgagor to moneys owing by each mortgagor jointly with another or by the particular mortgagor alone. In my view, the proper construction of cl 5 is that cl 1.1.8 operates so that the obligation under cl 5 is that the mortgagors jointly and each of them severally are liable in respect of secured moneys owing by them jointly and owing by each of them severally.

[30] The appeal should be dismissed with costs.