SUPREME COURT OF QUEENSLAND

CITATION:	*Atlantic 3-Financial (Aust) Pty Ltd v. Deskhurst Pty Ltd & Anor* [2004] QSC 130
PARTIES:	**ATLANTIC 3-FINANCIAL (AUST) PTY LTD (ACN 056 262 723)** (plaintiff) **v.** **DESKHURST PTY LTD (ACN 101 303 705)** (first defendant) and **ROBERT GEORGE HALLAS** (second defendant)
FILE NO:	S5736 of 2002
DIVISION:	Trial
PROCEEDINGS:	Claim and counter-claim
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	30 April 2004
DELIVERED AT:	Brisbane
HEARING DATES:	12 and 13 February 2004
JUDGE:	Helman J.
CATCHWORDS:	MORTGAGES – ESTATE AND INTEREST OF MORTGAGOR AND MORTGAGEE'S ESTATE – RIGHTS INCIDENT TO MORTGATGEE'S ESTATE – ALIENATION OF SECURITY – where sub-mortgagee's rights infringed by a release of the principal mortgage, executed by the mortgagee. s. 228(1) of the *Property Law Act* 1974 s. 122 of the *Land Title Act* 1994 *Trade Practices Act* 1974 (Cth) *Mercantile Credits Ltd v. Shell Co of Australia Ltd* (1976) 136 C.L.R. 326 *P.T. Ltd v. Maradona Pty Ltd* (1992) 25 N.S.W.L.R. 643 *Pyramid Building Society (in liquidation) v. Scorpion Hotels Pty Ltd* [1998] 1 V.R. 188
COUNSEL:	Mr D.G. Clothier for the plaintiff No appearance for the first defendant Mr P.W. Hackett for the second defendant

SOLICITORS: Lynch & Co. for the plaintiff
North Coast Law for the second defendant

[1] In this proceeding the plaintiff, relying on its rights as sub-mortgagee under a sub-mortgage of a principal mortgage of interests in land, seeks declarations that a release of the principal mortgage executed by the first defendant as mortgagee is void, that the second defendant is in default under the terms of the principal mortgage, and that the first defendant is in default under the terms of the sub-mortgage, and ancillary relief. In seeking the first declaration the plaintiff relies on s. 228(1) of the *Property Law Act* 1974 which provides that an alienation of property made with intent to defraud creditors shall be voidable at the instance of any person prejudiced by the alienation. The second defendant has a counter-claim against the plaintiff and the first defendant to which I shall refer further later.

[2] The first defendant did not appear at the trial. I am not satisfied that it was served with the claim, but I am satisfied it was served with the counter-claim. The latter was proved by an affidavit sworn by Mr Simon Young, solicitor acting for the second defendant, filed by leave on 12 February 2004. The plaintiff's solicitor attempted to serve the first defendant by facsimile transmission on 19 July 2002, mistakenly believing that he had been notified that Mr Young had authority to accept service on the first defendant. Within thirty minutes of the attempted service the plaintiff's solicitor was, however, notified by telephone and by facsimile transmission of the mistake. The endorsement required by rule 115(2) of the *Uniform Civil Procedure Rules* 1999 was not made, and no further steps were taken by the plaintiff to serve the first defendant.

[3] The second defendant, a plumber of Gatton, is the registered proprietor of estates in fee simple in two parcels of land in the County of Churchill, Parish of Gatton: lot 2 on registered plan 96912 in Jensen Street, Gatton on which a house let to tenants stands; and lot 120 on registered plan 197911, which is vacant land in Davey Road, Gatton. The second defendant was a director of a now deregistered company called S.H. Hallas Pty Ltd from 25 November 1986 to 26 April 1994 when it was dissolved. A winding-up order had been made on 6 October 1989. There were two other directors whose appointments ceased on 26 April 1994, the official company records showing their appointment dates as unknown: Mr John William Hallas and his wife Kathleen Clare Hallas. From 25 November 1986 to 5 June 1989 a Ms Lisa Adele Strohfeldt, the second defendant's girlfriend at the time, was also a director.

[4] The second defendant and Mr John Hallas, known to the second defendant as Jack, are cousins. According to the official company records of S.H. Hallas Pty Ltd Mr John Hallas was the elder, his date of birth being 9 January 1945 and the second defendant's 6 June 1961. The second defendant became a director of the company after his cousin, an insurance salesman, persuaded him to do so. He then forsook his trade to enter the world of insurance, for which it appears he was ill-suited. S.H. Hallas Pty Ltd, originally called J. Hallas (Insurance Nominees) Pty Ltd, was an agent for the National Mutual Life Association of Australasia Limited, which had lent money to S.H. Hallas Pty Ltd. The second defendant became a guarantor of the performance of S.H. Hallas Pty Ltd's loan-agreement obligations to National Mutual. A dispute concerning the loan arose between S.H. Hallas Pty Ltd and National Mutual and the latter began proceedings against the second defendant

and others, including it appears, S.H. Hallas Pty Ltd. Mr John Hallas had control of the defence to the National Mutual claim.

[5] On 20 October 1988 the second defendant as mortgagor executed the principal mortgage over his two lots in favour of the first defendant as mortgagee. (A sub-mortgage is a mortgage of a mortgage. I have used the term 'principal' to describe the latter. That is the term used in *Fisher and Lightwood's Law of Mortgage*, Aust. ed. (1995) Chapter 15 'Sub-Mortgages', but in Sykes and Walker, *The Law of Securities*, 5th ed. (1993), p. 178 'original' is used, and in the pleadings 'primary'. In the practice manual of the Titles Registration Unit of the Department of Natural Resources and Mines the term 'head' is used. All terms could be regarded as equally apt.) Item 8 of the bill of mortgage set out the consideration, rate of interest, terms of repayment, and payment etc.:

> The Mortgagor in consideration of DESKHURST PTY. LTD. (hereinafter called "the Mortgagee") agreeing at the request of (inter alia) the Mortgagor to lend and advance to S.H. HALLAS PTY. LTD. (hereinafter called "the Debtor") the sum of ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150000.00) (hereinafter called "the Principal Sum") DOES HEREBY COVENANT with the Mortgagee as follows:-
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> 1. The Mortgagor will pay to the Mortgagee the Principal Sum on or before the Twentieth day of October 1989.
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> 2. The Mortgagor will pay to the Mortgagee interest on the Principal Sum at the rate of 17 per centum per annum such interest to be paid on quarterly rests on the Twentieth days of January, April, July and October and charged and calculated in the first instance from the Twentieth day of October 1988.

On 20 October 1988 the directors of the first defendant were Mr John Hallas's parents: Mr Percy Charles Hallas, now deceased, and his wife Daphne Alona Hallas. Mr Percy Hallas ceased to be a director on his death on 20 June 1993, and Mrs Hallas on 1 July 1996. On 1 July 1996 Mr John Hallas became the only director of the first defendant, and its secretary. On 3 May 2001 Messrs Philip Jefferson and Gerald Collins were appointed receiver-managers. I shall discuss the evidence and the circumstances that gave rise to the execution of the principal mortgage, which was not registered until 14 September 1989, later.

[6] Neither Mrs Daphne Hallas, who is now eighty-nine years old, nor Mr John Hallas was called to give evidence at the trial. The second defendant, who has returned to plumbing, gave evidence, but his evidence was imprecise and included no details of what advances, if any, had been made by the first defendant to S.H. Hallas Pty Ltd or of what repayments, if any, had been made by S.H. Hallas Pty Ltd. No records of either company were produced to show those details.

[7] On 20 January 1999 an agreement recorded in a deed of loan was executed by the plaintiff as lender, Mr John Hallas as borrower, and the first defendant and another company as guarantors and third party mortgagors. By clause 2 of the deed the plaintiff agreed, subject to the terms of the agreement, to grant to Mr John Hallas a loan facility of $105,000. By clause 3, conditions precedent to the advance included the execution by the first defendant of a guarantee in a form acceptable to the plaintiff guaranteeing the repayment of all moneys payable by Mr John Hallas under

the deed, and execution by the first defendant of a mortgage in a form acceptable to the plaintiff guaranteeing the repayment of all moneys payable by Mr John Hallas under the deed to the extent of the security offered. Among the collateral documents specified in the schedule to the deed was a sub-mortgage of the principal mortgage. By clause 7 Mr John Hallas would, at the option of the plaintiff, be immediately in default upon the occurrence *inter alia* of either of the following events of default:

> If there was default (other than by the plaintiff) in the performance of any term, agreement, or condition contained in, or implied by, the agreement, any security or any other collateral document or securities (clause 7(a));
>
> If a receiver or official manager or analogous person of the first defendant's undertaking or any part of it was appointed (clause 7(c) and (n)).

By clause 9(a)(iii), so far as it is relevant, at any time after default the plaintiff might, in the manner and at the time that it in its absolute discretion deemed appropriate but without any obligation to do so and notwithstanding any omission, neglect, delay, or waiver of the right to exercise of such option and without liability for loss, recover the debt by the plaintiff's exercising its rights under the agreement and/or under any collateral document or security without prejudice to and without reference to the plaintiff's rights under any other document or security. By clause 10(o), so far as it is relevant, in consideration of the agreement by the plaintiff to advance to Mr John Hallas the $105,000 at the request of Mr Hallas and/or the first defendant (which request was acknowledged by its execution of the deed) Mr Hallas and/or the first defendant thereby covenanted with the plaintiff in terms of the deed and a memorandum specified in item 11 (memorandum of common provisions registered no. 700354622) and filed in the office of the Department of Natural Resources or with the Registrar of Titles.

[8] On 20 January 1999 the first defendant executed a deed of guarantee and indemnity and the sub-mortgage over its interest in the principal mortgage in favour of the plaintiff to secure the moneys payable by the first defendant to the plaintiff pursuant to the guarantee and indemnity. In the sub-mortgage the first defendant covenanted with the plaintiff in terms of an attached schedule and document no. 700354622 and charged the interest or estate in land with the repayment/payment to the plaintiff of all moneys payable by the first defendant to the plaintiff pursuant to the guarantee and indemnity. On 18 February 1999 the sub-mortgage was registered.

[9] As I have indicated, I am satisfied that the deed of loan and the guarantee and indemnity were executed. I am also satisfied that money was lent under the loan agreement. I accept the evidence of Dr Frederick Acker, who was a director of the plaintiff until 12 January 2004, that from 3 February to 20 April 1999 $100,000 was advanced to Mr John Hallas, and that the balance outstanding on 12 June 2002 ($86,749.71 according to the plaintiff's records, but from which $5,000 not actually advanced must be deducted) remains outstanding. The deed of loan provided for the repayment of all moneys on 19 January 1999 but the term of the loan was extended to 19 August 2000.

[10] In the statement of claim the plaintiff alleges that the first defendant is in default under the sub-mortgage. The plaintiff relies on clauses 1.1, 11, and 11.4.5 of the

sub-mortgage. Clause 11.4.5 providing that an event of default under the principal mortgage is an event of default under the sub-mortgage was before me, but clauses 1.1 and 11 were not before me, as it appears that they are to be found in the document incorporated by reference in the sub-mortgage, no. 700354622, which was not tendered in evidence.

[11] It was not in issue, however, that the first defendant was in default under the sub-mortgage, as Mr Hackett, for the second defendant, conceded (transcript pp. 62-63 and 89). The allegation concerning clause 1.1 of the sub-mortgage appeared in paragraph 18 of the statement of claim. It was alleged there that by that clause the moneys secured by the sub-mortgage included the moneys owing by the first defendant to the plaintiff pursuant to the deed of loan and the guarantee and indemnity. In paragraph 10 of the amended defence the second defendant admitted that if the deed of loan and the guarantee and indemnity were entered into and moneys were lent under the deed of loan and the guarantee and indemnity (which facts were not admitted) the moneys secured by the sub-mortgage as defined in clause 1.1 of the sub-mortgage would include any of the moneys owing under the deed of loan and the guarantee and indemnity. The allegations concerning clause 11 of the sub-mortgage appeared in paragraphs 19 and 20 of the statement of claim. In paragraph 19 it was alleged that by clause 11 the first defendant was in default of the sub-mortgage in the event that the first defendant was in default of any of the provisions of the deed of loan and the guarantee and indemnity. In paragraph 11 of the amended defence the second defendant admitted that if the deed of loan and the guarantee and indemnity were entered into, moneys were lent under the deed of loan and the guarantee and indemnity, and default had been made under the terms of the deed of loan and the guarantee and indemnity (which facts were not admitted), the first defendant would be in default under the sub-mortgage by virtue of clause 11. In paragraph 20 of the statement of claim the plaintiff alleged that by clause 11 of the sub-mortgage the first defendant was in default of the sub-mortgage in the event that an official manager or receiver was appointed to any part of its undertaking. That allegation was admitted by the second defendant in paragraph 12 of his amended defence. In paragraph 21 of the amended statement of claim the plaintiff alleged that by clause 11.4.5 of the sub-mortgage the occurrence of an event of default under the principal mortgage constituted an event of default under the sub-mortgage, and that fact was admitted by the second defendant, also in paragraph 12 of his amended defence.

[12] I should add that I did not understand Mr Hackett to concede that the first defendant was in default under the sub-mortgage by operation of clause 11.4.5. The alleged default of the second defendant under the principal mortgage was a central issue in the case. I understood the second defendant's concession to proceed from the evidence concerning the failure to repay in full the $100,000 lent to Mr John Hallas by the plaintiff.

[13] The plaintiff's case against the second defendant rests on the allegation that he is in default under the provisions of the principal mortgage. That allegation was put in issue by the second defendant in his defence filed on 15 August 2002 and remains in issue in his amended defence and counter-claim filed by leave on 12 February 2004. The second defendant admits that he has not paid the first defendant $150,000 but asserts that he has at no time been in default under the provisions of the principal mortgage. In paragraph 3(c) of his defence, which has

not been amended, he alleged that the circumstances leading to his executing the principal mortgage were these:

> (i) At all material times, Jack Hallas acted for an [*sic*] on behalf of and with the full authority of the First Defendant;
>
> (ii) Sometime in the second half of 1988, but before 20 October 1998, Jack Hallas, on behalf of the First Defendant, approached the Second Defendant in relation to the providing of a mortgage over the Land [the second defendant's lots 2 and 120] as security for the provision of funding for legal costs to the Company [S.H. Hallas Pty Ltd] which at the time was defending a claim brought by National Mutual Limited in relation to a disputed agency development loan ("the Litigation");
>
> (iii) The Second Defendant and the First Defendant orally agreed that if the First Defendant agreed to advance monies to the Company, the Second Defendant would grant a mortgage over the Land to the first Defendant to secure any monies lent, but that:
>
> A. The Second Defendant would never have to repay any monies that may be lent to the Company;
>
> B. The mortgage would be released by the First Defendant once the Litigation was at an end, ("the Agreement");
>
> (iv) In reliance on the Agreement, the Second Defendant executed the Primary Mortgage.

[14] Paragraph 6 of the amended defence is the second defendant's response to paragraph 9 of the statement of claim in which it is alleged that the second defendant failed to repay the $150,000 to the defendant on or before 20 October 1989 or at all and thereby breached, and is in default of, the terms of the principal mortgage. In paragraph 6(a) in its original form the second defendant did not admit what, if any, money was:

> (i) Lent or advanced by the first defendant to S.H. Hallas Pty Ltd;
> (ii) Repaid by S.H. Hallas Pty Ltd to the first defendant

as he was, he pleaded, unaware of the truth or falsity of the allegations in paragraph 9 despite his having made reasonable enquiries. In the amended form of paragraph 6(a) the second defendant:

> (a) Denies that any advance was made by the First Defendant to the Company because:-
>
> (i) the Second Defendant was a director of the Company from 25 November 1986 until its liquidation on 6 October 1989 and is not aware of any such advance during that period;
>
> (ii) there has never been a demand by or on behalf of the First Defendant of the Second Defendant pursuant to the Primary Mortgage or otherwise notwithstanding that the Primary Mortgage required the repayment of principal (if any) by 20 October 1989;

(iii) the 1991, 1992 and 1993 annual returns of the First Defendant lodged with ASIC do not reflect any asset of a value of the advance agreed to be made and the subject of the Primary Mortgage or that it had the capability of making such an advance;

(iv) the Final Accounts of the Liquidator of the Company on 7 October 1993 record that no proof of debt was received from the First Defendant and that the only creditor was National Mutual;

(v) John Hallas as the sole director of the First Defendant executed an acknowledgment on 18 October 2001 that there was no money owing under the Primary Mortgage;

(vi) John Hallas as the sole director of the first Defendant executed a Release of the Primary Mortgage on 12 March 2002.

[15] In addition, there is a new paragraph 6(aa) in which the second defendant:

(aa) Denies that the Company has not repaid any advance made by the First Defendant because of the matters particularised in paragraph (a) hereof.

[16] The plaintiff failed to adopt the prudent courses referred to by H. Woodhouse 'Sub-Mortgages – Their Creation, Realization, Transfer and Discharge' (1948) 12 *Conv*. (NS) 171:

> The basic rule is that the sub-mortgagee (like an out and out transferee) takes the security subject to any equities arising between the principal mortgagor and mortgagee prior to notice of the sub-mortgage being given to the principal mortgagor, and is bound by the actual state of accounts between the principal mortgagor and mortgagee. Thus, for instance, the principal mortgagor may have reduced the mortgage debt or may have a set-off against the mortgagee, and if this is so, the amount of money actually secured by the principal mortgage at the date of the sub-mortgage will not be the sum stated in the principal mortgage deed but that amount less the sum paid off or the subject of the right of set-off. Such a state of affairs may render the principal mortgage valueless as a security in the hands of the sub-mortgagee (see, *e.g., Parker v. Jackson*, [1936] 2 All E.R. 281). This rule may, of course, be displaced by the principal mortgagor's own conduct which, in appropriate circumstances, may prevent him from setting up an equity against the sub-mortgagee, *e.g.*, in a case where the principal mortgage deed contains a receipt for the sum expressed to be advanced to the mortgagor, he would be unable to claim, as against a sub-mortgagee who had acted on the faith of the receipt, that only a smaller sum had in fact been advanced (*Bickerton v. Walker* (1885), 31 Ch. D. 151).
>
> To obviate the serious consequences which may flow from the application of the above rule, it is in the interest of the sub-mortgagee that the principal mortgagor should join in the sub-mortgage. If he does so, he will have notice of the sub-mortgage and will at the same time be bound by any recitals in the sub-mortgage deed as to the state of the principal mortgage debt. If the principal mortgagor does not join in the sub-mortgage (and in

> practice he frequently does not), then the sub-mortgagee should take two precautions:-
>
> (a) he should obtain satisfactory evidence of the state of the principal mortgage debt (*e.g.*, by direct inquiry of the principal mortgagor), and
>
> (b) he should give to the principal mortgagor notice in writing of the sub-mortgage as soon as it has been completed.
>
> Should he fail to take precaution (a) but act merely in reliance on the mortgagee's own statement, then the principal mortgagor would not be prevented from asserting against the sub-mortgagee any equity he had against the mortgagee. Should the sub-mortgagee not take precaution (b), he would run the risk that the principal mortgagor might pay off the principal mortgage debt to the mortgagee and would, in addition, take subject to any equities arising after the date of the sub-mortgage but before the principal mortgagor obtained notice of the sub-mortgage, as well as to equities subsisting at the date of the sub-mortgage. Any answer given by the principal mortgagor in reply to an inquiry as to the state of the mortgage debt should be carefully preserved. (pp. 173-174)

That passage must of course be read bearing in mind the indefeasibility rules of the Torrens system, but precaution (a) in particular was one the plaintiff could have taken with advantage, but did not take.

[17] There has been no acknowledgment by the second defendant of the making of any advances by the first defendant under the principal mortgage. The plaintiff received from Mr John Hallas a declaration dated 29 January 1999 that the principal mortgage was 'still current and the amount of $150,000 principal together with interest calculated at the rate of 17% per annum' was owing from 20 October 1988 and that there was no dispute between the mortgagee and the mortgagor. The declaration was admitted as exhibit 9, but was not received as evidence of the truth of its contents.

[18] By a letter dated 9 August 2001 to the second defendant, the plaintiff's then solicitors referred to the sub-mortgage and alleged that the first defendant was in default under it and also that the second defendant was in default under the principal mortgage. The solicitors notified the second defendant that their client elected to have all moneys payable by him under the principal mortgage paid to it, to enter into possession of the mortgaged properties as mortgagee, and to require rental payments to be made by tenants paid directly to it; but it should be noted that the second defendant has continued to receive the rent from the Jensen Street tenants without interruption since he granted the principal mortgage. In the letter the second defendant was also notified that the plaintiff would be giving notice of exercise of the power of sale of the mortgaged properties. That letter was it appears the first notice the second defendant had of the sub-mortgage. No further steps were taken in 2001 and there followed correspondence with the second defendant's then solicitors. On 18 October 2001 Mr John Hallas signed an acknowledgement as director of the first defendant that there were no moneys 'of whatsoever nature' owing by the second defendant to the first defendant under the principal mortgage.

[19] On 12 March 2002, Mr John Hallas, as director of the first defendant, signed a release of the principal mortgage. Under cross-examination, the second defendant agreed that he had gone to Mr John Hallas and had him sign the release, because he

wanted to make sure that his land was not sold. On 14 March 2002 the release was lodged for registration, but it has not yet been registered. In a letter dated 12 April 2002 to the plaintiff's then solicitors, the second defendant's solicitors referred to a letter dated 9 April 2002 from the plaintiff's then solicitors enclosing a notice of exercise of the power of sale. On 18 April 2002 the second defendant lodged a caveat under s. 122 of the *Land Title Act* 1994 forbidding the registration of any instrument affecting his land, contending that the plaintiff's purported exercise of the enforcement provisions of the principal mortgage was invalid as no default had been made by the second defendant under the terms of the principal mortgage and no money was owing by him to the first defendant. In a letter dated 15 May 2002 from the second defendant's solicitors to the plaintiff's then solicitors, it is said that his indebtedness to the first defendant was released 'prior to' the sub-mortgage, that he sought, and obtained, 'a forgiveness of the debt' from the first defendant 'which was the basis of [his] agreeing to the mortgage in the first instance. That is, when the mortgage was initially created, [he] was assured that the mortgage would be forgiven'. (I should mention here that no document recording the forgiveness of debt was produced at the trial.) On 12 June 2002 a further notice of exercise of the power of sale dated that day was sent by the plaintiff's then solicitors to the second defendant's solicitors.

[20] The plaintiff alleges that the second defendant accepted the benefit of the release of the principal mortgage in circumstances in which he knew that the intent of the first defendant in executing the release was to defraud the plaintiff by extinguishing the plaintiff's right to sell the land derived from the sub-mortgage. The plaintiff also alleges that the second defendant, in accepting the benefit of the release, did not act in good faith. Those allegations rest of course on the contention that the second defendant was in default under the terms of the principal mortgage.

[21] In resisting the plaintiff's claim the second defendant relies first on an agreement he alleges he had with Mr John Hallas made before the execution of the principal mortgage. Under the agreement he would retain his land, and any powers conferred on the mortgagee by the principal mortgage would not under any circumstances be exercised. The version of the agreement pleaded in paragraph 3(c) of the amended defence was, it will be noted, that the mortgage was to secure advances of money by the first defendant to S.H. Hallas Pty Ltd to enable the latter to meet legal fees, whereas the version sworn to by the second defendant in his oral evidence was that the mortgage was a mere device - a sham - to enable him, if necessary, to preserve his interests in the land from National Mutual in its proceedings against him and others. He agreed under cross-examination that the sole purpose of his executing the principal mortgage was to protect his interests and not to secure an advance of moneys. The discrepancy between the two versions of the agreement is obvious, although the second defendant swore that he did not believe that there was a discrepancy. Taking that discrepancy into account and the second defendant's ready admission of his being party to a sham transaction, but above all a pervasive vagueness in his evidence concerning the events in question, I conclude that the second defendant is not a witness upon whose word any reliance may be placed. I accept as correct a submission to that effect made on behalf of the plaintiff. I am not satisfied that there was any agreement of the kind contended for by the second defendant.

[22] In any event such an agreement could not defeat the plaintiff's claim since it can rely on the indefeasibility of the registered interest of the mortgagee under the

principal mortgage, which it acquired as sub-mortgagee. That indefeasibility extends to the second defendant's covenant to pay the mortgagee under the principal mortgage the $150,000 on or before 20 October 1989: *Mercantile Credits Ltd v. Shell Co. of Australia Ltd* (1976) 136 C.L.R. 326 at p. 343 per Gibbs J.; *P.T. Ltd v. Maradona Pty Ltd* (1992) 25 N.S.W.L.R. 643 at pp. 676-679; and *Pyramid Building Society (in liquidation) v. Scorpion Hotels Pty Ltd* [1998] 1 V.R. 188 at p. 196 per Hayne J.A., with whom Brooking and Tadgell JJ.A. agreed. The mortgagee's right to recover the debt is included in the rights rendered secure by registration as that would be necessary to assure to the mortgagee its estate or interest in the land: *P.T. Ltd v. Maradona Pty Ltd*, at p. 679.

[23] The second defendant admits that he has not paid the $150,000, and so it was submitted on behalf of the plaintiff that that is sufficient to show that he was in default under the principal mortgage. That would be so if item 8 in the bill of the principal mortgage should be construed as requiring payment whether or not the loan was made by the first defendant to S.H. Hallas Pty Ltd and whether or not the latter repaid the loan itself. But I am not persuaded that that is a correct construction of the item. Reading paragraph 1 of the item in the context of the preamble – as it must be read – I conclude that the only reasonable construction that can be put upon in is that it required payment by the second defendant only if the loan had in fact been made and had not been repaid to the first defendant. To establish that the second defendant was in default under the principal mortgage it would then be necessary to prove that the loan had been made by the first defendant, and that it had not been repaid by 20 October 1989, either by S.H. Hallas Pty Ltd or by the second defendant.

[24] There is no direct evidence that the loan was made and none that it had not been repaid to the first defendant. There is some circumstantial evidence that suggests that a loan may have been required: the fact that, as the second defendant agreed under cross-examination, lawyers were retained in the proceeding brought by National Mutual. The evidence was, however, so lacking in precision as to do no more than support the hypothesis of the possibility of an advance. Mr Hackett in his address referred to the first defendant's annual returns for the years ending 30 June 1991, 30 June 1992, and 30 June 1993 which all showed the first defendant's total assets at $325, indicating, Mr Hackett said, the first defendant's lack of capacity to make an advance of the magnitude contemplated in the principal mortgage and also its failure to do so. But as Mr Clothier, for the plaintiff, pointed out in response the first defendant was shown in the returns as a trustee company, which one might expect not to have many assets of its own. There is not sufficient evidence, on my assessment, to reach a firm conclusion one way or the other as to whether an advance was made. I am unable to determine whether or not the first defendant was repaid any money it may have lent to S.H. Hallas Pty Ltd - if money was lent. Accordingly I conclude that the plaintiff has failed to prove that the second defendant was in default under the terms of the principal mortgage at any relevant time: he may or may not have been, I am unable to say. The plaintiff's claim must then fail.

[25] The second defendant in his counter-claim seeks a declaration that he owes no moneys under the principal mortgage and an ancillary order that the plaintiff and the first defendant take all steps necessary to redeem the principal mortgage and the sub-mortgage and to remove the principal mortgage and the sub-mortgage from the title to the land, including the plaintiff's forthwith executing and lodging a release

of the sub-mortgage. In addition, the second defendant sought other relief including an order for specific performance of the agreement pleaded in paragraph 3(c) of his amended defence and other relief in reliance on the relevant provisions of the *Trade Practices Act* 1974 (Cth) based on the allegation that the terms of the agreement amounted to misleading and deceptive representations. In addressing me, Mr Hackett made no submissions in support of the additional relief to which I have referred, but did not abandon those claims. He did however indicate that the second defendant wished to press the claims to the declaration and its ancillary order I have mentioned. Both limbs of the counter-claim must fail, however, because I am not satisfied that the second defendant has proved that he is not in default under the principal mortgage and I am not satisfied that there was any agreement of the kind for which he contended.

[26] On 9 January 2004 the plaintiff assigned by deed its right of action in this proceeding to a company called Atlantic 3 Funds Management Ltd (A.C.N. 092 110 097). On 14 November 2003 Mullins J made an order the effect of which was to restrain the plaintiff from assigning *inter alia* its right of action in this proceeding. Notwithstanding the plaintiff's failure to comply with her Honour's order the plaintiff and the assignee sought leave to file and read an amended statement of claim (exhibit 23) which joined the assignee as a second plaintiff. Although no objection was taken to that course on behalf of the second defendant, I reserved the question for further consideration since to permit the filing of the amended statement of claim would appear to sanction an act done in defiance of an order of this court. It is unnecessary for me to consider the matter further since the claim, unaltered except as to claimants in the amended statement of claim, must fail in any event.

[27] I shall invite further submissions on the orders to be made and costs.