

SUPREME COURT OF QUEENSLAND

CITATION: *ING Bank (Australia) Ltd v Leagrove Pty Ltd & Anor; ING Bank (Australia) Ltd v Stafford & Ors* [2011] QCA 131

PARTIES: **ING BANK (AUSTRALIA) LTD**
ACN 000 893 292
(appellant)
v
LEAGROVE PTY LTD
ACN 103 669 405
(first respondent)
MARK FRANCIS STAFFORD
(second respondent)

ING BANK (AUSTRALIA) LTD
ACN 000 893 292
(appellant)
v
BRIAN JAMES STAFFORD
(first respondent)
CHRISTOPHER MICHAEL STAFFORD
(second respondent)
MARK FRANCIS STAFFORD
(third respondent)
**LEAGROVE PTY LTD ACN 103 669 405 as trustee for
THE STAFFORD INVESTMENT TRUST**
(fourth respondent)

FILE NO/S: Appeal No 9496 of 2010
Appeal No 9499 of 2010
SC No 10187 of 2009
SC No 1790 Of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 June 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 February 2011

JUDGES: Margaret McMurdo P, White JA and Martin J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS:

A. In Appeal No 9499/10

- 1. Appeal allowed.**
- 2. The orders at first instance are set aside.**
- 3. Judgment is entered for the plaintiff against the defendants for the amount claimed, together with interest up to the date of the delivery of these orders.**
- 4. The respondents defendants are to pay the appellant plaintiff's costs of the appeal and of the proceeding at first instance.**

B. In Appeal No 9496/10:

- 1. Appeal allowed.**
- 2. The orders at first instance are set aside.**
- 3. The plaintiffs' proceeding against the defendant is dismissed.**
- 4. The respondents plaintiffs are to pay the appellant defendant's costs of and incidental to the appeal and of the proceeding at first instance.**

CATCHWORDS:

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – GENERALLY – where the appellant loaned money to Leagro Pty Ltd secured by registered mortgages – where the appellant extended the original loan facility conditional upon specified security being obtained – where the respondents executed joint and several deeds of guarantee and indemnity – where the appellant failed to obtain the securities listed in the agreement to extend the loan facility – where the respondents argued that this was a condition precedent to or an implied condition of the guarantees – where the respondents contended that the guarantees did not come into effect or were discharged – where the respondents raised a number of other contentions to impugn the guarantees – where respondents argued no moneys were secured under the registered mortgages – where the primary judge dismissed the appellant's application for summary judgment in each proceeding – whether summary judgment should be granted in favour of the appellant

Property Law Act 1974 (Qld), s14, s 50

Uniform Civil Procedure Rules 1999 (Qld), r 292

Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424; [2004] HCA 28, cited

Bofinger v Kingsway Group Ltd (2009) 239 CLR 269; [2009] HCA 44, cited

BP Refinery (Westernport) v Shire of Hastings (1977) 180 CLR 266; [1977] UKPCHCA 1, considered

Buckeridge v Mercantile Credits Ltd (1981) 147 CLR 654; [1981] HCA 62, cited

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337; [1982] HCA 24, considered

Glennon v Federal Commissioner of Taxation (1972) 127 CLR 503; [1972] HCA 52, considered
ING Bank (Australia) Ltd v Stafford & Ors; Leagrove Pty Ltd & Anor v ING Bank (Australia) Ltd [2010] QSC 289, considered
Re Kwan; ex parte Hastings Deering (Solomon Islands) Ltd (1987) 15 FCR 264, considered
Sonntag v Graziano [1994] NSWCA 291, considered
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28, cited
Suncorp Insurance and Finance v Commissioner of Stamp Duties (Qld) [1998] 2 Qd R 285; [\[1997\] QCA 225](#), considered
Taubmans Pty Ltd v Loakes [1991] 2 Qd R 109, considered
Williams v Frayne (1937) 58 CLR 710; [1937] HCA 16, considered

COUNSEL: A J H Morris QC, with V G Brennan, for the appellant
 L Harrison QC, with A Musgrave, for the respondents

SOLICITORS: McCullough Robertson for the appellant
 Adamson Bernays Kyle & Jones Lawyer for the respondents

- [1] **MARGARET McMURDO P:** The appellant in each appeal, ING Bank (Australia) Ltd, lent Leagrove Pty Ltd (the first respondent in Appeal No 9496/10) \$7.25 million on 29 August 2005. The loan was secured by means including a registered mortgage¹ over land at Hope Island owned by Leagrove as trustee for the Stafford Investment Trust (the fourth respondent in Appeal No 9499/10) and a registered first mortgage over other Hope Island land, owned by Mark Francis Stafford (the second respondent in Appeal No 9496/10 and the third respondent in Appeal No 9499/10). I will refer to Leagrove Pty Ltd when acting in its own right, as "Leagrove", and Leagrove Pty Ltd when acting as trustee for the Stafford Investment Trust as "Leagrove as trustee".
- [2] In September 2007, ING Bank, under a letter of offer accepted by Leagrove extended the period of the original loan facility to Leagrove and increased the amount of the loan to \$8.25 million, conditional upon specified security being obtained. On 30 October 2007, two joint and several deeds of guarantee and indemnity were executed, one by Leagrove as trustee, and the other by the directors of Leagrove, Mark Stafford, Brian James Stafford (the first respondent in Appeal No 9499/10) and Christopher Michael Stafford (the second respondent in Appeal No 9499/10). It is common ground that Leagrove failed to repay ING Bank when the loan became due.
- [3] In February 2009, ING Bank commenced a Supreme Court action against all four respondents under the two guarantees for the unpaid money ("the ING proceeding" Appeal No 9499/10). In June 2009, Mark Stafford and Leagrove as trustee lodged caveats over the mortgaged land. Leagrove as trustee and Mark Stafford commenced a proceeding in the Supreme Court against ING Bank seeking

¹ On 7 September 2005, the Public Trustee transferred its first registered mortgage over the trust land to ING Bank so that it ultimately held first and second mortgages over the land.

declarations that no moneys were secured by the registered mortgages and that Leagrove as trustee and Mark Stafford had caveatable interests in the mortgaged land, together with associated relief ("the mortgage proceeding" Appeal No 9496/10). ING Bank brought applications for summary judgment in both proceedings. ING Bank has appealed from the primary judge's order dismissing those applications.

- [4] These are my reasons for allowing the appeal, setting aside the orders at first instance and granting ING Bank's applications for summary judgment.

The relevant documents

- [5] As noted, under the original loan facility Leagrove borrowed \$7.25 million from ING Bank, secured by means including a registered mortgage over land owned by Leagrove as trustee and a registered first mortgage over land owned by Mark Stafford. The mortgages were, for relevant purposes, in identical terms which included the following.

- [6] The term "Secured Money" was defined as meaning:
- "[A]ll amounts which the Mortgagor owes to [ING Bank] at any time, including:
- (a) all amounts which at any time [ING Bank] has *advanced* or paid, or has become liable to *advance* or pay, for any reason:
 - (i) to or on behalf of the Mortgagor; or
 - (ii) at the express or implied request of the Mortgagor; or
 - (iii) because of any act or omission of the Mortgagor; or
 - (iv) because of any act or omission of [ING Bank] made at the express or implied request of the Mortgagor; and
 - (b) all amounts for which at that time the Mortgagor is or may become actually or contingently liable to [ING Bank] for any reason, including all amounts for which the Mortgagor is or may become liable to [ING Bank] in respect of any orders, drafts, cheques, promissory notes, bills of exchange, letters of credit Guarantees, bonds and other instruments or engagements (whether negotiable or not) which:
 - (i) have been drawn, issued, accepted, endorsed, discounted or paid by [ING Bank]; or
 - (ii) are held by [ING Bank] as a result of any transaction entered into by [ING Bank] for, or on behalf of, or at the express or implied request of the Mortgagor; and
 - (c) all amounts which at that time are owing and unpaid, or owing but not presently payable, or owing upon a contingency, by the Mortgagor to [ING Bank] for any reason; and
 - (d) all amounts which at that time [ING Bank] is entitled to recover or claim from the Mortgagor for any

reason (including any assignment, transfer or disposition by any person to [ING Bank] of any property); and

- (e) all amounts which at that time it is reasonably foreseeable or at some future time falls into any of the descriptions in (a), (b), (c) or (d) above applied as at that future time; and
- (f) all amounts which at that time the Mortgagor owes or is liable for, to any assignee of [ING Bank] because the assignee performs an agreement or exercises a right [ING Bank] had before the time of the assignment; and
- (g) all amounts which are payable to [ING Bank] under this mortgage or under any Collateral Security."

[7] Clause 22 dealt with the preservation of ING Bank's rights and relevantly provided:

"22.1 The rights of [ING Bank] and the obligations and liabilities of a Mortgagor under this mortgage are not affected by anything which might otherwise affect them at law or in equity including, without limitation, any of the following:

- (a) [ING Bank] or another person granting time or other indulgence to any Mortgagor or Security Provider;

...

- (c) any transaction or arrangement that may take place between [ING Bank] and a Security Provider, any Mortgagor or any other person;

- (d) any variation of a transaction, arrangement or agreement between [ING Bank] and a Security Provider, any Mortgagor or any other person;

- (e) [ING Bank] failing or neglecting to recover by the realisation of any Collateral Security or otherwise any of the Secured Money from any person;

...

- (h) the release, discharge, abandonment, loss, impairment, transfer of or other dealing with (either in whole or in part and whether with or without consideration) any right of [ING Bank] under this mortgage or under any Collateral Security;

..."

[8] On or about 14 September 2007, ING Bank sent a letter to Leagrove's directors offering to extend the term of the lease and to increase the original loan facility by \$1 million. That offer, with some handwritten amendments, was accepted on 28 September 2007 by Mark Stafford and Brian Stafford as Leagrove's directors. Mark, Brian and Christopher Stafford also signed the agreement as guarantors. The Staffords' solicitor witnessed their signatures. The agreement included these terms:

"Security: *The proposed loan variation is conditional upon the following security being provided in form and substance acceptable to [ING Bank]. If anything relating to the security or anything else occurs which in [ING Bank's] opinion makes the loan variation undesirable, [ING Bank] may withdraw from the proposed transaction.*

1. *Registered first mortgage from Leagrove Pty Ltd as trustee for the Stafford Investment Trust over englobo parcels of land described as Lots 156 and 157 on RP 79932, Lot 209 on RP 902366 and Lot 210 on RP 901018 situated at 41 and 49 Crescent Avenue and 11 and 17 Broadwater Avenue Hope Island, Gold Coast.*
2. *Registered third party, first mortgage from Mark Stafford over englobo parcel of land described as Lot 211 on RP 901019 located at 35 Crescent Avenue Hope Island, Gold Coast.*
3. Registered first fixed and floating charge over assets and undertakings of Leagrove Pty Ltd.
4. *Code of Banking Practice compliant joint & several guarantees of;*
.Brian James Stafford;
.Christopher Michael Stafford;
.Mark Francis Stafford
5. *Unlimited guarantee & indemnity given by Leagrove Pty Ltd as trustee for the Stafford Investment Trust." (my emphasis)*

[9] The passage quoted in the preceding paragraph includes the handwritten amendments which were to add in "1" after "Leagrove Pty Ltd" the words "as trustee for the Stafford Investment Trust"; in "4" to omit the word "Unlimited" before "joint & several guarantees of" and replace it with the words "Code of Banking Practice compliant"; and to add "5", making Leagrove as trustee a fourth guarantor.

[10] On 30 October 2007, Mark, Brian and Christopher Stafford and Leagrove as trustee executed their joint and several deeds of guarantee and indemnity. The following terms of the deeds, which were identical in each deed except where footnotes indicate otherwise, are relevant:

"Background

A [ING Bank] has agreed to provide the Guaranteed Money to [Leagrove] at the Guarantor's request and for valuable consideration.

B The Guarantor has agreed to provide a Guarantee for the repayment of the Guaranteed Money to [ING Bank].

...

3 Guarantee

3.1 Payment of Guaranteed Money

The Guarantor unconditionally and irrevocably guarantees to the [ING Bank] [Leagrove's] punctual payment to [ING Bank] of the Guaranteed Money.

3.2 Without demand

The Guarantor agrees that if [Leagrove] does not pay the Guaranteed Money or any part of the Guaranteed Money on or before the time it is due for payment, the Guarantor must immediately pay the Guaranteed Money (or part of the Guaranteed Money) to [ING Bank], whether or not [ING Bank] has made demand on [Leagrove].

3.3 Limitation

If the provisions of the Code of Banking Practice apply to this document the Guarantor's liability is limited in connection with the

Facility plus all interest, legal costs, enforcement costs, fees and charges which [Leagrove] owes to [ING Bank] at any time.

...

5 Preservation of [ING Bank's] rights

5.1 [ING Bank's] rights unaffected

[ING Bank's] rights and the Guarantor's obligations and liabilities under this document are not affected by anything which might legally affect them including any of the following:

...

- (h) the release, discharge, abandonment, loss, impairment, transfer of or other dealing with (either in whole or in part and whether with or without consideration) the [ING Bank's] rights under this document or under any Collateral Security;

...

7 Guarantor's representations and warranties

...

7.2 No representations by [ING Bank]

The Guarantor acknowledges that:

- (a) the Guarantor has not signed this document as a result of or by reason of any promise, representation, statement or information of any nature or kind whatever given or offered to it by or on behalf of [ING Bank] whether in answer to any enquiry by or on behalf of the Guarantor or not; and

...

7.3 Guarantor's representations and warranties

The Guarantor certifies and confirms to [ING Bank] that:

...

- (b) the Guarantor has power to enter into this document and do everything contemplated by this document and all necessary action has been taken and Authorisations obtained to make sure this document is legally binding on the Guarantor and to enable the Guarantor to carry out all of obligations imposed on the Guarantor under this document;

...

7.5 Reliance on representations and warranties

The Guarantor acknowledges that:

- (a) [ING Bank] has incurred obligations under this document and any Collateral Security in reliance on the representations and warranties given by the Guarantor and each Security Provider;
- (b) the Guarantor has not entered into this document or any Collateral Security in reliance upon and the Guarantor will not rely on any representation, warranty, promise or statement made by [ING Bank] or any person on [ING Bank's] behalf at any time, unless the representation, warranty, promise or statement is in writing and signed by [ING Bank's] Authorised Officer.

...

14.1 Authority

- (a) If the Guarantor has entered into this document as trustee of the Trust, the Guarantor and its successors as trustee are liable under this document as trustee so that the assets of the Trust at any time are available to satisfy the Guarantor's liabilities under this document. The Guarantor's right of indemnity out of the Trust's assets is charged with the payment of the Guaranteed Money provided that nothing in this clause releases the Guarantor from any liability in the Guarantor's personal capacity.²

...

18.4 Entire agreement

- (a) This document together with any offer letter, facility agreement or Collateral Security supersedes all previous agreements about their subject matter and embodies the entire agreement between the parties.
- (b) Any statement, representation, term, warranty, condition, promise or undertaking made, given or agreed to in any negotiation, arrangement, understanding or agreement, has no effect except to the extent expressly set out or incorporated by reference in any of those documents.³

... "

- [11] It was common ground that, contrary to the agreement extending Leagrove's loan facility,⁴ the guarantee executed by the Staffords did not comply with the Code of Banking Practice in these ways. First, contrary to cl 28.2 of that Code, their guarantee was not limited to a specified amount plus other liabilities. Second, it was not limited to the value of a specified security at the time of recovery. Third, it did not include a statement to the effect that the Code applied to it, and nor did it contain a warning notice directly above the space where the Staffords were to sign. It was also common ground that the respondents have not alleged any prejudice arising from the fact that the Staffords' deed of guarantee was not Code of Banking Practice compliant.⁵

The issues in this appeal

- [12] In defending ING Bank's applications for summary judgment on the respondents' guarantees, Mark Stafford deposed at first instance that he executed his guarantee on the basis that the trust land subject to Leagrove as trustee's mortgage would be available to repay Leagrove's debt if ING Bank required it. He believed this land would be sold with the resulting moneys available to reduce the ultimate amount of Leagrove's debt the subject of his guarantee. He also believed that guarantees would be obtained from all other parties mentioned as guarantor in accordance with the agreement extending Leagrove's loan facility⁶ and that when he executed his guarantee⁷ he did not realise it did not comply with the requirements of the earlier

² Clause 14.1 was only in Leagrove as trustee's deed of guarantee and indemnity.

³ Clause 19.4 in Leagrove as trustee's deed of guarantee and indemnity.

⁴ Set out at [8] of these reasons.

⁵ Transcript 1-14 Lines 41-42; Appellant's Outline of Argument, [31] and [65]; and Appellant's Outline of Argument in Reply, [12].

⁶ Set out at [8] of these reasons.

⁷ The relevant terms are set out at [10] of these reasons.

agreement. He believed and was informed by Brian and Christopher Stafford that they held similar beliefs. This evidence was unchallenged.

- [13] In both applications, all respondents contended that summary judgment should be refused as they had an arguable defence which required a determination at trial.
- [14] The respondents' principal argument in both the ING Bank proceeding and the mortgage proceeding was that ING Bank failed to obtain the securities listed in the agreement to extend Leagrove's loan facility,⁸ namely, Code of Banking Practice compliant guarantees from the Staffords. All respondents acted on that term of the agreement and entered into their guarantees on the basis that ING Bank would obtain this suite of securities. This was a condition precedent to or an implied condition of the guarantees. It followed, they argued, that ING Bank's failure to comply with a condition precedent to all guarantees coming into effect resulted in the guarantees not coming into effect at all. In the alternative, the respondents contended that it was an implied term of all guarantees that the Staffords' guarantee would be Code of Banking Practice compliant. As a result, they argued that all guarantees were discharged when ING Bank failed to meet that implied term. It followed that there were no secured moneys under the mortgages. It was necessary to determine at trial whether ING Bank was entitled to enforce the guarantees and mortgages.
- [15] The respondents conceded that the trust deed empowered Leagrove as trustee to enter into a guarantee,⁹ but contended in both the ING proceeding and the mortgage proceeding that Leagrove as trustee's guarantee was invalid for another reason. ING Bank lent money to Leagrove. Leagrove as trustee was not a different entity from Leagrove, ING Bank's debtor. ING Bank's claim against Leagrove as trustee under its guarantee was therefore against Leagrove as guarantor of itself. Leagrove could not guarantee its own performance of its obligations as debtor. It followed that the guarantee was not valid as Leagrove as debtor, and Leagrove as trustee and guarantor, were the same legal entity. Further, there was no evidence that Leagrove as trustee was acting within the terms of the trust in giving a guarantee to ING Bank on behalf of the trust.
- [16] In this appeal, the respondents did not otherwise challenge the validity of the mortgages in the mortgage proceeding.¹⁰ They did, however, emphasise that the mortgages secured only moneys owing and were not themselves a primary source of liability. Under the mortgages, the term "secured money" was defined¹¹ as all amounts which the mortgagor, that is, Leagrove as trustee, or Mark Stafford, owes to the mortgagee (that is, ING Bank) at any time. As the respondents' guarantees never came into effect or were discharged as soon as they were executed, there was no moneys owing under them so that the appellant in the mortgage proceeding had no real prospect of success at trial.
- [17] ING Bank contended that it was not a condition precedent to or an implied term of the respondents' guarantees that the Staffords' guarantees be Code of Banking Practice compliant. All guarantees turned solely on their clear written terms which justified summary judgment for ING Bank in the ING Bank proceeding. The

⁸ Set out at [8] of these reasons.

⁹ Respondents' Outline of Argument, [27].

¹⁰ See appeal hearing transcript 1-24 to 1-25.

¹¹ See [6] of these reasons.

mortgages secured debts owed by Leagrove as trustee and Mark Stafford so that ING Bank was also entitled to summary judgment in the mortgage proceeding.

- [18] ING Bank also contended that Leagrove as trustee could guarantee the debts of Leagrove in its own right to ING Bank. Leagrove as trustee as guarantor was acting in a different capacity to Leagrove in its own right as debtor. There was no reason to consider that Leagrove as trustee in acting as guarantor and mortgagor was acting outside the terms of the trust.

The primary judge's approach

- [19] The primary judge accepted the respondents' contention that there was a real question to be tried as to whether there was an implied obligation on ING Bank in the guarantees to "obtain and maintain" the specified securities, particularly a guarantee from the Staffords which was Code of Banking Practice compliant.¹² Referring to Pincus J's observations in *Re Kwan; Ex parte Hastings Deering (Solomon Islands) Ltd*,¹³ his Honour considered that business people coming into this transaction would consider the Staffords' guarantees should be Code of Banking Practice compliant. ING Bank prepared the guarantee. It was not argued that non-compliance with the Code of Banking Practice vitiated the guarantees but the matter went:

"to the question of whether there are real, as opposed to fanciful, prospects of the [respondents] succeeding on the issue as to whether [ING Bank] was required to "obtain and maintain" a compliant guarantee and whether [ING Bank's] failure to do so has the effect of discharging the securities. ... [T]hese matters go to the question of whether there ought be trials of these issues."¹⁴

- [20] His Honour held that cl 5.1(h) of the guarantees¹⁵ and cl 22.1(h) of the mortgages¹⁶ relied on by ING Bank should be construed *contra proferentem* ING Bank. It was at least arguable that those clauses did not assist ING Bank because they did not specifically refer to ING Bank's failure to obtain a particular collateral security, namely, the Code of Banking Practice compliant guarantee from the Staffords as specified in the agreement extending Leagrove's loan facility. Further, it was at least arguable that ING Bank's failure to obtain such a guarantee discharged the guarantees and other securities, including the mortgages given by Leagrove as trustee and Mark Stafford. That alone was sufficient reason to refuse both applications for summary judgment.¹⁷
- [21] His Honour noted that ING Bank's loan was to Leagrove in its own right. The effect of cl 14.1(a)¹⁸ of Leagrove as trustee's guarantee was that the relevant guarantee seemed to be from both Leagrove in its own right and Leagrove as

¹² *ING Bank (Australia) Ltd v Stafford & Ors; Leagrove Pty Ltd & Anor v ING Bank (Australia) Ltd* [2010] QSC 289, [30].

¹³ (1987) 15 FCR 264, 267; [1987] FCA 275.

¹⁴ *ING Bank (Australia) Ltd v Stafford & Ors; Leagrove Pty Ltd & Anor v ING Bank (Australia) Ltd* [2010] QSC 289, [32].

¹⁵ Set out at [10] of these reasons.

¹⁶ Set out at [7] of these reasons.

¹⁷ *ING Bank (Australia) Ltd v Stafford & Ors; Leagrove Pty Ltd & Anor v ING Bank (Australia) Ltd* [2010] QSC 289, [34], [35].

¹⁸ Set out at [10] of these reasons.

trustee. A company cannot guarantee its own debt.¹⁹ The respondents' submission based on *Glennon v Federal Commissioner of Taxation*²⁰ and *Suncorp Insurance and Finance v Commissioner of Stamp Duties (Qld)*,²¹ that Leagrove could not effectively assign property in its capacity as trustee to itself in its personal capacity, missed the point. The covenant in the present case was not between guarantor and debtor but between guarantor and creditor of the debtor.²² But the clear and unambiguous words at the conclusion of cl 14.1(a) demonstrate that Leagrove as trustee's deed of guarantee purported to be a guarantee by Leagrove both in its own right and in its capacity as trustee. All this suggested that Leagrove as trustee in entering into the guarantee was purporting to guarantee its own debt, a guarantee unenforceable under the Statute of Frauds.²³ It was not necessary to express a concluded view but, on the face of the documents, the judge considered that the matter was sufficiently arguable as to warrant further investigation at trial.²⁴

Were the guarantees subject to a condition precedent or an implied condition?

- [22] It was clear at first instance that the respondents had executed deeds of guarantee of Leagrove's debt to ING Bank which was then due and owing. Despite this, the trial judge accepted the respondents' submission that there was a need for a trial to determine whether the agreement extending Leagrove's loan facility²⁵ imposed conditions precedent to or implied conditions in the guarantees, namely, that the Staffords' guarantees would be Code of Banking Practice compliant. That condition precedent or implied condition was not met in that the Staffords' guarantees were not Code of Banking Practice compliant. It followed, the respondents submitted, that the securities, including both guarantees, either did not come into effect or were discharged. The respondents submitted that this contention was supported by Dixon J's observations in *Williams v Frayne*,²⁶ Pincus J's decision in *In Re Kwan, Ex parte Hastings Deering (Solomon Islands) Ltd*,²⁷ and by McPherson J's observations in *Taubmans Pty Ltd v Loakes*.²⁸
- [23] It is helpful to begin an analysis of this contention by discussing the cases on which the respondents rely. In *Williams v Frayne*, Walter Williams borrowed money from the defendants to purchase a bakery business conducted on leased premises. Clifford Williams guaranteed the loan. Walter Williams assigned his interest under the lease to the defendants as security but did so without the landlord's consent as required under the lease. Walter Williams sold his bakery business which was on-sold by a number of successive owners, each continuing to pay rent directly to the landlord, with the defendants treating each subsequent business purchaser as their debtor. The last purchaser obtained a new lease from the landlord who, until then, was unaware Walter Williams had assigned the lease to the defendants as security. Walter Williams, as borrower, and Clifford Williams, as guarantor, were

¹⁹ *ING Bank (Australia) Ltd v Stafford & Ors; Leagrove Pty Ltd & Anor v ING Bank (Australia) Ltd* [2010] QSC 289, [40]-[43].

²⁰ (1972) 127 CLR 503; [1972] HCA 52.

²¹ [1998] 2 Qd R 285; [1997] QCA 225.

²² *ING Bank (Australia) Ltd v Stafford & Ors; Leagrove Pty Ltd & Anor v ING Bank (Australia) Ltd* [2010] QSC 289, [38] and [39].

²³ Above, [43].

²⁴ Above, [44].

²⁵ The relevant terms of that agreement are set out earlier with emphasis in [8] of these reasons.

²⁶ (1937) 58 CLR 710, 738; [1937] HCA 16.

²⁷ (1987) 15 FCR 264, esp 267.

²⁸ [1991] 2 Qd R 109.

unsuccessful, both at first instance and on appeal to the High Court, in applying for a declaration that they were discharged from repaying the loan because of the failure of the defendants to inform the landlord of his security.

In that context, Dixon J observed in his reasons for refusing the Williams' application:

"The omission to obtain the landlord's consent [to the assignment of the lease] involved no departure from the contract on the part of the creditors. ... None of the consequences flowing from the fact that the security was not a permitted assignment can afford the guarantor a ground of relief. For they involve no alteration in the contract or its performance and no default in the creditors (See, per Lord *Atkin*, *Pratapsing v. Keshavlal*). The creditors are not in this respect in a position analogous to the creditor who in *Wulff v. Jay* failed to register his bill of sale, or who in *Capel v. Butler* did not register his security over the craft assigned to him, or who in *Strange v. Fooks* abstained from giving notice of an equitable assignment. *If the guarantee is given upon a condition, whether express or implied from the circumstances, that a specific security shall be obtained, completed, protected, maintained or preserved, any failure in the performance of the condition operates to discharge the surety and the discharge is complete. But otherwise the surety can complain only if the creditor sacrifices or impairs a security, or by his neglect or default allows it to be lost or diminished, and in that case the surety is entitled in equity to be credited with the deficiency in reduction of his liability.* The cases are collected in the ninth chapter of Sir *Sidney Rowlatt's* book and there is an examination of some of them in the judgment of *Hanna J* in *Northern Banking Co v Newman & Colton*.

The question remains whether the failure of the creditors in the present case after the unpermitted assignment to inform the landlord of its existence amounted to a non-observance of any condition implied in the suretyship, or to a neglect or default."²⁹ (footnotes omitted) (*my emphasis*)

Dixon J concluded that the defendants as creditors were not guilty of neglect or default in failing to inform the landlord of his security after its unpermitted assignment.

- [24] In *Re Kwan*, Kwan successfully applied to set aside a bankruptcy notice arising from his liability under a guarantee, essentially on the ground that the creditor would not have needed to resort to the guarantee if it had not failed to register a security given by the principal debtor. Pincus J referred to and applied³⁰ Brennan J's comments (with which Murphy J agreed and Gibbs CJ and Wilson J generally agreed) in *Buckeridge v Mercantile Credits Ltd*:³¹

"In a case where the act of a creditor does not discharge a surety, but the creditor has nonetheless sacrificed or impaired a security, or by his neglect or default allowed it to be lost or diminished, the surety is

²⁹ (1937) 58 CLR 710, 737-738; [1937] HCA 16.

³⁰ (1987) 15 FCR 264, 266.

³¹ (1981) 147 CLR 654, 675; [1981] HCA 62.

entitled in equity to be credited with the deficiency in reduction of his liability."

Pincus J found that the creditor neither registered the security in time nor, when that failure was pointed out, did it do anything to effect registration of the security until it was too late. Applying *Buckeridge*, there was in truth and reality no debt.³² Pincus J then referred to counsel for the debtor's alternative argument, namely, that the creditor's failure to register the bill of sale had extinguished the debt, relying on Dixon J's observations set out above in *Williams v Frayne*. Pincus J continued:

"On the evidence the case is one of a kind familiar in commercial life: the directors of a private company were asked to guarantee a company debt to support a substantial security taken over the company's property, there being no express statement that the efficacy of the guarantee depended upon the creditors troubling to perfect the security. In such a situation, it is (in general) at least implicit that the creditor will take all reasonable steps to perfect the security. It would be contrary to the expectation of business people that the creditor, not having perfected the security given by the principal debtor, should be free to have recourse to the guarantors. In my opinion, here, where the guarantee was given on the basis of an express stipulation that there should be a bill of sale, there was such an implied condition as I have mentioned; the guarantee is therefore discharged for breach of that condition. It should be added, perhaps superfluously, that what is held here has nothing to do with instances in which the guarantee is so drawn as to exclude the use of such a defence by the guarantor, nor with a case in which the failure to perfect the security was not the fault of the creditor."³³

- [25] In *Taubmans*, Loakes contended that he agreed to guarantee a corporate trader's indebtedness to Taubmans for paint it supplied on account on the condition that Ramble would be a co-surety. Taubmans contended that Loakes orally agreed that credit would only be extended to the trader if Loakes signed a memorandum evidencing his own promise to guarantee payment of the trader's indebtedness and that Loakes alone should become the guarantor. No contrary evidence was placed before the trial judge. Taubmans obtained summary judgment on the guarantee.

On appeal, McPherson J (as his Honour then was) considered that summary judgment was apposite. His Honour noted that a guarantee may be executed subject to a condition that it is binding only if another or others also executed as guarantors. In determining whether the parties formed such an intention, a cogent factor may be that the guarantee is in a form or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable. That is because, without execution by the other guarantor or guarantors, the signatory loses the right to contribution from the others as co-sureties in the event of their having to pay.³⁴

Williams J (as his Honour then was) also concluded that, on that unchallenged material, the primary judge was entitled to give summary judgment.³⁵

³² (1987) 15 FCR 264, 266.

³³ Above, 267.

³⁴ [1991] 2 Qd R 109, 111.

³⁵ Above, 120.

Demack J agreed that the evidence supported the order for summary judgment. His Honour noted that sometimes it was necessary to give commercial efficacy to an agreement which was not consistent with the written form that was signed, but each case had to be decided in accordance with the intention of the parties.³⁶

- [26] This discussion demonstrates that the factual situations in *Williams v Frayne*, *Re Kwan* and *Taubmans*, where it was not suggested the terms of the guarantees or related agreements were comparable to those in the present case, are not analogous here. It is trite but true that each case turns on the terms of the relevant agreements and guarantees and the objective intention of the parties. In this case the Staffords' personal beliefs as to the effect of their guarantees³⁷ were far from determinative. In deciding the critical question as to the objective intention of the parties, it is necessary to carefully consider the terms of, firstly, the agreement extending Leagrove's loan facility, but primarily the guarantees.
- [27] That part of the agreement extending Leagrove's loan facility emphasised by the respondents is set out at [8] of these reasons. It was clearly intended by all parties to be for the benefit of ING Bank which would not have been disposed to temporally extend and increase Leagrove's loan facility by \$1 million without receiving the securities listed there. That was so, even though the handwritten amendment to that agreement under the heading "Security", changing "4" from "Unlimited" to "Code of Banking Practice compliant" must have been made at the request and for the benefit of the Staffords. The respondents do not contend that they suffered any prejudice through the Staffords' guarantees not being Code of Banking Practice compliant.³⁸ Under the agreement to extend Leagrove's loan facility, if the specified securities were not provided, ING Bank was entitled to withdraw from the transaction. In that case, Leagrove would not have any temporal extension to or increase by \$1 million of its loan facility, something, it may be inferred, which was very much desired by all respondents. ING Bank, in proceeding to extend and increase Leagrove's loan facility, confirmed that the securities provided were in form and substance acceptable to it. Its failure to obtain the Staffords' guarantees in a form which was Code of Banking Practice compliant then became irrelevant for the purposes of the agreement extending Leagrove's loan facility.
- [28] Two days later on 30 October 2007, the respondents each executed their guarantee in the presence of their solicitor. They could have insisted that the Staffords' guarantees be Code of Banking Practice compliant as specified in the earlier agreement, but they did not. All respondents agreed in their deeds to unconditionally and irrevocably guarantee to ING Bank the punctual payment of Leagrove's debt.³⁹ ING Bank's rights and the respondents' obligations and liabilities under the guarantee were to be unaffected by "anything".⁴⁰ I also note that the mortgages entered into by Leagrove as trustee and Mark Stafford contained equally wide clauses preserving ING Bank's rights.⁴¹ The respondents as guarantors certified and confirmed to ING Bank that they had the power to enter into the guarantees and to do everything contemplated by them to make sure the guarantees

³⁶ Above, 110.

³⁷ Set out at [12] of these reasons.

³⁸ See footnote 5.

³⁹ Clause 3.1 set out at [10] of these reasons.

⁴⁰ Clause 5.1 set out at [10] of these reasons.

⁴¹ Clause 22.1 set out at [7] of these reasons.

were legally binding on them and to enable them to carry out their obligations imposed under the guarantees.⁴² Leagrove as trustee bound its successors as trustee to the guarantee.⁴³

- [29] Despite Mark Stafford's evidence,⁴⁴ the clear and broad terms of the deeds of guarantee executed by all respondents do not suggest that they or their solicitor were concerned to ensure the Staffords' guarantees were Code of Banking Practice compliant. Their intention evinced from the deeds was to satisfy ING Bank with comprehensive guarantees so as to ensure the Leagrove loan facility was extended and increased. True it is that in Australia the settled principle governing the interpretation of guarantees is that a doubt as to the construction of a provision should be resolved in favour of the surety: *Andar Transport Pty Ltd v Brambles Ltd*;⁴⁵ *Bofinger v Kingsway Group Ltd*.⁴⁶ But that principle is not invoked in this case. That is because there can be no doubt from the unambiguous and comprehensive terms of the deeds of guarantee that each respondent unequivocally intended to be made absolutely liable to ING Bank for Leagrove's debt, almost certainly because they thought this was the only way to ensure ING Bank immediately extended the period of and increased the amount of Leagrove's loan.
- [30] And nor was it a case where ING Bank sacrificed or impaired a security or by neglect or default allowed a security to be lost or diminished: cf *Williams v Frayne*⁴⁷ and *Re Kwan*.
- [31] The present case also differed from *Re Kwan* in that there the guarantee was given on the basis of an express stipulation that there should be a bill of sale which the creditor did not take out. Pincus J specifically noted that the approach he took in *Re Kwan* would not be appropriate where the guarantee was drawn so as to exclude the use of such a defence by the guarantor, or where the failure to perfect the security was not the fault of the creditor. In the present case, the terms of the guarantee were clearly intended by the guarantors to protect absolutely ING Bank's rights as creditor. As a result of the agreement extending Leagrove's loan facility, the Staffords could have insisted their guarantees were Code of Banking Practice compliant; but they did not. The respondents have not alleged any prejudice by ING Bank's failure to ensure the Staffords' guarantees were Code of Banking Practice compliant.⁴⁸
- [32] Despite cl 18.4(a),⁴⁹ in light of the other terms of the guarantees set out in [10] of these reasons, I am confident that all respondents executed the deeds intending that the guarantees not be subject to any condition precedent or implied condition arising out of the agreement to extend Leagrove's loan facility. That conclusion seems entirely consistent with the realities of commercial life. This is not a case where Dixon J's observations in *Williams v Frayne*⁵⁰ have application.

⁴² Clause 7.3(b) set out at [10] of these reasons.

⁴³ Clause 14.1(a) set out at [10] of these reasons.

⁴⁴ See [12] of these reasons.

⁴⁵ (2004) 217 CLR 424, 433-437, [17]-[23]; [2004] HCA 28.

⁴⁶ (2009) 239 CLR 269, Gummow, Hayne, Heydon, Kiefel and Bell JJ, 292; [2009] HCA 44.

⁴⁷ (1937) 58 CLR 710, 738.

⁴⁸ See footnote 5.

⁴⁹ Set out at [10] of these reasons. Note this was cl 19.4(a) in Leagrove as trustee's deed of guarantee and indemnity.

⁵⁰ Set out at [23] of these reasons.

- [33] The construction I have taken of the guarantees, despite the earlier agreement extending Leagrove's loan facility, is consistent with that taken by Mahoney JA, albeit in respect of a different agreement and guarantee, in *Sonntag v Graziano*.⁵¹ Mahoney JA (with whom Clarke and Sheller JJA agreed) noted that:

"[T]he execution and delivery of the security was not a condition precedent to the existence of the loan agreement or the guarantee but was a stipulation precedent to the performance of certain of the obligations created by the loan agreement."

Those observations are apposite in this case.

- [34] I also note that at least some of the mandatory requirements necessary before implying a term in an agreement in accordance with *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings*⁵² and *Codelfa Construction Pty Ltd v State Rail Authority of N.S.W.*⁵³ were not satisfied here. It may be arguable that the implied condition contended for by the respondents was reasonable and equitable. But it was not necessary to give business efficacy to the deeds of guarantee which were and are completely effective without it. The implied term contended for by the respondents was capable of clear expression and did not directly contradict any express term of the deeds, but it was contrary to the clear intent of the deeds, namely, that the respondents would unequivocally and absolutely guarantee Leagrove's debts to ING Bank. The implication of the term urged by the respondents was certainly not so obvious that "it goes without saying". On an application of the principles in *BP Refinery* and *Codelfa*, the term contended for by the respondent should not be implied in the deeds of guarantee.
- [35] For all these reasons, I am satisfied that it was not reasonably arguable that the respondents' guarantees were subject to a condition precedent or an implied condition that the Staffords' guarantees must be Code of Banking Practice compliant.

Could Leagrove as trustee guarantee Leagrove's debt?

- [36] Leagrove as trustee also contends that its guarantee was invalid as Leagrove both borrowed the \$8.25 million from ING Bank and guaranteed that loan.
- [37] Ordinarily, it would be pointless for a guarantor to guarantee its own debt: that is not the purpose of a guarantee which is to promise to answer for the debt of another. Leagrove entered into the loan from ING Bank in its own right. ING Bank secured Leagrove's loan obligations with guarantees, including a guarantee from Leagrove as trustee, and a mortgage over trust land entered into by Leagrove as trustee. Whilst Leagrove, acting in its own right, and Leagrove as trustee were not different entities, Leagrove entered into the loan in one capacity and guaranteed the loan and gave a mortgage over trust land in another capacity. Leagrove as trustee held legal title to the assets of the trust and owed a fiduciary duty to the beneficiaries of the trust. In my view, the fact that Leagrove as debtor and Leagrove as trustee were acting in such different capacities as debtor and trustee meant that Leagrove as trustee was not prohibited from guaranteeing Leagrove's debt, at least whilst acting within the terms of the trust and consistent with its fiduciary duty.

⁵¹ [1994] NSWCA 291.

⁵² (1977) 180 CLR 266, 283; [1977] UKPCHCA 1.

⁵³ (1982) 149 CLR 337, 346-347; [1982] HCA 24.

- [38] Nothing in cl 14.1 of the deed of guarantee suggests a contrary intention or requires a contrary conclusion. I would expect such transactions, where debtor companies hold no substantial assets in their own right but hold substantial assets as a trustee of family trusts, are reasonably common commercially. Section 14 and s 50 of the *Property Law Act 1974* (Qld) in combination seem to authorise such dealings. I am not persuaded that, on the facts of this case, it was unlawful for Leagrove as trustee to guarantee Leagrove's debt to ING Bank entered into in Leagrove's personal capacity.
- [39] Whist conceding that Leagrove as trustee had power under the trust deed to enter into guarantees, the respondents next contend that ING Bank has not demonstrated that Leagrove had power as trustee to charge the trust property with the payment of a debt by converting the debt Leagrove in its own right owed to ING Bank to a debt of Leagrove as trustee. In making that contention, the respondents rely on *Glennon v Federal Commissioner of Taxation*⁵⁴ and *Suncorp v Commissioner of Stamp Duties*.⁵⁵
- [40] *Glennon* concerned trustees transferring trust property in the context of whether there was a subsequent liability to pay duty on the transfers under the *Gift Duty Assessment Act 1941-1966* (Cth). *Suncorp* concerned a default assessment of stamp duty under s 54AB of the *Stamps Act 1894* (Qld) and turned on whether transactions undertaken by a trust resulted in creating an interest in real property so that stamp duty was payable. I do not find either case helpful in resolving the issue raised by the respondents in this case.
- [41] The evidence before the primary judge strongly suggested that the respondents and all concerned in the Stafford Family Trust were keen to obtain the temporal extension and \$1 million increase to Leagrove's loan facility with ING Bank. The terms of the trust deed authorised Leagrove as trustee to enter into a guarantee. The agreement to extend Leagrove's loan facility appeared to be for the benefit of the trust. There was no evidence to the contrary. Nor was there evidence that, in entering into the guarantee and in mortgaging trust land, Leagrove was breaching the terms of its trust or compromising its fiduciary duty as trustee. In the absence of such evidence, the only rational inference in the circumstances of this case was that Leagrove as trustee was acting for the benefit of and within the terms of the trust in entering into the guarantee and mortgage. I am satisfied it was entitled as trustee to guarantee Leagrove's debt to ING Bank and to mortgage trust property.

Summary

- [42] The respondents in both the ING Bank proceeding and the mortgage proceeding were bound by the clear, unambiguous and comprehensive terms of their deeds which required them to guarantee the repayment of Leagrove's debt when it became due. It is common ground that Leagrove's debt was due and owing to ING Bank. The guarantees and mortgages were valid securities which were immediately enforceable. The respondents had no real prospect of successfully defending ING Bank's claim for payment of the amount owing by them under their guarantees. There was no need for a trial of the claim or part of it: see *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) r 292 and *Spencer v Commonwealth*.⁵⁶ The primary

⁵⁴ (1972) 127 CLR 503, 511-512.

⁵⁵ [1998] 2 Qd R 285; [1997] QCA 225.

⁵⁶ (2010) 241 CLR 118, 141, [60]; Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 28.

judge erred in concluding otherwise. It follows that ING Bank should have judgment entered against the respondents in the ING proceeding.

[43] And nor did Leagrove as trustee and Mark Stafford have any real prospect of succeeding on all or part of their application for declarations that no moneys were secured by the mortgages and that they had caveatable interests in the mortgaged land. There was no need for a trial of their claim or part of it: see UCPR r 293 and *Spencer v Commonwealth*.⁵⁷ The primary judge erred in concluding otherwise. It follows that ING Bank should also have summary judgment in the mortgage proceeding.

[44] For the reasons given, the primary judge erred in refusing ING Bank's applications for summary judgment in each case. I would allow each appeal and set aside the orders at first instance. In CA 9499/10 (the ING proceeding), I would order that summary judgment be entered for the plaintiff against the defendants for the amount claimed together with interest up to the date of the delivery of judgment in this appeal. In CA 9496/10 (the mortgage proceeding), I would order that the plaintiffs' proceeding against the defendant be dismissed. In each appeal, I would order that the respondents pay the appellant's costs of and incidental to the appeal and to the proceeding at first instance.

ORDERS:

A. In Appeal No 9499/10

1. Appeal allowed.
2. The orders at first instance are set aside.
3. Judgment is entered for the plaintiff against the defendants for the amount claimed, together with interest up to the date of the delivery of these orders.
4. The respondents defendants are to pay the appellant plaintiff's costs of the appeal and of the proceeding at first instance.

B. In Appeal No 9496/10:

1. Appeal allowed.
2. The orders at first instance are set aside.
3. The plaintiffs' proceeding against the defendant is dismissed.
4. The respondents plaintiffs are to pay the appellant defendant's costs of and incidental to the appeal and of the proceeding at first instance.

[45] **WHITE JA:** I have had the advantage of reading the reasons for judgment of the President and agree for those reasons that the appeals should be allowed and the further orders made as proposed by her Honour.

[46] **MARTIN J:** I agree, for the reasons given by the President, with the orders she proposes.

⁵⁷ Above, 141, [60].