SUPREME COURT OF QUEENSLAND

CITATION:	*Sucrogen Australia Pty Ltd v Westpac Banking Corporation & Anor* [2011] QSC 393
PARTIES:	**SUCROGEN AUSTRALIA PTY LTD** **ACN 081 051 792** (applicant) **v** **WESTPAC BANKING CORPORATION** **ACN 007 457 141** (first respondent) and **PROSERPINE CO-OPERATIVE SUGAR MILLING ASSOCIATION LIMITED** **ACN 080 866 539 (ADMINISTRATORS APPOINTED)** (second respondent)
FILE NO:	11189 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2011
JUDGE:	Applegarth J
ORDERS:	**1. Leave is granted pursuant to s 440D(1)(b) of the *Corporations Act* 2001 (Cth) to commence these proceedings against the Second Respondent.** **2. The First Respondent shall forthwith inform the Applicant in writing of the sum required, as at 10.00 am on 8 December 2011, to discharge the following securities granted to the First Respondent by the Second Respondent:-** **(a) Real property mortgage registered no. 601382265 (T632978V);** **(b) Real property mortgage registered no. 703072092;** **(c) Real property mortgage registered no. 711679610;** **(d) Real property mortgage registered no. 711679617;** **(e) Fixed and Floating ASIC charge registered no. 1511226.**

3. The First Respondent shall forthwith, upon tender by or on behalf of the Applicant of the sum required to discharge the securities, transfer the securities to the applicant.

4. Liberty to apply on appropriate notice.

CATCHWORDS: MORTGAGES – ESTATE, RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE – DISCHARGE OR RECONVEYANCE – ASSIGNMENT OR TRANSFER TO THIRD PARTY – where applicant held fixed and floating charge over assets and undertaking of a company in administration – where applicant was third-ranking secured creditor – where first respondent, as first-ranking creditor, held a fixed and floating charge and several mortgages over the company's land – where applicant sought under s 94 of the *Property Law Act* 1974 (Qld) (the PLA) to require the first respondent to transfer the first respondent's securities to it – whether applicant is a "third person" within the meaning of s 94(1) of the PLA

Property Law Act 1974 (Qld), s 94

Challenge Bank Ltd v Hodgekiss (1995) NSW Conv R 55-756 discussed
Corozo Pty Ltd v Westpac Banking Corporation (No. 2) [1988] 2 Qd R 481 cited
First Chicago Australia Ltd v Loyebe Pty Ltd [1980] 2 NSWLR 703 followed
In the Marriage of Gould (1993) 115 FLR 371 cited
Ley v Scarff (1981) 146 CLR 56; [1981] HCA 5 discussed
Re Magneta Time Co Ltd (1915) 84 LJ Ch 814 cited
Public Trustee v Smith [2008] NSWSC 397 cited
St George Bank Ltd v Perpetual Nominees Ltd [2011] 1 Qd R 389; [2010] QSC 57 cited
Teevan v Smith (1882) 20 Ch D 724 discussed

COUNSEL: S L Doyle SC and D G Clothier for the applicant
S E Brown for the first respondent
R G Bain QC and C A Wilkins for the second respondent

SOLICITORS: Russells for the applicant
Gadens for the first respondent
Thynne & Macartney for the second respondent

[1] The applicant ("Sucrogen") is a third-ranking secured creditor of Proserpine Co-Operative Sugar Milling Association Limited (Administrators Appointed) ("the Company"). It applies for orders requiring the first-ranking secured creditor ("Westpac") to transfer certain securities to it or, alternatively, to a related company ("Sucrogen Investments"). It advances its case on three bases:

(a) An entitlement as an "encumbrancee" under s 94(2) of the *Property Law Act* 1974 ("the PLA") to require Westpac to transfer Westpac's securities to it, or to Sucrogen Investments;

(b) An entitlement under s 94(1) as a "mortgagor", within the extended definition of that word in the PLA, to require Westpac to transfer Westpac's securities to it, or to Sucrogen Investments;

(c) An entitlement, pursuant to its securities, to exercise in the name of the Company the Company's rights under s 94(1) to require Westpac to transfer Westpac's securities to it.

[2] As to the first two bases, Westpac acknowledges Sucrogen's entitlement to exercise the power to require Westpac, instead of discharging its securities, and on the terms on which Westpac would be bound to discharge its securities, to transfer the securities. Westpac does, however, raise a concern as to whether Sucrogen is entitled to direct a transfer of the Westpac securities to itself (Sucrogen), and also raises a concern as to the alternative direction that the securities be transferred to Sucrogen Investments because of a doubt as to whether Sucrogen Investments is a "third person" within the meaning of s 94(1) of the PLA.

[3] As to the third basis of Sucrogen's case, neither Westpac nor the Company submit that the powers conferred upon Sucrogen by its fixed and floating charge to request in the Company's name a transfer of Westpac's securities to Sucrogen have not been properly exercised. However, both Westpac and the Company took the view that it was for the applicant to establish that the exercise by it of its powers was a proper exercise of its powers. They acknowledge that if the Court was satisfied on this point, then s 94(1) obliged Westpac to transfer the securities to Sucrogen.

[4] The first two bases of Sucrogen's case are supported by the decision of Kearney J in *First Chicago Australia Ltd v Loyebe Pty Ltd*[1] ("*First Chicago*"). Westpac's submissions raise issues as to the correctness of *First Chicago* in relation to the operation of provisions in terms similar to subsections 94(1) and (2) of the PLA. The application came on for hearing in circumstances of urgency and was heard on the morning of 7 December 2011. After hearing argument, and with the benefit of comprehensive written and oral submissions, I considered my decision and, later that day, indicated that I had decided to follow *First Chicago*. I made orders that day. These are my reasons for making those orders. The facts as outlined below relate to the situation at the time of my decision. Since then the orders made on 7 December, if carried into effect, will have resulted in the transfer of the Westpac securities to Sucrogen upon the tender by or on behalf of Sucrogen of the sum required to discharge them.

Background

[5] By an Asset Sale Agreement dated 3 June 2011, Sucrogen (Pioneer) Pty Ltd, a company related to Sucrogen, agreed to acquire the assets of the Company.

[6] Westpac holds securities over the assets and undertaking of the Company, namely a registered fixed and floating charge and several registered mortgages over land in

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1 [1980] 2 NSWLR 703.

Queensland. As noted, Westpac's securities are first ranking. The amount owing to Westpac under its securities is approximately $65 million.

[7] The Commonwealth Bank of Australia Ltd (CBA) holds a second-ranking registered fixed and floating charge over the assets and undertaking of the Company. It was given notice of Sucrogen's intention to acquire Westpac's securities and of these proceedings. It has not sought to acquire Westpac's securities itself and has stated that it does not wish to be heard in relation to the proceedings.

[8] Sucrogen is the third-ranking secured creditor of the Company. It and the Company entered into a commercial loan agreement dated 7 July 2011, which is secured by a registered fixed and floating charge over the assets and undertaking of the Company. The amount owing under the commercial loan agreement is approximately $14.3 million.

[9] Sucrogen, Westpac and the CBA (among others) entered into a Deed of Priority dated 8 July 2011. Relevantly, the Deed regulates the order of priority between the secured creditors of the Company. Clause 5.2(b) of the Deed provides that Sucrogen will not enforce its securities without the consent of Westpac, such consent not to be unreasonably withheld.

[10] On 3 November 2011, Westpac consented to Sucrogen enforcing its fixed and floating charge in the event that Sucrogen's debt under the commercial loan agreement was not repaid in full by 4 November 2011. Repayment was not made and so Westpac's consent became effective.

[11] Administrators were appointed to the Company on 6 November 2011. By notice dated 7 November 2011, the Administrator irrevocably consented to Sucrogen enforcing its fixed and floating charge. Pursuant to s 440B(a) of the *Corporations Act* 2001 (Cth), this consent means that there is no statutory impediment to Sucrogen having taken enforcement action. The Administrators have also stated that they will abide the outcome of these proceedings.

[12] Sucrogen and the Company entered into a second commercial loan agreement dated 16 November 2011, which is secured by a second registered fixed and floating charge over the assets and undertaking of the Company. The amount owing under the second commercial loan agreement is approximately $1.7 million. Therefore the total amount owing by the company to Sucrogen is approximately $16 million. Consequent upon these events, Sucrogen, Westpac and the CBA (among others) entered into a Deed of Acknowledgment of Priority.

[13] The Asset Sale Agreement is to be considered at a meeting of creditors to be held at 9.00 am on 9 December 2011. If carried into effect, it should see creditors paid out in full before Christmas. Many of the creditors are local cane growers.

[14] Sucrogen wishes to acquire the securities of Westpac, among other things, so as to be in a position to vote the amount of Westpac's debt at that meeting. It has requested that Westpac transfer its securities to Sucrogen. It is ready, willing and able to do what is required on its behalf to fulfil this request.

[15] The only impediment to Sucrogen's acquisition of Westpac's securities was identified in correspondence between the parties' solicitors, namely a concern on

the part of Westpac that s 94 of the PLA does not authorise Sucrogen to require a transfer of Westpac's securities to Sucrogen. This was based upon certain obiter comments in *Challenge Bank Ltd v Hodgekiss*[2]. None of the other requirements of s 94 are in dispute.

[16] Sucrogen maintains its position that s 94 entitles it to direct a transfer of the Westpac securities to it. However, it advanced, as an alternative, a direction that the Westpac securities be transferred to Sucrogen Investments. Sucrogen Investments and Sucrogen have three directors in common, the same company secretary, the same ultimate holding company and the same sole shareholder. Westpac raised an issue as to whether Sucrogen Investments could be regarded as the "alter ego" of Sucrogen for these reasons or, more precisely, whether it was a "third person" within the meaning of s 94. If the Court did not grant Sucrogen an order requiring Westpac to transfer the securities to it, then Sucrogen Investments was prepared to acquire Westpac's debt and securities, and to do so by funding the acquisition itself. It proposed to hold those securities in its own right, and not for Sucrogen.

[17] Sucrogen submits as to its alternative relief (the transfer to Sucrogen Investments) that it is entitled under s 94 to require a transfer to Sucrogen Investments because Sucrogen Investments is not an "alter ego" in the sense used by Barwick CJ in *Ley v Scarff*[3] but is a "third person" according to the meaning of that term, as discussed in that authority.

[18] The third basis of Sucrogen's case makes it necessary to refer to Sucrogen's securities, including a fixed and floating charge given by the Company. The appointment of the Administrators to the Company was an event of default under a relevant commercial loan agreement. That event of default entitled Sucrogen to take any action available to it under any loan document. The fixed and floating charge is such a loan document.

[19] Pursuant to cl 7.1 of the fixed and floating charge, an Event of Default under the commercial loan agreement is a Default under that document. The appointment of the Administrators is also an Insolvency Event within the meaning of paragraph (c) of the definition in cl 1.2, which had the consequence of automatically fixing the charge to the extent that it was floating prior to that time.

[20] These events confer on Sucrogen a variety of powers under the fixed and floating charge. Pursuant to cl 7.3, it is entitled to do all things that a mortgagee or an absolute owner of the charged property could do and to exercise all of the rights, powers and remedies of such a person, of a receiver appointed under the *Corporations Act* 2001 (Cth) and as specified in cl 7.4.

[21] Section 420(2)(k) of the *Corporations Act* 2001 (Cth) confers on a receiver the power to execute any document, bring or defend any proceedings or do any other act or thing in the name of and on behalf of the company to which the receiver is appointed. Similarly, cl 7.4(s) of the fixed and floating charge confers on Sucrogen the ability to do, whether in its or in the Company's name or otherwise, anything expedient or incidental to exercise any of its powers without limiting those powers. Clause 7.10(b) constitutes Sucrogen as attorney for the Company to do, on the Company's behalf and in the Company's name, anything it considers necessary or

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2 [1995] NSW Conv R 55-756.

3 (1981) 146 CLR 56, 61-62.

expedient to give effect to a power or exercise a power, including by signing any document for that purpose.

[22] One set of powers conferred on Sucrogen pursuant to the fixed and floating charge is stated in cl 7.5 to be the right, upon a Default, to purchase a debt or liability secured by a prior Security Interest, pay the amount required to discharge or satisfy that debt or liability, and take a transfer or assignment of that Security Interest and anything ancillary or collateral to it. Thus, upon a Default, Sucrogen had power under the fixed and floating charge to acquire Westpac's debt and securities and to do, either in its name or the company's name or otherwise, anything expedient to give effect to that power.

[23] The third basis for Sucrogen's case relating to the enforcement of its securities by making a requisition in the Company's name under s 94(1) of the PLA led to an application, out of an abundance of caution, for leave under s 440D of the *Corporations Act* (Cth) to commence proceedings against the Company and for leave to join it as a second respondent. I granted such leave and the Company appeared at the hearing. There was no suggestion that Sucrogen's proposal would have a detrimental effect on creditors in the sense that it would affect the asset and liability position of the Company. The Administrators had already consented to Sucrogen enforcing its securities. The Company, through its Administrators, did not oppose leave being granted, and did not oppose the orders being sought by Sucrogen.

Relevant provisions in relation to the s 94 issues

[24] Section 94 of the PLA provides:

> "**94 Obligation to transfer instead of discharging mortgage**
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> (1) Where a mortgagor is entitled to redeem the mortgagor shall because of this Act, have power to require the mortgagee, instead of discharging, and on the terms on which the mortgagee would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs, and the mortgagee shall because of this Act be bound to transfer accordingly.
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> (2) The right of the mortgagor conferred by this section shall belong to and be capable of being enforced by each encumbrancee, or by the mortgagor, despite any intermediate encumbrance, but a requisition of an encumbrancee shall prevail over a requisition of the mortgagor, and as between encumbrances a requisition of a prior encumbrance shall prevail over a requisition of a subsequent encumbrancee.
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> (3) This section shall not apply—
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> (a) in the case of a mortgagee being or having been in possession; or

> (b) in the case of a mortgage which contains a valid and enforceable covenant or condition in favour of the mortgagee in restraint of the trade or business of the mortgagor or any other collateral benefit or advantage in favour of the mortgagee.
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> (4) This section applies to mortgages whether made before or after the commencement of this Act, and shall have effect despite any stipulation to the contrary."

[25] A number of terms used in s 94 are defined in the dictionary to the Act:

(a) "***encumbrance*** includes a mortgage in fee or for a lesser estate or interest, and a trust for securing money, and a lien and a charge of a portion, annuity or other capital or annual sum."

(b) "***encumbrancee*** has a meaning corresponding with that of encumbrance, and includes every person entitled to the benefit of an encumbrance, or to require payment or satisfaction of an encumbrancee."

(c) "***mortgage*** includes a charge on any property for securing money or money's worth."

(d) "***mortgagee*** includes any person from time to time deriving title to the mortgage under the original mortgagee."

(e) "***mortgagor*** includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the mortgagor's estate, interest, or right in the mortgaged property."

[26] There is no dispute that s 94 of the PLA applies to the Westpac securities, including its registered charge. Subject to any other Act, s 94 applies to a mortgage or charge on any property for securing money, whether the property secured is land or any other property.[4]

The s 94 issues

[27] Sucrogen's claimed entitlement on the first two bases of its case turns on the interpretation of s 94. The issue is not whether Sucrogen has an entitlement under s 94 to direct Westpac to transfer the Westpac securities. Rather, the issue is whether s 94 constrains it from directing that such a transfer be made to it, or alternatively to Sucrogen Investments, because neither it nor Sucrogen Investments is a "third person" within the meaning of s 94.

[28] The concern raised by Westpac is that the entitlement of an encumbrancee in s 94(2) relates to the "right of the mortgagor conferred by this section" and that such a right is constrained by the terms of subsection 94(1). The right of the "mortgagor" (which by definition includes a subsequent mortgagee who has an entitlement to redeem) conferred by s 94(1) is to "transfer the mortgage to any third person".

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4 PLA, s 77A; *St George Bank Ltd v Perpetual Nominees Ltd* [2011] 1 Qd R 389, 394 [31].

Westpac acknowledges that *First Chicago* is authority for the conclusion that the reference to a third person in s 94(1) is intended to identify a person other than the original mortgagor named in the mortgage, or, in other words, that the subsection, in using the expression "any third person" is referring to someone other than a party to the original mortgage.[5] Westpac submits, however, that the preferable interpretation of "third person" is a person other than the persons giving or receiving the requisition.

[29] Sucrogen submits that it is entitled to rely directly on s 94(1) to require a transfer of Westpac's securities to itself, that *First Chicago* supports this conclusion and that the later decision of the High Court in *Ley v Scarff*[6] is not inconsistent with this. It submits that *Ley* decided that s 94(1) is intended to enable one lender to be substituted for another and therefore does not entitle a mortgagor (in the true sense) or its "alter ego" that is paying out the secured debt to take a transfer of the security itself. *Ley* did not decide that a subsequent security holder cannot, under s 94(1), require a transfer of securities to itself.

[30] Sucrogen also relies upon s 94(2) as giving it a substantive and independent right to exercise the Company's rights under s 94(1). Again it relies upon *First Chicago* to support the existence of this entitlement, and submits that neither *Ley* nor the other relevant authority, *Challenge Bank Ltd v Hodgekiss*[7], were concerned with the operation of the New South Wales equivalent of s 94(2).

[31] The submissions of Sucrogen and Westpac make it necessary to refer to the legislative background to s 94 and the three relevant authorities cited in argument.

The legislative background to s 94

[32] Section 94 has its origins in s 15 of the English *Conveyancing Act* 1881 (UK). That s 15, as originally enacted, did not contain the equivalent of s 94(2). The section in its original form was considered by the Court of Appeal in *Teevan v Smith*.[8]

[33] Sir George Jessel MR explained that before s 15 was enacted a mortgagor only had a right to redeem and to have a reconveyance on payment of the mortgage debt. A difficulty arose because lenders were willing to advance money if they could have a transfer of the mortgage security but, "dreading intermediate incumbrances", they were not willing to take a security directly from the mortgagor.[9] This and other difficulties were removed by the provision. The section used the words "[w]here a mortgagor is entitled to redeem". The Master of the Rolls explained that every mortgagor is entitled to redeem, but there is a difference in their rights:

> "Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior

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5 *First Chicago Australia Ltd v Loyebe Pty Ltd* [1980] 2 NSWLR 703. 708, [32].
6 (1981) 146 CLR 56.
7 [1995] NSW ConvR 55-756.
8 (1882) 20 Ch D 724.
9 Ibid, 728.

> mortgage he must also redeem all who are between that mortgagee and himself."[10]

A second mortgagee was a "mortgagor" under the definition in the Act, and as an assign of the mortgagor was entitled to redeem. Jessel MR stated:

> "It appears to me that no person can avail himself of the 15th section who is not entitled to call for a reconveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a reconveyance."[11]

[34] The Master of the Rolls also said this about the section:

> "Every person who is behind the first mortgagee is entitled to redeem, and is a mortgagor within the meaning of the section, and if there are several successive mortgagees of the same mortgagor, which of them has a right in priority to the others to call upon the first mortgagee to assign the mortgage? It must be that one who is next to him."[12]

Lindley LJ was of the same opinion in relation to the construction of the section. His Lordship regarded the phrase "instead of reconveying" as the key to the section:

> "The mortgagor there must be some one who has the right to require a reconveyance. If that be the true view it makes an end of the whole controversy. The second mortgagee seeks to obtain, and has in fact, obtained, a reconveyance; but the mortgagor says 'No, I will have the first mortgagee transfer the estate to my nominee.' I am of opinion that he has no such right as he claims."[13]

[35] *Teevan v Smith* is authority for the proposition that the English equivalent of s 94(1) in the form it was enacted in 1881 only permitted a mortgagor, or a person claiming under the mortgagor, who had a right to require a reconveyance of the mortgage to take advantage of the section. The "mortgagor... entitled to redeem" referred to in the section meant a mortgagor who had the right to require a reconveyance from the mortgagee. If there were subsequent mortgagees, the mortgagor could not require the first mortgagee to assign the mortgage debt and convey the mortgage property to its nominee under the section. It required the consent of the subsequent mortgagee or mortgagees.

[36] The section, as enacted, enabled a mortgagor to pay out a mortgagee and give the lender the benefit of a transfer of the existing mortgage, rather than expose the lender to the risk of an intermediate encumbrance that had priority over a mortgage given directly by the mortgagor. However, the section did not confer upon the original mortgagor the right to call for a transfer of a first mortgage if there were subsequent mortgagees, unless it was entitled to a reconveyance of the mortgage, which would require it to pay out or obtain the consent of the subsequent mortgagee or mortgagees.

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10 Ibid, 729.
11 Ibid, 730.
12 Ibid.
13 Ibid, 731.

[37] In short, the original mortgagor did not have a right under the provision where there was an intermediate encumbrance. Instead, a subsequent mortgagee was entitled to redeem an earlier mortgage, and had the right conferred by the section because the subsequent mortgagee fell within the Act's extended definition of "mortgagor". A problem therefore arose when there was an intermediate encumbrance, such as a second mortgage.

[38] The equivalent of s 94(2) was introduced to address this problem. Section 12 of the English *Conveyancing Act* 1882 (UK) was enacted on 10 August 1882. As the Queensland Law Reform Commission observed in its report that led to the enactment of the *Property Law Act* 1974, subs (2) of the English provision has the effect of enabling the mortgagor to exercise the right notwithstanding the existence of an intermediate encumbrance, such as a second mortgage, and overrules the decision in *Teevan v Smith*.

[39] The Queensland provision must be taken to have enabled a mortgagor to exercise the right in s 94(1), notwithstanding the existence of an intermediate encumbrance. As a result, a first-ranking security holder cannot refuse to transfer in accordance with s 94 in reliance on the fact that a subsequent security holder has not been paid its debt or has not consented. In *Corozo Pty Ltd v Westpac Banking Corporation (No. 2)*[14] it was held that a mortgagee to whom the amount required to redeem the mortgage is tendered is not entitled to refuse to transfer the mortgage to a third person as directed by the mortgagor on the ground that a subsequent encumbrancee has not consented.

The authorities

First Chicago Australia Ltd v Loyebe Pty Ltd

[40] Unlike the other two Australian authorities canvassed in submissions, *First Chicago* concerned issues joined between mortgagees in circumstances in which a subsequent mortgagee claimed a right under the statute to require a transfer of a mortgage to it, instead of discharging the mortgage. This case, unlike the others, considered the equivalent of s 94(2) of the PLA.

[41] The plaintiff was a second mortgagee. The first defendant was the transferee of a first mortgage. The plaintiff claimed an order that the first defendant should transfer that mortgage to it, based on an entitlement under ss 94 and 95 of the *Conveyancing Act* 1919 (NSW). The first defendant submitted that the plaintiff had not brought itself within those sections. Kearney J held that the expression "mortgagor... entitled to redeem" as used in s 94 of the New South Wales Act (equivalent to s 94(1) of the PLA) included an assignee such as the official receiver of the bankrupt mortgagor, the legal personal representative of a deceased mortgagor or some such "alter ego" of the mortgagor.[15] The first defendant argued that the expression "mortgagor" does not encompass the second and later mortgagees, and relied on the wording of s 95 (s 94(2) of the PLA). Kearney J accepted that there was nothing in s 94 of the New South Wales Act "standing alone" to create a context displacing the meaning given to the expression "mortgagor" by the definition in s 7(1) of that Act. However, regard was had to s 95. His Honour stated:

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14 [1988] 2 Qd R 481.

15 *First Chicago Australia Ltd v Loyebe Pty Ltd* [1980] 2 NSWLR 703, 706-707, [16]-[20].

> "It is however apparent that in s 95 a distinction is drawn between a mortgagor in the sense of the mortgagor named in the original instrument of mortgage and subsequent mortgagees. However, this distinction is to be considered in the light of the purpose evinced by s 95 as a whole, as well as by the wording of the particular provisions therein. It seems to me that the intent of s 95 is to provide an enabling power to cover the situation where there may be intermediate incumbrances. I consider that the governing phrase in the first portion of s 95 is the wording 'notwithstanding any intermediate incumbrance'. This indicates that the section assumes that the person entitled to take advantage of s 94 may be a second or later mortgagee, but empowers such a later mortgagee to exercise the power, although there may be intervening mortgages."[16]

[42] His Honour had regard to the historical background referred to in *Teevan v Smith*, and the terms of s 95. Reference was made to the fact that the persons who are enabled to exercise the power under s 95 specifically include the "mortgagor", and it was held that this expression should bear the extended meaning given in s 7 of the NSW Act so as to comprehend, as a person entitled to exercise the power thereby conferred, a second mortgagee such as the plaintiff. His Honour went on to state that even if second and later mortgagees were not encompassed by the expression "mortgagor... entitled to redeem" in s 94, the provisions of s 95 would in such a case "operate independently to confer the like right on such subsequent mortgagees."[17]

[43] Kearney J then turned to deal with a submission that is central to the issue that I have to decide in this proceeding, namely the meaning of "third person" in the context of s 94(1) of the PLA. It is appropriate to set out the relevant paragraphs of his Honour's judgment on this aspect:

> "The second submission on behalf of the relevant defendants was that the right conferred by s 94 is limited to requiring a transfer of the mortgage 'to any third person as the mortgagor directs'. It is then submitted that, as the plaintiff's notice exercising such right required a transfer to the plaintiff itself, and, in its proceedings, the plaintiff continued to seek a transfer to itself, the plaintiff's claim falls outside the scope of s 94.
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> On this point, I prefer the construction propounded on behalf of the plaintiff, namely, that the reference to a third person in s 94 is intended to identify a person other than the original mortgagor named in the mortgage, in other words, that the section, in using the expression 'any third person', is referring to someone other than a party to the original mortgage.
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> Accordingly, I consider that the claim of the plaintiff to require a transfer of the mortgage to itself is a valid claim falling within the terms of s 94."[18]

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16 Ibid, 707 [23].
17 Ibid, 708 [30].
18 Ibid, 708, [31]-[33].

This passage is relied upon by Sucrogen in this proceeding as authority for the proposition that the reference to a third person in s 94(1) of the PLA is someone other than a party to the original mortgage or its alter ego.

[44] This construction is submitted also to flow from the terms of s 94(1) and a consideration of the authorities which disclose the section's purpose and the meaning of "third person" in the present context. In short, s 94(1) cannot be used by a mortgagor (in what Sucrogen describes as the mortgagor in "the true sense" of that word) or its "alter ego" to require a transfer of securities to itself. Section 94(1) does, however, entitle a subsequent mortgagee (which is not a mortgagor in that true sense but is a "mortgagor" according to the PLA's definition) to require a transfer to itself because such a subsequent mortgagee is not a "third person".

[45] The passages that I have quoted from paragraphs 31 to 33 of *First Chicago* directly support Sucrogen's submission that it is not a "third person" within the meaning of s 94(1) of the PLA, and Sucrogen's entitlement under s 94(1) to direct a transfer of the Westpac securities to itself. Sucrogen also relies upon *First Chicago* as recognising its "independent" entitlement pursuant to s 94(2) as a subsequent mortgagee (or "encumbrancee" to use the word contained in that subsection) to require a transfer of the mortgage.

[46] Westpac submits that the characterisation of s 94(2) as operating "independently to confer the like right on such subsequent mortgagees" should be properly understood. The subsequent mortgagee's right under s 94(2) is confined to the right of the mortgagor under s 94, and that right is constrained by s 94(1) to a transfer in the stated circumstances to "any third person".

Ley v Scarff

[47] This authority did not discuss the equivalent of s 94(2) of the PLA, and did not concern the issue of whether a subsequent mortgagee could require a transfer of securities to itself. It did, however, discuss the meaning of "any third person as the mortgagor directs" in the New South Wales equivalent of s 94(1) of the PLA, and the background to the enactment of ss 93 and 94 of the *Conveyancing Act* 1919 (NSW).

[48] The appellant's wife was the registered proprietor of certain land that was mortgaged, apparently as security for a debt owed by a company. She transferred her equity of redemption to the appellant "who, by reason of the transfer from his wife, had become the mortgagor."[19] The appellant commenced proceedings that were in substance a suit for redemption of mortgages over the property. The appellant reached terms of settlement with the representative of the first mortgagees. The primary judge found that the agreement was subject to a condition precedent that there should be no legal objection to the proposed assignment of the first mortgage to the appellant. The primary judge also found that the condition precedent was not satisfied as there was a legal objection to the assignment and therefore there was no effective agreement to assign the mortgage. The appellant, who appeared in person in the High Court, unsuccessfully argued against this finding.

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19 (1981) 146 CLR 57, 59. The appellant also might have been regarded as the "alter ego" of the original mortgagor.

[49] Chief Justice Barwick (with whom Stephen, Mason, Murphy and Aickin JJ agreed) concluded that the general law did not allow for such a transfer and that it was not authorised by s 94 of the *Conveyancing Act* (NSW) (the equivalent to s 94(1) of the PLA). The Court did not refer to or need to address s 95 of the New South Wales Act (the equivalent of s 94(2) of the PLA) because no issue as to the rights of a subsequent security holder arose in the proceeding. Chief Justice Barwick explained the position prior to the enactment of ss 93 and 94 of the New South Wales Act:

> "Prior to the enactment of ss 93 and 94 of the *Conveyancing Act*,1919 (NSW), if a mortgagor found need to discharge a mortgage and to replace it with another to secure a like amount, it would be necessary to redeem the existing mortgage by payment, accept a discharge of the mortgage and then execute a new mortgage to a new lender. Apart from the expense of such a procedure, a particular problem presented itself where the mortgagor had executed a second mortgage. In this instance, to be in a position to give the new lender a first charge on the land, it would be necessary to negotiate with the second mortgagee to postpone his security to the first mortgage to be given to the second lender, because otherwise on the discharge of the first mortgage the second mortgage would become the first charge on the land. Failing successful negotiation with the second mortgagee, it might prove necessary to discharge that security by payment.
>
> Section 93 and 94, which I set out hereunder, were enacted to better the position of the mortgagor in each of these situations."[20]

[50] After setting out ss 93 and 94 the Chief Justice continued:

> "The law now gives the mortgagor the ability to maintain the position of the first mortgage at no greater expense than the cost of the assignment of the existing security to the new lender. This maintains the priority of that security and obviates any negotiation in dealing with the subsequent mortgage.
>
> The legislation in terms provides for the assignment of the security to 'any third person as the mortgagor directs'. **Such a third person, in this context, does not include a person who is no more than the alter ego of the mortgagor. It refers to the new lender who, of course, must be nominated by the mortgagor, who has arranged the loan to pay out the existing mortgagee. The sections, in my opinion, have no relevant function where the mortgagor is providing the funds to pay out the first mortgagee**.
>
> Where there is a second mortgage, there is an equity of redemption of the first mortgage in the second mortgagee. That means that that mortgagee has a distinct interest in what is done as between the mortgagor and the first mortgagee about and in relation to the first mortgagee's security. Naturally, if no more is to occur than the discharge of that security, his interest is minimal. But a transfer of

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[20] Ibid at 60-61.

> that security to the mortgagor is a matter of some moment for the second mortgagee. In the present case, the avowed aim of the appellant is to obtain possession of the title deeds to the Lewisham property. He sees in their possession some advantage for himself in his dealings with the second mortgagee. Perhaps he is right: it might be some disadvantage to the second mortgagee for the appellant to have possession of the certificate of title, freed as it might be of the encumbrance of the first mortgage. I agree with the view expressed by Neville J in *In re Magneta Time Co Ltd* … and with the statements in the textbooks to which I have referred. The first mortgagee is not obliged to assign his security to the mortgagor when payment in discharge of his debt is made by or on behalf of the mortgagor. To do so without the concurrence of subsequent encumbrances does involve risks to the first mortgagee which he ought not in general to take. I therefore agree with the primary judge that the terms of settlement did not become effective."[21] (emphasis added)

[51] Finally, Barwick CJ addressed a further argument by the appellant to the effect that he was not a mere mortgagor but was a surety who, on payment of the debt of the principal creditor, was entitled to an assignment of the securities held by that creditor. Barwick CJ observed that if the appellant was such a surety and if the relevant mortgage was a security of the debt of the company, then the appellant might be correct in his assertion. However, the appellant was found not to be a surety. This part of the judgment is relied upon by Sucrogen as supportive of the proposition that someone other than the original mortgagor who asserts an entitlement to a transfer pursuant to the Act in some role other than that of the mortgagor (in the true sense) or that mortgagor's alter ego can take advantage of the section. However, I do not consider that this passing observation which was made on the basis of an unsupported assumption that the appellant was a surety provides any guidance concerning the operation of the section in the present case.

[52] Sucrogen's principal reliance upon *Ley v Scarff* is based on that case's recognition that the rationale for the limitation in the equivalent of s 94(1) of the PLA is to preserve the position of a subsequent mortgagee from having the mortgagor substituted as the holder of the title under the first mortgage, to the potential disadvantage of the subsequent mortgagee. It is not to prevent what the Chief Justice described as a "new lender", who has arranged a loan to pay out an existing mortgagee, from obtaining the advantage of a transfer pursuant to the section. The purpose of the section is to permit such a lender to have the benefit of the existing mortgage, rather than to have that mortgage discharged.

[53] This understanding of the rationale for the reference to "any third person" in s 94(1) of the PLA and equivalent provisions in other jurisdictions is said to support Sucrogen's submissions about the proper construction of s 94, namely, in accordance with *First Chicago*, that the expression "any third person" is referring to someone other than a party to the original mortgage.

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21 Ibid at 61-62.

Challenge Bank Ltd v Hodgekiss

[54] This case was not concerned with a request of the kind made in the present case, by which a subsequent mortgagee proposes to loan additional amounts and seeks the transfer of an existing mortgage to it. The case arose after a bank advanced a sum to Mr and Mrs Hodgekiss at the request of three companies which guaranteed the loan. The bank obtained a mortgage in its favour over the home of Mr and Mrs Hodgekiss. The bank served demands on Mr and Mrs Hodgekiss requiring payment of the sum due under the mortgage because of defaults. The solicitors for Mr and Mrs Hodgekiss informed the bank that they had instructions to seek to exercise the mortgagors' right under s 94 of the *Conveyancing Act* (NSW) to have the mortgage paid out, and to have the mortgage and the guarantees transferred to a third party. However, the mortgagors were only entitled to a discharge of the mortgage upon payment. There was no tender, and no dispensation from tender. Young J (as his Honour then was) found that the claimed rights under s 94 had not come into being.

[55] Mr and Mrs Hodgekiss asserted that pursuant to s 94 of the *Conveyancing Act* (NSW) the bank was required to assign to one of the companies that was a guarantor (and referred to in the judgment as "Consolidated") the guarantee given by the other companies. Young J referred to the principle that under s 94 a mortgagor may direct that in lieu of discharging the mortgage the mortgagee should transfer it to the nominee of the mortgagor who provided the moneys to redeem the mortgage. This principle was said to have been defined in *Ley v Scarff*. After referring to that authority and to the decision in *Re Magneta Time Co Ltd*[22] (which had been applied in *Ley*), Young J observed:

> "In *First Chicago Austr Ltd v Loyebe Pty Ltd* … Kearney J did hold that the section enabled a second mortgagee to ask that the first mortgage be transferred to itself. That decision, which was delivered only days before *Ley's* case was argued and was not referred to in *Ley's* case, should be treated as having been partially overruled by *Ley's* case. It may be argued that the decision of Kearney J still stands, at least where there is no notice of a subsequent mortgage, but it seems to me that the words of Barwick CJ in *Ley's* case are so strong that one cannot agree with this argument."[23]

[56] The view that *First Chicago* should be treated as having been partially overruled by *Ley's* case was obiter. The claimed statutory right under s 94 of the New South Wales *Conveyancing Act* simply did not arise because payment had not been made. In addition, and relying upon *Ley's* case, Young J concluded that Consolidated was the "alter ego" of the mortgagor, thus rendering s 94 inapplicable. Moreover, the consideration of s 94 was in the context of a claim that that section obliged the bank to assign to Consolidated a guarantee. The facts of *Challenge Bank* are materially different to the present case. Young J was not required to consider the application of the equivalent of s 94(1) of the PLA in the case of a new lender which is not the "alter ego" of the original mortgagor and which seeks the transfer, upon payment, of a mortgage granted to a first-ranking mortgagor.

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22 (1915) 84 LJ Ch 814.

23 *Challenge Bank Ltd v Hodgekiss* [1995] NSW ConvR 55-756, 55,821.

[57] I am unable, with respect, to agree that *First Chicago* should be treated as having been partially overruled by *Ley's* case. *Ley* was concerned with an appellant who was in substance the mortgagor. Chief Justice Barwick referred to him as a mortgagor, whereas Young J referred to him as being "the alter ego" of the mortgagor. The issue in *Ley* was whether a provision like s 94(1) of the PLA entitles such a mortgagor to require a transfer to itself. The background to the legislation and the mischief at which it was directed led to the conclusion that the section was not intended to entitle such a mortgagor to require a transfer to itself or its alter ego. As Barwick CJ observed, the sections have "no relevant function where the mortgagor is providing the funds to pay out the first mortgagee." The decision in *Ley* is not inconsistent with *First Chicago*. *Ley* did not address the issue of whether a new lender, which is an existing subsequent mortgagee and a "mortgagor" within the Act's extended definition, should be taken to be a "third person". The appellant in *Ley* was not such a subsequent mortgagee. *Ley* is not authority for the proposition that s 94(1) prevents a subsequent mortgagee from requiring a transfer to itself in circumstances in which it has arranged funds to pay out the existing mortgage.

[58] The question remains whether *First Chicago* should be followed. That turns upon the proper construction of s 94, governed by the principles that are stated in the authorities I have reviewed, and the discussion in those authorities of the purpose of provisions such as s 94.

The proper construction of s 94

[59] The principal issue of statutory interpretation that arises in this proceeding is whether *First Chicago* is correct in interpreting the expression "any third person" in its statutory context as referring to someone other than a party to the original mortgage. This view is not obvious from the words of s 94(1), but nor is it inconsistent with the terms of that subsection. Regard must be had to the purpose of the section as a whole, and the fact that it is not intended to entitle a mortgagor (in the sense of the original mortgagor, that mortgagor's assignee, successor in title or other "alter ego") to require a transfer of a mortgage to it, to the possible prejudice of another mortgagee who might be entitled to redeem an earlier mortgage and who accordingly falls within the statutory definition of "mortgagor". Against that background, the "third person" referred to in s 94(1) might be understood to be a person other than the original mortgagor named in the mortgage or someone else who might be described as "no more than the alter ego of the mortgagor" in the sense discussed in *Ley*. *Ley* made clear that a "third person" in the context of s 94(1) refers to the new lender who has arranged the loan to pay out the existing mortgage. There is no reason to suppose that such a new lender would not be a subsequent mortgagee seeking to refinance the mortgagor's debt and to take a transfer of an existing mortgage upon payment of the amount required to discharge it. In fact, there is every reason to suppose that a subsequent mortgagee often will provide such a new loan, and nothing in the terms of the section leads one to suppose that such a subsequent mortgagee should not have the entitlement which the Act provides to obtain a transfer of the existing mortgage that is to be paid out.

[60] The words "third person" in s 94(1), viewed in isolation, might be taken to mean a person other than the "mortgagor" who gives the requisition referred to in the section or the mortgagee to whom the requisition is given, such that a subsequent mortgagee (who may be a "mortgagor" according to the statutory definition if it is

entitled to redeem the mortgage) is not such a "third party". The alternative interpretation, namely that a "third party" is someone other than a party to the mortgage, is also open on a reading of s 94(1). Having regard to the mischief at which the section was directed, and the section's application in the case of a subsequent mortgagee who wishes to redeem an earlier mortgage, I favour the latter interpretation. In my view, that interpretation is to be preferred since it best achieves the apparent purpose of s 94, and because it avoids apparently unintended consequences. In general terms, the purpose of the section is to facilitate the transfer of a mortgage from one lender to another instead of requiring the discharge of the existing mortgage and the granting of a new one with its associated costs and complications. The entitlement or "right" to a transfer that is conferred by the section on the incoming lender enables the incoming lender to enjoy the same priority as the outgoing lender. A transfer to the incoming lender, provided it is not the alter ego of the original mortgagor, does not give rise to the difficulties alluded to by Barwick CJ in *Ley*. The mischief identified by Barwick CJ in *Ley* does not arise when the "third person" is a lender with an existing, subsequent mortgage. The mischief identified in the authorities indicates that the section cannot be used by the original mortgagor or its "alter ego" to require a transfer to itself, and the term "third person" should be construed accordingly. For this reason, "third person" means a person other than the original mortgagor or its alter ego.

[61] If one was to construe s 94(1) as not entitling a subsequent mortgagee to require a transfer to itself, this would lead to apparently unintended consequences and would deprive subsequent mortgagees of the rights which s 94 was intended to confer.

[62] I accept Sucrogen's submission that there is no apparent reason for excluding from the class of incoming lender someone who is an existing lender. There is no rationale for limiting the operation of s 94(1) to cases where the incoming lender is not an existing mortgagee. Such a course would seem to be contrary to the purpose of the section, since an existing mortgagee may be more likely to refinance a mortgagor's indebtedness to another mortgagee than an entirely new lender. An interpretation that limits s 94(1) to an entirely new lender, and that excludes existing mortgagees from its scope, is not compelled by the language of the section or the authorities that have ruled on its operation. Such an interpretation would limit the right of a subsequent mortgagee, as expressly recognised in s 94(2), to require a mortgage to be transferred to someone other than itself. It is hard to discern any rationale for such a limitation.

[63] Westpac acknowledged that there is "no apparent reason to exclude an existing lender from requiring a transfer to itself". However, it submitted that this was to ask the wrong question, and that such a limitation was not inconsistent with the mischief of the section as identified by Barwick CJ in *Ley*.

[64] Westpac submitted that the mischief at which the section was directed was the difficulty experienced by a mortgagor (in the traditional sense of a borrower) in bringing in a new lender, and the section's purpose was to give such a borrower a simple process to transfer a security to a new lender. This understanding of the mischief was re-stated in *Ley*. The enactment of provisions like s 94(2) was said to be to ensure that the right of the mortgagor could be exercised where there was an intermediate mortgagee, not to give wider rights to an encumbrancee to direct a transfer to itself.

[65] If the mischief at which s 94(1) was directed is identified in the terms suggested, then it does not assist in the interpretation of that section in isolation, or of the section as a whole, in circumstances where s 94(1) is availed of by a subsequent mortgagee which has an entitlement to redeem the relevant mortgage. *Teevan v Smith* and later authorities recognise that such a mortgagee has rights under the section by virtue of the statutory definition of "mortgagor". One must ask what in the terms or purpose of s 94(1) requires the words "third person" to be interpreted so as to exclude such a subsequent mortgagee from requiring a mortgage to be transferred to itself. The identified mischief does not supply the answer. The purpose of the section is to facilitate the transfer of a mortgage to a new lender. The limit on the right to transfer suggests that the "third person" is a person other than the original mortgagor or its alter ego since the section was not intended to entitle the original mortgagor to require a transfer to itself. But that limit does not apply where it is an incoming lender in the form of a subsequent mortgagee that is exercising the rights that s 94(1) confers upon it. No purpose would be served by construing s 94(1) so as to preclude a subsequent mortgagee from requiring a transfer to itself. No purpose is identified by Westpac or by the authorities.

[66] I conclude that when regard is had to the section as a whole, its apparent purpose and the rationale, as discussed in the authorities, for the limitation contained in s 94(1) (namely, that the transfer be to a "third person"), the preferable interpretation of s 94(1) is that adopted in *First Chicago*.[24] I respectfully adopt the construction favoured by Kearney J in that case, which is that a reference to a third person is intended to identify a person other than the original mortgagor named in the mortgage, or, in other words, that the section is using the expression "any third person" as referring to someone other than a party to the original mortgage.

[67] Adopting the interpretation of s 94(1) favoured in *First Chicago*, I conclude that Sucrogen is entitled under s 94(1), as a "mortgagor" within the extended definition of that word, to require Westpac to transfer its securities to it.

[68] Sucrogen also relied upon an entitlement under s 94(2) as an encumbrancee to require Westpac to transfer Westpac's securities to it. The express reference in s 94(2) to an encumbrancee having the "right of a mortgagor" conferred by s 94, a right which is said to "belong to" and to be capable of being enforced by the encumbrancee, makes clear that an encumbrancee is entitled to exercise the rights of a mortgagor under s 94(1). In this regard, s 94(2) may be said to "operate independently to confer the like right on such subsequent mortgagees."[25] However, the right conferred by s 94(2) is the right of the mortgagor conferred by s 94(1), and that right is constrained by the terms of s 94(1). I agree with Westpac's submissions in that regard. However, this directs attention to the meaning of "third person" in s 94(1). For the reasons given above, such a person may be an existing encumbrancee, such as Sucrogen, that wishes to obtain a transfer to it of an existing mortgage. The enactment of s 94(2) facilitates such an existing encumbrancee paying out another mortgagee in order to protect its position.

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24 I note that the learned authors of *Fisher and Lightwood's Law of Mortgage*, 2nd Aust ed. (Chatswood: LexisNexis Butterworths, 2005), 732 [32.55] cite *First Chicago*, *Ley* and *Corozo* as authorities for the proposition that the mortgagor may require the transfer to be made to any third person—that is, to any person other than the mortgagor named in the mortgage or the alter ego of the mortgagor.

25 *First Chicago Australia Ltd v Loyebe Pty Ltd* [1980] 2 NSWLR 703, 708 [30].

[69] I do not accept that s 94(2) provides an "independent right" that overcomes some relevant limitation in s 94(1). However, I accept that Sucrogen, as an encumbrancee, is entitled by virtue of s 94(2) to require Westpac to transfer Westpac's securities to it. This is because s 94(2) provides that the right of the mortgagor conferred by s 94(1) belongs to an encumbrancee such as Sucrogen and, in turn, the right of the mortgagor conferred by s 94(1) is to require a transfer of the relevant mortgage to a "third person", being someone other than a party to the original mortgage. For the reasons given by me, Sucrogen is a "third person" within the meaning of s 94(1).

[70] Section 94(2), in effect, entitles an encumbrancee to exercise the right of the mortgagor (in this case the Company) to transfer a mortgage to a third person. One of the purposes of s 94(2) is to empower an encumbrancee such as Sucrogen to exercise the right conferred by s 94(1) upon an original mortgagor such as the Company to require a mortgage to be transferred to an existing mortgagee. In other words, s 94(2) entitles an encumbrancee to require the transfer of a mortgage to itself. In exercising the entitlement given by s 94(2) to enforce "the right of the mortgagor" conferred by s 94(1), the encumbrancee is a "third person" in respect of *that* mortgagor and the other party to the mortgage that is to be transferred. Section 94(2) therefore enables such an encumbrancee to require a mortgage to be transferred to itself.

[71] In summary, I consider that the interpretation favoured in *First Chicago* should be adopted. Sucrogen is a "third person" within the meaning of s 94(1). Section 94(1) entitles Sucrogen to require Westpac to transfer the Westpac securities to Sucrogen on the terms on which Westpac would be bound to discharge those securities. In addition, s 94(2) gives the same right to Sucrogen as an "encumbrancee".

Sucrogen Investments

[72] My conclusion makes it unnecessary to address the alternative relief sought by Sucrogen, being orders which would have required Westpac to transfer its securities to Sucrogen Investments. However, the matter having been argued, I should briefly state my conclusions in relation to this aspect. The concern expressed by Westpac was that Sucrogen Investments might be regarded as the "alter ego" of Sucrogen as it is a related corporation with the same sole shareholder. The description "alter ego" is given in many different contexts. In some contexts it describes a situation where one entity controls another.[26] In the present context the term "alter ego" is not contained in the statute. Instead, it is a term used in two of the judgments that I have considered. In *First Chicago* it was used by Kearney J in a particular context in response to an argument that the word "mortgagor" in the equivalent of s 94(1) of the PLA is limited to the person named in the instrument of mortgage as the mortgagor. His Honour rejected that view, at least to the extent that it sought to exclude "an alter ego of the mortgagor such as his trustee in bankruptcy or legal personal representative."[27] The other context in which "alter ego" was used was by Barwick CJ in *Ley*, who stated a third person "does not include a person who is no more than the alter ego of the mortgagor."[28] I do not consider that either of these authorities supports the conclusion that the mere fact that a mortgagee which falls

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26 *In the Marriage of Gould* (1993) 115 FLR 371, 383; *Public Trustee v Smith* (2008) 1 ASTLR 488, 516.

27 *First Chicago Australia Ltd v Loyebe Pty Ltd* [1980] 2 NSWLR 703, 706 [17].

28 *Ley v Scarff* (1981) 146 CLR 57, 61-62.

within the extended definition of "mortgagor" in the Act and another company are related parties makes the related company the "alter ego of the mortgagor". The mortgagor being referred to in that context is the mortgagor in the true sense of the word, not an encumbrancee which falls within the statutory definition. The limitation in s 94(1) is directed at an original mortgagor or its alter ego.

[73] If required to decide Sucrogen's alternative claim to relief, I would not have found that Sucrogen Investments was an "alter ego of the mortgagor" in the sense discussed in the authorities.

The third basis of Sucrogen's case

[74] My decision that Sucrogen had an entitlement to require the transfer of the Westpac securities, on terms, particularly upon tender of the sum required to discharge the securities, makes it unnecessary to consider the third basis upon which Sucrogen sought orders for Westpac to transfer Westpac's securities to it. Although there was a basis in the evidence to conclude that the powers being exercised by Sucrogen under its securities were being properly exercised, and no party submitted to the contrary, it is neither necessary nor appropriate in the circumstances to reach a conclusion on this point.

Orders

[75] The orders made by me on 7 December 2011 are as follows:

1. Leave is granted pursuant to s 440D(1)(b) of the *Corporations Act* 2001 (Cth) to commence these proceedings against the Second Respondent.

2. The First Respondent shall forthwith inform the Applicant in writing of the sum required, as at 10.00 am on 8 December 2011, to discharge the following securities granted to the First Respondent by the Second Respondent:-

   (a) Real property mortgage registered no. 601382265 (T632978V);

   (b) Real property mortgage registered no. 703072092;

   (c) Real property mortgage registered no. 711679610;

   (d) Real property mortgage registered no. 711679617;

   (e) Fixed and Floating ASIC charge registered no. 1511226.

3. The First Respondent shall forthwith, upon tender by or on behalf of the Applicant of the sum required to discharge the securities, transfer the securities to the applicant.

4. Liberty to apply on appropriate notice.