SUPREME COURT OF QUEENSLAND

CITATION:	*In Roma Pty Ltd v Adams & Anor* [2012] QCA 347
PARTIES:	**IN ROMA PTY LTD** ACN 111 769 861 (appellant) **v** **GRANT ANTHONY ADAMS & FREYA ANGELA O'SULLIVAN AS TRUSTEE FOR THE GAA DISCRETIONARY TRUST** (respondents)
FILE NO/S:	Appeal No 8756 of 2012 SC No 9114 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2012
JUDGES:	Chief Justice and Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed;** **2. The appellant pay the respondents' costs, to be assessed on the standard basis unless agreed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – appellant purported to plead non-admission to a number of allegations in the statement of claim, including that the deed of charge had been delivered – appellant failed to provide any explanation for the non-admission – appellant did not plead an agreement to release the deed of charge – appellant did not raise an agreement to release the deed of charge until closing oral submissions – whether purported non-admissions are to be treated as deemed admissions – whether appellant precluded from arguing the existence of an agreement to release the deed of charge DEEDS – DELIVERY – appellant agreed to provide a fixed and floating charge over the company – appellant executed

	the deed of charge and gave it to the appellant's solicitor for registration – appellant's solicitor informed respondents' solicitor the deed of charge had been executed – deed of charge not physically delivered to respondents' solicitor – settlement occurred before the signed charge physically delivered – whether the deed of charge was "delivered" upon execution
	Property Law Act 1974 (Qld), s 47 *Uniform Civil Procedure Rules* 1999 (Qld), r 166
	400 George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 Qd R 302; [2010] QCA 245, distinguished *Baypoint Pty Ltd v Baker* (1994) 6 BPR 13,687, followed *Groongal Pastoral Co Ltd (In liq) v Falkiner* (1924) 35 CLR 157; [1924] HCA 54, distinguished *Grundy v Ley* [1984] 2 NSWLR 467, cited *Lady Naas v Westminster Bank Ltd* [1940] AC 366, cited *Mirzikinian v Tom & Bill Waterhouse Pty Ltd* [2009] NSWCA 296, cited *Xenos v Wickham* (1867) LR 2 HL 296, cited
COUNSEL:	P Dunning SC, with G Radcliffe, for the appellant G Thompson SC, with AW Duffy, for the respondents
SOLICITORS:	Robinson & Robinson for the appellant Piper Alderman for the respondents

[1] **CHIEF JUSTICE**: The learned primary judge held that the appellant ("In Roma") is bound by a deed of fixed and floating charge, and specifically, that it was not released from its obligations under that deed by a registered release of mortgage signed by the respondents, Mr Adams and Mrs O'Sullivan, on 14 March 2007. In Roma appeals against his Honour's declarations to that effect.

The primary judgment

[2] It will assist disposition of the grounds of appeal if I set out at this stage something of the circumstances leading to the issue between the parties, and the elements of his Honour's reasoning.

Brief Summary

[3] In December 2006, Mr Adams and Mrs O'Sullivan, as trustees of a discretionary trust, agreed to lend a little over $2,000,000 for the purchase of the Warrego Hotel in Cunnamulla. The borrowers defaulted in payment a year later.

[4] As part of the security for the loan, In Roma had agreed to grant Mr Adams and Mrs O'Sullivan a fixed and floating charge over the company. By its director the second defendant Mr Goeytes, In Roma executed that charge and provided it to its solicitor, Mr Cvetkovic for registration.

[5] Although that solicitor informed the solicitor for Mr Adams and Mrs O'Sullivan (Mr Caravousanos) that the charge had been executed, he did not actually deliver the document to their solicitor, giving rise to the issue whether the deed had been "delivered".

[6] His Honour found that it had been delivered, because execution by In Roma was intended to constitute delivery.

[7] As to whether the respondents released In Roma from its obligations under the deed of charge, the judge found first, that they did not agree to a release; and second, that by releasing a mortgage given by In Roma over another property, the Commonwealth Hotel at Roma, the respondents intended, as evident from the terms of that release, to release the Commonwealth Hotel land from the charge, but not, as well, to release In Roma from the personal covenants in the mortgage, including the obligation to repay which founded the subsistence of the deed of charge.

Some more detail

[8] The learned judge comprehensively canvassed the circumstances preceding Mr Goeytes's signing of the deed of charge. I will at this stage of the proceeding focus on what I would regard as the critical events.

[9] The initiating loan agreement, which led to the settlement on 8 December 2006, to which In Roma was a party, in its capacity as "additional security provider", contained Recital B, which said that In Roma had agreed to provide the "additional securities". They were defined in the schedule to include a first registered fixed and floating charge over In Roma. While cl 11 of the agreement obliged the borrower to secure the granting of the additional securities, Recital B confirmed, as his Honour held, In Roma's independent agreement to grant the charge. Consistently with that, In Roma executed the deed of charge on 8 December 2006.

[10] On the day before, the respondents' solicitor Mr Caravousanos had sent to one of the solicitors for In Roma, Ms Newman, the deed of charge for execution by In Roma. On the following day, Mr Farnham, of the borrower, confirmed to the respondents' solicitor that Mr Goeytes had executed the deed of charge. Mr Goeytes provided his solicitors that day with the signing page of the deed and the form for registration. The settlement then occurred.

[11] Three days later Mr Cvetkovic (for the appellant) informed the respondents' solicitor that his client had executed the deed of charge and the document required for its registration.

[12] His Honour concluded that In Roma had entered into a binding deed of charge on two bases: one depended on the way the matter had been pleaded, and the other on the conclusions to be drawn from the factual circumstances summarised above. It is convenient to deal with those matters in reverse order.

Whether In Roma bound by the "undelivered" deed

[13] The learned judge referred to *400 George Street (Qld) Pty Ltd v BG International Ltd* [2010] QCA 245, in which the Court endorsed the orthodox view that whether a deed is "delivered" depends not on actual delivery, but upon the intent with which execution – absent actual delivery – is made. That much is confirmed by s 47 of the *Property Law Act* 1974.

[14] His Honour was in this case influenced by the circumstance that the parties did not expressly stipulate that the chargor would be bound only upon execution by the chargee; and by the fact that the chargor sent the executed deed of charge together with the registration documents to the defendants' solicitor, to facilitate the settlement which was imminent.

[15] The judge said:

> "[75] In the present case, there was no condition or stipulation between the parties to the effect that the chargor would only become bound upon execution of the document by the chargee. It is, however, quite clear that all of the parties to this transaction intended that settlement should be effected on 8 December 2006 on the basis that each party was immediately bound by the provisions of the documents that each had executed prior to settlement. So much is clear not merely from the 'mechanical' arrangements which were put in place for the parties in remote areas to sign documents, confirm the fact of signature, and then forward the hard copies of signed documents after settlement had occurred, but specifically in the case of the defendants by the fact that it was not only the deed of charge which was executed by the first defendant but also the ASIC forms necessary to be lodged in order to obtain registration of that charge. These were all sent by the second defendant to his solicitor by fax before settlement. It is also to be recalled that the defendants' then solicitor emailed Mr Caravousanos, albeit on the Monday after the Friday on which settlement had occurred, confirming that all documents, including the fixed and floating charge with the amended page, had been signed.
>
> [76] These matters, in the context of the timing of the settlement of the advance, lead me to infer that the first defendant intended to be legally bound by the charge when it was executed by it on 8 December 2006, and that the deed of charge was 'delivered'."

[16] The judge inferred from those circumstances that In Roma intended to be bound upon its execution of the deed, without more.

[17] There was an added circumstance, to which I advert because of an aspect of the grounds of appeal. His Honour said at paragraph 77:

> "I have already noted that the second defendant, who executed the charge of behalf of the first defendant, did not give evidence. Clearly he could have given evidence if there were circumstances which pointed to there being no intention to be bound by the signing of the charge in the form of a deed, instructing his solicitors to advise that it had been signed, and permitting settlement to proceed in circumstances where it was not intended for the deed of charge to be legally binding. The fact that the second defendant did not give evidence on these matters leads to the clear inference that any evidence from him would not have assisted the defendants' case."

[18] His Honour thereby found the deed to have been delivered notwithstanding there was no actual handing over to the respondents themselves or execution by them.

The relevance of the defendants' pleading

[19] The learned judge separately found that the appellant should be deemed to have admitted, as a matter of pleading, that In Roma was bound by the deed of charge.

That was because In Roma, in failing to admit the allegations about the deed of charge, offered no explanation for declining to do so, contrary to the requirements of the *Uniform Civil Procedure Rules*.

[20] These were the allegations in the further amended statement of claim:

> "6A. The Plaintiffs, by their solicitors, Ebsworth & Ebsworth, forwarded the Charge document and related documents to the First Defendants' solicitors, Mullins Lawyers, by email on 7 December 2006 at 11:00am.
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> 6B. Mullins Lawyers forwarded the Charge document and related documents to the Second Defendant to execute on behalf of the first Defendant by email on 8 December 2006 at or about 1:44pm.
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> 6C. On 8 December 2006, the First Defendant, by its director and duly authorised agent the Second Defendant, executed the Charge.
>
> PARTICULARS
>
> 6C.1 The Second Defendant signed the signature page of the Charge as a director and authorised person of and on behalf of the First Defendant; and
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> 6C.2 The Second Defendant initialled a handwritten amendment to page 3 of the Charge; and
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> 6C.3 The Second Defendant signed an ASIC Form 309 in relation to the Charge on behalf of the First Defendant; and
>
> 6C.4 The Second Defendant signed an ASIC Form 350 in relation to the Charge on behalf of the First Defendant;
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> 6D. On 8 December 2006 at or about 3:11pm, the Second Defendant sent copies of the documents referred to in sub-paragraphs 6C.1, 6C.2, 6C.3 and 6C.4 to Mullins Lawyers by facsimile.
>
> 6D. The Charge was a Deed which was signed, sealed and delivered by the First Defendant upon its execution by the First Defendant on 8 December 2006, whereupon the First Defendant was bound by its terms.
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> 6E. The following were express terms of the Charge:
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> 6E.1 by clause 3.4, that the Charge was to be a first ranking charge;
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> 6E.2 by clause 3.4, that the First Defendant was required not to create or permit any encumbrance over the First

Defendant's assets without the prior written consent of the Plaintiffs;

6E.3 by clause 13.17, that in the event the Charge was not registered within any time period allowed or it cannot be registered, the First Defendant would, on demand, execute and procure the registration of a security substantially the same as the Charge in a form and substance satisfactory to the Plaintiffs."

[21] This was the defendants' response (para 7A further amended defence):

"7A. The Defendants do not admit the allegations of fact contained in paragraph 6A, 6B, 6C, both numbered paragraphs 6D, and paragraph 6E and paragraph 7B of the Further Amended Statement of Claim and with respect to the allegations contained in paragraph 6A, 6B, 6C, both numbered paragraphs 6D and paragraph 6E, the Defendants say that if this Honourable Court finds that the First Defendant granted a charge to the Plaintiffs as alleged, then the Defendants say that the Plaintiffs released the First Defendant from the charge as alleged in paragraph 6 hereof."

[22] The Judge observed:

"[63] To the extent that this purported to be a non-admission of those matters alleged by the plaintiffs in paragraphs 6A – 6E of the further amended statement of claim, paragraph 7A of the further amended defence failed completely. It contained no explanation at all for the non-admission, let alone the required 'direct explanation' for the defendants' belief that the allegations could not admitted. Accordingly, by reason of the operation of r 166(5), the defendants are taken to have admitted each of those allegations in the statement of claim."

[23] It is convenient to say now that his Honour's conclusion was, with respect, correct.

[24] The non-admission plainly was not explained.

[25] The consequence of non-admission in those circumstances, set out in r 166(5), depends upon the allegation's being an allegation of fact.

[26] Mr Dunning SC, who appeared for the appellant, submitted that because the construction of a deed (a matter of law) bears on the intent with which the deed was executed, whether it was delivered was a mixed question of law and fact. It is convenient to address that submission now.

[27] Whether a deed is delivered is a question of fact (*Mirzikinian v Tom & Bill Waterhouse Pty Ltd* [2009] NSWCA 296 para 34; *Xenos v Wickham* (1867) LR 2 HL 296, 319). The matter involved, in determining whether a deed has been delivered, is the intent of the executing party, and that is a question of fact.

[28] His Honour therefore rightly held that the appellant was deemed to have admitted In Roma was bound by the deed, having signed and sealed it (matters not in issue) and having delivered it (the deemed admission).

Release?

[29] The judge recounted the basis for the appellant's assertion that it had agreed upon a release from the deed in March 2007; and that alternatively, the respondents' release of the real estate mortgage over the Roma Hotel operated to release, also, the deed of charge.

[30] As to the former, his Honour noted that the appellant had not pleaded the existence of any such agreement to release: the claim there was an agreement first emerged in final oral submissions for the present appellant. It was an issue on which, with proper notice, the present respondents could have led evidence.

[31] The evidence of the respondent Mr Adams, accepted by the judge, was that the respondents intended to release only the real property mortgage, and not the personal covenants. His solicitor Mr Caravousanos gave contrary evidence which the judge doubted. His Honour deals with this in paras 89-105 of his reasons. I return to this matter later.

[32] As to the alternate matter, his Honour relied on the terms of the release, which provided that the respondents "release the mortgage as a charge on the land". He referred to *Groongal Pastoral Co Ltd v Falkiner* (1924) 35 CLR 157, *Grundy v Ley* [1984] 2 NSWLR 467, *Provident Capital Ltd v Printy* [2008] NSWCA 131 and *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81, together with the relevant provisions of the *Land Title Act* 1994, for the conclusion that what was critical, namely, the express terms of the release, operated to release the mortgage as a charge, but not, in addition, to release the mortgagor from the personal covenants in the mortgage which were (and are) the foundation of the deed of charge.

Grounds of Appeal

[33] The grounds of appeal are expressed as follows:

> "**Errors in relation to whether the putative instrument of fixed and floating charge ("the Charge Document") was a deed**
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> 1. The learned trial judge erred in holding that there was, by operation of UCPR r 166(5), an implied admission of the second paragraph numbered 6D of the Further Amended Statement of Claim, when the matters there alleged were questions of law or mixed questions of law and fact, and to the extent they were questions of law the appellant had no obligation to plead to such matters, nor could UCPR r 166 have any application to them.
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> 2. The learned trial judge at Reasons [77], and [76], apparently considered relevant the subjective intention of the director of the appellant. If that be so, the learned trial judge gave consideration to an impermissible matter in arriving at his conclusion that delivery was to be inferred by the execution of the Charge Document.
>
> 3. The learned trial judge's conclusion at Reasons [76], that delivery by the appellant occurred upon execution of the Charge Document on 8 December 2006, was predicated upon the material facts identified by his Honour at Reasons [75]. Those were not the material facts upon which the respondents had

pleaded in paragraphs 6A – 6D of the Statement of Claim that there was delivery by the appellant upon execution of the Charge Document. Consequently, there was a breach of natural justice in relation to the appellant as the case was decided by his Honour on a basis not pleaded by the respondents and of which it had not had proper notice.

4. The learned trial judge erred in holding that the appellant was bound by the Charge Document when it was executed by it on 8 December 2006, and should have held that there was no delivery then, or at all, because the respondents never executed the Charge Document as had been contemplated by its terms and the parties.

Errors in relation to the ambit of the release agreed between the appellant and the respondents on 7 March 2007

5. The learned trial judge erred at Reasons [83] – [88] in holding that the appellant's pleadings were not sufficient to allow it to agitate a case that consensus or agreement had been reached in March 2007 for the respondents to release the appellant from all securities it had provided.

6. The learned trial judge erred in failing to hold that on or about 7 March 2007 an agreement was reached between the appellant and the respondents that the respondents would release any security they had over the appellant.

7. Further or alternatively, the learned trial judge erred in holding that the instrument of release of mortgage did not also operate to discharge all obligations of the appellant to the respondents.

Pleading issues generally

8. In addition to each of grounds 1 and 5 above, the learned trial judge erred in failing to hold that any difficulty in relation to the proper identification of issues at the trial was primarily due to the form in which the allegations were made in the Further Amended Statement of Claim.

Errors in the proper construction of the loan agreement

9. The learned trial judge erred in the proper construction of the loan agreement:

(a) by holding at reasons [54] that there was an '... independent agreement referred to in Recital B being an agreement by the first defendant to provide the Additional Securities';

(b) and further holding at reasons [55] that there was '... an independent obligation on the part of the [appellant] pursuant to the agreement referred to in Recital B';

(c) when the operative provisions of the loan agreement did not contain any covenant by the appellant to provide such

> security, rather such obligation was only imposed upon other parties to the loan agreement."

Ground 1: Non-admission

> "The learned trial judge erred in holding that there was, by operation of UCPR r 166(5), an implied admission of the second paragraph numbered 6D of the Further Amended Statement of Claim, when the matters there alleged were questions of law or mixed questions of law and fact, and to the extent they were questions of law the appellant had no obligation to plead to such matters, nor could UCPR r 166 have any application to them."

[34] For reasons already expressed (paras 23-28), this ground is not sustained.

Ground 2: Mr Goeytes's actual intent

> "The learned trial judge at Reasons [77], and [76], apparently considered relevant the subjective intention of the director of the appellant. If that be so, the learned trial judge gave consideration to an impermissible matter in arriving at his conclusion that delivery was to be inferred by the execution of the Charge Document.'

[35] The judge did not rely, in reaching his conclusion, upon a view as to the actual subjective intention of Mr Goeytes. He spoke of the absence of evidence from Mr Goeytes of "circumstances which pointed to" there being no intention. See para [17] above.

[36] Mr Dunning submitted however that there was no relevant evidence Mr Goeytes could have given, because the form and content of the deed of charge were the only matters to be considered in determining what intent accompanied execution. That does not emerge from a reading of paras 6A to 6D of the amended defence, on which Mr Dunning relied for that submission: those paragraphs travel well beyond the form and content of the deed of charge.

[37] Furthermore, the case was conducted on the basis that the variety of circumstances to which his Honour referred (paras 75, 76) when addressing the issue of delivery, were all relevant. They were dealt with in written submissions.

[38] Accordingly, his Honour's approach to the significance of the absence of evidence from Mr Goeytes was open.

Ground 3: Delivery

> "The learned trial judge's conclusion at Reasons [76], that delivery by the appellant occurred upon execution of the Charge Document on 8 December 2006, was predicated upon the material facts identified by his Honour at Reasons [75]. Those were not the material facts upon which the respondents had pleaded in paragraphs 6A – 6D of the Statement of Claim that there was delivery by the appellant upon execution of the Charge Document. Consequently, there was a breach of natural justice in relation to the appellant as the case was decided by his Honour on a basis not pleaded by the respondents and of which it had not had proper notice."

[39] The appellant alleged in this ground an absence of natural justice because the judge reached his conclusion on a basis not pleaded or foreshadowed.

[40] This objection could not survive the respondents' express plea that the charge was delivered upon execution by the appellant, and the further amended statement of claim, paras 6A-D (see para [20] above), sufficiently raised the material fact foundation for his Honour's treatment of the issue in his paras 75 and 76. Significantly, the appellant did not object to the reception of the evidence on which the judge relied in para 75 of his reasons for judgment (as to the dispatch of the executed charge and registration document to the solicitor for the chargor), evidence which had been provided to the appellant a considerable time before the trial. The issue was dealt with in oral and written submissions at the trial.

[41] The appellant withdrew from its pursuit of this ground upon the hearing of the appeal.

Ground 4: Absence of execution by chargees

> "The learned trial judge erred in holding that the appellant was bound by the Charge Document when it was executed by it on 8 December 2006, and should have held that there was no delivery then, or at all, because the respondents never executed the Charge Document as had been contemplated by its terms and the parties."

[42] His Honour concluded that the deed of charge was delivered upon execution by the chargor, consistently with the evidence of that party's intent objectively discerned.

[43] In challenging that conclusion, Counsel for the appellant relied on a number of matters as telling the other way: that the form of the deed contemplated execution by the chargees as well (and see cl 13.6 as to counterparts), that the deed placed obligations on the chargees (e.g. cl 4, 8.1, 8.2, 8.4), so that it was unlikely In Roma would charge its assets unless the chargees were first bound by those obligations, and that the deed did not in terms provide that In Roma would be bound upon execution by it only.

[44] The provisions in cl 4 (release) and cl 8.1, 8.2, 8.4 (application of proceeds of sale) do not impose obligations which transcend obligations which arise under the general law in any case, so that the chargor would not have been unduly concerned by the chargees' not having committed themselves to that complementary contractual confirmation.

[45] Mr Dunning relied on the absence, from the deed, of a provision like cl 15.8 of the loan agreement, that each party to the loan agreement would, upon execution, be deemed to have signed, sealed and delivered it as a deed, intending to be immediately bound. Such a provision, while appropriate to a contract, is not necessary in a deed, to which a party is bound by law when that party has signed, sealed and delivered it, regardless of the other party's position. See the caution of Lord Wright in *Lady Naas v Westminster Bank Ltd* [1940] AC 366, 403 about transposing the pattern of one regime onto another.

[46] This case differs from *400 George Street*, where the negotiation was expressly "subject to a mutually agreed legal document by both parties". In the present case, there was no such stipulation, and it is also significant, as his Honour observed, that the appellant did not wait until the chargees had executed the deed before sending

the signed forms necessary for registration of the charge. This was done to ensure the settlement, which was obviously very important to In Roma, went ahead.

[47] While the features listed for the appellant are of some relevance to the determination of In Roma's intent in executing the deed, particularly the provision for execution by all, they are overwhelmed by the matters just summarised, warranting the judge's reasoning and conclusions set out in paras 75 and 76 of his reasons for judgment.

Ground 5: No pleading of agreement to release

> "The learned trial judge erred at Reasons [83] – [88] in holding that the appellant's pleadings were not sufficient to allow it to agitate a case that consensus or agreement had been reached in March 2007 for the respondents to release the appellant from all securities it had provided."

[48] The simple fact is that the defendants did not plead an agreement to release. When the issue was squarely raised, they did not seek leave to amend. Counsel for the appellant said the judge did not in his reasons advert to paras 7A, 8(b), (c), 8B(b) of the amended defence, and that is true, but those paragraphs do not plead anything even resembling an agreement to release. Further, the case was conducted on the basis no agreement was pleaded.

Ground 6: Absence of finding of agreement to release

> "The learned trial judge erred in failing to hold that on or about 7 March 2007 an agreement was reached between the appellant and the respondents that the respondents would release any security they had over the appellant."

[49] Such an agreement was neither pleaded nor particularised. The judge's findings, open on the evidence, excluded it in any event.

[50] That evidence came from Mr Adams, who held fast under cross-examination to his recollection that he was only ever asked, and agreed, to release the mortgage. Mr Caravousanos, on the other hand, said Mr Adams instructed him to prepare releases of all the securities. The judge doubted that evidence, especially it seems in light of an email from Mr Caravousanos to Mr Farnham referring to his "assumption" that the charge was to be released.

[51] The email read:

> "Just to confirm – This is the release for Commonwealth Hotel Roma owned by In Roma Pty Ltd. Are we also releasing the ASIC charge? I assume so?"

That expression of doubt is hardly consistent with his having a short time previously been instructed to release the charge.

[52] The judge preferred the evidence of Mr Adams, expressly rejecting, for example, a suggestion Mr Adams had been evasive, and the judge was entitled to do that.

[53] Then his Honour said:

> "[103] Secondly, and crucially, none of this is evidence of an agreement between the plaintiffs and the first defendant. At its highest, it is evidence of the security-holder acceding to

> a request by the principal debtor that the security-holder release some or all of the securities held from a third party. But it is not evidence of an agreement between the security-holder and the third party for the release of the securities.
>
> [104] If the sort of agreement for which the defendants argued in their final submissions truly formed part of the case they sought to advance at trial, one would have expected evidence on the existence of such an agreement to have been led from the second defendant and, perhaps, Mr Farnham or Mr Lewis. The fact that none of those persons gave evidence about the existence of such an agreement leads me to infer that none of those persons could have given evidence to assist the defendants' case."

[54] Although criticised by Counsel for the appellant, those observations were not only open, but in my view amply justified.

[55] The appellant is by this ground of appeal challenging a finding of fact based on an assessment of credibility. The finding was open and not vulnerable, even were the absence of a pleaded agreement an obstacle which could be overcome.

[56] Counsel also submitted that the judge did not refer in his reasons to subsequent exchanges said to have been consistent with an arrangement which embraced the release of the charge. It is not necessary to refer to that evidence particularly : none of it clearly supported Counsel's submission, which presumably explains the absence of reference to it in the reasons.

Ground 7: Release of all liabilities

> "Further or alternatively, the learned trial judge erred in holding that the instrument of release of mortgage did not also operate to discharge all obligations of the appellant to the respondents."

[57] This depended on the construction of the release, particularly the words: "The Mortgagee releases the mortgage as a charge on the land described in Item 2." The judge's analysis, summarised in para [32] above, was in my view correct.

[58] As noted by Young J in *Baypoint Pty Ltd v Baker* (1994) 6 BPR 13,687, *Groongal* "depends on a very specifically worded discharge document and the then effect of the *NSW Real Property Act* and is not of general application". I respectfully agree with that.

[59] I also agree with the primary judge's conclusion that this release released only the real property charge and did not extinguish the personal covenant.

Ground 8: Issue about pleadings

> "In addition to each of grounds 1 and 5 above, the learned trial judge erred in failing to hold that any difficulty in relation to the proper identification of issues at the trial was primarily due to the form in which the allegations were made in the Further Amended Statement of Claim."

[60] There was no apparent difficulty in identifying relevant issues at the trial.

[61] It is convenient here to say that the time taken by his Honour in delivering judgment, a matter raised for the appellant, has no apparent significance to the disposition of the appeal. While this point was not developed further, it is fair to note that the reasons for judgment, which are extensive, suggest careful application to the facts of the matter and appreciation of the issues of law.

Ground 9: Construction of loan agreement

> "The learned trial judge erred in the proper construction of the loan agreement:
>
> (a) by holding at reasons [54] that there was an '... independent agreement referred to in Recital B being an agreement by the first defendant to provide the Additional Securities';
>
> (b) and further holding at reasons [55] that there was '... an independent obligation on the part of the [appellant] pursuant to the agreement referred to in Recital B';
>
> (c) when the operative provisions of the loan agreement did not contain any covenant by the appellant to provide such security, rather such obligation was only imposed upon other parties to the loan agreement."

[62] It is plain that In Roma agreed to give this charge. That commitment is confirmed by Recital B. Consistently, In Roma proceeded with execution of the deed. As to the source of the commitment, his Honour did not, in any event, say that it arose from the recital: he spoke of "the independent agreement referred to in recital B" (emphasis added).

Conclusion

[63] None of the grounds of challenge to the primary judgment has been sustained. I would order that the appeal be dismissed, and that the appellant pay the respondents' costs, to be assessed on the standard basis unless agreed.

[64] **HOLMES JA:** I agree with the reasons of the Chief Justice and the orders he proposes.

[65] **FRASER JA**: I have had the advantage of reading the reasons for judgment of the Chief Justice. I agree with those reasons and with the orders proposed by his Honour.