SUPREME COURT OF QUEENSLAND

CITATION:	*Aquilina Holdings Pty Ltd v Lynndell Pty Ltd & Anor; Lynndell Pty Ltd & Anor v Capital Finance Australia Limited & Ors* [2008] QSC 57
PARTIES:	**LYNNDELL PTY LTD (ACN 102 268 217)** (first applicant) and **OFF THE PLAN PTY LTD (ACN 100 719 926)** (second applicant) **v** **CAPITAL FINANCE AUSTRALIA LIMITED (ACN 069 663 136)** (first respondent) and **ARLANDIS ANUSAITIS, ERNST SELZ, HELEN LAVY and THE ALBATROSS PROPERTY GROUP PTY LTD (ACN 114 397 036)** (second respondent) **AQUILINA HOLDINGS PTY LTD (ACN 103 213 172)** (Applicant) **v** **LYNNDELL PTY LTD (ACN 102 268 217)** (first respondent) (and) **OFF THE PLAN PTY LTD (ACN 100 719 926)** (second respondent)
FILE NOS:	BS 8939 of 2007 BS 8835 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	1 April 2008
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2007
JUDGE:	Daubney J
ORDER:	**1. That the parties be heard as to the orders required to dispose of the matter in accordance with the reasons contained herein.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – EQUITABLE

DOCTRINES AND PRESUMPTIONS – SUBROGATION – where there is a dispute as to the distribution of balance proceeds following the payment of a creditor – whether the applicant had a right to be subrogated to the securities of the first respondent – where the guarantee document contained a clause purporting to restrict the transfer of securities – whether the applicant had waived any right to subrogation

EQUITY – GENERAL PRINCIPLES – PRIORITY – PRIORITY GENERALLY – where the applicant sought to be subrogated to interests of an earlier mortgagee – whether the interest of the applicant would take priority over the interest of a subsequent mortgagee

AE Goodwin Ltd (in Liq v AG Healing Ltd (In Liq) (1979) 7 ACLR 481
Austin v Royal (1999) 47 NSWLR 27
Banque Financiere de la Cite v Parc (Battersea) Ltd [1998] 2 WLR 475
Buckeridge v Mercantile Credits Ltd (1981) 147 CLR 654
Challenge Bank Ltd v Mailman (Unreported, NSW Court of Appeal, 14 May 1993)
Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd (2003) 59 NSWLR 452
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Duncan, Fox & Co v North & South Wales Bank (1880) 6 App Cas 1
Garnac Grain Co Inc v HMF Faure & Fairclough Ltd [1968] AC 1130
Gedye v Matson (1858) 53 ER 655
Goss v Lord Nugent (1833) 5 B & Ad 58
Highland v Exception Holdings Pty Ltd (in liq) and Another (2001) 60 ACSR 223
Latec Investments Ltd v Hotel Terrigal Pty Ltd (in Liquidation) (1965) 113 CLR 265
Mahoney v McManus (1981) 36 ALR 545
Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66
Manzo v 555/255 Pitt Street Pty Ltd (1990) 21 NSWLR 1
McColls Wholesale Pty Ltd v State Bank (NSW) [1984] 3 NSWLR 365
O'Day v Commercial Bank of Australia (1933) 50 CLR 200
The Queen v Toohey; Ex parte Attorney General (N.T) (1980) 145 CLR 374
R v Portus; Ex parte Federated Clerks Union of Australia (1949) 79 CLR 428
Reale Bros Pty Ltd v Reale [2003] NSWSC 666
Russett Pty Ltd (In Liq) v Bach (Unreported, Supreme Court of New South Wales Equity Division, 23 June 1988)
Westfield Management Ltd v Perpetual Trustee Company Ltd

[2007] HCA 45

Mercantile Act 1867 (Qld)

COUNSEL:	RE Dubler SC for the first and second applicant AJH Morris QC for the first respondent CA Wilkins for the second respondent IR Perkins for the applicant RE Dubler SC for the first and second respondent
SOLICITORS:	Queensland Law Group for the first and second applicant Hopgood Ganim for the first respondent Tucker & Cowen for the second respondent Deacons for the applicant Queensland Law Group for the first and second respondent

Background

[1] The present dispute relates to the funds remaining following the sale of two parcels of land (collectively "the land") near Airlie Beach in northern Queensland. The land was purchased as part of a joint venture between two sole-director companies, Off the Plan Pty Ltd ("OTP") and Aquilina Holdings Pty Ltd ("Aquilina"). The directors of the two companies are Mr John Stavrou and Mr Nikola Aquilina respectively.

[2] The two companies took the land as tenants in common in equal shares.

[3] OTP and Aquilina initially intended to procure the construction of a residential apartment complex on the land. This intention was formally recorded in a Joint Venture Agreement ("JVA") dated 21 October 2004 in which OTP and Aquilina were described as "the Venturers":

> "**2.1 Establishment of Joint Venture**
>
> The Venturers acknowledge that they have agreed to associate and participate as Venturers in the Joint Venture for the purposes of conducting the Venture Business including:
>
> (a) acquiring the land;
>
> (b) appointing the Consultants;
>
> (c) preparing the Concept Plans and the Plans and Specifications for the Development;
>
> (d) obtaining relevant Authority approvals on terms acceptable to the [Project Control Group];
>
> (e) funding the Development;

(f) procuring construction of the Buildings and the Development;

(g) the registration of survey plans creating the lots and establishing a community titles scheme for the Development; and

(h) the transfer of John's Lot to John (Stavrou) and Niko's lot to Niko (Aquilina),

as required by the [Project Control Group]"

[4] The JVA made provision for the management of the proposed development by a Project Control Group ("PCG") which would oversee the joint venture and provide directions to a third company, Aquiplan Management Pty Ltd ("Aquiplan"), designated as the 'Manager' of the venture.

[5] This arrangement was recorded in the following terms:

"**5.1 Establishment of PCG**

The Venturers will establish a PCG to oversee the management and administration of the Venture Business and to give directions to the Manager and the Consultants to implement PCG decisions.

….

6.1 Day to day management

Subject to clause 6.3, the PCG will be responsible for the day to day management of the Venture Business.

6.2 Programme

At its first meeting, the PCG must adopt a Programme for the Development. The PCG may vary the Programme from time to time in the course of the Joint Venture.

6.3 Manager's duties

Subject to this Agreement and the directions of the PCG, from the Commencement Date, the Venturers appoint the Manager and the Manager agrees to carry out the Manager's duties in Schedule 2 in accordance with the Programme."

[6] Aquiplan was registered specifically for the purpose of the Joint Venture. Its issued capital consists of two shares – one each held by OTP and Aquilina.. Niko Aquilina and John Stavrou were named as its directors.

[7] The duties of Aquiplan, as detailed in Schedule 2 of the JVA, included:

" ….

(g) Seeking and arranging funding for the Joint Venture;

(h) Entering into loan and security documents as borrower on behalf of the Corporate Venturer's [i.e OTP and Aquilina]."

[8] The JVA also made provision for the funding of the arrangement:

> "**7.1 Initial Capital Contributions**
>
> The Corporate Venturer's initial capital contributions to the Venture will be by way of contribution to their respective interests in the land. In addition:
>
> (a) Aquilina has contributed $200,000.00 cash; and
>
> (b) OTP will contribute $200,000.00 cash when requested by the PCG.
>
> **7.2 Principal Financier and Mezzanine Financier**
>
> The Venturers agree that it is there [sic] intention that additional funding for the Joint Venture will be provided by:
>
> (a) the Mezzanine Financier to the extent of $700,000.00; and
>
> (b) the Principal Financier.
>
> **7.3 Funding by the Principal Financier**
>
> The Manager (as borrower) and the Corporate Venturers (as mortgagors) will enter loan documentation and securities (as approved by the PCG) with the Principal Financier. All funds advanced to the manager by the Principal Financier pursuant to these facilities must be paid to the Joint Venture bank account or otherwise in accordance with the directions of the PCG."

[9] Ultimately, funding was secured by a loan for $7,900,000 from Capital Finance Pty Ltd ("Capital") to Aquiplan. This loan was secured by registered mortgage no.709588766 (the "First Registered Mortgage") over the land to Capital. A single guarantee document ("the Guarantee") contained guarantees by each of Nikola Aquilina, John Stavrou, Aquilina, OTP and another company, of which Mr Stavrou was the sole director, Lynndell Pty Ltd ("Lynndell") in favour of Capital.

[10] After this initial loan, and as contemplated in clause 7.2 of the JVA above, Aquilina and OTP executed a second mortgage in favour of four private investors; Arlandis Anusaitis, Ernst Selz, Helen Lavy and the Albatross Property Group Pty Ltd (collectively the 'Second Mortgagees'), to secure a loan of $700,00.00.

[11] Prior to the fulfilment of the objectives of the JVA, the parties fell into dispute and agreed to sell the land.

[12] A contract to sell the land for $8,600,000 was entered into on 30 May 2007. The contract was scheduled to settle on 27 September 2007. However, two days before this date Lynndell lodged a caveat over the land claiming "an equitable interest in the land pursuant to mortgage no.709588766 by way of subrogation".

[13] This equitable interest was said to be supported by Lynndell's payment, on 14 March 2007, of $469,772.54 towards the satisfaction of the debt due to Capital by Aquiplan.

[14] Aquilina made an application to the court seeking, inter alia, removal of the caveat under section 127 of the *Land Title Act 1994* (Qld). Lynndell and OTP cross-applied for declarations giving effect to Lynndell's putative right to subrogation.

[15] When the matter came before the court, the parties agreed to give undertakings by which Lynndell would release its caveats over the land to allow for the sale of the property and enable Capital to be paid out. The balance of the funds (approximately $300,000.00) were to be deposited into the trust account of Capital's solicitors until a further hearing to determine:

> "whether or not, upon payment in full of the debt owing to [Capital] from the proceeds of sale under the contract of sale, [Lynndell] will be entitled to the balance referred to in sub paragraph (b)(v) of the undertaking of the [Aquilina and Capital] recorded above, by way of subrogation under the securities [Capital] holds from [Aquilina]and[OTP], including Registered Mortgage No. 709588766."

[16] The parties have agreed that I should resolve the present dispute by reference to this question.

[17] This question, in my view, gives rise to two interdependent enquiries, namely:

1. whether Lynndell has an equitable charge over the balance proceeds by virtue of the operation of the principles of subrogation; and

2. if so, whether that charge has priority over the claims of the second mortgagees.

Claim for Subrogation

[18] In a general sense, subrogation is the "process by which one party is substituted for another so that he may enforce that other's rights against a third party for his own benefit."[1]

[19] In the context of guarantees, the principles of subrogation operate so that a person who makes payments in satisfaction of the guaranteed obligation of another has an entitlement to the benefit of any securities possessed by a creditor in respect of that obligation.[2]

[20] There has been some conjecture as to the doctrinal basis underpinning the right to subrogation. The English courts have tended towards a view that subrogation is:

> "[A]n equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment."[3]

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1 C Mitchell, *The Law of Subrogation* (1994) at 3.

2 See s4 *Mercantile Act 1867* (Qld); *Gedye v Matson* (1858) 53 ER 655 at 656 per Romilly MR.

3 *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1998] 2 WLR 475 at 487-8 per Lord Hoffmann.

Australian courts, on the other hand, have been willing to apply the principles of subrogation without the need for significant exploration of its doctrinal underpinnings:

> "[I]t is enough to see subrogation as an entitlement which equity accords to the payer, firmly established by judicial decisions notwithstanding that a satisfactory doctrinal basis is difficult to identify, and notwithstanding that classification of the mortgagor's position as unconscionable seems very attenuated."[4]

[21] Nevertheless, it can be said with some certainty that the doctrine of subrogation:

> "[I]s one of equity, not contract; and the essence of it is that it is not considered fair, as between principal debtor and surety, that the surety should bear the burden of the debt, just because the creditor chooses to exact it from him rather than the principal debtor."[5]

[22] Doctrinal underpinnings aside, it is clear that a right to subrogation will, except in the most unusual cases,[6] only arise once a particular debt has been satisfied in full.[7] This is not, however, to say that a party will only be entitled to be subrogated to a creditor's securities where they alone have been responsible for the repayment of the relevant debt. Where a debt has been wholly satisfied, a surety who has contributed to the satisfaction of the debt, even if only in part, will be able to seek subrogation.[8]

[23] The operation of the doctrine of subrogation in Queensland has been codified to some extent by virtue of section 4 of the *Mercantile Act 1867* (Qld). Whilst this provision does not alter the operation of the equitable principles in the present case, it is nevertheless appropriate to bear its terms in mind:

> "**4 A surety who discharges the liability to be entitled to assignment of all securities held by the creditor**
>
> (1) Every person who being surety for the debt or duty of another or being liable with another for any debt or duty shall pay such debt or perform such duty shall be entitled to have assigned to the person or to a trustee for the person every judgment specialty or other security which shall be held by the creditor in respect of such debt or duty whether such judgment specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty.
>
> (2) And such person shall be entitled to stand in the place of the creditor and to use all the remedies and if need be and upon a proper indemnity to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety co-contractor or co-debtor as the case may be indemnification for the advances made and loss

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4 *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* (2003) 59 NSWLR 452 per Bryson J, referred to with approval by Santow JA in *Highland v Exception Holdings Pty Ltd (in liq) and Another* (2001) 60 ACSR 223 at 240.

5 *Russett Pty Ltd (In Liq) v Bach* (Unreported, Supreme Court of New South Wales Equity Division, 23 June 1988) per Hodgson J at [13]

6 See *Challenge Bank Ltd v Mailman* (Unreported, NSW Court of Appeal, 14 May 1993).

7 *Duncan, Fox & Co v North & South Wales Bank* (1880) 6 App Cas 1.

8 *AE Goodwin Ltd (in Liq v AG Healing Ltd (In Liq)* (1979) 7 ACLR 481; *McColls Wholesale Pty Ltd v State Bank (NSW)* [1984] 3 NSWLR 365.

> sustained by the person who shall have so paid such debt or performed such duty and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him or her.
>
> (3) However, no co-surety co-contractor or co-debtor shall be entitled to recover from any other co-surety co-contractor or co-debtor by the means aforesaid more than the just proportion to which as between those parties themselves such last mentioned person shall be justly liable."

[24] In addition to these general principles of subrogation, there are a number of specific circumstances that can impact on the operation of the doctrine. In this regard, the parties in the present matter raised two issues of particular significance:

1. whether Lynndell has waived its right to make a claim for subrogation; and

2. whether the structure of the loan arrangements allows Lynndell to seek to be subrogated to the security of capital.

Has Lynndell waived its right to make a claim for subrogation?

[25] Turning to the first of these matters, it is well established that a guarantor's equitable right of subrogation may be excluded by the terms of a guarantee document.[9]

[26] In *O'Day v Commercial Bank of Australia*[10], the High Court held that a clause in the following terms positively excluded any right to subrogation:

> "[T]his guarantee shall be considered to be in addition to any other guarantee or security either from the guarantors or any other person or company which the bank now has or may hereafter take for the debts of the company and that the guarantors will not in any way claim the benefit or seek the transfer of any other security or any part thereof."

McTiernan J made the following comments in the circumstances of the case.

> "It is true that the surety is entitled to the benefit of all securities held by the creditor and if such securities are by the creditor's act rendered unavailable to the surety he will be entitled to be discharged from the suretyship. This right 'is not necessarily dependent upon contract, but is the result of the equity of indemnification attendant on the suretyship.' But the surety may by his contract give up this right"[11] (references omitted).

[27] More recently, Giles CJ, in *Austin v Royal*[12] applied the reasoning of the High Court to find that a clause which provided that "the guarantor will not in any way or at any time claim the benefit or seek to acquire the transfer of any such security or guarantee or any part thereof respectively" was effective to exclude a right to subrogation.

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9 *O'Day v Commercial Bank of Australia* (1933) 50 CLR 200 at 219-220.

10 Ibid

11 Per McTiernan J at 223

12 (1998) NSW Conv R 55-863 affirmed by the NSW Court of Appeal in *Austin v Royal* (1999) 47 NSWLR 27.

[28] The Guarantee (to which, as already noted, Lynndell is a party) includes a clause in substantially the same terms as those considered in *O'Day v Commercial Bank of Australia* and *Austin v Royal*. It provides, at Clause 6.1, that:

> "This guarantee will not prejudicially affect or be prejudicially affected by any other security, guarantee or indemnity at any time held by the Lender and that security, guarantee, or indemnity will be deemed to be collateral and *the guarantor must not, as against the lender, in any way claim the benefit or seek the transfer of any security guarantee or indemnity or any part of them*" (emphasis added).

[29] The only difference of any note between the clauses in *O'Day v Commercial Bank of Australia* and *Austin v Royal* and the clause presently under consideration is the addition of the words "as against the lender". Accordingly, it is necessary to assess the impact of those words on the operation of the clause.

[30] Counsel for Lynndell submitted that the addition of the words 'as against the lender' constitutes a material difference between Clause 6.1 and the clauses considered in the earlier authorities, and contended that Lynndell is not claiming the benefit or seeking the transfer of the security 'as against the lender' but rather 'as against the second mortgagee.'

[31] On this view of the contract, the parties may have added the words "as against the lender" simply to reinforce the fact that Lynndell would not be able to seek to be subrogated to Capital's securities until such time as Capital was paid out.

[32] Despite this submission, I am not persuaded that the addition of the words "as against the lender" takes Clause 6.1 of the Guarantee beyond the ambit of the clause considered by the High Court in *O'Day v Commercial Bank of Australia.* Whilst Lynndell may, in fact, be claiming 'the benefit' of Capital's securities 'as against' the Second Mortgagees, it cannot be said that Lynndell is seeking 'the transfer' of the security as against any party other than Capital.

[33] Adoption of the formulation propounded by Lynndell would require one to ignore not only this latter fact, but also the objectively ascertainable intent of the clause. The clause is in substantially the same terms as the clauses considered in the leading cases. It seems to me that the clause, on its face, is a clear expression of an intention to completely exclude claims to subrogation by the guarantors.

[34] Accordingly, I find that Lynndell's claim to subrogation is excluded by the terms of the Guarantee. Notwithstanding this finding, I will consider the other arguments raised before me.

Were OTP and Aquilina principal debtors or guarantors?

[35] It was not in issue that Lynndell made payments to Capital in satisfaction of the debt to which this matter pertained.

[36] Even if I had found that Clause 6.1 was not effective in excluding a right of subrogation, Lynndell would only have been able to be subrogated to Capital's securities if it could satisfy me that OTP and Aquilina are principal debtors to Capital rather than merely guarantors. If the reverse is true, Lynndell could not be

subrogated to Capital's securities and would only have recourse to an equitable right of contribution from its co-guarantors.

[37] The doctrine of contribution usually operates as between two or more parties who are responsible for the same obligation of another person. In *Mahoney v McManus*, Gibbs CJ observed:

> "A surety is entitled to contribution from his co-sureties so that the common burden is borne equally and so that no surety is required, as between himself and his co-sureties to pay more than his due share."[13]

[38] The doctrine aims to ensure that the common obligations of co-sureties are not inequitably distributed between them. There is no suggestion that this has occurred in the present case. Lynndell contributed approximately $470,000 to the satisfaction of the debt to Capital, while OTP and Aquilina, following the sale of the land, together paid slightly more than $8,000,000. Clearly, Lynndell will have no right of contribution as against OTP and Aquilina if the three companies are considered to be co-guarantors only.

[39] Thus, Lynndell is left to contend that OTP and Aqualina were principal debtors. The terms of the loan documentation, however, appear to stand against this proposition; in the Master Loan Deed, the JVA and the Guarantee Aquiplan is named as the borrower. OTP and Aquilina, on the other hand, are named only as guarantors or, in the case of the JVA, mortgagors.

[40] Lynndell seeks to overcome this apparent difficulty by arguing that Aquiplan, in borrowing the funds from Capital, was merely acting as agent for OTP and Aquilina and that, in truth, the latter two companies were principal borrowers.

[41] To this end, Lynndell filed an affidavit of Mr John Stavrou, in which he deposes to the contents of discussions between him and Mr Nikola Aquilina. Mr Stavrou says that, prior to the incorporation of Aquiplan, it was agreed between OTP and Aquilina that "Aquiplan would act as the agent of those two companies with authority to deal with and enter into contracts with outside organisations".

[42] There was no evidence lead disputing the truth of the Mr Stavrou's affidavit. Instead, Aquilina sought to prevent the admission of this evidence by contending that it violated the parol evidence rule.

[43] It is well established that, where a contract has been reduced to writing:

> "[V]erbal evidence is not allowed to be given of what passed between the parties, either before the written document was made or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract".[14]

[44] At first blush it may seem that the parol evidence rule would render Mr Stavrou's evidence inadmissible. However, a consistent theme in the judicial commentary on this topic is that the right of a surety to be subrogated to a creditor's

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[13] (1981) 36 ALR 545 at 549

[14] *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64-65 per Denman CJ. See also, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

security "does not depend upon contract but upon the equity that the surety should not have the whole thrown upon him by the choice of the creditor not to resort to the remedies in his power."[15]

[45] It would seem appropriate then, for the court to inform itself of the true position of the parties in such a way as to best do equity as between them.

[46] In any event, there are exceptions to the operation of the parol evidence rule. Extrinsic evidence may be properly admitted in order to allow the court to ascertain the relationship between the parties to a contract, or the capacity in which a party contracted.[16] Such evidence has been used to determine whether a party who appears to be a principal debtor is, in fact, merely a guarantor or the agent of a principal debtor.[17] In *Manzo v 555/255 Pitt Street Pty Ltd*, Hodgson J[18] said:

> "However, it is established that extrinsic evidence is admissible to show, in cases concerning guarantees, who is in substance a guarantor, and who is in substance a principal debtor."

[47] A similar approach was adopted by Young CJ in Eq in *Reale Bros Pty Ltd v Reale*[19] where His Honour noted that:

> "[I]t is clear that as between the persons named as grantor and guarantors inter se, extrinsic evidence may be admitted to show that there were equities which enabled a court of equity to decree inter se the real and substantive position between them".[20]

[48] In the event that their submissions as to the operation of the parol evidence rule were unsuccessful, the Second Mortgagees advanced two further submissions as to why extrinsic evidence, particularly Mr Stavrou's evidence about pre-contractual discussions, should not be admitted. I will consider these submissions in turn.

[49] First, the Second Mortgagees contended that to admit extrinsic evidence as to the existence of an agency relationship between Aquiplan and OTP and Aquilina would contradict the principle that extrinsic evidence should not be admitted to contradict the contents of an instrument registered under the *Land Titles Act 1994* (Qld).

[50] The First Registered Mortgage provides that:

> "In this mortgage:
>
> (a) The Borrower is Aquiplan Management (IGBR) Pty Ltd ACN 108 324 241.
>
> (b) The Guarantor is Aquilina Holdings Pty Ltd ACN 103 213 172 in its own right and as trustee for the Aquilina Family Trust, Off the Plan Pty Ltd ACN 100 719 926 in its own right and as trustee for the

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[15] *Buckeridge v Mercantile Credits Ltd* (1981) 147 CLR 654 at 668-9 per Aickin J
[16] See, in the context of association membership: *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 75
[17] *Manzo v 555/255 Pitt Street Pty Ltd* (1990) 21 NSWLR 1 at 7 per Hodgson J.
[18] At 7.
[19] [2003] NSWSC 666
[20] At [51]

> Stavrou Family Trust, Lynndell Pty Ltd ACN 102 268 217, John Stavrou and Nikola Bartholomew Aquilina.
>
> (c) …"

[51] It is true that the mortgage lists the borrower as 'Aquiplan' and makes no mention of an agency arrangement. The Second Mortgagees then, refer to the recent decision of the High Court in *Westfield Management Ltd v Perpetual Trustee Company Ltd*[21] in which it re-emphasised the "…importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility…"[22] and noted that:

> "The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[23]

[52] At a superficial level of analysis, this principle appears to support the Second Mortgagee's contention. With respect, however, this analysis is not entirely appropriate in the present case. The principles of subrogation do not allow a party to undermine the register by enforcing a registered mortgage in their own name. Rather a party who seeks subrogation merely stands in the shoes of a creditor and makes use of the remedies available to it under a registered instrument.

[53] When viewed in this way, Lynndell's reference to extrinsic material, to use the words of the High Court, "does no violence to the principles of the Torrens system."[24] The reality is that a successful claim to subrogation will almost always give rise to a result which does not strictly accord with the contents of the register. The party enforcing the charge will not be the party contemplated in the register as having a right to do so. However, in light of the fact that subrogation does not involve any actual assignment of securities; there is no inconsistency between the doctrine of subrogation and the principles of indefeasibility.

[54] More particularly, allowing a party to examine the true function of a party named as borrower on a registered instrument does not, at least for the purposes of determining whether a right to subrogation has arisen, infringe upon the indefeasibility of title provided for in the *Land Titles Act 1994* (Qld).

[55] The Second Mortgagees' final contention on this point was that an estoppel has arisen in the present matter on account of the fact that the "parties to the guarantee agreed to treat Aquiplan as the only borrower and OTP and Aquilina Holdings as sureties for the purposes of the Guarantee transaction."

[56] In my opinion this submission must also fail. There was, on the evidence before me, no clear representation made by Lynndell to the Second Mortgagees that it would not seek to be subrogated to the rights of Capital. There was also no evidence before me that the Second Mortgagees relied upon such a representation when offering the additional funds.

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21 [2007] HCA 45 at [35]-[45] per Gleeson CJ, Gummow, Kirby, Hayne, and Heydon JJ.
22 at [38]
23 Ibid at [39]
24 at [42]

[57] Accordingly, I am prepared to refer to the whole of the circumstances surrounding the execution of the loan documentation when deciding whether OTP and Aquilina were principal debtors with Aquiplan acting as their agent to procure and receive the borrowed funds.

[58] An agency relationship can arise in multiple ways. Most commonly, it will arise by agreement, either express or implied, between the parties. The parties are not required to explicitly agree that one is to act as an agent in order for an agency relationship to arise. Agency will arise if the parties "have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it."[25]

[59] The terms of the relevant documents, for the most, simply list Aquiplan as borrower, without referring to the possibility that it was agent for Aquilina and OTP as principal debtors.

[60] However, as set out in paragraph 7, above, the JVA did list "[e]ntering into loan and security documents as borrower *on behalf of the Corporate Venturers*" among Aquiplan's duties. Furthermore, clause 6.6 of the JVA provides:

> "The manager may enter or sign any Development Contract and any documentation relating to the land, the Development or the Venture Business in accordance with the decisions of the PCG (But not otherwise). *The manager must use its best endeavours to ensure that all Development Contracts are entered on behalf of the Corporate Venturers* [OTP and Aquilina] and limit the recourse of the contractor against the Corporate Venturers to the Joint Venturer Assets."(emphasis added)

[61] Importantly, the phrase 'on behalf of' is "not an expression which has a strict legal meaning"[26] and "context will always determine to which of the many possible relationships the phrase 'on behalf of' is in a particular case being applied".[27] In this instance it is clear to me that the phrase is intended to make reference to an agency arrangement.

[62] There is, however, no mention of such an arrangement in the Master Loan Deed or the Offer of Loan Facility.

[63] Indeed, the latter document provides:

> "**Facility Terms:**
> …
>
> **5.** **Trust:** The Borrower [Aquiplan] enters this Facility Agreement on its own behalf and as trustee of any trust of which the Borrower is trustee ("the Trust"). The Borrower and its successors as trustee of the Trust will be liable under this Facility Agreement as trustee of the Trust and all the assets both present and future of the Trust will be available to satisfy the liabilities of the Borrower."

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[25] *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137 per Lord Pearson.
[26] *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 435 per Latham CJ.
[27] *The Queen v Toohey; Ex parte Attorney General (N.T)* (1980) 145 CLR 374 at 386 per Stephen, Mason, Murphy, Aickin JJ.

[64] Moreover, the discussion deposed to by Mr Stavrou as to an agency relationship took place prior to 11 March 2004, at least seven months before the actual entry into the JVA (which was executed on 21 October 2008). When it came time, after legal advice had been received, to formally draft the terms of the JVA, Aquiplan was named as a 'manager' of the project, rather than an 'agent' for OTP and Aquilina.

[65] Despite these matters, when the entirety of the context[28] of the relationship between Aquiplan, Aquilina and OTP is considered, the balance is skewed towards a conclusion that Aquiplan was, in fact, acting as agent. While Aquiplan, in the direct sense, certainly borrowed the relevant funds from Capital, these funds were, in fact, received by OTP and Aquilina, which applied them to re-finance the property in their names. This fact, together with the framing of the JVA, and notwithstanding the terms of the loan documentation, points to a conclusion that Aquiplan borrowed the funds not in its own right, but as agent for OTP and Aquilina.

Priority

[66] For completeness, I should consider whether, if a right to subrogation had arisen, Lynndell's equitable interest would have had priority to the interest of the Second Mortgagees.

[67] On 12 October 2007 the Second Mortgagees released their mortgage to allow completion of the contract of sale. They did this on the basis that their rights to receive balance funds at completion would be preserved.

[68] There is, then, no doubt that the Second Mortgagees continue to hold an equitable lien or charge over the balance proceeds of sale which extends beyond the time at which they released their mortgage. This interest would have competed with any equitable interest that arose in Lynndell's favour by virtue of its subrogation to Capital's security.

[69] Such a circumstance has the appearance of a case for the application of the usual principle – that where the equities are equal priority goes to the earlier in time.[29]

[70] This needs to be viewed against the practical operation of the doctrine of subrogation. The relevant equitable principles, as reflected in the statute, are well established.

[71] In *Gedye v Matson*,[30] Romilly MR stated:

> "It is quite settled that if a man makes a mortgage and induces a third person to become his surety and to covenant to pay the debt, the surety is entitled to stand in the place of the creditor, and to have the benefit of all the remedies and advantages which the creditor had against the principal debtor. No interest which the surety can acquire can have priority over the creditor but to the extent to which the surety has paid off the debt, he has a right to the benefit of the remedies of the mortgagee."

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28 *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 435 per Latham CJ.

29 *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in Liquidation)* (1965) 113 CLR 265 at 276.

30 (1858) 53 ER 655 at 656

[72] If Lynndell's claim to subrogation had succeeded, it would have been entitled to stand in the place of Capital, and would, for the purposes of a priority dispute, be treated in the manner that Capital would be treated.[31] Accordingly, if a right to be subrogated to Capital's securities had arisen in favour of Lynndell, the interest flowing from that right, being treated as if it was the interest of Capital, would take priority to the interest of the Second Mortgagees.

[73] This is underscored by the deed of priority entered into by Capital, the Second Mortgagees, OTP, Aquilina, Nikola Aquilina and John Stavrou, which provided:

> "The Securities will rank and operate at law and equity so as to confer:
>
> (i) first priority on [Capital's] Securities over the [Second Mortgagee]'s Securities up to an including the amount specified in Item 3 ([Capital]'s Priority);
> (ii) Second Priority on the Subsequent Mortgagee's Securities over [Capitals's] Securities up to and including the amount specified in Item 4 ([Second Mortgagee]'s Priority);
> (iii) Thereafter absolute priority to [Capital]'s Securities for the balance of money thereby secured, if any."

[74] This confirms the position at general law, that Capital, as first registered mortgagee would have priority over later registered mortgagees. As such, Lynndell, standing in Capital's shoes, would have had priority over the interest of the Second Mortgagees. As was submitted by Counsel for Lynndell, the opposite result would tend to undermine the operation of the equitable doctrine of subrogation.

[75] It is, of course, unnecessary for me to express a final conclusion on this aspect of the matter because of my finding that any possible right possessed by Lynndell to be subrogated to the security of Capital was successfully excluded by the terms of Clause 6.1 of the Guarantee document.

Conclusion

[76] Accordingly, my determination on the question referred to me by the parties is in the negative. Upon payment in full of the debt owing to Capital from the proceeds of sale under the contract of sale, Lynndell did not become entitled to the balance referred to in sub-paragraph b(v) of the undertaking of Aquilina and Capital, by way of subrogation under the securities Capital holds from Aquilina and OTP including Registered Mortgage No 709588766.

[77] I will hear the parties as to the orders now required to dispose of the matter in accordance with this determination.

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[31] See s 4 *Mercantile Act 1867* (Qld)