Court of Appeal
New South Wales

Case Title:	Aged Care Services Pty Ltd v Kanning Services Pty Ltd
Medium Neutral Citation:	[2013] NSWCA 393
Hearing Date(s):	15 August 2013
Decision Date:	26 November 2013
Before:	Meagher JA at [1]; Gleeson JA at [2]; Leeming JA at [95]
Decision:	1. Appeal dismissed. 2. Appellant to pay the first respondent's costs. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	MORTGAGES - mortgages and charges generally - particular mortgages and encumbrances - subrogation - where joint venture agreement - where third party has paid off a mortgage - whether the presumption that the third party intends to keep the mortgage alive for its own benefit was rebutted - whether primary judge erred in rejecting the subrogation claim EQUITY - general principles - priorities between competing interests
Legislation Cited:	Real Property Act 1900, s 57(2)(b)
Cases Cited:	Banque Financiere de la Cite v Parc (Battersea) Ltd

	[1999] 1 AC 221 Baumgartner v Baumgartner [1987] HCA 59; 164 CLR 137 Bofinger v Kingsway Group Ltd [2009] HCA 44; 239 CLR 69 Cash Resources Australia Pty Ltd v B.T. Securities Ltd [1988] VR 576 Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd [2003] NSWSC 1072 Cheltenham & Gloucester Plc v Appleyard [2004] EWCA Civ 291 Cochrane v Cochrane (1985) 3 NSWLR 403 Coleman v Bone (1996) 9 BPR 16,235 Filby v Mortgage Express (No 2) [2004] EWCA Civ 759 Ghana Commercial Bank v Chandiram [1960] AC 732 Halifax plc v Omar [2002] EWCA Civ 121 in Highland v Exception Holdings Pty Ltd (in liq) [2006] NSWCA 318; (2007) 60 ACSR 223 In the matter of Dalma No 1 Pty Limited (in liquidation) (ACN 111 772 260); Application of Bruce Gleeson and David Shannon in their capacity as joint and several liquidators of Dalma No 1 Pty Limited (in liquidation) and anor [2013] NSWSC 1335 Muschinski v Dodds [1985] HCA 78; 160 CLR 583 New South Wales Medical Defence Union Ltd v Crawford (No 3) (NSWCA, unreported, 23/9/94) Porter v Latec Finance (Qld) Pty Ltd (1964) 111 CLR 177 State Bank of New South Wales v Geeport Developments Pty Ltd (1991) 5 BPR 11,947 Taleb v National Australia Bank Ltd [2011] NSWSC 1562; 82 NSWLR 489 Troncone v Aliperti (1994) 6 BPR 13,291
Texts Cited:	C Mitchell, The Law of Subrogation, Clarendon Press, Oxford (1994) Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 4th ed (2002)
Category:	Principal judgment
Parties:	Aged Care Services Pty Ltd (Appellant) Kanning Services Pty Ltd trading as Community & Aged Care Consulting Services (First Respondent) Macedonian Aged Care & Accommodation Ltd (Second Respondent)
Representation	

- Counsel:	Counsel: B A Coles QC with S Galitsky (Appellant) P Blackburn-Hart SC with D Roberts (First Respondent)
- Solicitors:	Solicitors: Websters Solicitors (Appellant) Richard Busutill & Co (First Respondent)
File Number(s):	2012/205864
Decision Under Appeal	
- Before:	McDougall J
- Date of Decision:	07 June 2012
- Citation:	Aged Care Services v Macedonian Aged Care [2012] NSWSC 531
- Court File Number(s):	2010/422352

JUDGMENT

1 **MEAGHER JA**: I agree with Gleeson JA.

2 **GLEESON JA**: This appeal concerns a priority dispute between the appellant (**ACS**) and the first respondent (**Kanning**) who both claimed security interests in respect of a property at West Street, South Hurstville (**Lot 2**). The second respondent (**MACAL**) is the registered proprietor of Lot 2. The dispute arose in the circumstances summarised below. It will be necessary in due course to refer to some further facts in more detail.

Factual background

3 From late 2005, Kanning carried out consulting services for MACAL by assisting the latter to develop Lots 1 and 2 at West Street, South Hurstville (variously described as Carlton and Blakehurst) as a residential retirement

village. Lot 2 was the subject of a registered mortgage by MACAL in favour of the ANZ Bank (**ANZ**) dated 21 August 2007. The adjoining property, Lot 1, was then owned by a third party.

4 Kanning rendered invoices to MACAL, but these were not paid. Ultimately, a document described as an Acknowledgement of Debt was executed on behalf of MACAL on 13 August 2008. This acknowledged a debt for consulting fees owing by MACAL to Kanning of $423,119.39 plus interest from that date at a specified rate, until payment. Further, MACAL also agreed that in the event of non-payment of the debt by 30 September 2008, Kanning would be entitled to lodge caveats over MACAL's real estate while mortgage documents were prepared and registered over MACAL real estate and supported by a fixed and floating charge over all of the assets of MACAL.

5 MACAL failed to pay the debt to Kanning by the agreed date. On or about 17 November 2009, Kanning lodged Caveat AF116801 at the Land Property and Information (**LPI**) office against Lot 2. On the same day, ANZ issued a s 57(2)(b) *Real Property Act 1900* notice to MACAL in respect of Lot 2.

6 On 28 April 2010, Kanning requested that MACAL execute a form of mortgage (in respect of Lot 2) and a deed of charge which it delivered to MACAL, but MACAL failed to execute such documents.

7 On 1 May 2010, ANZ entered into a contract for sale of Lot 2 to Mrs Dragica Mircevski for $910,000 in the exercise of its power of sale as mortgagee. Mrs Mircevski was the mother-in-law of Mr Tiricovski, the sole director of MACAL.

8 Shortly thereafter on 26 June 2010, Kanning's caveat lapsed following the service of a lapsing notice from ANZ.

9 On 8 October 2010, MACAL entered into a joint venture agreement with ACS to develop Lot 1 and Lot 2 for the construction of 57 retirement units.

10 The joint venture agreement obliged ACS to pay the sum of $4,500,000 to MACAL to facilitate the purchase by MACAL of Lot 1 from a third party, and to discharge all encumbrances registered or unregistered against Lot 2. In consideration of the payment of the $4,500,000, ACS was to receive security from MACAL in the form of an equitable charge over the property of MACAL, including Lots 1 and 2. The precise terms of this security arrangement are referred to below.

11 On 11 October 2010, MACAL requested that ACS pay out the ANZ mortgage urgently, because ANZ was threatening to sell Lot 2 as mortgagee. ACS agreed to this request, initially on the basis that it would lend Mrs Mircevski the funds on mortgage so that she could pay out ANZ on completion of the contract of sale entered into on 1 May 2010. ACS was to receive security (from Mrs Mircevski) in the form of a caveatable interest over Lot 2 and $90,000 interest payable in 3 months time.

12 Shortly prior to 14 October 2010, MACAL suggested a different arrangement (which did not involve Mrs Mircevski). MACAL requested that ACS pay out the ANZ mortgage and MACAL would retain Lot 2. ACS agreed to MACAL's request on the basis that ACS would obtain a caveatable interest over the property and one over the home of Mr Tiricovski. Mr Tiricovski agreed on behalf of MACAL.

13 On 14 October 2010, ACS provided a cheque for $792,188.08 to discharge the ANZ mortgage. ACS received from ANZ a form of discharge of the ANZ mortgage and the certificate of title to Lot 2. On the same day, ACS registered the discharge of mortgage.

14 On about 27 October 2010, ACS lodged Caveat AF840494 with the LPI office in respect of Lot 2, claiming an estate or interest under the joint-

venture agreement dated 8 October 2010 with MACAL. Mr Tiricovski, as sole director and secretary of MACAL, signed a consent to this caveat on behalf of MACAL on 25 October 2010.

15 In November 2010, a dispute arose between ACS and MACAL concerning implementation of the joint venture. On 17 November 2010, ACS sent a letter to Mr Tiricovski asserting that he had misrepresented who was the beneficial owner of MACAL, and stated that ACS had loaned an amount of $792,000 in good faith to clear the debt on Lot 2 due to this misrepresentation. ACS demanded that MACAL "return the funds so lent within 7 days". On the following day, the solicitors for MACAL responded to ACS stating that it had paid an amount of $792,188.08 on account of the sum of $4,500,000 that ACS had agreed to pay pursuant to the joint venture agreement, but had failed to pay the balance.

16 This dispute led to litigation between ACS and MACAL, which was purportedly compromised on 3 June 2011. The basis of the compromise included a consent declaration that the joint venture agreement be set aside ab initio. Kanning was later joined on its own application as a party to those proceedings, which were ultimately heard by McDougall J.

17 ACS claimed in the proceedings below that it was entitled to be subrogated to the security right of ANZ, and thus to be treated in equity as if it had that security over Lot 2. On this basis, the case involved a straightforward issue of priority as between ACS's claim to an interest by way of subrogation to the position of ANZ as secured creditor and Kanning's claim to an equitable interest arising under the promise to execute a mortgage over Lot 2 pursuant to the Acknowledgement of Debt.

18 ACS contended that its subrogation claim was a "classic" case in which it is presumed that a third party who pays off a mortgage intends to keep the mortgage alive for its benefit, unless the contrary appears, and that this had not been established.

19 The primary judge rejected ACS's claim for subrogation, finding that the contrary had been shown. Accordingly, his Honour held that the earlier equitable interest of Kanning prevailed over ACS's later interest in Lot 2, which was assumed to be equitable: [2012] NSWSC 531.

20 For the reasons set out below, I agree that the equity of subrogation did not arise in favour of ACS in the circumstances of the present case. The earlier equitable interest of Kanning has priority over ACS's later interest in Lot 2, whether that interest be an equitable interest created on 14 October 2010 or an equity under the joint venture agreement dated 8 October 2010. The appeal should be dismissed with costs.

Issues on appeal

21 The notice of appeal raised 21 separate grounds of appeal directed to three issues:

(1) On the issue of subrogation, whether Kanning had rebutted the presumption in favour of ACS being subrogated to the ANZ's security interest.

(2) Whether the Acknowledgement of Debt dated 13 August 2008 gave rise to a legally enforceable debt owing by MACAL to Kanning, and an equitable charge upon Lot 2 in favour of Kanning.

(3) On the priority issue, whether the absence of notification of any caveat by Kanning at the point of lodgement by ACS of the ANZ mortgage for discharge was disentitling conduct, sufficient to disturb the ordinary priorities in favour of Kanning as the holder of the earlier equitable interest.

22 On the hearing of the appeal, counsel for ACS abandoned the grounds of appeal relating to the second issue. The appeal proceeded on the basis that there was no issue as to the existence of the debt owing by ACS to

Kanning and that the debt was secured by an equitable charge upon Lot 2 in favour of Kanning.

23 By its notice of contention, Kanning asserted that ACS has alternate remedies to subrogation and that it would not be equitable for ACS to be subrogated to the ANZ mortgage for a number of reasons. These included that if the payment to the ANZ was not made pursuant to the joint venture agreement, but in light of what ACS perceived to be a lucrative investment opportunity, then the payment was gratuitous and therefore ordinary priority rules applied and Kanning's interest as first in time prevailed.

The primary decision

24 In relation to the subrogation issue, the primary judge at [44] stated:

> "The key question is whether the payment made by ACS to ANZ was made under or pursuant to, or in partial performance of, the joint venture agreement. If it were, then the entitlements of ACS are those (if any) flowing from the joint venture agreement."

25 It is with respect to this statement that ACS asserts that the primary judge erred in his approach to subrogation.

26 The primary judge proceeded to identify the relevant recitals and significant provisions of the joint venture agreement. His Honour found that at least recitals C to G were intended to have operative affect: at [47]. ACS does not challenge this finding on appeal. It is necessary to set out those recitals to understand his Honour's reasoning and the parties' arguments on appeal.

> "A. The tenement at 202 West Street CARLTON NSW 2218 and described as Lot 2 Section 5 in DP 7754 is beneficially owned by MACAL.
>
> B. The tenement at 200 West Street CARLTON NSW 2218 and described as Lot 1 Section 5 in DP 7754 is beneficially owned by Robert Tiricovski and Slavica Tiricovski.

C. MACAL will purchase the tenement at 200 West Street CARLTON NSW 2218 and described as Lot 1 Section 5 in DP 7754 from Robert Tiricovski and Slavica Tiricovski and discharge all encumbrances registered or unregistered against the tenements. MACAL will purchase the tenement at 202 West Street CARLTON NSW 2218 and described as Lot 2 Section 5 in DP 7754 from Dragica Mircevski and discharge all encumbrances registered or unregistered against the tenements.

D. ACS will pay the amount of $4.5 million to MACAL as a Joint Venture Land Use Fee ('JVLUF'). The JVLUF is to facilitate the purchase of Lot 1 Section 5 in DP 7754 from Robert Tiricovski and Slavica Tiricovski 4 and discharge all encumbrances registered or unregistered against and Lot 2 Section 5 in DP 7754.

E. The JVLUF will be released to MACAL AND upon release of the JVLUF, MACAL will irrevocably undertake to apply the JVLUF to the purchase of Lot 1 Section 5 in DP 7754 from Robert Tiricovski and Slavica Tiricovski and discharge all debt and encumbrances on Lot 2 Section 5 in DP 7754.

F. During the course of the Joint Venture Project ACS will source third party finance for such amounts as mutually agreed between the parties and lend said monies to the Joint Venture to facilitate the building and development of the Aged Care Facility. The Joint Venture will reimburse ACS for the financing costs of this loan.

G. MACAL grants a first mortgage to a mortgagee nominated by ACS and a caveatable interest and or second mortgage to ACS over Lot 1 Section 5 in DP 7754 and Lot 2 Section 5 in DP 7754 (herein after tenement) for the full amount of the loan provided by the third party described as "the mortgagee AND MACAL confirms that it has no legal constraints providing the third party mortgage or charges over its assets.

H. The participants have agreed to:

(i) form a joint venture to carry out the project and
(ii) Appoint a suitably qualified project development manager as their agent to conduct the project, on the terms and conditions set out in this Agreement.
(iii) Engage as joint venturers with each other in future and now unspecified Aged Care and/or retirement villages incorporating the terms of this Agreement as the Joint Venture Agreement."

27 At [49], the primary judge noted that cl 2(3) of the joint venture agreement provided for MACAL to give an equitable charge to ACS at some time in the future:

> "MACAL confirms with respect to the tenement that they own or will own the tenements in their own right. In respect of the buildings erected thereon the Joint Venture participants will grant a Deed of Equitable Charge over the property to ACS a copy of which is annexed hereto as Annexure G."

28 This finding is not challenged on appeal. Indeed, in its oral submissions, ACS relied upon the failure to obtain the security contemplated under the joint venture agreement as supporting rather than being inconsistent with its claim to an interest by way of subrogation to the ANZ mortgage.

29 At [50], the primary judge found that the charge contemplated by cl 2(3) was not to be granted until, at least, the full sum of $4.5 million had been paid by ACS to MACAL. ACS does not challenge this finding on appeal.

30 The primary judge next referred to cl 4 (secondly appearing) which provided for each party to give security to the other for the purpose of its obligations under the joint venture agreement: at [51]. The clause provided that contemporaneously with execution of the joint venture agreement, each participant must execute and deliver a deed of charge and cross charge in a specified form (the Schedule E charge), encumbering the participants' interest in favour of each other participant as security for performance of their respective duties and obligations arising under or by virtue of what were referred to as project agreements.

31 The evidence of the circumstances in which ACS came to make the payment of $792,188.08 to ANZ on 14 October 2010 was given by Mr Dimitri Amargianitakis, a director of ACS. The primary judge recorded what happened at [60]-[65] as follows:

> "60. Mr Dimitri Amargianitakis, a director of ACS, described the circumstances in which, according to him, that happened. He said that after the joint venture agreement was made, Mr Tiricovski asked him to 'pay out the mortgage ASAP' because 'ANZ is breathing down our necks'. According to Mr Amargianitakis, he said that Mrs Macevski could be lent the entire amount, but that he wanted security and an amount on account of interest. In the

course of those discussions, according to Mr Amargianitakis, he said:

> 'We will pay out the loan if we get a caveatable interest. Until the whole deal is put together I want to be a secured lender in place of the bank'.

61 Mr Amargianitakis said that Mr Tiricovski agreed, saying 'You will be secured'.

62 A few days later, Mr Tiricovski proposed a different plan: namely, that the bank be paid out without the intervention of his mother-in-law. According to Mr Amargianitakis, he replied:

> 'We will still need a caveatable interest over the property and one over your house'.

63 On that basis, Mr Amargianitakis said, he arranged for ACS to procure a bank cheque in favour of ANZ for the required amount, attended at the office of ANZ, handed over the cheque and received 'the discharge documents'.

64 Mr Amargianitakis did not suggest that, at any time up to this point, he had obtained a recent search of the property which disclosed the state of affairs, including as to caveats and the like.

65 After those events had happened but apparently on the same day, Mr Amargianitakis said that he went to the Land and Property Information office to arrange for registration of the discharge of mortgage. He apparently found out there, by viewing information on a screen, that the NACL caveat was still on the title. According to Mr Amargianitakis he was not greatly concerned about that."

32 The primary judge was unimpressed with the evidence of Mr Amargianitakis. At [66], his Honour found that aspects of his evidence under cross-examination were unconvincing, and at [67] he recorded his clear impression that Mr Amargianitakis was tailoring his evidence in cross-examination to meet what he perceived to be arguments adverse to the interests of ACS.

33 At [68], the primary judge found that the clear inference is that when Mr Amargianitakis paid over the money required to discharge the ANZ mortgage, without having undertaken or caused to be undertaken any other search, he did so in the light of what he then perceived to be a lucrative investment opportunity.

34 His Honour did not accept the evidence of Mr Amargianitakis (and the submissions based on his evidence) that he did not regard the payment made to ANZ as one made under the joint venture agreement. His Honour cited three pieces of contemporaneous evidence, which he considered was contrary to what Mr Amargianitakis said in evidence: at [70]. These were:

(1) the terms of the caveat lodged by the solicitor for ACS on 25 October 2010: at [71];

(2) the draft heads of agreement prepared by Mr Amargianitakis for the consideration of MACAL on 18 November 2010, which included recitals that:

> "ACS has advanced MACAL $792,000 under the joint venture agreement to allow MACAL to repay a loan on the property at xxx West Street, Blakehurst": at [73],
>
> and;

(3) a letter from Ziman & Ziman (dated 18 November 2010), the then solicitors for MACAL to ACS which recorded, that:

> "Pursuant to the Agreement you have paid an amount of $792,188.08 on account of the sum of $4,500,000 that you agreed to pay",

and asserted that ACS had failed to pay the balance of $3,707,811.92 which was due and payable under the agreement: at [74].

35 Having not accepted the evidence of Mr Amargianitakis as to the reasons why ACS made the payment to ANZ: at [78], the primary judge found at [79] that the payment was made pursuant to, and not in addition to or outside, the joint venture agreement.

36 His Honour observed that the joint venture agreement contained the terms on which security would be given to ACS for the performance of MACAL's obligations. In the first instance this was the Schedule E charge, and on

payment of the full amount of $4,500,000 and the satisfaction of other conditions, the Schedule G charge: at [80]. The primary judge found that the joint venture agreement did not provide that, upon making a payment on account of the $4,500,000, ACS was to become entitled to some additional security: at [81].

37 At [82], the primary judge accepted that there is a presumption in favour of subrogation where ACS, as a third party (leaving aside the joint venture agreement), had paid out a secured debt owed by MACAL. His Honour found that the presumption had been rebutted because the impact of the joint venture agreement was that ACS was not properly to be regarded as a "third party" for the purposes of the presumption in favour of subrogation. The joint venture agreement explained why the payment was made and provided for the consequences that would follow from the making of the payment.

38 At [83], his Honour observed that destruction of the ANZ mortgage meant that there was nothing to which ACS, as payer, could be subrogated.

39 It is with respect to this finding that ACS asserts that his Honour erred because the principle of subrogation proceeds upon the fiction that the security which has been discharged is "kept alive" for the benefit of the payer.

40 On the issue of priority, the primary judge found that Kanning had an equitable interest under the Acknowledgement of Debt and that ACS had either an equitable interest or an equity under the joint venture agreement: at [92]. His Honour proceeded on the basis, without deciding, that the interest of ACS was an equitable interest: at [93].

41 After referring to the general rule of priorities between competing equitable interests that the first in time prevails: at [95], the primary judge considered whether there had been postponing conduct by Kanning, either by failing

to perfect its security, or its failure to maintain a caveat; the onus of proving postponing conduct being on the person asserting it: at [97].

42 At [99], the primary judge rejected the submission by ACS that Kanning's conduct had permitted Mr Tiricovski of MACAL to misrepresent the true position to Mr Amargianitakis of ACS. His Honour did not accept Mr Amargianitakis' evidence to the effect that he would have acted differently had the search at the LPI office revealed a caveat by Kanning. His Honour found that the very fact that Mr Amargianitakis handed over the money (to ANZ) without bothering to check the register provided strong support for his view.

43 The primary judge also found that ACS did not hand over the money to ANZ on the faith of the register, or in reliance on the absence of any caveat by Kanning, nor was there any other act or omission by Kanning that caused Mr Amargianitakis to act as he did: at [100].

44 The primary judge rejected the submission by ACS that the failure of Kanning to perfect its interest was in any way of significance: at [101].

45 As to the lapsing of the caveat lodged by Kanning, his Honour considered that Kanning had no other choice, because its interest could not have prevailed over the ANZ's interests as first registered mortgagee: at [102]. His Honor observed at [103] that Kanning could not lodge a further caveat without leave of the Court and that such leave would not have been granted (or should not have been granted) so long as ANZ was registerd as first mortgagee.

46 His Honour concluded that Kanning was entitled to succeed against ACS on the priority question: at [107].

Legal principles - subrogation

47 There was general agreement between the parties as to the relevant legal principles governing the equitable doctrine of subrogation. The main area of disagreement concerned the significance of the intention of the third party who pays out the secured creditor.

48 For the purposes of the appeal, it is sufficient to note the following principles.

49 First, in a general sense, subrogation is the "process by which one party is substituted for another so that he may enforce the other's rights against a third party for his own benefit" (sic): C Mitchell, *The Law of Subrogation,* Clarendon Press, Oxford (1994) at 3 cited with approval in *Highland v Exception Holdings Pty Ltd (in liq)* [2006] NSWCA 318; (2007) 60 ACSR 223 per Santow J at [90].

50 Secondly, as explained by the High Court in *Bofinger v Kingsway Group Ltd* [2009] HCA 44; 239 CLR 69 at [90], the equitable doctrine of subrogation is not a "tangled web" in need of the imposition of the "top down" reasoning which is characteristic of some all-embracing theories of unjust enrichment. Rather:

> "[94] .. the relevant principles of equity do not operate at large and in an idiosyncratic fashion. So it was that in *Boscawen v Bajwa*, Millett LJ, after denying that subrogation is a remedy which the court has a general discretion to impose whenever it thinks fit to do so, went on:
>
> > 'The equity arises from the conduct of the parties on well settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff'."

51 Thirdly, one well recognised area of subrogation is where there has been payment out by a third party of a prior security: see Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, 4th ed (2002) at [9-060] to [9-075].

52 Thus, where a third party has paid off a mortgage, he or she is presumed, unless the contrary appears, to intend that "the mortgage shall be kept alive for his own benefit": see *Ghana Commercial Bank v Chandiram* [1960] AC 732 at 745; see also *Filby v Mortgage Express (No 2)* [2004] EWCA Civ 759 at [53]; *Butler v Rice* [1910] 2 Ch 277; *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177 at 202 per Windeyer J, who dissented on the facts.

53 Fourthly, the expression "*kept alive*" means in this context, that the legal relations between the third party and the debtor are regulated as **if** the benefit of the security had been assigned to the third party: *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 at 223F per Lord Hoffmann.

54 In *Cochrane v Cochrane* (1985) 3 NSWLR 403 at 405, Kearney J accepted that the principle emerging from *Ghana Commercial Bank* applies, unless it is shown that the circumstances are such as to displace the presumption. His Honour observed that:

> "This principle is based on equity's concern to prevent one party obtaining an advantage at the expense of another which in the circumstances of the case is unconscionable. Hence, there is a common thread running through the relevant cases to the effect that the conscience of the mortgagor should be affected so as to cause the mortgage to be kept alive. This is illustrated in the text book examples first, of a third party not being entitled to a right by way of subrogation where he simply lends the money on an unsecured basis to the mortgagor who then uses such funds to pay off the mortgage; and secondly, of a third party being so entitled where he advances the money to pay out the mortgage on the understanding that security would be provided for such advance **upon** the mortgage being paid out." (emphasis added)

55 Subsequently, in *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* [2003] NSWSC 1072 (not reproduced in the report (2003) 59 NSWLR 452) at [48]-[50], Bryson J expressed the view that an explanation of the doctrine in terms of intention or the presumed intention of the payer, did not yield a clear or readily understood basis of the right of subrogation.

However, his Honour accepted that intention may be significant where it is for some reason clear that the payer did not intend to be secured at all.

56 In rejecting the English approach of explaining subrogation in terms of restitution and unjust enrichment, as dating merely from *Boscawen v Bajwa* in 1995 and failing to explain why the mortgagor was regarded in equity as being bound to regard the payer as a secured creditor, Bryson J stated at [50]:

> "[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."

57 More recently, *In the matter of Dalma No 1 Pty Limited (in liquidation) (ACN 111 772 260); Application of Bruce Gleeson and David Shannon in their capacity as joint and several liquidators of Dalma No 1 Pty Limited (in liquidation) and anor* [2013] NSWSC 1335, a decision handed down after this appeal was argued, Brereton J at [32] expressed his agreement with the view expressed by Bryson J at [48]-[50] in *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd*, subject only to the caveat that his Honour considered that the role of the payer's actual or presumed intention could not be disregarded entirely. Brereton J went on to observe at [32], in relation to the classification of the mortgagor's conduct as unconscionable, that:

> "..., the explanation is no more than that sufficient unconscionability to engage the doctrine is to be found in the mortgagor insisting that the effect of the third party's payment is to discharge it from the encumbrance, unless that was the basis on which the third party made the payment. In other words, the position of a mortgagor who claims to be discharged as a result of the third party's payment, rather than that the mortgage subsists for the benefit of the third party, is prima facie unconscionable, even if that characterisation is somewhat "attenuated"; but that prima facie position is displaced if it is shown that the third party intended otherwise."

58 Sixthly, there is no occasion to order subrogation where there is available to a third party a remedy at law or in equity sufficient to avoid the unconscionable result. For example, where one co-mortgagor has repaid the mortgage debt the doctrine of subrogation does not apply, adequate justice being done by his entitlement to contribution; see *Cochrane* at 405D-E, referred to with approval by Kirby P (Sheller JA agreeing) in *New South Wales Medical Defence Union Ltd v Crawford (No 3)* (NSWCA, unreported, 23/9/94 at p 7).

59 Although each case will necessarily turn on its own facts, in *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291, Neuberger LJ, stated 13 propositions regarding subrogation at [32]-[44]. In *Highland v Exception Holdings* at [106], Santow JA (with whom Giles and Hodgson JJA agreed on the question of subrogation) cited with approval, Neuberger LJ's propositions 4 to 11, which deal with the issue of failed security. It is sufficient for present purposes, to note propositions 4, 7, 9 and 10:

> "[35] Fourthly, a classic case of subrogation is that described by Walton J in *Burston Finance* at 1652B-D .... The reasons that a lender's anticipated security may not have been forthcoming so that he has sought to invoke subrogation are various. Examples include the lender's ineptitude (as in *Burston Finance*), the lender being misled (as in *Banque Financiere* and in *Boscawen*), the borrower being an infant (as in *Thurstan -v- Nottingham Building Society* [1903] AC 6), and the borrowing being ultra vires the borrower (as in *Re Cork and Youghall Railway Co* (1860) LR 4 Ch App 748).
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> ...
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> [38] Seventhly, a lender cannot claim subrogation if he obtains all the security which he bargained for, as in *Burston Finance* (applying *Capital Finance Co Limited v Stokes* [1969] 1 Ch 261) or where he has specifically bargained on the basis that he would receive no security as in *Paul v Speirway Limited (in liquidation)* [1976] 1 WLR 220.
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> ...
>
> [40] Ninthly, the absence of a common intention on the part of the borrower and the lender that the lender should have security is by no means fatal to a lender's subsequent claim for subrogation: see *Banque Financiere* at 232B-234C. However, the intention of the

> parties to the arrangement which is said to give rise to a claim for subrogation may be 'highly relevant': ibid at 234D. It would seem that the intention of the lender is particularly important (see for example *Banque Financiere* at 235A-B and *Boscawen* at 339H-340A).
>
> [41] Tenthly, subrogation cannot be invoked so as to put the lender in a better position than that in which would have been if he had obtained all the rights for which he bargained: see *Banque Financiere* at 235D and 236G-273B per Lord Hoffmann. This point was also made by Lindley MR in *Wrexham* at 447."

Consideration

60 The present case involves a claim for subrogation in the context of an assertion of failed security. The starting point is that because ACS paid off the ANZ mortgage, it is presumed, unless the contrary appears, to intend that the ANZ mortgage shall be kept alive for its own benefit.

61 In stating the question as he did at [44], the primary judge directed attention to the relevant question, being whether the circumstances displaced the presumption that ACS intended to keep the ANZ mortgage alive for its own benefit. Those circumstances required a consideration of the character of the payment made by ACS to ANZ and whether ACS did not obtain the security that it intended. Necessarily this required a close examination of whether the payment by ACS to ANZ was referable to the joint venture agreement, and if so, what were the entitlements of ACS (if any) arising from that agreement.

62 In this context, three matters of significance should be noted.

63 First, the attempt by Mr Amargianitakis in his evidence to characterise the payment made to ANZ as not made under the joint venture agreement was rejected by the primary judge and there is no challenge to this finding: at [69]. The intention of the payer is clearly relevant to whether the presumption has been rebutted.

64 Secondly, the primary judge was correct to focus upon whether ACS did not obtain the security (if any) that it intended. This issue may be approached in one of two ways. On the approach adopted by the primary judge, the payment was made pursuant to the joint venture agreement. On the approach advanced by ACS on appeal, the payment was made independently of the joint venture agreement. As explained below, on either approach, the circumstances of the present case are not one of failed security **upon** the ANZ mortgage being paid out.

65 Thirdly, relevant to this inquiry is whether it is unconscionable for MACAL to be excused from discharge of its obligations to ANZ. As explained below, the circumstances of the present case do not involve the inequitable discharge of MACAL's obligations to ANZ.

Payment pursuant to the joint venture agreement

66 The primary judge approached the matter on the basis that the payment to ANZ was on account of the $4,500,000 payable by ACS to MACAL under the joint venture agreement. Counsel for ACS did not directly challenge this finding. He acknowledged that there would have been a credit allowed by MACAL (in respect of ACS's obligation to pay $4,500,000) for the payment of $792,188.08 to ANZ. However, ACS contended that the payment could not be regarded as being made "under or pursuant" to the joint venture agreement, because there was no express term requiring payment of any particular sum to ANZ, nor was there any provision requiring payment of **part** of the $4,500,000. There are a number of difficulties with ACS's argument.

67 First, there is a significant tension between the contention by ACS that the primary judge was in error in characterising the payment to ANZ as being referable to the joint venture agreement, and its oral submissions that ACS is in the position of the second category of cases referred to by Kearney J in *Cochrane v Cochrane* at 405, of not having received the securities

promised to be granted under the joint venture agreement, being the Schedule E and Schedule G charges upon receipt of the $4,500,000 from ACS.

68 Secondly, there is a significant factual difference between the present case and the principle underlying the equity of subrogation in the context of failed security, as referred to in *Cochrane v Cochrane.*

69 In the present case, the primary judge found that the relevant security promised to ACS under the joint venture agreement was **only** to be provided upon payment of the $4,500,000: at [50]. The joint venture agreement did not provide for security in the form of the Schedule G charge to be provided to ACS **upon** the ANZ mortgage being paid out; compare the statement of principle of Kearney J in *Cochrane v Cochrane* set out at [54] above.

70 Thirdly, the character of the payment by ACS to ANZ was undoubtedly in part payment of the $4,500,000 owing by ACS to MACAL under the joint venture agreement. It is not to the point that the joint venture agreement did not itself require payment by ACS to ANZ. The joint venture agreement obliged MACAL to apply the $4,500,000 received from ACS towards, amongst other things, the discharge of all encumbrances against Lot 2; this included the ANZ mortgage. Nor is it to the point that the joint venture agreement did not require payment of part of the $4,500,000. MACAL requested the urgent advance of part of this sum, as ANZ was threatening to sell Lot 2, and ACS agreed. The payment by ACS to ANZ was in part satisfaction of its obligation to pay $4,500,000 to MACAL. There was no error by the trial judge in taking into account the three pieces of evidence, referred to at [71], [73] and [74]: see [34] above, in rejecting the evidence of Mr Amargianitakis (and the submissions based on that evidence) that he did not regard the payment made to ANZ, as one made under the joint venture agreement.

71 The timing of the provision of security to ACS under the joint venture agreement reflected the commercial arrangements between the parties. These included that the joint venture property comprising Lot 1 and Lot 2 was intended to be mortgaged to a third party financier introduced by ACS and that ACS, was only to receive security over the joint venture property, including Lot 1 and Lot 2, either by way of a caveat or a second mortgage, **after** a first registered mortgage had been granted to the third party financier of the proposed development to be constructed on those lots. There was simply no intention under the joint venture agreement that ACS would receive security over Lot 2 **upon** the ANZ mortgage being paid out.

72 When the payment to ANZ is viewed in light of the relevant circumstances, including the terms of the joint venture agreement, it did not result in the inequitable discharge of MACAL's obligations to ANZ. The discharge of the ANZ mortgage was a necessary step towards the fulfilment of the transactions contemplated by the joint venture agreement. Those transactions included that the encumbrances on Lot 2 would be cleared, and the purchase of Lot 1 completed, both funded by ACS's payment of $4,500,000 to MACAL. These steps were necessary to enable security to be given by MACAL over Lot 2, as well as Lot 1, to a new third party financier and only then would ACS obtain security over, amongst others, Lot 2.

73 In the events which happened, ACS never provided the whole of the $4,500,000 to MACAL under the joint venture agreement and conversely never received the Schedule G charge. However, ACS was never entitled to security over Lot 2 in the form of the Schedule G charge unless and until it paid the whole of the $4,500,000.

74 Counsel for ACS submitted in reply that MACAL had taken unconscionable advantage of ACS by obtaining title to Lot 2 clear of the ANZ mortgage and, where the joint venture arrangements had fallen over, for whatever reason, equity would intervene to avoid the consequences simply lying

where they fall. He called in aid the High Court decision in *Muschinski v Dodds* [1985] HCA 78; 160 CLR 583. To similar effect is the decision in *Baumgartner v Baumgartner* [1987] HCA 59; 164 CLR 137.

75 These cases illustrate the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails, when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them. In such circumstances, equity may grant relief by way of constructive trust over the assets that are the subject of a joint endeavour, subject to any necessary adjustments to avoid injustice which would otherwise result by reason of disparity between individual financial contributions.

76 This principle does not assist ACS's claim for subrogation in the present case. Rather it reinforces the view that there has been no inequitable discharge of the ANZ mortgage. MACAL held the property that was the subject of the joint venture, in particular Lots 1 and 2, for the benefit of itself and ACS as joint venturers. In the event of the joint venture coming to an end, through no attributable blame to either party, then as between ACS and MACAL, those circumstances may have called for the imposition of a constructive trust over Lot 1 and Lot 2 in favour of ACS, to preclude the retention or assertion by MACAL of beneficial ownership of the property, to the extent that such retention or assertion would be contrary to equitable principle. None of this however would have assisted ACS, as against Kanning, with its claim of subrogation to the ANZ mortgage.

77 The entitlement of ACS to the relevant security contemplated by the joint venture agreement simply did not arise. The present case is not one of failed security intended to be provided to ACS upon the discharge of the ANZ mortgage. Whatever equitable rights may have arisen in favour of ACS against MACAL upon failure of the joint venture, they do not include a claim of subrogation to the ANZ mortgage.

78 In my view, there is no error in the primary judge's finding that the presumption in favour of subrogation of ACS to the ANZ security had been rebutted.

Arrangement for a caveatable interest over Lot 2

79 There is another way in which the subrogation claim of ACS may be approached, which also addresses the contention of ACS that the payment to ANZ was independent of the joint venture agreement. This approach takes the circumstances as found by the primary judge, and adds to those circumstances, the terms of the arrangement agreed between ACS and MACAL shortly before 14 October 2010. These arrangements, which were referred to by the primary judge at [62]-[63], are set out at [31] above.

80 On this approach, the case remains one in which there is no failed security, nor an inequitable discharge of MACAL of its obligations to ANZ. Rather, ACS paid out the ANZ mortgage on the understanding with MACAL that it would receive a caveatable interest over Lot 2 and to this end, MACAL consented in writing to the registration of such a caveat by ACS, which occurred on or about 27 October 2010. Accordingly, ACS received exactly what it bargained for when it paid out the ANZ mortgage.

81 Kanning contended in its oral submissions that this arrangement, which it recognised was a separate and distinct arrangement between ACS and MACAL, did not create an equitable interest over Lot 2 in favour of ACS. Kanning submitted that a caveat based upon a contractual provision of the type the subject of the evidence of Mr Amargianitakis did no more than enable ACS to impede and obstruct MACAL's path as registered proprietor, without conferring any equitable interest in Lot 2.

82 Whether it is possible to discern from the authorisation to lodge a caveat (given by a registered proprietor), an intention to create a charge which would support a caveat is the subject of conflicting views in the authorities.

The conflict relates to whether there is a principle establishing what implication must be drawn in all cases from the authority to lodge a caveat in connection with an obligation to pay money, or whether each case is to be addressed by reference to the terms of the contractual document to discover what it means, by expression and by implication: *Taleb v National Australia Bank Ltd* [2011] NSWSC 1562; 82 NSWLR 489 at [60] per Bryson AJ.

83 In my view, Bryson AJ was correct to observe in *Taleb* that the statements of Mahoney JA and Meagher JA in *Troncone v Aliperti* (1994) 6 BPR 13,291 are not to be taken as such a principle. Rather, they are to be taken as a proposition to be derived from the facts in *Troncone*. So much is clear from the summary of the proposition in *Troncone*, given by McLelland CJ in Eq in *Coleman v Bone* (1996) 9 BPR 16,235 at 16,239:

> "... if in a contract between A and B, A grants B authority to lodge a caveat in respect of property of A, that grant carries with it by implication such estate or interest in the property as is necessary to enable that authority to be exercised. Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B, and there is no sufficient indication to the contrary, the implication is that the estate or interest granted is an equitable charge to secure payment to B of that money (*Troncone* at BPR 13,293-4, ConvR 60,020 per Meagher JA)."

84 Applied to the facts of the present case, the arrangement negotiated between Mr Amargianitakis of ACS and Mr Tiricovski of MACAL shortly before 14 October 2010, as referred to by the primary judge at [62], is to be understood in the context of the discussion in the immediate preceding days recorded at [60]-[61]. Although the primary judge did not accept aspects of the evidence of Mr Amargianitakis concerning whether the payment to ANZ was made under the joint venture agreement, his Honour did not expressly reject his evidence recorded at [60]-[63] of the arrangement with MACAL shortly before 14 October 2010.

85 In my view, the authority given by MACAL to ACS to lodge a caveat in respect of Lot 2 carried with it by implication, the grant of an equitable

charge over Lot 2 in favour of ACS. This is established by the express reference in the discussions between Mr Amargianitakis and Mr Tiricovski to ACS obtaining of "security" by way of a caveatable interest over Lot 2, to which MACAL agreed.

86 As already noted, MACAL consented in writing to the lodgement of such a caveat by ACS, and this occurred on 27 October 2010. On the evidence of Mr Amargianitakis, ACS received what it bargained for when it paid out the ANZ mortgage. It obtained an equitable charge over Lot 2. There was no inequitable discharge of MACAL's obligations to ANZ.

87 The grounds of appeal relating to the subrogation claim should be rejected.

Priorities

88 As there was no error in the primary judge rejecting the subrogation claim, the priority issue is a straightforward issue of competition between Kanning's earlier equitable interest and ACS's assumed equitable interest under the joint venture agreement, or any equitable interest arising from the arrangements agreed with MACAL shortly prior to 14 October 2010.

89 ACS did not contest on appeal the primary judge's reasoning on the priority issue at [92]-[106]. In particular, no written or oral submissions were made in support of appeal grounds 19-21 directed to the priority issue. Rather, ACS's submissions on the priority issue proceeded on the assumption that ACS had established its claim of subrogation. Thus, ACS contended in its written submissions in reply that when Kanning acquired its equitable interest in Lot 2, ANZ was already on the title as first mortgagee, and Kanning knew it had a subordinate interest (to ANZ). ACS submitted that its interest in the ANZ mortgage, by the equity of subrogation, goes back to the time that the ANZ mortgage was registered.

90 If ACS had established an entitlement to be subrogated to ANZ's earlier mortgage then this analysis would be correct, and ACS's interest in Lot 2 by way of subrogation would have taken priority over Kanning's earlier equitable interest. A claimant who is subrogated to a security right is treated in equity as if he or she had that security: *State Bank of New South Wales v Geeport Developments Pty Ltd* (1991) 5 BPR 11,947 at 11,954 per Cohen J; *Halifax plc v Omar* [2002] EWCA Civ 121 at [84] per Parker LJ. As stated by Cohen J in *State Bank v Geeport Developments* at 11,954:

> "... a first mortgage, when paid out by a person who is subrogated, remains in priority to a subsequent encumbrance, even though that later encumbrance came into being, whether at law or in equity, at an earlier time than the payment. See *Drew v Lockett* (1863) 32 Beav 499; 55 ER 196."

91 However, this analysis does not apply in this case where, as the primary judge correctly concluded, ACS is not entitled to be subrogated to ANZ's earlier mortgage. In the circumstances as found by the primary judge, the priority issue involved competition between Kanning's earlier equitable interest in Lot 2 and ACS's assumed equitable interest under the joint venture agreement: C*ash Resources Australia Pty Ltd v B.T. Securities Ltd* [1988] VR 576. ACS did not advance any submission that the primary judge erred in concluding that there was no postponing conduct by Kanning, and that Kanning's earlier equitable interest had priority over ACS's later interest in Lot 2 under the joint venture agreement which was assumed to be an equitable interest.

92 This reasoning is equally applicable to the competition between Kanning's earlier equitable interest and ACS's later interest arising under the arrangement reached with MACAL shortly before 14 October 2010, that ACS would obtain a caveatable interest over Lot 2, which I have concluded is an equitable interest.

93 On either approach, Kanning has priority over ACS as the holder of the equitable interest earlier in time. No basis has been established for postponing Kanning's earlier equitable interest. In the circumstances, the appeal must fail.

Orders

94 The orders that I propose are:

(1) Appeal dismissed.

(2) Appellant to pay the first respondent's costs.

95 **LEEMING JA**: I agree with Gleeson JA.

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