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Variation & Assignment of Mortgages

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1. Enforcement of Mortgages *19 June 2003*
2. Indefeasibility of Mortgage Title *17 Nov 2003*
3. Mortgage Drafting in NSW *17 Mar 2004*
4. Mortgage Priorities *15 June 2004*
5. The Rights of Mortgagors *10 Oct 2005*
6. The Rights of Mortgagees *10 Nov 2005*
7. Mortgagees Power of Sale *23 May 2006*
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15. Proportionate Liability in claims against Valuers *29 Oct 2008**
16. Examinations under the Corporations Act and ASIC Act *5 March 2012*†

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1. Introduction

It is quite common for parties to a mortgage to find it in their mutual interest to vary the terms originally agreed. Typical instances include construction facilities, where the vicissitudes of building alter the original projections, and or expired loans, where the mortgagor's good conduct has convinced the lender to extend the term – sometimes at a lower interest rate.

2. Variation by refinancing

Where there has been a checkered history between the parties, particularly one involving interest arrears, enforcement action and/or partial discharges, often the best way to deal with the legalities is to discharge the old mortgage and replace it with a new one.

The main advantage is that the occasion can be used to document the mortgagor's agreement to the payout figure on the old mortgage reducing the chance a defence based on the earlier history will be raised. In such cases the mortgagor is usually required to execute a deed of release in relation to matters arising out of the earlier mortgage.

Typically the payout figure of the old mortgage, plus the lender's legal costs, will be capitalized in the new mortgage. If the old mortgage was, prior to the date of discharge, in arrears then usually the new mortgage will have a period of either prepaid or capitalized interest. Where construction finance is involved if the strata plan has been registered and the units are being sold the funder will often be able to offer a lower rate of interest.

If there is a subsequent mortgage care should be taken to preserve priority. This can be done by obtaining postponements from the subsequent mortgagees (or, in the case of mortgages protected by caveat, consents). In conjunction with this, variations to any deeds of priority should also be documented.

3. Variation of registered mortgages

i) Section 91 of the *Conveyancing Act*

Formal variation of registered mortgages is governed by section 91 of the *Conveyancing Act* 1919. Subsection 1 applies to all mortgages (old system, equitable and registered) and reads:

> In the case of every mortgage (whether made before or after the commencement of this Act):
>
> (a) the mortgage debt may be discharged, and
>
> (b) the rate of interest may be increased or reduced, and
>
> (c) the amount secured by the mortgage may be increased or reduced, and
>
> (d) the term or currency of the mortgage may be shortened, extended, or renewed, and

(d1) the provisions of a mortgage may be otherwise varied, omitted or added to, and

(e) the mortgage may be transferred:

by a memorandum indorsed on or annexed to the mortgage, and signed by the persons to be bound thereby and attested by one witness.

The applicability of the section to registered mortgages is circumscribed by subsection 6 which reads:

> Subject to the memorandum referred to in subsection (1) being in or to the effect of an approved form within the meaning of the Real Property Act 1900 , paragraphs (b), (c), (d) and (d1) of that subsection apply to mortgages under that Act and, upon lodgement of such a memorandum for registration, the Registrar-General shall make such recordings in the Register kept under that Act as may be necessary to give effect to the memorandum.

The approved form issued by the Registrar-General is based on schedule 5 of the *Conveyancing Act*. Contrary to the wording of subsection 1 there is no need for the variation to be indorsed on or annexed to the original mortgage. The approved form can be downloaded from the LPI website.

Section 91(5A) reads:

> A memorandum of variation of mortgage may not operate so as to vary the land to which the mortgage relates.

ii) LPI practice

Under LPI practice:

(a) The Certificate of Title must be produced if the first ranking registered mortgage is being varied (subsequent registered mortgagees do not need to produce the CT),

(b) If caveats on the title prevent registration of dealings then their withdrawal or consent is required,

(c) Variations must be stamped (nominal stamp duty is payable however if the principal is increased duty on the increase is payable at normal rates),

(d) Other mortgagees do not need to give their consent,

(e) Both the mortgagor and mortgagee must sign the variation and be witnessed by a person who is not a party,

Despite the fact the consent of subsequent mortgagees is not required

iii) Indefeasibility of variation of title

Mercantile Mutual Life Insurance Co Ltd v Gosper,[1] is authority for the proposition that in the absence of personal equities (which were found to apply in the case) a forged variation of mortgage would acquire indefeasibility and sustain rights *in rem* (bind the land).

[1] (1991) 25 NSWLR 32.

iv) Personal covenants

In *Mercantile Mutual Life Insurance Co Ltd v Gosper,*[2] Kirby P said:

> The only way in which the personal covenants contained in the valid original mortgage between the respondent and the appellant could be varied was by deed. That is why s.91 (1) of the *Conveyancing Act* 1919 requires a variation to be signed by the persons to be bound thereby and attested by a witness. Only then will such a variation 'operate as a deed': see s.91 (2).

In *Gosper's* case although the mortgagor had signed the original mortgage the variation was a forgery by her husband. The above statement is authority for the proposition that indefeasibility did not operate to make the mortgagor liable under the personal covenants.

v) Unauthorised use of a certificate of title

In *Mercantile Mutual Life Insurance Co Ltd v Gosper*[3], Mercantile Mutual held a mortgagor's certificate of title as mortgagee under a valid mortgage. A forged variation of mortgage was innocently registered by Mercantile Mutual with the aid of the certificate of title. It was held that Mercantile Mutual owed obligations to the mortgagor arising from its possession of the certificate of title under the original mortgage not to use that certificate of title without the authorisation of the mortgagor. In consequence, a personal equity was found to exist enabling the mortgagor to compel Mercantile Mutual to relinquish the benefit that had been obtained in breach of its obligations, being the registration of the forged variation. Mahoney JA held:

> Mercantile Mutual Life Insurance Co then produced the certificate of title to the Registrar-General for the purpose of procuring that the forged variation of mortgage be registered….But the company had no authority to produce or otherwise use the certificate of title for such a purpose…The proper conclusion is, in my opinion, that the company used the certificate of title in breach of its obligations to Mrs Gosper and that its use of it in that way was a necessary step in securing the registration of the forged variation of mortgage…In my opinion where the registration of a forged instrument has been produced by such a breach by the new owner, that is sufficient to create, in the relevant sense, a "personal equity" against the new owner.

vi) Informal variation of a registered mortgage

In *Torre v Jonamill*[4] Barret J, rejecting an argument that section 91(6) of the *Conveyancing Act* nullified the effect of any variation that was not registered referred to the above passage by Kirby P in *Mercantile Mutual Life Insurance Co Ltd v Gosper*[5] noting:

> Kirby P's statement indicates that an unregistered variation of such a mortgage takes effect as a deed upon execution and without registration. The significance of registration is, I think, that stated in Professor Lang's "New South Wales Conveyancing Law and Practice" (CCH looseleaf) at para 36-400:

[2] (1991) 25 NSWLR 32
[3] (1991) 25 NSWLR 32
[4] [2002] NSWSC 152
[5] (1991) 25 NSWLR 32

> "The variation must be registered to secure an indefeasible title to (in the case of Torrens title land) or priority for (in the case of old system land) the rights created by the variation."

It seems to me, therefore, that lack of *Real Property Act* registration of an instrument of variation is relevant only to issues going to indefeasibility of estate or interest as distinct from the content or effect of covenants.

vii) Power of sale

In *Scarel v City Loan & Credit Corporation Pty Ltd*[6] Young J noted that a variation constituted a compounding of the original mortgage and the new variation. This had the effect of vacating the registered mortgage and making the mortgagee's rights flow from the unregistered compound document. This in turn affected the notice required to be issued before a power of sale could arise. His Honour's reasoning bears careful consideration because of its potential effect on priorities:

> The undisputed facts are that a mortgage dated 6 November, 1981 was executed and was duly registered … However, by deed bearing date 24 September, 1984 the parties purported to vary that mortgage so as to recognise that the total principal and interest, as at the date of the deed, … to make this sum the new principal sum on which the mortgagee was entitled to receive interest, and to extend the time for repayment for three years.
>
> The deed of 1984 was never registered. It would have been necessary to execute and register the prescribed form of variation of mortgage and so attract s91 of the *Conveyancing Act* if the deed were to appear on the register. This was not done, but it does not seem to me that the mortgagee can be in any better position through not doing this than if it had done it.
>
> Such authority as there is on the point, authority which is recognised by the standard books on the *Conveyancing Act*; see *Stuckey on the Conveyancing Act* 2nd Edition p.202 and *Woodman & Nettle on the Real Property Act* p. 469, indicates that the legal effect of a variation of mortgage, where at least there is an alteration in the principal sum, is that a new contract has come into force compounding the terms of the previous mortgage, plus the variations. That statement is based on two decisions of the New Zealand Court of Appeal, namely, *Re Goldstone's Mortgage* [1916] NZLR 489 and *Public Trustee v Mortleman* [1928) NZLR 337, both of which appear to support it.
>
> If the new mortgage then is constituted by the deed of 1984, then that new mortgage has not been registered and accordingly the mortgagee's rights flow from a document other than a mortgage … registered under the *Real Property Act* and thus before it can exercise a power of sale a notice must be given under s111 of the *Conveyancing Act*. This has not been done and accordingly, at the moment the mortgagee has no power to sell.

[6] (1986) 4 BPR 9226.

4. Variation of unregistered mortgages

i) Variations executed in registerable form

The question arose in *Torre v Jonamill*[7] as to whether an unregistered mortgage could be varied by an unregistered variation. Barret J holding:

> Regardless of the absence of … registration under the *Real Property Act* in relation to both the mortgage and the variations… the conclusion is that each unregistered variation, once executed and attested in the appropriate form, operated as a deed by virtue of s.91 (2) of the *Conveyancing Act*.

5. Variation within existing terms

Often mortgages will be broadly drafted so as to allow extraneous documents or happenings to vary the obligations of the mortgagor which are secured by the mortgage. The most common instance of this are so-called *all monies mortgages*. Typically an all monies mortgage will not contain details of the loan (such as principal, rate or term) on the face of the register. Rather the mortgage will incorporate a registered mortgage memorandum consisting of boilerplate terms. One of these terms will define the amount secured as being "*all monies owing from time to time by the mortgagor to the mortgagee*".

Young J in *Estoril Investments Pty Ltd v Westpac Banking Corporation*[8] and Santow J in *Re Modular Design Group Pty Ltd*[9] have adopted the following 9 guidelines in interpreting all monies clauses:

1. The mortgage will only secure advances made or debts incurred in the past or future if the past debts are identified.

2. Only debts of the same type or character as the original debt are secured by the mortgage.

3. A dragnet clause will often cover future debts if documents evidencing those debts specifically refer back to the clause.

4. If the future debt is separately secured it may be assumed that the parties did not intend that it also be secured by the dragnet mortgage.

5. The clause is inapplicable to debts which were originally owed by the mortgagor to third parties and which were assigned to or purchased by the mortgagee.

6. If there are several joint mortgagors only future debts on which all of the mortgagors are obliged or at least which all were aware will be covered by the dragnet clause.

7. Once the original debt has been fully discharged, the mortgage is extinguished and cannot secure further loans.

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[7] [2002] NSWSC 152.
[8] (1993) 6 BPR 13,146.
[9] (1994) 35 NSWLR 96.

8. If the mortgagor transfers the land to a third party, any debt which the original mortgagor incurs thereafter is not secured by the mortgage.

9. If the real estate is transferred by the mortgagor, advances subsequently made to the transferee are not secured by the mortgage even if the transferee expressly assumed the mortgage.

Within these criteria it is possible for the parties to agree any terms they want including rolling lines of credit, overdrafts, debt factoring, the entering into and discharge of loans and guarantees given to secure third party debts.

In addition to all monies, mortgages and deeds of loan which they secure may provide for variation of interest rates by reference to published interest rates or other external stimuli so long as it does not amount to a unilateral variation of terms.

6. Variation deemed by section 92 of the *Conveyancing Act*

When a mortgage has expired and the mortgagee has accepted interest for a period of three months or more, and there are no other defaults (other than a failure to repay interest) Section 92(1) of the *Conveyancing Act* applies:

> Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the said sum for any period (not being less than three months) … then, so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not be entitled to take proceedings to compel payment of the said sum, or for foreclosure, or to enter into possession, or to exercise any power of sale, without giving to the mortgagor three months' notice of his or her intention so to do.

Although arguably this constitutes a rolling extension of the mortgage, Manning J in *Kater v Kater*[10] held that section 92 of the *Conveyancing Act* operated as a prohibition upon the mortgagee's right to exercise certain contractual powers and was not a prohibition which automatically from time to time re-fixed a date upon which the principal sum was payable. Section 92 is construed strictly and requires notices to specify that it intends to take legal proceedings to either (i) compel payment of the sum; (ii) foreclose; (iii) enter into possession; or (iv) exercise any power of sale – see *JE & EJ Investments P/L v Masselos.*[11]

7. Variation by informal agreement

Informal variations, usually in the form of letters or emails, usually operate by estoppel, although a suit for specific performance can be brought where appropriate. Typically a mortgagee will indicate that a mortgage will not be called up upon expiry provided interest payments at the lower rate continue to be made.

It is not uncommon for mortgagors to allege telephone conversations or emails concerning arrears give rise to estoppel. Although such defences rarely succeed they usually raise a triable issue and result in the enforcement of the mortgage being consequently delayed.

[10] (No 1) (1963) NSWR 1667.
[11] [2001] NSWSC 844 at paragraph 28.

Mortgagees are therefore well advised to avoid informal communications (email and telephone) and communicate (and insist on communication) by letter.

8. Priorities

i) The effect of the compounding principle

In the New Zealand Court of Appeal case of *Re Goldstones Mortgage*[12] cited with approval by Young J in *Scarel v City Loan & Credit Corporation Pty Ltd*[13] Hosking J in delivering judgment for the full court held:

> It may be here observed that to call any such transaction as we have described a variation of the original mortgage would in popular language be correct, but in law and in truth the alteration made by the new instrument is a new contract compounded of the terms of the old and the new instrument. It is incorrect to speak of the result as two transactions. There is but one transaction, although two or more purposes may be accomplished.[14]
>
> And, though alterations provided for by the section are referred to as variations of the terms of the mortgage, variations so called do, as we have indicated, really constitute a new contract compounded of the terms implied by the, form used and of the previous mortgage.[15]

Young J in *Scarel* took this principle so much to heart that he considered the registered mortgage as being an empty shell - useless of itself to give rise to a power of sale. Following this reasoning it has been argued that a variation has the effect of postponing the priority of the varied mortgage[16]. The writer respectfully suggests that the general law of priorities most likely governs relations between mortgagees in light of variations rather than any overriding coup created by the *compounding* principle.

ii) Section 36(9) of the *Real Property Act*

Section 36(9) of the *Real Property Act* provides:

> Dealings registered with respect to, or affecting the same estate or interest shall, notwithstanding any notice (whether express, implied or constructive), be entitled in priority the one over the other according to the order of registration thereof and not according to the dates of the dealings.

Applying this rule to variations it would seem that a prior mortgagee who varies his mortgage when there exists a subsequent mortgagee so as to increase the principal sum would – so far as the increase is concerned - rank behind the subsequent mortgagee. However it is submitted that the question in practice is addressed by reference to the principles of tacking.

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[12] [1916] NZLR 489.
[13] (1986) 4 BPR 9226.
[14] at 502.
[15] at 503.
[16] *Mortgages Law in Australia* (with W Duncan & L Willmott, 2nd ed, 1996) page 173.

iii) Tacking

The traditional battleground on which such issues are fought is in and around the principles of tacking. When a prior mortgagee seeks to maintain priority not just over an original advance but also subsequent advances he is said to tack the latter advance to his prior mortgage. Although the tacking of further advances remains part of the general law of New South Wales, the circumstances in which tacking can occur are limited. In *Hopkinson v Rolt* (1861) 11 ER 829, the House of Lords determined that tacking of further advances was only permissible in circumstances where the further advance in question was made without the mortgagee having notice of any subsequent encumbrances. In *West v Williams* [1899] 1 Ch 132, it was decided that notice of a subsequent encumbrance prevented tacking of further advances even when the first mortgage obliged the mortgagee to make those further advances, and obliged the mortgagor to receive them.

The rule in *Hopkinson v Rolt* remains applicable in New South Wales, although the rule as it was applied in *West v Williams* has been challenged in *Matzner v Clyde Securities Ltd*,[17] with *West v Williams* being distinguished. *Matzner* thus warrants closer examination to determine the correct rule in New South Wales.

In *Matzner v Clyde Securities Ltd*, Holland J was obliged to determine a question of priorities between three registered mortgagees of *Real Property Act* land. The first mortgage was expressed to be security for a $273,600 "principal sum" to be loaned to the mortgagor, but which the mortgagor was obliged "to accept the whole of the principal sum" in instalments. There was no fixed timetable for the advances to be made, but the mortgagor could apply for "progress payments" at any time so as to compel the mortgagee to advance further monies so as to bring the total funds advanced up to 73.4% of the aggregate value of the mortgaged land and the cost price of labour and materials used in the improvement of the mortgaged land. The second and third mortgages, however, were registered prior to all of the principal sum being advances, and there was thus a question as to whether the first mortgagee had priority for advances of principal made after the registration of those subsequent mortgages.

His Honour noted the rule established by *West v Williams*[18] that a first mortgagee cannot claim priority for subsequent advances made after notice of a second mortgage (in other words, engage in "tacking" the subsequent advances to the first mortgage) even when the first mortgage obliged the mortgagee to make further advances and obliged the mortgagor to accept them. His Honour, however, distinguished *West v Williams* on the basis that in the case before him the further advances were being applied to improve the property and so allowing the first mortgage to tack those advances to the first mortgage should not be to the prejudice of the subsequent mortgagees.

Matzner v Clyde Securities Ltd does not seek to overturn *West v Williams* generally, but simply to allow tacking in the cases of building mortgages obliging further advances to be made and accepted, when the further advances are likely to result in an improvement in the value of the security property: see *Philos Pty Ltd v National Bank.*[19] *Matzner* can thus be seen as doing no more than applying the principal in *Shepard v Jones*[20] that in the case of a mortgagee paying for improvements upon the security, even if there is no consent or

[17] [1975] 2 NSWLR 293.
[18] [1899] 1 Ch 132.
[19] (1976) 5 BPR 11,810 at 11,815.
[20] (1981) 21 Ch D 469.

acquiescence by other interested parties, the mortgagee is nevertheless entitled to be repaid the cost of the improvements to the extent they have enhanced the value of the security. *West v Williams* thus, presumably, continues to hold good in cases where the further advances are not applied to improvements in the value of the security.

In the course of the judgment in *Matzner*, Holland J cited (p 303) a passage from Hogg's *Conveyancing and Property Law in New South Wales* (1909) stating:

> The only safe course for a mortgagee proposing to advance money by installments seems to be, that the actual arrangement which is contemplated should be sufficiently set out in the mortgage instrument, and the mortgagor bound by a special covenant to accept the proposed advances from his intended mortgagee, and no one else. In the absence of these precautions, a first mortgagee could, it seems, only have priority for the amount actually advanced at the time of the second mortgagee giving notice.

His Honour then impliedly approves that passage, although noting that despite doubts raised by the author of the passage, the rule would also extend to allow a first mortgagee priority with respect to progress payments made under a building mortgage in the circumstances of the case before him. To the limited extent *Matzner v Clyde Securities Ltd* allows tacking of further advances after notice of a subsequent mortgage, it would thus appear that such tacking can only occur when there are express provisions in the mortgage obliging the mortgagee to advance and the mortgagor to accept further advances. If the mortgagor is not obliged to draw down the entire specified principal sum, then it would appear that no tacking of subsequent advances would be permitted, even if the mortgage was otherwise found to fall within the ambit of the *Matzner v Clyde Securities Ltd* exception to *West v Williams*. The point is, however, probably a moot one, as *Matzner* appears only to apply in cases where the further advances are used to enhance the value of the security, and to the extent the value is enhanced such monies are recoverable as a priority in any event under the doctrine in *Shepard v Jones*, regardless of whether the mortgagee was obliged to advance (or the mortgagor obliged to accept) the advances in question.

iv) Prevention of tacking

As tacking of either description at the expense of an unregistered mortgage is not possible if notice of that mortgage has been given (the *Matzner v Clyde Securities Ltd* exception to the rule against tacking with notice being limited to situations in which subsequent mortgagees will not be prejudiced in that the further advances are used to improve the security), a prudent unregistered mortgagee should attempt to bring the unregistered mortgage to the notice of any registered mortgagees. The easiest method to affect such notice is to lodge a caveat on the title in question, although a written notice to the registered mortgagees might be employed in lieu or in addition. It follows that a mortgagee considering making further advances should search the title for caveats to avoid advancing such monies notwithstanding constructive notice of a subsequent encumbrance, with the subsequent encumbrance thus taking priority over the repayment of the further advances.

9. Stamp duty

Stamp duty on variations is assessed in accordance with Revenue Ruling SD61. Although technically obsolete (through its reference to the *Stamp Duties Act 1920*) its tenor continues to be applied to the new Act and no replacement has been issued. The ruling reads:

> This Ruling considers the stamp duty implications of memoranda endorsed on or annexed to mortgages in terms of section 91.
>
> **RULING**
>
> If the variation of mortgage increases the amount secured by the mortgage, it is considered that the instrument is liable to duty as a "loan security", by virtue of the provisions of section 84(1) of the *Stamp Duties Act 1920*. Liability would arise whether or not the rate of interest or term of the mortgage is also varied.
>
> Where the variation of mortgage does not increase the amount secured by the mortgage and its only operation is to increase or reduce the interest or term (or vary some other condition) the instrument will attract a fixed duty of $10 in accordance with paragraph (2) under the heading "Deed" in the Second Schedule of the *Stamp Duties Act*.
>
> Instances have come under notice where variation of mortgage forms under the *Real Property Act* (varying some condition other than the amount secured) have been used to substitute new mortgagors for those mentioned in a registered mortgage.
>
> Instruments which, amongst other things, substitute new mortgagors are considered to be liable to ad valorem duty as new loan securities.
>
> Accordingly, where a variation of mortgage under the *Real Property Act* is lodged for stamping, the following should be presented by the lodging party to establish whether or not ad valorem duty is payable at the rates applicable to loan securities:
>
> * the principal mortgage; or
>
> * a letter stating the names of the mortgagor(s) shown on the registered mortgage to which the variation of mortgage relates.
>
> Where a letter is relied upon to establish that the mortgagors remain the same as in the principal mortgage, that letter must be signed by a person conversant with the facts. Where the variation of mortgage is lodged by a legal practitioner, the signature of the practitioner acting on behalf of the party or parties liable will be satisfactory.

B. Assignment of mortgages

1. The mortgagees right to assign

All mortgagees have the right to transfer their security to another party. The consent of the mortgagor does not need to be obtained.[21] However Young J in *Elders Rural Finance Ltd v Westpac Banking Corporation*[22] noted the following exceptions:

(1) where the purchaser of the mortgagee's interest stands in a position of confidence to the mortgagor; e.g. *Hobday v Peters* (1860) 54 ER 400: or

(2) where the assignment is equitable only and the assignee has to resort to a court of equity to effect his title; *Re Romford Canal Co* (1883) 24 ChD 85, 93: or

(3) where the assignee is the mortgagor or a co-mortgagor; *Otter v Vaux* (1856) 43 ER 1381; *Green v Walker* 45 A 742 (1900) and *Harrington v Harrlngton* 427 A 2d 1314 (1981).

There is no duty on the assignor to give the mortgagor or subsequent mortgagors first right of refusal if it is proposed to assign the mortgage even if it is to be assigned at a discount.[23]

2. Accounts between the mortgagor and transferee

i) Transferee stands in the shoes of the transferor

The transferee stands in the shoes of the transferor. Thus if part of the loan has been discharged, the transferee must give credit despite having been misled by the transferor.[24] In *Parker v Jackson*[25] Farwell J noted:

> It is, I think, quite well settled that an assignee of a mortgage who chooses to take an assignment without the concurrence or consent of, or without any notice to, the mortgagor, does so at his own peril, and he takes the security subject to the state of account between the transferring mortgagee and the mortgagor… at the date of the assignment.

ii) Mortgagor gets credit for payments to the transferor without notice

If the Mortgagor is not given notice that the mortgage has been transferred and continues to make payments to the transferor the transferee as between them must bear the loss.[26]

iii) Mortgagor has the right of set off

If at the time of the transfer the mortgagor has a right of set-off against the transferor this will carry over to the transferee. In *Parker* the transferee took the transfer of mortgage in circumstances where, at the time of the transfer, the transferor owed monies to the mortgagor which exceeded the face value of the mortgage. After the transfer the transferor

[21] *Re Tahiti Cotton Co; Ex parte Sargent* (1874) LR 17 Eq 273 at 279 per Sir G Jessel MR.
[22] (1988) 4 BPR 9383.
[23] *Elders Rural Finance Ltd v Westpac Banking Corporation* (1988) 4 BPR 9383.
[24] *Elders Rural Finance Ltd v Westpac Banking Corporation* (1988) 4 BPR 9383.
[25] [1936] 2 All ER 281 at 287.
[26] *Nioa v Bell* (1902) 27 VLR 82.

became insolvent and the mortgagor claimed the set-off against the transferee. Deciding in favor of the mortgagor Farwell J held:[27]

> If a mortgagor joins in the assignment, he of course thereby recognises the existence of the debt, and it is impossible for him to challenge the amount of the debt at the date of the transfer or thereafter. If a person does not choose to give notice to the mortgagor, or take the wiser step of getting the mortgagor joined in the transaction, then, in my judgment, the mortgagee cannot by the transferring deprive the mortgagor of any rights which he had as against the transferor. As I have already said, if the mortgagor is joined as a party to the transfer, or knows of it and does nothing in the matter, then I think it must follow that it is not open to the mortgagor thereafter to claim that he can set up some right which he might have had against the transferor of the original mortgage. But if the transaction as between the mortgagee and the assignee is done without the knowledge or the concurrence of the mortgagor, then, in my judgment, the mortgagor's position cannot be prejudiced by that transaction, and whatever rights the mortgagor has as against the mortgagee can be successfully asserted by him against the assignee.

iv) The position under Torrens mortgages

The position is no different with a registered transfer of mortgage. Regardless of indefeasibility of title the mortgage is still only taken to secure the sum reduced by any payments made to the transferor after the transfer but without notice by the mortgagor. In *Nioa v Bell*[28] Holroyd J held:

> The old doctrine of equity that payments made by a mortgagor, who has had no notice of the transfer of the mortgage, to the original mortgagee subsequently to the transfer are to be deemed as payments made to the transferee, still prevails. I think there is nothing in the *Transfer of Land Act* which destroys that old equitable doctrine. To have destroyed it, the language should have been extremely clear and explicit, because it is a doctrine founded on the plainest principles of justice, as it seems to me …. If the position were otherwise, a mortgagor, before he made any payment whatever, would have to go and search the register—which would be a monstrous onus to impose upon him.

v) The mortgagor liable for assisting the transferor to mislead the transferee

Notwithstanding the above authorities if the mortgagor assists the transferor to mislead the transferee as to the amount owing, that representation shall override the state of the accounts as between the mortgagor and transferee. In *Bickerton v Walker*[29]the mortgagor signed a receipt upon settlement of an advance that he had received £250 when in fact only £91 was received. The English Court of Appeal held the mortgagor was estopped from asserting a lower amount was due under the mortgage due to their having carelessly armed the transferor with the means to commit the fraud.

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[27] Ibid at 289.
[28] (1902) 27 VLR 82.
[29] (1885) 31 Ch D 151.

vi) Mortgages assigned at a discount on their face value

If the mortgage is sold to the transferee at a discount, the transferee, if he has obtained a legal assignment, may still collect the full face value of the mortgage from the mortgagor.[30]

vii) Interest arrears capitalized in certain circumstances

The rule in relation to interest arrears was stated by the Lord Chancellor in *Ashenhurst v James*[31] as follows:

> The general rule is, where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest (vide *Smith v. Pemlberton,* 1 *Cha. Ca.* 67. *Chamberlain* v. *Chamberlain, ibid.* 258. *Gladman* v. *Henchman,* 2 *Vern.* 135); but where it is assigned without the consent of the mortgagor, the assignee must take it only upon the same terms with the assignor. (Vide *Porter v. Hubbart, 3 Cha. Rep.* 78. *Earl of Macclesfield* v. *Fitton, 1 Vern.* 168.)

3. Registered transfers of mortgage

i) Unregistered transfers

Section 41 makes clear that until registered no transfer of a registered mortgage will vest the legal estate in the transferee. *Silkdale Pty Ltd v Long Leys Co Pty Ltd*[32] is authority for the proposition that an unregistered transfer is merely an equitable assignment.

ii) The effect of sections 51 & 52 of the *Real Property Act*

Section 51 and section 52 elaborate on the consequences of the registration of a transfer of mortgage.

> 51. Interest and rights of transferor pass to transferee
>
> Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which the transferee would have been subject and liable if named in such instrument originally as mortgagee, chargee or lessee of such land, estate, or interest.
>
> 52. Transfer of mortgage or lease transferee's right to sue
>
> 1) By virtue of every such transfer, the right to sue upon any mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof.

[30] *Elders Rural Finance Ltd v Westpac Banking Corporation* (1988) 4 BPR 9383.
[31] (1745) 3 Atk 270; 26 ER 958.
[32] (1995) 7 BPR 14,414 at 14,422.

These provisions have the effect of vesting the debt at law with the transferee.[33] In the High Court decision of *Consolidated Trust Co Ltd v Naylor*[34] Starke J held:

> The purpose of these provisions is to transfer the mortgage security and the rights, powers and privileges relating to the debt secured by the mortgage. But the provisions do not, I think, extend to collateral obligations, such as guarantees, given by strangers to the mortgage transaction.

In *Naylor* the guarantee and mortgage instrument were a single document. Nevertheless Dixon J and Evatt J agreed with Starke J holding:

> A guarantee is thus collateral to the mortgage transaction, and the circumstance that the obligation is expressed in the mortgage instrument must be regarded as accidental to the mortgage transaction and not as characteristic of the dealing contemplated by the legislation. In relation to transfers of mortgage secs. 51 and 52 should be understood as dealing only with rights, powers, privileges, debts and sums of money affecting the mortgage transaction as between mortgagor and mortgagee.

In the High Court case of *Measures v McFayden*[35] Griffith CJ (with whom O'Connor J and Isaacs J agreed) held:

> The question is whether the right to sue for damages for a breach of covenant, not being a continuing breach, which is complete before transfer passes by virtue of these provisions to the transferee. The term "transfer" in sec. 51 means the transference of estate resulting from registration, and the word "thereto" refers to the estate or interest transferred. The estate or interest transferred is one thing, and the personal right of action in respect of an antecedent completed breach of contract is another. In my opinion the words of this section are not sufficient to transfer the right to bring an action in respect of such a past breach. The plaintiff, however, contends that the words "the right to sue upon any ... instrument and to recover any . . damages thereunder" in sec. 52 (1) are sufficient to transfer the right. The state of the law before the Act is shown by the case of *Coward v. Gregory*[36], and in my judgment these words are not sufficient to alter it. The purpose of the Act was to transfer the estate or interest of the transferor in the land with all the rights incidental to present and future possession, but I do not think that it was intended to transfer also mere choses in action in respect of past and completed breaches of covenant.

Their Honours were at pains to point out that the clause in question was a covenant to "forthwith complete and erect" and a covenant to pay interest would no doubt be considered a continuing breach.

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[33] Fisher & Lightwoods LAW OF MORTGAGE Tyler, Young, Croft, Second Australian Edition page 370.
[34] (1936) 55 CLR 423 at 432.
[35] (1910) 11 CLR 723 at 731.
[36] L.R. 2 C.P., 153.

iii) Notice is not required for the transfer to be effective legal assignment

In *Gilmour and Anor v Pyramid Building Society*[37] Meagher JA (with whom Priestley JA and Clarke JA agreed) held:

> There is no reason to impugn its assignment to Pyramid Building Society by the Memorandum of Transfer on 21 February 1990. No notice of that assignment was given either to the mortgagor or to the guarantors. However, under the *Real Property Act*, perhaps anomalously, no notice is necessary. On 29 October 1990 that assignment was registered, and, for relevant purposes, that registration constituted notice to all the world. In my view that assignment was an assignment not only of the mortgaged property and of the personal covenant but also of the guarantee contained in that document, which was an integral part of the mortgage: see *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423.

The contention that registration constitutes "notice to all the world" is not, it is submitted, intended to override the rule concerning accounts between mortgagor and transferee in *Nioa v Bell.*[38]

iv) The need to join the transferor?

There is much law to the effect that an equitable assignee must join the transferee to proceedings to enforce the mortgage. However the following comment by Lord Eldon in *Chambers v Goldwin*[39] did not confine itself to equitable assignments and arguably applies to all proceedings;

> There is no instance, where an assignee has been bound to go through the accounts of the assignor with the original debtor without his assistance; and the contrary has been held, upon the principle of *Burt v Dennet* (2 *Bro. C. C.* 225); that, wherever two persons are implicated in the result of an account, or the execution of a trust both shall be before the Court; though one may be the primary party, the other in the second degree; and that principle is adopted by Lord Redesdale*;* who states *(Mitf.* 144), that for the purpose of doing complete justice, by deciding upon the rights of all persons interested in the subject, all materially interested ought to be parties, however numerous; so that a complete decree may be made between those parties.

4. Unregistered transfers of mortgage

i) Registered mortgages

As noted above Section 41 makes clear that until registered no transfer of a registered mortgage will vest the legal estate in the transferee. *Silkdale Pty Ltd v Long Leys Co Pty Ltd*[40] being authority for the proposition that an unregistered transfer is merely an equitable assignment.

[37] (1995) 6 BPR 13,979.
[38] (1902) 27 VLR 82.
[39] (1804) 32 ER 600 at 602.
[40] (1995) 7 BPR 14,414 at 14,422.

ii) Section 12 Conveyancing Act

> Any absolute assignment by writing under the hand of the assignor... of any debt ... of which express notice in writing has been given to the debtor... shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to ... transfer the legal right to such debt ... and the power to give a good discharge for the same without the concurrence of the assignor...

Section 12 applies only to unregistered mortgages (see *Gilmour and Anor v Pyramid Building Society*[41] per Meagher JA). The section has been held as not just enabling legal assignment (as its construction would suggest) but rather as being a portal through which unregistered mortgages must go in order to be assigned.

In *Condor Asset Management Ltd v Excelsior Eastern Ltd*[42] Barret J held:

> This does not mean that an equitable assignment is incomplete or imperfect in the absence of notice to the obligor. What it does mean is that, in the absence of full legal assignment under s.12 of the *Conveyancing Act*, the assignee cannot maintain a debt action in a court of common law in his own name. To sue at law, he must enlist (or, with the aid of equity, compel) the assistance of the assignor: see the discussion at (2000) 74 ALJ 287. Where that assistance is not willingly given by the assignor, the first task of the equitable assignee is to make a case in a court of equity justifying an order that the assignor lend his name to an action at law against the debtor. It has been said that this is really no more than "a formality": *National Mutual Life Nominees Ltd v National Capital Development Commission* (1975) 6 ACTR 1 at p.8 per Blackburn J. This is no doubt so once the all-important matter of the assignment itself has been proved.

In the High Court decision of *Consolidated Trust Co Ltd v Naylor*[43] Dixon J and Evatt J after noting that section 12 of the *Conveyancing Act* was taken from section 25(6) of the Judicature Act 1873 held:

> In our opinion the indorsed memorandum of transfer does amount to an assignment by writing of the defendant's covenant sufficient to satisfy Sec. 12. It is under the mortgagee's hand and it states that he thereby assigns unto the plaintiff company all moneys secured by the mortgage written within it and all his rights, powers and remedies thereunder. Because it is indorsed on the mortgage and refers to it as "the within written mortgage," the memorandum of transfer must be read as it would be if it contained a full recital of the mortgage.[44]
>
> The object of the requirement made by the words "of which express notice in writing shall have been given" is, we think, correctly stated in *Warren's Choses in Action* (1899), at pp. 177, 178. "The term 'express notice' is doubtless employed by way of

[41] (1995) 6 BPR 13,979.
[42] [2005] NSWSC 1139 at paragraph 24.
[43] (1936) 55 CLR 423 at 436.
[44] Ibid.

> opposition to notice arising by implication or operation of law, and to what was known in equity as constructive notice. It means a notice which indicates an express intention - a direct and definite statement of a thing as distinguished from supplying materials from which the existence of such a thing may he inferred." The purpose is to make essential actual notice that the debt has been assigned. "One of the objects of the giving of notice to the debtor is that he shall 'know with certainty' in whom the legal right to sue him is vested" … The purpose does not extend to giving the debtor particulars of the assignment. The assignment must be by writing, but, if it is in writing, then notice to the debtor is necessary only to acquaint him with the fact that the debt is payable to the assignee and the statute requires that he shall be expressly notified. But, neither in its exact terms, nor according to its general intent, does the provision appear to make it essential that the notice should contain an express statement that the assignment is a written one. [45]

In *Long Leys Co Pty Ltd v Silkdale Pty Ltd*[46] Sheller JA (with whom Priestly JA and Meagher JA agreed) held:

> Where the assignment of legal property is only equitable the assignor generally remains a necessary party to an action to enforce the interest assigned and the assignee is entitled to require him to be joined or to sue in his name. As explained in the *Performing Right Society* case at 14, if this were not so a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. See also *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 29-30 where Windeyer J remarked: The assignor (the creditor) as legal owner, the debtor and any assignees of other parts of the debt were all necessary parties, so that all the obligations of the debtor and the rights of all persons interested in the fund might be established by the decree. This was the rule of the Chancery Court. It is still the law: see *Performing Right Society Ltd v London Theatre of Varieties Ltd* (1924) AC 1 at 14, 20, 30-31.'

Sheller JA then cited with approval Blackburn J in *National Mutual Life Nominees Ltd v National Capital Development Commission*:[47]

> The requirement that the assignor's name be added as co plaintiff in an action by the assignee against the debtor was (at any rate in England) so much a formality that if the assignor did not consent, he could be joined as a defendant; *E M Bowden's Patents Syndicate Ltd v Herbert Smith and Co* (1904) 2 Ch 86 per Warrington 3 at 91. If the defendant did not take the point that the assignor was not joined as co plaintiff, the Court could ignore the non joinder; *William Brandt's Sons and Co v Dunlop Rubber Co Ltd* (1905) AC 454 per Lord Macnaghten at 462.

Sheller JA continued:

> More to the point is the decision of the English Court of Appeal in the *Warner Bros Records* case in which it was held that the equitable assignee of a contractual option

[45] At 438.
[46] (1991) 5 BPR 11,512.
[47] (1975) 6 ACTR 1 at 7-8.

was not entitled to exercise that option in his own name so as to bind the grantor. At first instance Willis J at 434 held that the assignee's failure to give notice of the assignment to the third party resulted in an inherent and an incurable defect in the title of the assignee to maintain the proceedings which could not be validated by the purely procedural step of joining the assignor. The reason for this was stated in the judgment of Roskill LJ at 443-4 to be that the only rights that an equitable assignment can create in the equitable assignee are rights against his assignor who thenceforth becomes the trustee of the benefit of the option for the assignee. The assignor could of course be compelled in equity to exercise rights for the benefit of the assignee. Sir John Pennycuick at 445 put it in the following way: "Where there is a contract between A and B, and A makes an equitable but not a legal assignment of the benefit of that contract to C, this equitable assignment does not put C into a contractual relation with B, and, consequently, C is not in a position to exercise directly against B any right conferred by the contract on A.

There emerge from these cases two separate propositions. One is procedural spawned on the need to protect the defendant from repeated claims. The second is more fundamental. The right of an equitable assignee of a chose in action being one against the assignor rather than the debtor, the equitable assignee cannot exercise a contractual right against the debtor.

iii) Conclusion

Where a transfer is unregistered, either of a registered or unregistered mortgage, the transferee ought to serve notice in accordance with section 12 of the *Conveyancing Act* and when bringing proceedings join the transferor.

5. Transfer by payment

When a third party pays a mortgage pursuant to the doctrine of subrogation it is presumed that the third party intended to have it transferred to himself. This doctrine applies even if the intention of the third party was to obtain his own mortgage which would secure the amount advanced but which for some reason is abortive. These were the facts in the House of Lords decision of *Ghana Commercial Bank v DC Chandiram*[48] where Lord Jenkins (delivering the judgments for all their lordships) held:

> It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears to intend that the mortgage shall be kept alive for his own benefit: see *Butler* v. *Rice.*[49]
>
> In the present case it has been contended that the execution of the abortive legal mortgage sufficed to negative any such intention. Their Lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for

[48] [1960] AC 732 at 745.
[49] [1910] 2 Ch. 277, 288, 283.

their own benefit save in so far as it was so replaced: see *Butler* v. *Rice* and *Chetwynd* v. *Allen.*[50]

However if there is an unequivocal intention by the party paying out the mortgage that the mortgage be discharged then the security will not be taken to have been preserved – see the Queensland Court of Appeal decision in *Tucker v Roberts.*[51]

6. The right to have the mortgage transferred (instead of discharged)

i) Section 94 of the Conveyancing Act

Section 94 of the Conveyancing Act reads as follows:

1) Where a mortgagor is entitled to redeem the mortgagor shall, by virtue of this Act, have power to require the mortgagee instead of discharging, and on the terms on which the mortgagee would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly.
2) This section does not apply in the case of a mortgagee being or having been in possession.
3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.
4) This section applies to mortgages under the *Real Property Act 1900*.

The section allows the mortgagor, in cases in which the mortgagee has not yet taken possession of the security property, to pay out the mortgage and, instead of having the mortgage discharged, require the mortgagee to transfer the mortgage to a third party. This section has been construed, however, as not permitting the mortgagor to require a transfer to any third party at all, but only to another lender who has provided money to pay out the existing mortgage and who is not the alter ego of the mortgagor: see *Ley v Scarff.*[52] By reason of sub-section (3) it cannot be contracted out of.

ii) Can the transferor be liable to the transferee?

If the outgoing mortgagee makes some warranty or representation to the incoming lender that the existing mortgage is valid and enforceable and thereby induces the incoming lender to pay out the existing mortgage in exchange for a transfer the outgoing mortgagee could be liable for damages.

A common basis on which a mortgage might be partially or wholly unenforceable is if a *Contract's Review Act* defence is successfully raised. The outgoing mortgagee should thus take care to assert in writing that no warranty is made as to the validity or enforceability of the mortgage being transferred.

[50] [1899] 1 Ch. 359.
[51] [1969] QdR 280.
[52] (1981) 146 CLR 56.

iii) The effect on personal covenants of a transfer under section 94.

The personal covenants are assigned as well as the mortgage, as debts are choses in action capable of being assigned at law. Thus the transferee can bring a personal claim against the mortgagor in debt as well as (or in lieu of) suing to enforce the proprietary rights granted by the mortgage.

iv) Can the transferor be the mortgagor?

In *Ley v Scarff,*[53] Barwick CJ (with whom the other judges agreed) construed sections 93 and 94 of the *Conveyancing Act*. In that case, a registered proprietor of land, after twice mortgaging her property, transferred her remaining interest in the land to her husband. The husband then sought to pay out the first mortgage and take a transfer of that mortgage, but the first mortgagee was unwilling to comply. The husband then relied on section 94 of the *Conveyancing Act*. His Honour found that the purpose of that section was to facilitate the refinancing of first mortgages, enabling the refinancing mortgagee to retain the same priority as the original first mortgagee without the need to obtain the consent of the second mortgagee, and that the expression in s 94(1) "any third person as the mortgagor directs" should be interpreted in that light. His Honour stated:

> Such a third person, in this context, does not include a person who is no more than the alter ego of the mortgagor. It refers to the new lender who, of course, must be nominated by the mortgagor, who has arranged the loan to pay out the existing mortgagee. The sections, in my opinion, have no relevant function where the mortgagor is providing the funds to pay out the first mortgagee.[54]

Ley v Scarff was applied in Queensland by the Full Court in *Corozo Pty Ltd v Westpac Banking Corp (No 2)*[55], and in NSW by Young J in *Challenge Bank Ltd v Hodgekiss.*[56]

v) Section 95 of the *Conveyancing Act*

Section 95 of the *Conveyancing Act* provides that the right under section 94 can be exercised by either the mortgagor or a subsequent mortgagee; if both mortgagor and a subsequent mortgagee seek to exercise the right, then the subsequent mortgagee's wishes shall prevail; and if two or more subsequent mortgagees wish to exercise the right then the mortgagee with the prior mortgage shall prevail.

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[53] (1981) 146 CLR 56
[54] at p 61
[55] [1988] 2 QdR 48
[56] (1995) 7 BPR 14,399