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Equitable Mortgage by Deposit of a Certificate of Title

In *Theodore v Mistford Pty Ltd* [2005] HCA 45, the High Court considered certain principles governing the creation of an equitable mortgage by the deposit of a title deed as first developed by the English courts of equity with respect to old system conveyancing. The decision will be of interest to Queensland practitioners as it concerned the application of these equitable principles to Torrens land regulated by the provisions of the *Land Title Act 1994* (Qld) and, in particular, the operation of s 75 of the *Land Title Act 1994* (Qld) which provides:

- (i) An equitable mortgage of a lot may be created by leaving a certificate of title with the mortgagee
- (ii) Subsection (1) does not affect the ways in which an equitable mortgage may be created.

Facts

The parties to a business sale contract were the respondents as vendors, Mobile Lab Pty Ltd as purchaser and Mr Glen Theodore as guarantor. Mobile Lab Pty Ltd was a shelf company acquired by Mr Theodore. The contract provided for a significant portion of the purchase price to be paid in instalments after completion. Clause 4.3 of the special conditions obliged the purchaser to procure on or before completion the lodgment with the vendors' solicitors of the duplicate certificate of title to land at Buderim owned by Mrs Theodore, Glen Theodore's mother, and an instrument of mortgage in favour of the vendors, to be unregistered while the purchaser complied with its obligations under the sale contract.

Prior to completion, Mr Theodore attended the offices of Mrs Theodore's solicitors. He produced to them a handwritten authority evidently composed by him. It had been signed by Mrs Theodore and authorised her solicitors to release to Mr Glen Theodore the duplicate certificate of title to the Buderim land. On the same day, Mr Glen Theodore obtained possession of the duplicate certificate of title, he deposited it with the vendors' solicitors and obtained their letter of acknowledgment addressed to him. This stated that the certificate of title was "to be held in safe custody on your behalf as security on account of the purchase ... of the business...".

Before the settlement, the vendors' solicitor advised his clients that simply holding the certificate of title was insufficient security for payment of the balance of the purchase price without the support of an executed guarantee and mortgage. Notwithstanding that advice, the vendors, who wished urgently to settle, instructed the solicitor to proceed. As a result, there was no insistence upon full compliance with the requirements of cl 4.3. As noted, those requirements had included provision on or before settlement not only of the

duplicate certificate of title but also of a mortgage of the Buderim land in favour of the vendors.

At settlement, Mr Theodore was furnished by the vendors' solicitor with, and took away, a draft guarantee by his mother in favour of the vendors of the balance of the purchase moneys owing by Mobile Lab Pty Ltd under the sale contract and a draft mortgage of the Buderim land by Mrs Theodore in support of that guarantee. The vendors' solicitor requested that Mr Theodore have these instruments signed by his mother and returned for holding without registration provided the terms of the sale contract were complied with. Subsequently, Mrs Theodore took these draft instruments to her solicitor and received advice as to her position. She never executed the guarantee and mortgage. Hence the reliance by the vendors upon the alleged equitable mortgage by reason of the deposit of the duplicate certificate of title several days before completion of the sale contract.

The Litigation Below

The litigation commenced with a claim instituted by Mrs Theodore in the District Court of Queensland in which she sought a declaration that the vendors held the duplicate certificate of title "as constructive trustees" and for her benefit. By counterclaim, the vendors sought against Mrs Theodore orders giving effect to their contention that an equitable mortgage had been created over the Buderim land in their favour. At trial before Robertson DCJ, Mrs Theodore's claim was dismissed and relief was given to the vendors on their counterclaim. In reaching this decision, the primary judge relied, in part, upon several key findings of fact:

... I regret to say that on the balance of probabilities, I do not accept her evidence that she did not know of her son's plans to deal with the deed as he did on the 18th July 1996. I think it more probable than not that at the time of purchase of the business by the son, she did act with her heart and not her head; and that she has now convinced herself that she did not give him authority to deal with the deed, when in fact she did. ... In my opinion, it is more probable than not that she was aware, after the failure to obtain finance, that the son was going to hand over the deed as security to enable him to complete the sale of the business. at [21]

On appeal, a majority of the Queensland Court of Appeal (McMurdo P and Philippides J; Jerrard JA dissenting) made a declaration to the effect that Mr Glen Theodore, with the authorisation of his mother had deposited the duplicate certificate of title to the parcel of land at Buderim with the vendors' solicitors and thereby secured, by equitable mortgage, the amount owing under the contract of sale.

High Court

In the High Court, Mrs Theodore sought to have the orders of the Court of Appeal set aside and a declaration that no equitable mortgage was created by the deposit of the duplicate certificate of title to the Buderim land. In determining that

the appeal should be dismissed, the joint judgment (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ) is instructive in a number of respects.

- The term “equitable mortgage” is not used with any single denotation. As indicated by s 75(2) of the *Land Title Act 1994* (Qld) there is no limitation upon the creation of equitable mortgages other than by deposit of a certificate of title. However, in this instance, the factual findings of the trial judge made it clear that authority had been given by Mrs Theodore for her son to furnish the duplicate certificate of title as the immediately effective security. This was not an instance where the equitable mortgage was constituted by an executory agreement, supported by deposit of title deeds, to give a legal mortgage.
- Notwithstanding that there was no direct dealing between Mrs Theodore and the vendors this was not a fatal objection to the vendors’ case. Two findings of fact were sufficient planks for the vendors’ case. First, Mrs Theodore had the necessary intention to deposit the duplicate certificate of title as security for her son’s indebtedness under the sale contract and, secondly, to effectuate that intention she conferred actual authority on her son in sufficiently broad terms encompassing his subsequent dealing with the certificate of title to procure settlement of the sale contract.
- The fact that the deposit of the title deed was made in advance of the completion of the sale contract was indecisive of any issue in favour of Mrs Theodore. When settlement occurred, there was simply a change in the nature of the dominion over the duplicate certificate of title. Before settlement the certificate of title was held in safe custody on behalf of Mrs Theodore; after settlement, the certificate of title was held as a security.
- The fact that the security was a third party security did not change the result. As noted by the High Court:

... the terms of s 75 of the Act do not foreclose the possibility of the provision of third party security by deposit of title deeds. ... There is nothing in the terms of s 75 to limit the nature of the obligations secured by an equitable mortgage by deposit of a certificate of title. At [37]

Although the vendors were successful in this instance, an 1877 judicial description of the equitable mortgage created by deposit of title deed remains apposite:

... it is not to be commended as a mode of investment: *Re Wildash and Kenneth Hutchison, Ex parte Miskin* (1877) 5 QSCR 46, 50 (Lilley J).