

PROPERTY LAW

CASE NOTES



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Sample

Australian and New Zealand Banking Group Ltd v Widin (1990) 102 ALR 289

Source: Lexis Nexis

Court details: Federal Court of Australia

Procedural history: The case was on appeal from a previous decision by the Federal Court of Australia.

Facts:

- ANZ lent money to Wardle, to be secured by a mortgage over his house.
- Wardle signed the appropriate mortgage forms with ANZ; however, several important details were omitted, such as specifying the property that was to be secured.
- The only reference to property was in the bank manager's diary, which the bank manager had noted during an earlier meeting with Wardle. The mortgage forms did not refer to this diary note.
- Wardle received money from ANZ; he subsequently became bankrupt. Wardle owed money to several creditors, including Widin. Wardle did not have enough money to fully repay all his debts.
- ANZ argued that their debt was securitised by the house, meaning that proceeds from the sale of Wardle's house would first be used to satisfy ANZ debts.
- Widin argued that the mortgage was void; hence, ANZ received no priority over any other creditors.

Issue:

- Was the mortgage form a sufficiently binding written contract or, in the alternative, were there sufficient acts of part performance such that equity could enforce the mortgage?

Reasoning / Decision (Commentary): Whilst the mortgage form could not constitute a valid mortgage agreement, ANZ's act of depositing money into Wardle's account constituted sufficient part performance such that equity would enforce the mortgage agreement.

Ratio:

Was there sufficient writing?

- '[F]or there to be sufficient writing... that writing must describe the subject matter of the mortgage. A mortgage of land that did not refer to all the mortgaged property would be unenforceable'.

- '[T]wo or more documents can be read together so as to constitute a sufficient memorandum in writing... if the note signed by the party to be charged refers expressly to some other document in such a manner as to incorporate it by reference in the note signed'.
- 'In this case the mortgage document does not refer... to another document'. Pursuant to the parol evidence rule, extrinsic evidence can only be used to 'clarify an ambiguity but [not] to supply the deficiency in writing'.

Was there sufficient part performance?

- 'The performance which has to be shown must be performance of the person seeking to enforce the contract or, as in the present case, the person seeking to show that the contract was enforceable, notwithstanding the lack of writing'.
- '[T]he bank obtained an indemnity agreement, took a mortgage in blank and took an authority to complete it (albeit the last two were deficient in that the title particulars were not completed). It then endorsed or accepted a bill or bills by virtue of which it became liable to holders thereof for the face value of those bills. It went onto the market and sold those bills at a discount, crediting the proceeds to the bankrupt's account. The acts of the bank, seen in this context, lead to the conclusion that they are unequivocally and in their own nature referable to a contract of the general nature of that alleged by the bank'.
- '[T]he bank has established sufficient acts of part performance prior to 24 February 1983 to render the agreement to grant the mortgage enforceable in equity and thereby to constitute an enforceable equitable mortgage'.

Order: ANZ had an enforceable mortgage over Wardle's house, meaning that money from the sale of Wardle's house would first be used to repay ANZ, at the expense of Wardle's other creditors.



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