MARSHALLING SECURITIES

and

WORDS OF RELEASE

Note on

***Hill v Love* (2018) 53 V.R. 459 and**

***Burness v Hill* [2019] VSCA 94**

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This paper was presented on 18 September 2019 at the Law Institute of Victoria to the Commercial Litigation Specialist Study Group. Revised 4 December 2019.

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The decisions of the Supreme Court of Victoria in *Hill v Love*[1] and, on appeal, *Burness v Hill*[2] address the doctrine of marshalling securities and also the construction of words of release in terms of settlement. The case was analysed by Leeming J.A.[3] in the Equity and Trusts section of the August issue of the *Australian Law Journal*.[4]

1. THE DOCTRINE OF MARSHALLING

A right to marshal arises where:

(a) there are two or more properties owned by the same person over which a creditor has security;

(b) at least one but not all of the properties are subject to a lower ranking security to another creditor; and

(c) the first creditor takes payment from a property that the second creditor has an interest in, and thereby prevents or diminishes the second creditor's recourse to that property.

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[1] (2018) 53 V.R. 459; [2018] VSC 29 (Sifris J.).

[2] [2019] VSCA 94 (Kaye, McLeish and Hargrave JJ.A.).

[3] Judge of Appeal, Supreme Court of New South Wales; co-author of J.D. Heydon and M.J. Leeming *Jacobs' Law of Trusts in Australia*, Lexis Nexis, 2016, (Eighth Edition) and J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, Lexis Nexis, 2014, (Fifth Edition).

[4] M.J. Leeming, "Marshalling Securities and Construing Releases in Equity" (2019) 93 A.L.J. 626. See also a Letter to the Editor from me in the November 2019 issue of the Journal: (2019) 93 A.L.J. 904.

The right to marshal is an equitable right pursuant to which the second creditor is allowed recourse to the other properties in which the first creditor has an interest, that is, to the properties over which the second creditor does not have security (apart from the marshalling right). The right or remedy available to the second creditor is a species of subrogation: the second creditor is entitled to be subrogated to the first creditor's securities over the other properties.

The doctrine is the subject of a book by Associate Professor Ali, now of Melbourne University[5], and a chapter in *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*[6]; see also *The Law of Securities* by Sykes and Walker and *Fisher & Lightwood's Law of Mortgage*[7].

It has been said that marshalling is most significant when the mortgagor is insolvent[8]:

> "marshalling only really comes into its own when the mortgagor/debtor is insolvent: marshalling improves the position of the second mortgagee as against the unsecured creditors of the debtor, not as against the debtor herself."

This is a truism in that proprietary security in general is most significant when the debtor is insolvent. It is the case, however, that a secured creditor usually has better, quicker and more effective remedies than an unsecured creditor, even if the debtor is solvent.

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[5] P.A.U. Ali, *Marshalling of Securities*, Oxford University Press, 1999.

[6] Op. cit., supra note 3: see Chapter 11 in Part III.

[7] E.I. Sykes and S. Walker, *The Law of Securities*, The Law Book Company Limited, 1993, (Fifth Edition) at 182 to 185 and E.L.G. Tyler, P.W. Young and C. Croft, *Fisher & Lightwood's Law of Mortgage*, Lexis Nexis, 2005, (Second Edition) at 684 to 689.

[8] *National Crime Agency v Szepietowski* [2014] A.C. 338, [2013] UKSC 65, at [32] on 350.

2. THE FACTS IN *HILL V LOVE*

The basic facts in *Hill v Love* were straightforward. It is convenient to summarize separately the facts relevant to marshalling and the facts relevant to the construction of words of release in terms of settlement.

2.1 Facts Relevant to Marshalling

(a) Mr. Hill, a solicitor, was the second registered mortgagee of 275 O'Herns Road, Epping. He took the mortgage to secure the payment of his costs and disbursements by his client, Mr. Love. The second mortgage secured:

> "each and all sums of money in which the Mortgagor may now or hereafter be indebted or liable or contingently indebted or liable to the Mortgagee in any manner or on any account whatever"

(b) The first registered mortgagee of 275 O'Herns Road was the Commonwealth Bank of Australia. Its first mortgage was also an all moneys security.

(c) The Bank had similar first registered mortgages over 315 O'Herns Road, Epping and 460 Cooper Street, Epping. Mr. Hill did not have security over 315 O'Herns Road or 460 Cooper Street.

(d) After the mortgagor, Mr. Love, defaulted, the Bank sold 275 O'Herns Road. This sale was completed by the registration of the transfer to the purchaser from the Bank on 16 February 2012. Upon that registration, Mr. Hill's second mortgage was removed by the Registrar of Titles in accordance with section 77 of the Transfer of Land Act 1958.

(e) Mr. Hill then sued Mr. Love in debt for approximately $3.75 million in the County Court and, pursuant to terms of settlement with Mr. Love, obtained judgment by consent for a compromise amount, $2.2 million.

(f) After that, Mr. Hill became aware of his right to marshal and lodged caveats over 315 O'Herns Road and 460 Cooper Street.

(g) 315 O'Herns Road was later sold by the Bank as first mortgagee but the proceeds were not sufficient to cover the Bank debt.

(h) 460 Cooper Street was the third property sold by the Bank as first mortgagee. The proceeds of that third sale were sufficient to satisfy the Bank and the surplus, approximately $5.9 million, was paid into Court.

(i) After the sale but before the settlement of 460 Cooper Street, Mr. Love became bankrupt.

2.2 Facts Relevant to the Words of Release Issue

(a) As mentioned in paragraph (e) in section 2.1 above, Mr. Hill and Mr. Love settled the County Court proceeding instituted by Mr. Hill. They did so about a year after the completion of the sale of 275 O'Herns Road, which was the property the subject of Mr. Hill's second mortgage.

(b) The terms of settlement provided for $2.2 million to be paid by Mr. Love to Mr. Hill and provided for a consent judgment in this amount. The County Court gave judgment accordingly on 4 February 2013.

(c) Before suing Mr. Love, Mr. Hill had asked Mr. Love to provide further security but Mr. Love had refused to do so.

(d) The issues in the County Court proceeding concerned:

(i) Mr. Hill's claim for approximately $3.75 million for costs and disbursements;

(ii) Mr. Love's defences to that claim based on alleged breaches of the Legal Practice Act 1996 or the Legal Profession Act 2004;

(iii) Mr. Love's counterclaim for unliquidated damages for alleged negligence.

(e) Neither Mr. Hill nor Mr. Love (although both were represented by solicitors) had any knowledge of the doctrine of marshalling at the time of the settlement.

(f) The terms of settlement signed by the parties:

(i) recited the claim for legal fees, that the claim was denied, that there was a counterclaim and that the counterclaim was denied;

(ii) recited that:

"The parties have agreed to resolve this proceeding as follows:"

(iii) contained the following release:

"In consideration of the parties entering into these terms of settlement, the parties hereby release each other from all claims, suits, demands and actions the parties now have; or but for these terms would in the future have, arising out of this proceeding and the allegations, acts, facts or matters the subject of this proceeding, and the Retainer."

3. THE RIGHT TO MARSHAL

The facts set out in paragraphs (a) to (d) in section 2.1 on page 5 above entitled Mr. Hill to marshal against 315 O'Herns Road and 460 Cooper Street, that is, to be subrogated to the rights of the first mortgagee in relation to the latter properties.

After the sale of the third property by the Bank, Mr. Hill was held to be entitled to be subrogated to the rights of the Bank as first mortgagee of 460 Cooper Street. Mr. Hill was entitled, therefore, to as much of the surplus moneys paid into Court as was needed to satisfy the liabilities which would have been secured by his second mortgage, had it not been removed as a result of the first mortgagee's sale.

In the words of the trial judge, Sifris J.[9], citing Meagher, Gummow and Lehane[10]:

> "Marshalling is an equitable doctrine that rests upon the principle that a senior creditor, having two funds to satisfy a debt, may not defeat a subordinated creditor who may resort to only one of the funds.
>
> The effect of a successful marshalling claim is that the subordinated creditor is subrogated to the rights of the senior creditor. In the circumstances of this case, the doctrine would result in Hill being treated as holding a second-ranking mortgage over 460 Cooper Street on the same terms as his mortgage over 275 O'Herns Road."

According to the Court of Appeal[11], "the equitable doctrine of marshalling of mortgages":

> "allows a second mortgagee whose debt has not been paid from the sale of the mortgaged property to access the proceeds of sale of another property mortgaged by the same debtor to the same first mortgagee, even though the second mortgagee has no security over the other property."

The right to marshal exists even if the mortgagor and mortgagee have agreed that the mortgagee will not have security over any property other than the property over which the subordinated security exists.[12]

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[9] *Hill v Love* (2018) 53 V.R. 459 at [43] and [44] on 468.

[10] Op. cit., supra note 3, at [11-030].

[11] *Burness v Hill* [2019] VSCA 94 at [1].

[12] *Hill v Love* (2018) 53 V.R. 459 at [21] on 464 and [54] on 470.

4. LIMITATIONS ON AND JUSTIFICATION OF MARSHALLING

It is important to distinguish the justification for or principles lying behind the doctrine of marshalling, on the one hand, from the criteria for and limitations of the application of the doctrine, on the other hand.

4.1 Principle

According to Meagher, Gummow and Lehane[13], marshalling rests on the principle that:

> "a senior creditor, having two funds to satisfy a debt, may not defeat a subordinated creditor who may resort to only one of the funds."

This does not mean that the senior creditor is prohibited from resorting first to the fund over which the subordinated creditor has security. The position is otherwise in the United States of America. In England and Australia, however, the holder of the prior security is free to realize his, her or its securities in whatever order the prior security holder chooses. The doctrine of marshalling protects the subsequent security holder from the harm that this freedom of choice could otherwise cause.

In various authorities and texts, the adjectives capricious, fortuitous, adventitious, arbitrary, and self-interested have been applied in describing the behaviour of prior security holders from which subordinated creditors are protected by the doctrine of marshalling. Despite these seemingly pejorative adjectives, however, two important

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[13] Quoted in section 3 on page 8 above and approved in *Hill v Love* (2018) 53 V.R. 459 at [43] and [44] on 468.

points must be made. The first is that there is nothing wrong, in Australian or English law, with a first mortgagee resorting first to the doubly secured fund or exercising its security rights for its own benefit and in a way which might, from the point of view of a subsequent security holder, be adventitious or seem arbitrary. The second is that it is wrong to elevate the policy reasons underlying the existence of the marshalling doctrine to the level of "essential elements to be established before the doctrine can be relied upon."[14] It is not the law that for a right of marshalling to exist, it must be possible to describe the conduct of the prior encumbrancer by some adjective such as " arbitrary" or "capricious" or the result as "fortuitous". The criteria for the application of the doctrine are free of such value judgements and are set out in section 1 on page 3 above.

4.2 Arrangement as to Order of Realization of Securities

The policy justification of the doctrine of marshalling has, however, led to a rule that marshalling of securities is not permitted where the prior ranking security holder is bound to resort first to the property or properties over which the subordinated creditor has security.[15]

In *Hill v Love*, the Bank was not bound to sell 275 O'Herns Road before the other properties but there was an accommodation by the Bank of the desire of Mr. Love that that property be sold first. The trustees in bankruptcy argued that because of

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[14] *Burness v Hill* [2019] VSCA 94 at [54].

[15] See, for example, the very complex case of *Miles v Official Receiver in Bankruptcy* (1963) 109 C.L.R. 501 at 510 and 511.

this arrangement, the decision of the Bank to sell 275 O'Herns Road first was not arbitrary or capricious. The trial judge held that because there was no agreement or binding arrangement as to the order of sale, there was no impediment to marshalling.[16] The Court of Appeal said that there is no impediment to marshalling unless there is:

> "a contractually enforceable arrangement, binding estoppel, or legislative obligation"

in relation to the order of sale of the relevant security properties.[17] It was in this context that the Court of Appeal made the comment referred to in section 4.1 on page 10 above that it is wrong to elevate the matters of policy underlying the marshalling doctrine to essential elements for its application.

5. WHAT IS SECURED BY MARSHALLING?

The consequences of the existence of a right to marshal securities depend both on the proprietary effect of the doctrine and on the question of what debts and liabilities are covered by it.

5.1 Value of the Security Property

The right to marshal is limited to the (unencumbered) value of the property (or properties) over which the subordinated creditor's security existed. It would be inequitable for the holder of the subordinated security to obtain more from the higher

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[16] *Hill v Love* (2018) 53 V.R. 459 at [51] and [52] on 469.

[17] *Burness v Hill* [2019] VSCA 94 at [54]; see also the Court's comments at [50] in relation to contractually enforceable obligations, statutory obligations and binding estoppels.

ranking security over other property to which he, she or it is subrogated than could have been obtained from the property (or properties) over which security was actually taken.[18]

This limitation was not relevant in *Hill v Love* because the second mortgage property was worth far more than the amount secured by the second mortgage. It was perfectly equitable, therefore, for Mr. Hill to recover the whole amount owed to him from the surplus proceeds of the first mortgagee's sale of 460 Cooper Street: Mr. Hill was not getting more security than he had bargained for in taking his second mortgage over 275 O'Herns Road.

5.2 Liabilities at Time of Realization of Prior Security

The right to marshal securities concerns liabilities secured by the subordinate security at the time that that security is removed (leaving, ex hypothesi, nothing[19] or an insufficient amount[20] for the holder of the subordinate security).[21]

In *Hill v Love*, Mr. Love's trustees in bankruptcy argued that Mr. Hill's claim for costs and disbursements merged in, and was therefore extinguished by the County Court judgment obtained by Mr. Hill. Since that judgment, so they argued, was obtained

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[18] See Meagher, Gummow and Lehane, op. cit., supra note 3, at [11.020].

[19] As in *Hill v Love* itself.

[20] As in *Bank of New South Wales v Colonial Mutual Life Assurance Society Limited* [1969] V.R. 556.

[21] *National Crime Agency v Szepietowski* [2014] A.C. 338 at [50] and [52] on 353 and 354.

after the removal of the second mortgage and "created a 'new charter'[22] of rights which were the only rights that could thereafter found a claim", there were no liabilities remaining which were in existence at the time of the removal of the second mortgage and, therefore, there was nothing left to marshal.

This argument was rejected by the trial judge who said that although a debt or other cause of action ceases to have an independent existence after judgment, the judgment does not eliminate the initial obligation and replace it with another.[23] Sifris J. cited *Tomlinson v Ramsey Food Processing Pty. Ltd.*[24] for the proposition that a final judgment quells the controversy between the litigants with the rights and obligations in controversy "merging" in the final judgment.

Far from extinguishing and replacing an existing obligation, a judgment vindicates and confirms that obligation.

The Court of Appeal had a further reason for rejecting the trustees' argument in relation to the liabilities secured by the second mortgage at the time that that security was removed following the first mortgagee's sale.[25] The Court of Appeal noted that Mr. Hill's second mortgage was an all moneys security: see the clause quoted in paragraph (a) in section 2.1 on page 5 above. The Court accepted that the remedy of

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[22] The expression "new charter" comes from *Tomlinson v Ramsey Food Processing Pty. Ltd.* (2015) 256 C.L.R. 507 at [20].

[23] *Hill v Love* (2018) 53 V.R. 459 at [61] on 471 (approved on appeal in *Burness v Hill* [2019] VSCA 94 at [38]).

[24] (2015) 256 C.L.R. 507 at [20] on 516.

[25] *Burness v Hill* [2019] VSCA 94 at [39].

marshalling is not available when the second mortgage does not secure any liability but said that[26]:

> "it does not follow that the extent of the second mortgagee's marshalling right is limited to the exact amount and legal character of the secured debt at the time the first mortgagee chooses to sell the commonly mortgaged property."

The Court of Appeal referred to a number of types of liability in relation to which marshalling would be available whether or not there was a present debt immediately payable at the time of the first mortgagee's sale. These included cases where the second mortgage secured a fluctuating line of credit; a future debt; a contingent debt; and a debt payable on demand, where no demand had been made at the time of the first mortgagee's sale.[27]

5.3 Interest and Costs

As a secured creditor, Mr. Hill was entitled to resort to the marshalled security for the full amount of his secured debt, including interest and, given that his second mortgage so provided, solicitor – own client costs or, according to the present nomenclature in the Supreme Court Rules, indemnity costs. The Court ordered that Mr. Hill's costs be paid out of the surplus on an indemnity basis pursuant to the terms of his second mortgage.[28] Interest, which was covered by the all moneys clause of the second mortgage, accrued on the County Court judgment debt under section

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[26] Ibid.

[27] *Burness v Hill* [2019] VSCA 94 at [42].

[28] This part of the decision of Sifris J. is noted by the Court of Appeal in [2019] VSCA 94 at [27]. The second mortgage provided for the payment of the mortgagee's "legal costs as between a solicitor and his own client". In *Re National Safety Council of Australia, Victorian Division (in liq) (No 2)* [1992] 1 V.R. 485 at 500 Phillips J. said that "taxing a bill of costs as between a solicitor and his own client" affords "in substance an indemnity". It follows that under the present rules, the Court should order taxation on an indemnity basis to give effect to the terms of a mortgage providing for costs on a solicitor – own client basis.

73(4) of the County Court Act 1958 at the rates from time to time applicable under section 2 of the Penalty Interest Rates Act 1983. It was also ordered to be paid to Mr. Hill out of the surplus.

6. UNCERTAINTIES IN MARSHALLING

There are a number of uncertainties surrounding the doctrine of marshalling. The most significant of these concern the conceptual uncertainty as to the nature of the interest which the subordinated security holder has in the properties in relation to which there is a right to marshal. A further uncertainty is whether the doctrine of marshalling requires a personal indebtedness on the part of the grantor of the relevant securities or whether a proprietary obligation is sufficient.

6.1 Nature of Marshalling Right

It is not clear whether a right to marshal gives rise to an equitable proprietary interest in the properties to which it permits the subordinated security holder to resort: see Meagher, Gummow and Lehane[29]. The better view is that the right is a proprietary one: see *Lawrance v Galsworthy*[30] and, in Victoria, *Bank of New South Wales v Colonial Mutual Life Assurance Society Limited*[31]. The opposite view is taken, however, in *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd.*[32], *Across*

[29] Op. cit., supra note 3, at [11.030] to [11.040].

[30] (1853) 3 Jur. (N.S.) 1049.

[31] [1969] V.R. 556 at 559 and, especially, 560 per Gillard J.

[32] [1970] Tas. S.R. 120 per Neasey J.

Australia Finance Pty. Ltd. v Kalls[33] and *Sarge Pty. Ltd. v Cazihaven Homes Pty. Ltd.*[34] and seems to be more widely accepted. The non-proprietary view of the marshalling right was advanced in *Hill v Love* by the trustees in bankruptcy and was noted but not adopted by Sifris J.[35]

The proprietary or other character of a marshalling right is likely to be acutely relevant where there is a priority issue between a subordinated creditor claiming a right to marshal on the one hand and a party claiming some other interest in the same property on the other hand. The clarification of the theoretical nature of a right to marshal is likely to assist in drawing conclusions about the relevance of matters such as priority in time, actual knowledge, constructive notice and consideration in resolving such priority issues.

Whatever the conceptual nature of a right to marshal, it seems clear that the grantor of the security will be restrained by injunction from acting in a way which would prejudice the right to marshal.[36] It would also seem to follow from the principle that a right to marshal consists of a right to be subrogated to the prior encumbrancer's other securities that the grantor of the relevant securities could be required by the Court to execute security instruments which would vindicate the subrogation right of the party entitled to marshal.

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[33] (2018) 3 B.F.R.A. 205, [2008] NSWSC 783 at [18] per Bryson A.J.

[34] (1994) 34 N.S.W.L.R. 658 at 654.

[35] (2018) 53 V.R. 459 at [71] to [73] on 474.

[36] The right to marshal is always enforceable against the grantor of the securities: see Ali, op. cit., supra note 5, at 171 ff.

6.2 Caveatable Interest?

It follows from the view that a right to marshal gives rise to an equitable proprietary interest in the subject property that the claimant could, if the property were land subject to the Transfer of Land Act 1958, lodge a caveat to protect the right to marshal. Conversely, it might be argued that the opposite view leads to the conclusion that a caveat cannot be lodged to protect a marshalling right. It is thought, however, that it would be wrong to take too prescriptive an approach to the question of what equitable rights may be protected by a caveat based on any traditional classification seeking to distinguish equitable interests, mere equities and personal equities. Even if a marshalling right is seen as a mere equity in such a catalogue, it is thought that since a right to marshal is constituted by a right to be subrogated to the higher ranking creditor's security, the right is closely analogous to an equitable security of the same kind. On this basis, it should be possible to protect it by lodging a caveat.

It seems that the Registrar of Titles takes the view that a right to marshal can be protected by caveat and that the proper "Estate or interest claimed" is "Interest as Mortgagee" or "Interest as Chargee" with the "Statement of claim" in the caveat form being completed respectively by the words "Subrogation to a mortgage with the following parties and date." or "Subrogation to a charge with the following parties and date."[37] These grounds of claim appear as part of the interactive electronic lodgment form.

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[37] See *Guide to grounds of claim for caveats*, Land Victoria, (accessed 17/9/2019) at https://www.propertyandlandtitles.vic.gov.au/forms-guides-and-fees/transfer-of-land/caveat-forms-2

6.3 Proprietary Obligations

There was a difference of opinion in *National Crime Agency v Szepietowski*[38] with the majority holding that it is a pre-requisite for marshalling securities that the owner of the relevant security properties, that is, the grantor of the relevant securities be personally indebted to the relevant creditors and not that there simply be a proprietary burden on the security properties without personal liability on the part of the property owner. On this point, Lords Neuberger, Sumption and Reed favoured the view that personal liability is required and Lords Carnwath and Hughes took the opposite view. This difference of opinion was not relevant to the result because all five judges would have rejected the marshalling claim for other reasons.

In principle, the minority position is correct.[39] It is just as undesirable that a subordinated creditor be prejudiced by the adventitious or arbitrary behaviour of a prior encumbrancer in the case where the obligations are purely proprietary as it is where personal liabilities are secured on the relevant properties.

[38] [2014] A.C. 338.

[39] See also W.M.C. Gummow and J.G.H. Stumbles, "Marshalling, the Personal Property Securities Act 2009 and third party securities: Highbury and Szepietowski — New applications of enduring principles" (2014) 25 J.B.F.L.P. 106 at 111 in support of this proposition.

7. CONSTRUCTION OF WORDS OF RELEASE

As mentioned in paragraph (e) in section 2.1 on page 6 above, Mr. Hill and Mr. Love settled the County Court proceeding instituted by Mr. Hill. The Terms of Settlement signed by them contained the words of release set out in paragraph (f)(iii) in section 2.2 on page 7 above. The words of release were of the very wide kind commonly found in terms of settlement. The trustees in bankruptcy argued that the words were wide enough to cover the right to marshal claimed by Mr. Hill. There is no doubt that if they were read very literally, the words of release covered Mr. Hill's marshalling claim.

The facts relevant to this issue are set out in section 2.2 beginning on page 6 above. The Supreme Court at both trial and appellate level rejected the argument that the marshalling claim was released by the terms of settlement. Two approaches to the construction of the words of release were employed by the Court. The first was the general approach to the construction of contracts ordinarily applied by the courts and the second involved the special principles applicable to the construction of words of release in terms of settlement.

7.1 General Approach to the Construction of Contracts

As a matter of general principle, a contractual provision is construed by reference to the words used and the objective circumstances, that is, objectively by reference to the

text, context and purpose.[40] In *Burness v Hill*, the Court of Appeal followed this approach to reach the conclusion that the marshalling right had not been released.[41] Its analysis involved a careful consideration of the words used in the terms of settlement and the way in which the various expressions interrelated. The Court of Appeal emphasized the limitation of the general words used in the release by reference to matters arising out of the proceeding and the retainer. The analysis also involved a careful consideration of the nature of the dispute between the parties on the pleadings in the County Court. These were all objective matters which did not depend on evidence of the actual intention or knowledge of the parties. This approach did not involve any special rules applicable to the construction of words of release.

7.2 Special Rules for the Construction of Releases

There are three "special principles"[42] applying to the construction of contracts of release. The first two of these come from the common law and the third from equity.

The two common law rules were authoritatively set out by the High Court in *Grant v John Grant & Sons Pty. Ltd*. They are as follows[43]:

(1) general words of release are limited by the recitals in terms of settlement; and

(2) general words of release are limited to the actual dispute between the parties.

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[40] *Mount Bruce Mining Pty. Ltd. v Wright Prospecting Pty. Ltd.* (2015) 256 C.L.R. 104 at [46] on 116.

[41] *Burness v Hill* [2019] VSCA 94 at [59] to [70].

[42] This expression was used by the Court of Appeal in *Burness v Hill* [2019] VSCA 94 at [59] and [70].

[43] *Grant v John Grant & Sons Pty. Ltd.* (1954) 91 C.L.R. 112, [1954] HCA 23, at 123 and 123-124 respectively.

These rules were re-stated and applied by the Court of Appeal in *Burness v Hill*.[44]

It will be noted from the words quoted in paragraph (f)(ii) in section 2.2 on page 7 above that the terms of settlement in *Hill v Love* contained a statement in the recitals that the parties had agreed to resolve the County Court proceeding on the terms set out later in the document. This statement of the purpose of the terms of settlement resulted in the limitation of the general words of release by reference to that purpose in accordance with the first of the two common law principle set out above.

Similarly, the dispute between the parties was defined by the pleadings in the County Court. The application of the second of the common law rules by reference to the matters in dispute between the parties, which did not include any question of marshalling, again led to the conclusion that the general words of the release should be limited to the particular matters in dispute.

The third special rule is the equitable principle that general words of release do not extend to claims of which the releasor was ignorant. The Court of Appeal, relying on *Grant v John Grant & Sons Pty. Ltd.*[45], held that the trial judge was justified in referring to the subjective intention of the releasor and relying on that lack of knowledge in construing the words of release.[46] As mentioned in paragraph (e) in section 2.2 on page 7 above, Mr. Hill (the releasor) and, indeed, Mr. Love, were ignorant at the time

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[44] *Burness v Hill* [2019] VSCA 94 at [71], [72] and [80].

[45] (1954) 91 C.L.R. 112.

[46] *Burness v Hill* [2019] VSCA 94 at [78]; the trial judge's decision that because of the ignorance of Mr. Hill, it would be unconscionable to allow the trustees to rely on the general words of release is at *Hill v Love* (2018) 53 V.R. 459 at [68] on 473.

that the terms of settlement were signed of the existence of any possible right to marshal. The decision in *Burness v Hill* is, therefore, a very clear re-affirmation that the equitable principle concerns the subjective intention and actual knowledge of the releasor.[47]

7.3 Grant v John Grant & Sons Pty. Ltd.

As Sifris J. said in *Hill v Love*[48], the starting point for the construction of terms of release is the decision of the High Court in *Grant v John Grant & Sons Pty. Ltd*. It has been cited and followed repeatedly. Sifris J. also referred[49] to the decision of the Court of Appeal of the Supreme Court of Victoria in *Doggett v Commonwealth Bank of Australia*[50] where the Court said that *Grant v John Grant & Sons Pty. Ltd.* is not authority for the proposition that terms of settlement can never release all conceivable future disputes. Sifris J. accepted that claims and rights are capable of being released even if the releasor is unaware of those claims or rights[51]. The question is whether the words, on their proper construction, produce that result.

In *Grant v John Grant & Sons Pty. Ltd.*[52], the High Court accepted that:

> "No doubt it is possible *a priori* that the release was framed in general terms in the hope of blotting out, so to speak, all conceivable grounds of further disputes or claims …, whether in respect of matters disclosed by a party against whom a claim might be made or undisclosed, of matters within the knowledge of a party by whom a claim might be made or outside it."

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[47] See further the extra-judicial comments of Leeming J.A., op. cit., supra note 4, at 629 and 630.

[48] (2018) 53 V.R. 459 at [65] on 472.

[49] Ibid. at [66].

[50] (2015) 47 V.R. 302 at [63] on 319.

[51] *Hill v Love* (2018) 53 V.R. 459 at [65] on 472.

[52] (1954) 91 C.L.R. 112 at 129.

The High Court considered that this situation would fall within the "exception" enunciated by Lord Northington in *Salkeld v Vernon*[53] to the third special rule of construction expounded above[54]. In *Salkeld v Vernon*, Lord Northington said that a Court will give effect to the broad scope of a release in circumstances where the parties have executed a deed on the basis that it reflects their desire for a "solemn composition for peace".

In *Pacific Parking Pty. Ltd. v Ryssal Three Pty. Ltd.*[55], the Full Court of the Supreme Court of Victoria noted that the release itself or the surrounding facts may disclose the intent of a solemn composition for peace.

Doggett v Commonwealth Bank of Australia and *Burness v Hill* are both Victorian Court of Appeal Cases where the continuing authority of *Grant v John Grant & Sons Pty. Ltd.* was confirmed. There is, however, a difference of emphasis. In *Doggett v Commonwealth Bank of Australia*, the Court of Appeal relied on a close analysis of the matters in dispute to arrive at a wide reading of the words of release while *Burness v Hill* involved an application of the special common law rules[56] relating to the narrow construction of words of release, as well as the equitable rule[57] (which applies where the releasor is ignorant of a possible cause of action), to give a restrictive interpretation to the general words employed by the parties.

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[53] (1758) 1 Eden 64, 28 E.R. 608.

[54] See section 7.2 on page 21 above.

[55] [1994] VicSC 672 (Unreported 4 November 1994).

[56] Set out in section 7.2 on page 20 above.

[57] Stated in section 7.2 on page 21 above.

8. OTHER POINTS

There are three miscellaneous points in *Hill v Love* which should be mentioned briefly.

8.1 Reasonable Security

A question was raised by the trustees in bankruptcy as to whether Mr. Hill's second registered mortgage constituted "reasonable security" within the meaning of section 94 of the Legal Practice Act 1996 or section 3.4.20 of the Legal Profession Act 2004. These provisions, which are permissive on their face, are the equivalent of the present section 206 of the Legal Profession Uniform Law, which says that a law practice may take "reasonable security" from a client for legal costs. It was held that the second mortgage over 275 O'Herns Road was the only security offered by Mr. Love and was "entirely reasonable".[58]

8.2 Fiduciary Duty

The trustees in bankruptcy argued that Mr. Hill breached his fiduciary duty by failing to obtain his client's fully informed consent to the second mortgage. The judge found, on the evidence, that Mr. Love was fully aware of the nature and extent of his liability under the second mortgage, that there was no undue influence, duress or special disadvantage, and that Mr. Love was an intelligent and experienced

[58] *Hill v Love* (2018) 53 V.R. 459 at [83] on 475.

businessmen able to comprehend the transaction. It was held that Mr. Love had given his informed consent to the second mortgage. There was, in any event an independent solicitor's certificate concerning Mr. Love's comprehension of the mortgage. The judge held that the point had no merit whatsoever.[59]

8.3 *Anshun* Estoppel

The trustees in bankruptcy argued that because Mr. Hill had not sought to vindicate his marshalling claim in the County Court proceeding for debt against Mr. Love, he was estopped under the *Anshun* principle from later making that claim. This argument was rejected by Sifris J. on the basis that it was not unreasonable for Mr. Hill not to have brought his marshalling claim in the County Court proceeding. According to Sifris J. the right to marshal was tangential to the issues in that proceeding.[60] The Court of Appeal rejected the *Anshun* estoppel argument for four reasons:

(a) the marshalling claim was irrelevant to the debt claim in the County Court and did not provide a defence to the negligence counterclaim, would have required the joinder of additional parties and would have led to a more complex and expensive trial;

(b) adding the marshalling claim would have made it more difficult to compromise the County Court proceeding;

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[59] *Hill v Love* (2018) 53 V.R. 459 at [80] on 475.

[60] *Hill v Love* (2018) 53 V.R. 459 at [70] on 473.

(c) there was no risk of conflict between any judgment in the County Court on the debt claim or negligence counterclaim and any judgment on the marshalling claim; and

(d) at the time of the County Court proceedings, two of the properties remained unsold, Mr. Love was not bankrupt and it was not then clear that Mr. Hill would need to resort to his claim to marshal in order to obtain payment of any judgment given in the County Court.[61]

[61] *Burness v Hill* [2019] VSCA 94 at [91] to [96].