



HIGH COURT OF AUSTRALIA

Manager, Public Information

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RONALD JOHN BOFINGER & ANOR v KINGSWAY GROUP LIMITED FORMERLY
WILLIS & BOWRING MORTGAGE INVESTMENTS LIMITED (ACN 089 265 127) & ORS
[2009] HCA 44

Today the High Court of Australia held that where guarantors of a secured loan have contributed to the repayment of that loan they may recoup that contribution from the borrower out of the remaining surplus securities before the surplus is used to repay a second loan that is secured over the same property, even though the guarantors have also guaranteed the second loan.

The appellants, Mr and Mrs Bofinger, were guarantors of three separate and sequential loans to a developer. Those loans were secured by first, second and third mortgages over the developer's properties. The guarantees were also secured by first, second and third mortgages over the guarantors' properties. The guarantors then sold their properties, the proceeds from which were used to repay some of the first loan. The three mortgages over the guarantors' properties were discharged at this time. The first lender then sold some of the developer's properties in order to repay the remainder of the first loan. The surplus funds and remaining properties were then made available to the second lender.

The guarantors claimed to be subrogated to the rights of the first lender over the surplus proceeds and unsold properties in priority over the second lender. They claimed that they should have been able to recoup what they had paid to the first lender out of the surplus funds and remaining properties before the surplus and properties could be used by the second lender to repay the second loan. The Supreme Court of New South Wales held that the guarantors could not recoup what they had repaid of the first loan from the securities ahead of the second lender. On 3 December 2008, the appellants' appeal to the Court of Appeal of the Supreme Court of New South Wales was dismissed. The High Court granted the guarantors special leave to appeal.

In a unanimous decision the High Court held that the guarantors were entitled to recoupment from the surplus funds and remaining properties before the second lender, notwithstanding that they had guaranteed the second loan. The Court held that once the first loan had been repaid, the first lender was obliged in good conscience to provide the surplus funds and remaining properties to the guarantors. By transferring the surplus funds and remaining properties to the second mortgagee the first mortgagee had breached this obligation. The High Court allowed the guarantors' appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*