IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2011 7030

TITLES STRATA MANAGEMENT PTY LTD (ABN 32 001 119 331) — Plaintiff

v

FRANK NIRTA AND OTHERS (according to the schedule attached) — Defendants

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JUDGE:	Daly AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	17-18 June, 20 June, 14-15 and 22 August 2014
DATE OF JUDGMENT:	15 May 2015
CASE MAY BE CITED AS:	Titles Strata Management Pty Ltd v Nirta
MEDIUM NEUTRAL CITATION:	[2015] VSC 187

EVIDENCE – Standard of proof – Civil proceedings – Whether signatures were forged – Strength of evidence required to meet standard – *Briginshaw v Briginshaw* (1938) 60 CLR 336 applied.

EVIDENCE – Credibility and weight – Party's failure to adduce evidence on fact in issue – Adverse inference – Application of *Jones v Dunkel* (1959) 101 CLR 298.

PRINCIPAL AND AGENT – Whether finance broker agent of lender – Whether broker acting for borrower or lender – Sub-agent.

REAL PROPERTY – Torrens system – Registration – Indefeasibility of title – Exception in case of fraud – Forged signature – *Transfer of Land Act 1958* s 42 – Followed *Perpetual Trustees Victoria Ltd v Xiao and anor* [2015] VSC 21 – Fraud not imputed to lender – *Russo v Bendigo Bank Ltd* [1999] 3 VR 376, *Macquarie Bank Ltd v Sixty Fourth Throne Pty Ltd* [1998] 3 VR 133, *Pyramid Building Society (in liq) v Scorpion Holdings Pty Ltd* [1998] 1 VR 188, *Beatty v Australian and New Zealand Banking Group Ltd* [1995] 2 VR 301 and *Australian Guarantee Corporation Ltd v De Jager* [1984] VR 483 considered.

REAL PROPERTY – Torrens system land – Whether registered mortgage secures amount owing under forged loan agreement – *Perpetual Trustees Victoria Ltd v Xiao and anor* [2015] VSC 21 followed and applied – *Solak v Bank of Western Australia Ltd* [2009] VSC 82 not followed.

SUBROGATION – Whether third party payer of an extinguished debt entitled to the benefit of all contractual rights of previous lender – Equitable remedy – Held: not entitled to interest at rate of previous lender.

PRACTICE AND PROCEDURE – Interest – *Penalty Interest Rates Act 1983* (Vic) s 2 – *Supreme Court Act 1986* (Vic) s 58 – Whether 'good cause to the contrary' for not awarding interest on

the statutory basis – Whether rate of interest should be calculated on a simple or compounding basis – *Talacko v Talacko* [2009] VSC 579 applied.

CONTRACT – Default Interest Clause – Penalty – *Robophone Facilities Ltd v Blank* [1996] 1 WLR 1428 applied.

REAL PROPERTY – Claim under s 110 of *Transfer of Land Act 1958* (Vic) – Joint tenants – Registration of mortgage – Signature of one mortgagor forged – Whether loss crystallises before severance of joint tenancy.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Selimi	Pasha Legal
For the First Defendant	No appearance	
For the Second Defendant	The Second Defendant appeared in person	
For the Second Defendant by counterclaim	Mr C Connor	Solicitor for the Registrar of Titles

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HER HONOUR:

The parties and the background to this proceeding

1 Titles Strata Management Pty Ltd ('Titles Strata') is a company which operates a business of managing owners' corporations. Its primary place of business, and the residence of its director, Mr John Koprivnjak, is in New South Wales. From time to time, Titles Strata has engaged in the business of short term commercial lending. Mrs Luisa Nirta is, along with her husband, Mr Frank Nirta, the registered proprietor of two properties, a commercial property at 305 Barkly Street, Footscray ('pizza shop') and 1 Kamona Court, Altona Meadows ('home').

2 On or about 25 August 2011, Titles Strata agreed to lend Mr and Mrs Nirta the sum of $635,437 for a period of two months, secured by mortgages over the pizza shop and the home. The mortgage over the pizza shop has been registered with the Registrar of Titles, while the mortgage over the home has not. The funds lent by Titles Strata were used, in the main, to pay out a previous loan made by Short Term Lending Solutions Pty Ltd and Lawfund Private Capital Pty Ltd ('STLS') in March 2011 ('first loan'). The first loan was secured by a mortgage over the pizza shop, and was in default. By 25 October 2011, the loan made by Titles Strata to Mr and Mrs Nirta ('second loan') was in default, and from around that time, Titles Strata has pursued recovery action against Mr and Mrs Nirta, including the issue of this proceeding. Default judgment has been obtained against Mr Nirta, and his application to set it aside was unsuccessful. However, Mrs Nirta was given leave to defend on the basis of her assertions that someone forged her signatures on the loan agreement, the two mortgages, and other associated documentation ('second loan documents').

3 Mrs Nirta has issued a counterclaim seeking, among other things, a permanent injunction restraining registration of the mortgage over the home, an order that the mortgage over the pizza shop be removed from the Register Book, and, against the Registrar of Titles ('Registrar'), an indemnity under s 110 of the *Transfer of Land Act 1958* (Vic) ('TLA') for any loss and damage she may have suffered by reason of the registration of the mortgage over the pizza shop.

4 The terms of the second loan provide for interest to be charged monthly at eight per cent per month while the loan is in default. As a result, the amount said to be owing by Mr and Mrs Nirta to Titles Strata at the time of trial was $7,750,030.67, and climbing rapidly.

5 Mr and Mrs Nirta are aged in their fifties, and have three children, two of whom live at home. Their middle child is severely autistic and has an intellectual disability. Mrs Nirta describes herself as a housewife and carer. She completed only two years of secondary school, although I would observe that is likely to have been as a result of circumstances and/or cultural background rather than by reason of lack of intelligence or ability. Mr Nirta's current occupation is unclear, although it is apparent from the evidence that he has been engaged in a range of commercial activities over time, and there was some reference in the evidence to him being a trade assessor for migrants. These commercial activities do not appear to be sufficiently lucrative to fund legal representation for this proceeding: although Mrs Nirta was represented from about April 2012, her former solicitors were granted leave to cease to act on 27 February 2014.

6 The Nirtas purchased the home in 1984, and the pizza shop in 1996. The Council valuation for the home as at 3 August 2011 was $416,000, although that is probably an undervaluation. Mrs Nirta is deemed to have admitted[1] (and seems content to accept) that the value of the pizza shop as at 9 December 2011 was $725,000. The balance of the loan from the Commonwealth Bank secured by the home as at 12 August 2011 was $188,303.42. On that basis, taking into account movements in the real estate market since 2011, one might expect that, setting aside the amounts owed pursuant to the second loan, the Nirtas would have had net assets of slightly over $1 million at the time of trial.

7 The circumstances in which Mr and Mrs Nirta obtained the first loan are a little unclear. On 23 February 2011, STLS made what is described as an 'indicative offer' of finance to the Nirtas of $450,000 to be secured over the pizza shop, which was at that time unencumbered. It appears that Mr Nirta agreed to lend money to some business associates, including the solicitor who witnessed the loan documents for the first loan, Mr Noor Dean, to assist them with some business ventures. Somewhat implausibly,

Mr Nirta gave evidence that this transaction would provide him with no commercial benefit. Mrs Nirta gave evidence that Mr Nirta told her it was a loan using the pizza shop for a business venture, being a Northern Territory camel farm. Mr Nirta gave evidence that the funds were to be used to purchase an abattoir in regional Victoria. In any event, it is common ground that both Mr and Mrs Nirta executed the loan and mortgage documents. The first loan was made on 3 March 2011, and was for a term of two months. On the same day, the mortgage of STLS in respect of the pizza shop was registered.

8 On 11 April 2011, the solicitors for STLS ('Galilee Lawyers') sent a letter to the Nirtas noting that a condition of the first loan, being that the Nirtas provide a letter confirming refinancing of the first loan within 30 days of settlement, had not been complied with. The Nirtas did not refinance the first loan, and on or about 12 May 2011 Galilee Lawyers sent a letter to the Nirtas enclosing a default notice. On 26 May 2011, Defteros Lawyers, purportedly acting on behalf of the Nirtas, wrote to Galilee Lawyers, requesting a copy of the loan agreement and other documents, but appeared to have played no further role in this matter.

9 STLS issued a proceeding in this Court on 14 July 2011 seeking possession of the pizza shop and the sum of $548,198.91. According to an affidavit of service sworn by Mr Malcolm Hadji, a process server, on 29 July 2011, the writ and statement of claim was served upon both Mr and Mrs Nirta on 21 July 2011. Mrs Nirta denies having been served with these documents. In the meantime, Mr Nirta had been making attempts to obtain funds to pay out the first loan, apparently seeking to recover the funds from his associates. However, Mr Nirta also obtained a market appraisal in relation to the pizza shop on 16 May 2011, and a formal valuation report was obtained by one of his associates on 17 June 2011, so no doubt refinancing of the first loan was under active consideration at that time.

10 Apart from the actual execution of the loan and mortgage documents, the events leading up to the making of the second loan are largely uncontroversial. According to Mr Koprivnjak, the director of Titles Strata, he was approached by a Mr Theo Kassinidis, who knew a friend of his, on behalf of Mr Nirta in or around early August

2011. Mr Kassinidis told Mr Koprivnjak that Mr and Mrs Nirta needed to refinance a property for a couple of months before obtaining longer term finance from a bank. He did not appreciate until just before settlement that the funds advanced were being used to pay out the first loan. He told Mr Kassinidis he would be prepared to make a short term loan to Mr and Mrs Nirta, and engaged solicitors recommended by Mr Kassinidis, Pasha Legal (the solicitors acting for Titles Strata in this proceeding) to prepare the loan documentation. He was also contacted by Mr Keith Blackney, who he described as a 'middle man', and discussed the amount to be loaned and valuations Mr Blackney had obtained in relation to the pizza shop. He was not satisfied with the valuation provided by Mr Blackney, as it was addressed to another lender, and he wanted a valuation addressed to him. Mr Koprivnjak told him that based upon the valuations for the pizza shop, the pizza shop was insufficient security for the second loan. Mr Blackney later told him that the Nirtas had agreed to provide additional security, being their equity in the home.

11 Mr Koprivnjak gave evidence that he did not retain Mr Blackney to act on behalf of Titles Strata, and he instructed his solicitors to make all of the arrangements for execution of the loan documents and to settle the loan. He confirmed that the loan was for a period of two months, as he did not have the capacity to lend the money for more than a short period of time. He explained the rationale for charging an interest rate of 8 per cent per month, being that he wanted a higher rate than the Nirtas had been paying on the first loan, and that he wanted to encourage prompt repayment, because he needed the money himself, and had experienced difficulties in recovering loans made by him in the past. He gave evidence that at settlement the sum of $14,200 was paid in commission, which he believed was shared equally between Mr Kassinidis and Mr Blackney.

12 A document purporting to be a mortgage over the pizza shop[2] was registered on 3 November 2011. There are some question marks about the provenance of this document, as discussed later in these reasons. The mortgage over the home was lodged for registration on 22 June 2012, but that mortgage was not registered, presumably by reason of the allegations made by Mrs Nirta in this proceeding.

13 On or about 24 November 2011, Mr Koprivnjak instructed Pasha Legal to issue a Notice of Demand to Mr and Mrs Nirta for the repayment of $692,416.66. This proceeding was issued on 22 December 2011. In the meantime, Mr Nirta, apparently with the assistance of Mr Blackney, was trying to raise funds to pay out the second loan. On 26 October 2011, the day after Mr and Mrs Nirta were required to repay the second loan, Mr and Mrs Nirta received a letter of offer from a firm of solicitors, Ajzensztat Jeruzalski & Co ('AJ & Co') offering a loan for one year of $380,000, at 11 per cent per annum, secured over the pizza shop ('third loan'). However, the third loan did not proceed.

The issues in the proceeding

14 This is far from simple mortgage recovery action. The factual and legal issues raised in this proceeding are quite complex. These include as follows:

(a) whether the signatures on the second loan documents purporting to be that of Mrs Nirta were in fact those of Mrs Nirta, or whether they had been forged by an unknown party;

(b) if Mrs Nirta's signatures on the second loan documents have been forged, whether knowledge of the fraud can be imputed to Titles Strata such as to defeat the Titles Strata's claim for indefeasibility in respect of the mortgage over the pizza shop;

(c) even if any fraud found to have occurred cannot be sheeted home to Titles Strata, and as such, the mortgage over the pizza shop is protected by reason of the principle of indefeasibility, whether the covenant to pay in the forged loan agreement has been incorporated into the mortgage, or whether the mortgage in fact 'secured nothing';

(d) if the registered mortgage over the pizza shop is ineffective, whether Titles Strata is entitled to the benefit of the doctrine of subrogation, on the basis that the funds advanced by the second loan were used to pay out the first loan;

(e) if Titles Strata is entitled to recover under the doctrine of subrogation, whether all the terms and conditions of the first loan apply, so as to enable Titles Strata to

recover not only the principal of the first loan, but also interest in accordance with the terms of the first loan;

(f) if the second loan agreement is valid, whether the clause providing for interest under the second loan agreement is unenforceable by reason of it being a penalty; and

(g) if Mrs Nirta's signatures on the second loan documents have been forged, but if the indefeasibility of the mortgage over the pizza shop is unimpeachable by reason of any fraud of Titles Strata, and it is held that the mortgage over the pizza shop secured the sum advanced by Titles Strata, is the Registrar liable to indemnify Mrs Nirta for any losses she has suffered by reason of the registration of the mortgage over the pizza shop, and if so, how much?

Were Mrs Nirta's signatures on the second loan documents forged?

15 The key factual issue in this proceeding is whether the signatures of Mrs Nirta on the second loan documents were her signatures, or whether they were forged by an unknown person. The second loan documents included the loan agreement, the mortgages in respect of the pizza shop and the home, the deed of settlement between Mr and Mrs Nirta and STLS, a document headed 'Financial Advice Acknowledgement Certificate' and a 'Legal Advice Acknowledgement Certificate'. Mrs Nirta in her evidence adamantly denied that the signatures on the second loan documents were hers, and steadfastly maintained her denials under cross-examination. She denied having any knowledge of the second loan. She was adamant that, while she would generally not read or understand the contents of legal documents her husband put before her, she would scan them, and she would never have signed any document that put the security of the home in jeopardy. It is the only home that her severely disabled son has ever known, and she could not contemplate moving him elsewhere.

16 Mrs Nirta was insistent that she had never met Mr Keith Blackney, who attested to the signatures on the second loan documents, prior to attending court on the second day of the trial. She denies ever having met him at a coffee shop to sign the second loan documents. She denies ever reading any letters from solicitors addressed to her and

her husband, or being served with any court documents relating to the first loan or this proceeding. She denies instructing Mr Defteros to act on her behalf in relation to the first loan. She denied that she had any knowledge of the second loan, or this proceeding, until around April 2012, when Mr Nirta finally confessed to her about the financial difficulties in which Mr Nirta's activities had placed them.

17 Mrs Nirta agreed that she signed the documentation for the first loan. She gave evidence that Mr Nirta told her that the loan was for a business venture in the Northern Territory. She gave evidence that she did not read the loan documentation for the first loan closely, and that she did not appreciate the first loan was required to be paid within two months. She also did not appreciate that it was a term of the first loan that STLS had the right to claim a charge over all of their assets, including the home. She gave evidence that Mr Noor Dean, a solicitor, came to their home and witnessed their signatures on the documentation regarding the first loan, but that he did not explain the documents to her. She believes that at the time she would have been busy with her usual domestic activities.

18 Mrs Nirta's oral evidence at trial was largely consistent with the evidence in the affidavit sworn by her on 15 June 2012 in support of her application to set aside the default judgment against her. In her affidavit, which was sworn when she was represented by solicitors, Mrs Nirta deposed, in summary, as follows:

(a) she is the full time carer of her son who is intellectually disabled and has severe autism. She has been diagnosed with depression, and has type 2 diabetes;

(b) she had only recently become aware of this proceeding as she was not served with any writ and statement of claim. She first became aware of the proceeding and the default judgment against her during a conference with her husband and his solicitors on or around 3 April 2012. She has never instructed or authorised Darroll Nelson & Co to file a Notice of Appearance;

(c) she stated that the second loan agreement was not signed by her and did not bear her true signature;

(d) in response to the affidavits sworn by Mr Blackney in the proceeding, Mrs Nirta deposes as follows:

> I refute the contents of those Affidavits and deny each and every allegation made by Mr. Blackney as follows:
>
> (a) I deny meeting with Keith William Blackney at Salt 'n Pepa Café on 25 August 2011 as alleged in paragraph 22 of the said affidavit. I deny ever having met Keith William Blackney. I deny ever attending the Salt 'n Pepa Café.
>
> (b) My husband Frank Nirta informs me that he never had a conversation with Keith William Blackney as alleged in paragraph 20 of the said affidavit in which he is said to have arranged a meeting with me and Keith William Blackney at Salt 'n Pepa Café. My husband accepts as deposed by Keith William Blackney that Keith William Blackney did arrange to see my husband in the afternoon on 25 August 2011 by an earlier telephone attendance that day.
>
> (c) I have sighted a copy of the mortgage dated 25 September 2011 and state that at no time did I sign the mortgage;
>
> (d) The signature which appears on the attestation page of the mortgage is not my signature, although it does resemble the signature which appears on my driver's licence;
>
> (e) I believe that my signature has been fraudulently copied from my driver's licence;
>
> (f) At no stage did I authorise anyone to sign the mortgage document on my behalf;
>
> (g) I have also been shown the signature appearing on the document in which I purportedly elect not to obtain legal advice concerning the mortgage dated 25 August 2011. The signature appearing on that document is not my signature. An examination of this signature and a comparison of it to that which appears on the mortgage shows that it is a different signature.

(e) In response to the affidavits sworn by the process server who deposed to serving the writ and statement of claim in this proceeding, Mrs Nirta deposes as follows:

> I refute the contents of those Affidavits in that:
>
> (a) My son Curtis needs constant supervision and cannot be left alone or unsupervised.
>
> (b) My husband Frank and I have, except for some respite for 3 hours on a Saturday, the constant care of our son Curtis.
>
> (c) The statement given by the process server that I answered the door with my husband Frank is false and untrue.
>
> (d) I believe I was in bed when the process server attended our house because my son was restless the previous night and had kept me up very late. I also believe Curtis was in bed at the time.

> My home is fully alarmed, including all external doors and windows. The alarm is armed at most times of the day, especially at night, so I know immediately if Curtis attempts to get out of the house. I usually get up around 11.30am or 12.00am each morning because I am often up very late at night trying to settle Curtis.

19 A good deal of time during the cross-examination of Mrs Nirta by counsel for Titles Strata was spent upon trying to secure an admission from Mrs Nirta that her signatures varied from time to time, and that the signatures on the second loan documents were just another variant of her signature. As such, counsel contended, any difference between the signatures on the second loan documents and other signatures would not necessarily have been as a result of forgery. Mrs Nirta rejected this contention, and expressed her view that the signatures on the second loan agreement were qualitatively different from her usual signatures, and looked 'contrived'. Mrs Nirta denied that she had deliberately signed the second loan documents in such a way as to be in a position to later disavow their authenticity.

20 Mrs Nirta agreed that she signed one of the letters of offer from AJ & Co with respect to the third loan,[3] having been told by her husband that it was something to do with the loan for the pizza shop, but, upon her recall to the witness box by counsel for the Registrar, she denied signing another version of the letter of offer.[4]

21 Mrs Nirta's evidence therefore directly contradicts the evidence of Mr Blackney, the broker who arranged the second loan, and who witnessed the signatures on the second loan documents. This is not a case where the existence of two different versions of events can be reconciled by possible explanations as faulty recollection or unconscious reconstruction. Either Mrs Nirta is telling the truth, or Mr Blackney is telling the truth. And, while I accept that Mrs Nirta bears the onus of proof in relation to this matter, in the end, I must determine which of the two witnesses I believe, and why.

22 Mr Blackney was, as described by counsel for Titles Strata, a 'staunch' witness. He gave his evidence cautiously, but confidently and not evasively. He gave evidence that two affidavits he swore on behalf of Titles Strata in this proceeding were true and correct save in one respect: he stated that the statement in his affidavit of 17 February 2012, that he was 'a financial consultant of the plaintiff' was not correct, and that he had never been engaged by Titles Strata in any capacity. In his affidavit sworn on 30 May

2012, Mr Blackney deposed, in summary, as follows:

(a) he is a financial consultant operating under the business name 'Blackney and Associates';

(b) on or around 10 August 2011 he had a conversation with Mr Theo Kassinidis, another financial consultant. Mr Kassinidis told him that he had previously arranged short term finance for Mr and Mrs Nirta, and that their loan was in default and their pizza shop was to be sold;

(c) Mr Kassinidis told him he had contacted Mr Koprivnjak, who was to provide a loan of approximately $640,000 to repay the loan that was in default, and that Mr Kassinidis needed him to coordinate the documentation of the loan. Mr Kassinidis gave him, among other things, a letter from a real estate agent in relation to the value of the pizza shop, and told him that Mr Nirta was arranging a market appraisal of the pizza shop;

(d) during the course of his meeting Mr Kassinidis telephoned Mr Koprivnjak, during which he handed the telephone to Mr Blackney and Mr Blackney introduced himself;

(e) on the following day, Mr Blackney met with Mr Nirta and Mr Kassinidis at the McDonald's restaurant in Altona North. He introduced himself to Mr Nirta, and stated that Mr Kassinidis had asked him to be involved in arranging documentation for the second loan, which would be for approximately $650,000, and secured by a mortgage over the pizza shop. He told Mr Nirta that he needed to obtain identification documents for him and his wife, including photo identification. He asked Mr Nirta how he intended to repay the second loan, and Mr Nirta told him that he wanted to arrange a loan with a longer term;

(f) the following day Mr Nirta sent to him by email identification documents for himself and Mrs Nirta, including Mrs Nirta's driver's licence. He also obtained a copy of a valuation and market appraisal for the pizza shop;

(g) Mr Blackney forwarded copies of the various valuation documents regarding

the pizza shop and letters from Galilee Solicitors to the Nirtas to Mr Koprivnjak. He subsequently had a conversation with Mr Koprivnjak where he said he needed security in addition to a mortgage over the pizza shop. He relayed this to Mr Nirta, who told him that he and Mrs Nirta owned the home, which was mortgaged to the Commonwealth Bank for approximately $190,000;

(h) Mr Blackney subsequently collected a rate notice for the home from Mr Nirta, which he forwarded to Mr Koprivnjak. Mr Koprivnjak telephoned him and told him a mortgage over the home would be signed, but would only be registered if the loan was not repaid at the end of the loan period of two months. He relayed the substance of this conversation to Mr Nirta;

(i) on or about 24 August 2011 he attended the offices of Pasha Legal, the solicitors for Titles Strata, and collected the Loan Agreement, the mortgages, and the deed of settlement;

(j) he telephoned Mr Nirta to tell him he had the second loan documents, and asked when he could meet with him and his wife to sign the documents. Mr Nirta told him that his son had autism and was unable to be left alone, so it would be necessary to meet with his wife the following morning and with him in the afternoon. He arranged to meet Mrs Nirta at the Salt 'n' Pepa Café in Pier Street, Altona in the morning and Mr Nirta at a house in Altona Meadows in the afternoon; and

(k) finally, at paragraph 22 of his affidavit, Mr Blackney deposed as follows:

> On 25 August 2011 at 10.00am I met Luisa Nirta at the Salt 'n Pepa Café. I was sitting at a table. I had the loan agreement, deed of settlement and the two mortgages in front of me on the table. Luisa Nirta entered the café and walked to me. As she walked towards me I was able to identify her as I had seen her photograph on her drivers licence. I had the copy of her drivers licence with me. She asked if I was Keith Blackney. I said yes. She said that she was Luisa Nirta. She sat down. I said that I had a loan agreement and two mortgages for her to sign. I opened the page headed Schedule A in the loan agreement. I said that it was a temporary loan of $635,437 for two months. I said that the loan was to be used to pay out the existing loan, which was meant to be repaid in May. I said that the loan was to be secured by a mortgage over the pizza shop at 305 Barkly Street Footscray and a mortgage over her house at 1 Kamona Court Altona Meadows. I said that the arrangement with the mortgage over her house in Altona was that the mortgage would not be registered but the lender would lodge a caveat on the title of the property. I said

> the mortgage would only be registered if the loan was not repaid at the end of the two months. I said that Frank had asked me to make inquiries to see what other finance was available which would be at a lower interest rate and for a longer term. In my presence Luisa Nirta initialled the foot of each page of the loan agreement, she signed the execution page of the loan agreement and she signed the certificates that are head 'Financial Advice Acknowledgment Certificate' and 'Legal Advice Acknowledgment Certificate'. In my presence Luisa Nirta signed the mortgage for the Footscray property and the mortgage for the Altona Meadows property. In my presence Luisa Nirta signed the execution page of the deed of settlement. After she signed those documents we both left the café. I was with her for 15 to 20 minutes.

23 The remainder of the affidavit deals with Mr Nirta's execution of the second loan documents, his emailing of the second loan documents to Pasha Legal and the delivery of the loan documents to the offices of Pasha Legal the following day, and subsequent discussions he had with Mr Nirta and others about refinancing the second loan.

24 In his oral evidence, Mr Blackney gave evidence that he had been a finance broker 'on and off' for about 18 years. He first became involved with the Nirtas when approached by a solicitor some three or four months before the first loan. He obtained an offer which was declined. Some months later Mr Kassinidis approached him about refinancing the first loan, and employed him to organise settlement and collect paperwork. Prior to that time he had never met Mr Koprivnjak, and he had never been employed by Titles Strata.

25 Mr Blackney also gave evidence that Mr Kassinidis had organised for the second loan documents to be prepared by Pasha Legal's offices, which he collected from Pasha Legal. He took those documents to Mr Nirta's office in Box Hill for him to sign, but Mr Nirta said he could not sign them because of other people being there, and he did not want others to know about the second loan. Accordingly, they arranged to meet the following day: Mrs Nirta in the morning and Mr Nirta in the afternoon. Mr Nirta asked him to attend the coffee shop to meet Mrs Nirta for the purposes of signing the second loan documents.

26 Mr Blackney identified Mrs Nirta in court as 'the lady sitting next to Mr Nirta'. He said that he first saw a photo of Mrs Nirta on 24 August 2011, when Mr Nirta emailed to him an enlarged copy of her driver's licence and her Medicare card.[5] He gave evidence that Mrs Nirta signed the second loan documents first, before

Mr Nirta.

27 Mr Blackney's oral evidence regarding his meeting with Mrs Nirta was largely consistent with his affidavit, save that he said that he met her in a coffee shop in Footscray. He had been asked to meet her there by her husband the day before in Box Hill. Mr Nirta told him that they did not want people coming to the house because they had trouble with their son in the mornings. He gave the following description of their meeting:

> You arrived first, is that correct?---That's correct, yes.
>
> So you were seated at the coffee shop, the table?---At the coffee shop inside and Mrs Nirta came in and introduced herself.
>
> What did she say?---She said, 'I'm Luisa' – no, sorry. She said, 'Are you Keith', and I said 'Yes'. And I said, 'Are you Luisa', she said, 'Yes'. She then sat down. I briefly explained about the mortgage and that we're doing this because her property is getting foreclosed on with the other company and we're doing this is post haste to organise a settlement. She signed and then she left. She was only there for probably 15/20 minutes. …
>
> So just take it one step at a time?---OK. She sat down. I said that, 'Would you like a cup of coffee'. She said 'No'. I already had one. She – I went through briefly with her conversation about the loan, how it was only for two months loan, there was a mortgage on the pizza shop, there was second mortgage - - -
>
> A pizza shop at Barkly Street, Footscray?---Barkly Street, yes.
>
> Yes?---I didn't say Barkly Street. I just said pizza shop.
>
> Yes?---There was a second mortgage on her property in Altona, her house, her family home and that that wouldn't be registered as long as we re−financed out within the next two months.
>
> What if anything did she say?---Just yes and just nodded basically that she agreed and I just said that, you know, I normally say to everybody as long as you pay this loan back, nothing happens.
>
> I'm not interested in what - - - ?---No, no, I said to her - - -
>
> No, just listen to the question, please?---OK.
>
> Listen to the question. I'm not asking you what you normally say to other people?---Yeah.
>
> Focus on what was said on this occasion, all right?---OK.
>
> So what did she say?---She just said that she's there to sign and she signed and then left.

28 Mr Blackney gave evidence that Mr Nirta signed the second loan documents at a house he was renovating in Altona in the afternoon of 25 August. Mr Blackney signed his name to each of the second loan documents when he returned to his home

that evening. He could not specifically recall seeing the deed of settlement between the Nirtas and STSL, but believed it must have been with all of the other paperwork. He believed the reference to '25/9/11' on the execution page of the loan agreement was a mistake made by him. He identified Mr and Mrs Nirta's signatures on the registered mortgage, but said that the date of 29 August 2011 was not written by him. At settlement he received a fee of $14,200, of which he kept some back to pay for the cost of a valuation of the pizza shop, and split the remainder between him and Mr Kassinidis. He also gave evidence about some subsequent dealings he had with Mr Nirta and others regarding refinancing of the second loan. He recalled meeting Mr Nirta and Mr Kassinidis at the pizza shop about a month or so after the second loan was made for the purposes of arranging a further valuation, but did not have any further dealings with Mr Nirta after November 2011.

29 Under cross-examination by counsel for the Registrar, Mr Blackney was taken to the documents he gave evidence that he emailed through to Pasha Legal on the evening of 25 August 2011. These documents included the mortgage over the pizza shop.[6] He was then taken to another document,[7] and asked to compare them. The latter document was the mortgage in respect of the pizza shop lodged for registration ('registered mortgage'), and there are marked differences between the two documents. He agreed that if the document which was actually registered was part of the package of documents he had arranged to be signed and witnessed that day, it would have been part of the package emailed through to Pasha Legal on the evening of 25 August 2011. Mr Blackney could not explain the difference between the two documents, or why in fact there were two versions of the mortgage over the pizza shop. When asked about the odd positioning of Mrs Nirta's signature on some of the second loan documents, Mr Blackney said that he just pointed to the middle of the page and told Mrs Nirta to 'sign there'.

30 Counsel for the Registrar also questioned Mr Blackney as to who requested that he obtain the valuation letter of the pizza shop from VL Cooper & Associates dated 23 August 2011. Mr Blackney confirmed that Mr Koprivnjak had requested him to obtain this valuation.

31 Mrs Nirta's cross-examination of Mr Blackney largely focussed on putting to him her allegations that she had never met him before that day and she did not sign the loan documents.

32 Mr Noor Dean was also called by Titles Strata to give evidence. He gave evidence that when he witnessed the signatures of Mr and Mrs Nirta upon the first loan documents, he attended at the home, and spent about two hours explaining the terms of the first loan documents to Mr and Mrs Nirta. Mrs Nirta's cross-examination of Mr Dean was truncated somewhat, as I was reluctant to allow her to pursue a line of questioning which appeared to be irrelevant to the issues in this proceeding, but more concerned with what happened to the proceeds of the first loan. I could not make any adverse findings about the credibility of Mr Dean, but do consider it somewhat surprising that a solicitor would spend two hours explaining the terms of simple loan documents. This evidence was disputed by Mrs Nirta. His evidence otherwise shed little light on the issues in the proceeding.

33 Mrs Nirta also called Mr Nirta to give evidence. His evidence surrounding the entry into the first and second loans was somewhat confusing, and on occasion defensive and/or evasive.

34 Mr Nirta gave evidence that the first loan was taken out in order to lend funds to Mr Noor Dean and an associate for a period of 12 months to assist them in funding a business venture involving a camel farm in the Northern Territory and/or an abattoir in Deniliquin. Mr Dean assured him that the funds advanced by STSL could be refinanced. Mr Nirta gave evidence that Mr Kassinidis told him that funds had been diverted for the personal use of Mr Dean and another unnamed person, and he then arranged for the funds to be advanced to Mr Kassinidis for the purposes of making short term loans. However, it appears that these funds were lent on an unsecured basis, and have not been able to be recovered. Accordingly, he then felt under pressure to take out the second loan, still being reassured by others that his money would be returned to him.

35 As for the circumstances surrounding the execution of the second loan documents,

Mr Nirta gave the following evidence, in summary, during the course of examination–in–chief and under cross–examination:

(a) he agreed that from time to time he asked Mrs Nirta to sign documents concerning the financial affairs of the family and expected that she would obey him in that regard;

(b) he was not present when Mrs Nirta signed the second loan documents, and her signature was not on the second loan documents when he signed them;

(c) he is aware that his wife has different styles of signature;

(d) he denied sending Mrs Nirta to the coffee shop to meet Mr Blackney;

(e) there was no reason why he would not invite someone to the home to sign documents;

(f) he did not understand how the loan went through without his wife signing the second loan documents, but accepted that it did;

(g) he did not tell his wife about the second loan because he did not want to worry her given the demands placed upon her by their son's disability and her poor health;

(h) he does not recall signing the second loan documents on more than one occasion;

(i) he denied forging his wife's signature on the second loan documents;

(j) he does not know how his wife's signature came to be on the second loan documents, referring to it as a 'miracle'; and

(k) he had no basis for suggesting that either Mr Blackney, Mr Kassinidis, or any other person forged his wife's signature on the second loan documents.

36 Mr Nirta also gave evidence about other relevant matters including:

(a) he utilised the services of Mr Kassinidis and Mr Blackney to seek funding to

pay out the second loan, but reached the view that obtaining further funding was not going to solve his problems;

(b) at one point he admitted that Mrs Nirta was served with the writ issued by STSL in July 2011, but later retracted that admission, and said that the evidence in the affidavit of the process server was incorrect;

(c) he could not recall whether he told his wife about the second loan in 2012;

(d) he said the evidence he gave in an oral examination before Mukhtar AsJ on 19 September 2013, where he said 'we signed – we signed under duress because of the other situation we had' was unintentional; and

(e) he could not recall precisely when he first heard about Mrs Nirta's allegations that her signatures on the second loan documents were forged, but believed that it might have been when he first went to see his solicitors. He did not report the matter to the police because he was told by his solicitors that this Court would refer the matter to the police.

37 At one point during his cross-examination he was taken to the document at CB 407 and CB 320A being the two versions of the letter from AJ & Co, dated 8 November 2011 and 10 December 2011 respectively. While his evidence was hard to follow, he seemed genuinely surprised to learn that there were two different versions of this document, saying that he was 'flabbergasted'. He was not present in Court when Mrs Nirta gave evidence that she believed that her signatures on the document at CB 407 were forgeries.

38 As well as the evidence of the main protagonists regarding the circumstances in which the second loan documents were executed, the examination of the second loan documents themselves, along with other documents in evidence, is material in determining whether Mrs Nirta has made good her allegation that her signatures on the second loan documents have been forged.

39 While counsel for Titles Strata made some headway in demonstrating that from time to time Mrs Nirta signs her name in different ways, there is no mistaking the fact that

the signatures on the second loan documents look quite different to the numerous examples of Mrs Nirta's signature in the court book which Mrs Nirta positively identifies as having been signed by her, being mostly documents concerning the first loan, and one document concerning the third loan. Further, the signature on the second loan documents substantially resembles the signature on Mrs Nirta's driver's licence. There is another document in evidence which bears a signature which is also similar to the versions of Mrs Nirta's signature on the second loan documents and the driver's licence: one of the two versions of the letter of offer from AJ & Co dated 26 October 2011, which were produced by AJ & Co on subpoena.[8]

40 One anomaly concerning the second loan documents, is the positioning of Mrs Nirta's signature and initials on some of the second loan documents, given Mr Blackney's evidence that Mrs Nirta signed the second loan documents first. On the loan agreement itself, Mrs Nirta's signature is affixed adjacent to her name, as might be expected. But her initials at the bottom of every page are to the right of Mr Nirta's initials, as might be expected if someone signed and initialled the document after him. On the Financial Advice Acknowledgement Certificate, Mrs Nirta's signature appears to the right of Mr Nirta's signature, and on the Legal Advice Acknowledgement Certificate, it appears below Mr Nirta's signature. As for the mortgage for the pizza shop, Mrs Nirta's signature again is to the right of Mr Nirta's signature, and on the mortgage for the home, Mrs Nirta's signature appears below that of Mr Nirta, although adjacent to their printed names.

41 On the Deed of Settlement in relation to the first loan (which was not included in the package of documents emailed by Mr Blackney to Pasha Legal on 25 August 2011), no anomalies are apparent, in that each of the signatures are affixed in their assigned position.

42 The positioning of the signatures and the initials on the second loan documents is consistent with Mr Nirta's evidence that when he signed the second loan documents, Mrs Nirta's signature was not on those documents, and inconsistent with Mr Blackney's evidence that Mrs Nirta signed the loan documents before Mr Nirta.

43 An additional anomaly concerning the second loan documents is the difference between the mortgage for the pizza shop emailed by Keith Blackney to Pasha Legal on the evening of 25 August 2011, and on his evidence delivered to their offices the following day, and the registered mortgage.[9] There are a number of significant differences between these two documents. The lodgement details of the document at CB 318 (being the document emailed and hand delivered by Mr Blackney to Pasha Legal) include a reference to 'pashalegal lawyers & consultants' of '1/605 Doncaster rd, Doncaster, VIC 3108.' The lodgement details in CB 117 (being the registered mortgage) are 'Pasha Legal Lawyers & Consultants' of 'Level 1, 605 Doncaster Road, Doncaster VIC 3108.' The document at CB 117 is endorsed with an address for Titles Strata and the date 298/2011 (both handwritten). On the document at CB 318, the reference to the number of the Memorandum of Common Provisions is handwritten, while at CB 117, the reference is typed. The signatures of each of Mr Nirta and Mrs Nirta are visibly different on the two documents, and are in different positions.

44 The last 'anomaly' which arises out of the documents tendered into evidence is the apparent difference between two versions of letters of offer from AJ & Co to Mr and Mrs Nirta, commonly referred to as the third loan.[10] The letters are both dated 26 October 2011, and the typewritten parts are in identical terms. However, the letters of offer are otherwise different in three material respects. First, Mrs Nirta's signature on the document at CB 407 is similar to the signature on the second loan documents and her driver's licence. Mrs Nirta denies that this is her signature, while accepting that the signature on the document at CB 320A is hers. There are also differences on the page headed 'Acceptance of Offer'. The document at CB 407 is dated '8 November 2011' compared with '10 December 2011' in the document at CB 320A. Further, the handwritten notation under the heading 'purpose of loan' is 'Investment purposes & Investment' on the document at CB 407, compared with 'Re-financing' on the document at CB 320A. To my untrained eye, the handwriting on CB 407 appears to be that of Mr Blackney, which is consistent with his evidence that he was assisting Mr Nirta to obtain refinancing for the second loan. I am less certain about the handwriting on CB 320A. Accordingly, if one accepts Mrs Nirta's evidence, her signatures on the document at CB 407, dated 8 November 2011, were forged, while her

signatures on the document at CB 320A, dated 10 December 2011, were genuine. Mr Nirta also seemed genuinely surprised to learn of the existence of two versions of this document.

45 During the course of the proceeding, Titles Strata commissioned a report by Mr Trevor Joyce of HD Forensic Experts Pty Ltd dated 14 March 2014.[11] Mr Joyce was not called to give evidence, although based upon remarks by counsel for Titles Strata the decision not to call Mr Joyce was made during the course of the trial. While I do not rely upon the contents of the report for forming a view as to whether Mrs Nirta's signature on the second loan was forged, I am entitled to draw an inference that Mr Joyce's evidence would not have assisted Titles Strata's case on the question of whether Mrs Nirta's signature on the second loan documents were forged.[12]

46 Mrs Nirta's submissions on the question of whether her signatures on the second loan documents were forgeries largely repeated her evidence. As a relatively unsophisticated self-represented litigant, little more could have been expected from her. She did not put forward an alternative theory as to who might have signed the second loan documents in her name: she simply maintained her assertion that she did not sign the second loan documents, and that she would not have signed those documents, because it involved granting a second mortgage over the home. She stated that she was not relying upon her son's disability as a means of trying to elicit sympathy from the Court, but rather as an explanation as to why she would have not signed the second loan documents.

47 Counsel for Titles Strata submitted that Mrs Nirta's family circumstances, and in particular, her son's disability, meant that Mrs Nirta did indeed have a powerful motivation to do 'whatever it takes' to save her home. At the time the Nirtas entered into the second loan, they were in a dire financial position, having entered into the first loan, the funds raised by the first loan having somehow disappeared, and a proceeding had been issued against them by STLS. The second loan was their only lifeline. In any event, Mrs Nirta's evidence is that she trusted her husband in relation to financial matters, and Mr Nirta's evidence was that he expected that Mrs Nirta would obey him unquestioningly in relation to such matters. Mr Nirta is a dictatorial man, and

Mrs Nirta is a dutiful wife. Counsel submitted that Mrs Nirta's giving of false evidence in this proceeding is consistent both with her desire to do 'anything it takes' to save the home, and her obedience to her husband.

48 Counsel for Titles Strata submitted further that Mrs Nirta should not be believed, because her evidence directly contradicted that of Mr Blackney, who counsel described as 'an honest and reliable witness who gave his evidence clearly and cogently.' Further, Mrs Nirta's evidence that she was not aware of the proceeding brought by STLS in relation to the first loan, and was not aware of the existence of this proceeding until around April 2012 is inconsistent with the sworn evidence of two process servers.

49 Counsel for Titles Strata also submitted that Mrs Nirta's reference to the 'second loan' in her cross-examination of Mr Dean amounted to an acknowledgement by her that she knew of the second loan at the time it was made. He characterised Mr Nirta's attempt to explain away what could be said to be a telling admission by Mr Nirta during the oral examination before Mukhtar AsJ as disingenuous.

50 The submissions made on behalf of the Registrar in relation to the question of whether the signatures on the second loan documents were forged were very even handed, notwithstanding it was not in the interests of the Registrar that there be a finding of forgery. Indeed, the conduct of the Registrar, and counsel engaged to appear on his behalf in the trial of this proceeding has been exemplary, and of great assistance to the Court in relation to both the factual and legal issues in this proceeding, especially in circumstances where the person making a claim against the Registrar was self-represented. The Registrar has been the very model of a model litigant, and I gratefully acknowledge that contribution. I would also add that counsel for Titles Strata, while of course adopting a more adversarial approach in the interests of his client, also conducted himself more than fairly and properly in all of the circumstances.

51 Counsel for the Registrar made the following observations about the question of whether Mrs Nirta's signature on the loan documents had been forged:

(a) the uncertainty about Mrs Nirta's ability to recognise her genuine signature as a result of her initial response to the letter from AJ & Co which she later said was

not her signature;[13]

(b) Mrs Nirta's entitlement to rely upon the rule in *Jones v Dunkel* with respect to Titles Strata's failure to call evidence from its handwriting expert; and

(c) Titles Strata's failure to call evidence from its solicitors to explain why two instruments of mortgage were prepared for the pizza shop, and why the registered mortgage was clearly not the document which was emailed by Mr Blackney to Pasha Legal on the evening of 26 August 2011.

52 Mrs Nirta bears the onus of proof in relation to the question of whether her signatures upon the second loan documents were forged. Further, given that the allegation made is one of fraud, in evaluating the evidence, I must have regard to the statement of principle made by Dixon J in *Briginshaw v Briginshaw* ('*Briginshaw*'),[14] (now enshrined in s 140 of the *Evidence Act 2008* (Vic) that:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences of a particular flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

53 In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[15] the High Court observed:

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

54 Of course, in the current case, Mrs Nirta does not accuse any particular individual of having forged her signatures on the second loan documents, she simply says that the signatures on the second loan documents are not hers. However, if I were to find in favour of Mrs Nirta in that regard, I am required to expressly reject Mr Blackney's evidence and make a finding that he, at the very least, attested to witnessing a signature that he did not in fact witness, and gave false evidence under oath to that

effect. The gravity of such a finding, especially concerning a person engaged in the finance industry, is self-evident, and I am acutely conscious that I need to be confidently satisfied that such a finding ought to be made. Once again, Dixon J's remarks in *Briginshaw*[16] are apposite:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

55 Other judges in the Court in *Briginshaw* refer to the necessity for a tribunal to feel a 'comfortable satisfaction',[17] a 'certainty of intellectual conviction',[18] and to not be 'oppressed with a reasonable doubt'.[19]

56 In reaching a determination as to whether Mrs Nirta's assertion that she did not sign the second loan documents is found to be proved, the three relevant matters I have taken into account when assessing the veracity of the evidence of both her and Mr Blackney have been:

(a) their demeanour;

(b) any motive they might have to give false evidence; and

(c) the consistency of their evidence with contemporaneous documentation and established facts.

57 The significance of demeanour in assessing the credibility of witnesses is the subject of much judicial and academic debate, and there is much to be said for the view that it ought to be of limited significance.[20] For example, it is very common for nervousness to be mistaken for evasiveness. There is also a view that a trial judge's observations about a witness's demeanour assume less significance with the time that elapses between the giving of evidence and the publication of the judgment. That proposition might be said to be relevant in the current case. However, the passage of time assumes less significance in the current case, because the facts of this case are so unusual, the unsolved mysteries are so puzzling, and the personalities involved are sufficiently memorable for me to retain a strong recollection of the events in the court room.

58 That said, there was nothing in the demeanour of Mr Blackney which would have caused me to doubt his honesty. There were some minor inconsistencies in his evidence, such as locating the meeting with Mrs Nirta in the coffee shop at Footscray, and his changing his evidence about what transpired at the commencement of the alleged conversation between him and Mrs Nirta at the coffee shop. By themselves, these could easily be attributable to faulty recollection, and nothing more.

59 However, demeanour did play a role in my assessment of Mrs Nirta's evidence. If, as suggested by counsel for Titles Strata, her story is a fiction, she has maintained that fiction for over two years, from the time of her first meeting with her solicitors in April 2012, and throughout a number of days of trial, and giving evidence under oath. She was subject to capable cross−examination by counsel, questioning from the Bench, and was taken through hundreds of pages of documents, and consistently maintained her position throughout. She spoke candidly and in a forthright manner, despite her nervousness. She did not always maintain her composure, and was occasionally emotional and teary. On a couple of occasions, she seemed to be suffering the physical effects of anxiety, and needed a break, although not while giving evidence. But that is to be expected in the circumstances. Overall, my conclusion is that if she is a liar, she is an exceptionally talented liar. Of course, that is not beyond the realms of possibility, but such a characterisation is inconsistent with her nervous and anxious presentation.

60 In his submissions, the Registrar raised the evidence of Mrs Nirta in relation to the discrepancies in the signatures on the two versions of the offer as being an example of how Mrs Nirta was uncertain about which signatures are hers. This was somewhat consistent with the submissions of counsel for Titles Strata, that there were many different variations of Mrs Nirta's signature. The relevant extract from the transcript follows:

> Mrs Nirta, I'm only really directing your attention to what purports to be your signature at the bottom right-hand of each of those pp. 407 - - -?---Yep.
>
> - - - through to 411, I'm just asking you to look at that. My question is do you regard that as your signature, yes or no?---Is this the third – the third loan?
>
> It's to do with what we've been calling the third loan?---The third loan. Yes it is my signature.
>
> To be fair to you could you now keep your thumb open on 407 and turn back to

320A and the pages after 320A through to 324?---328?

Page 320A?---320 OK.

I think the court book is a bit hard to follow with the pagination at that point?---Yeah.

So if you can find one with 320 then you will find one with 320A straight afterwards, have you got 320A now?---That's not my writing. That's not my writing on this – that's not my signature on this paper.

You've gone back to 407 have you?---Yeah I have.

That's why I - - -?---That's not my writing.

That's why I did look - - -

HER HONOUR: Right.

MR CONNOR: Yes all right. You've now had a good look at 320A?---Yeah.

You've already acknowledged to her Honour when you gave evidence last time that that's your signature on pp.320A - - -?---Yes.

- - - 321, 322, 323, 324?---Yes, yes.

But now having a further look at 407 - - -?---Cos I was thinking if it's the third loan, I must have signed it but no, that's not my writing. I'm – I'm not sure it's not my writing, I can guarantee that's not my writing.

You can take it from me if you will be kind enough that the actual typewritten letter you follow is exactly the same, it's the same letter to start with - - - ?---Yeah but it's not my – it's not my signature.

Do you have any knowledge of why there should be two documents with the same - - - ?---I've absolutely got no idea where this came from or why there's two, I know I signed for the first - the third loan and the first loan and I know that these are that funny looking signature that's on the second line.

It looks very similar to what you're saying is a forged signature doesn't it?---Yes.

Yes thank you?---I'm telling the truth, honest.

61 I have clear recollection of this part of Mrs Nirta's evidence, which was interposed during the course of Mr Nirta's evidence at the request of counsel for the Registrar. I accept Mrs Nirta's explanation as to why she originally accepted the signature on the 8 November letter of offer as hers, she saw the letterhead of AJ & Co, and automatically assumed the signature was hers. But, even while Mr Connor was asking her to turn to another page of the Court Book, something clearly struck her as being not quite right, and she looked again at the first page Mr Connor took her to, and recognised the signature as being the same as the version of her signature on the second loan documents. She, like just about everyone else in the court room, was genuinely

puzzled by the discrepancy between the two letters of offer, and I could detect no dissembling on her behalf.

62 So, as far as Mrs Nirta's demeanour is concerned, she presents as an honest and genuine witness under difficult circumstances. I accept that she has a powerful motivation to lie, and has traditionally been subservient to her husband. However, I believe that she has sufficient integrity to refuse to perjure herself in the face of any undue influence on the part of her husband, and I do not believe that she is sufficiently cunning and devious to maintain such a charade over such a long period of time and in such circumstances.

63 As for any motivation which might be attributed to Mr Blackney, counsel for Titles Strata correctly submitted that it is highly unlikely that Mr Blackney would have forged Mrs Nirta's signature for the sake of a half share of a commission of $14,200. Indeed, it was never put to Mr Blackney that he forged Mrs Nirta's signature, and I would be quite surprised if it were ultimately found that he had done so.

64 However, it was put to him that he had not witnessed Mrs Nirta signing the second loan documents. And there is quite a plausible scenario which would have led him to give false evidence in the witness box about having done so. All of Mr Blackney's dealings were with Mr Nirta. Mr Nirta had provided him with a copy of Mrs Nirta's driver's licence. He gave evidence that he saw Mr Nirta twice in two days, on 24 August 2011 in Box Hill, and the following afternoon in Altona Meadows. There is no reference to his visit to Box Hill in his affidavit. He had collected the second loan documents from Pasha Legal in Doncaster before travelling to Box Hill to see Mr Nirta. His evidence as to why Mr Nirta did not sign the second loan documents at that time was quite vague and unconvincing.

65 It is not beyond the realms of possibility that the documents provided by Mr Nirta to Mr Blackney on the afternoon of 25 August 2011 had been signed by both Mr Nirta, and, ostensibly, Mrs Nirta. Even if he had not witnessed the signatures on the second loan documents, Mr Blackney would have had no cause to believe that Mrs Nirta had not signed her signature on the second loan documents. There was a plausible reason

which could have been advanced that the Nirtas did not to want people to come to their house, being the difficulties they experience with their son. Mrs Nirta's signature on the loan documents matched the signatures on her driver's licence, which had been provided by Mr Nirta to Mr Blackney the evening of 24 August 2011. There would be no reason for Mr Blackney to suspect any wrong doing until after Mrs Nirta had made an application to set aside the judgment, after which time, he would have had a motivation to conceal his own role in the transaction.

66 This is, of course, a hypothetical scenario, and, without more, could not be conclusive. But it would not be correct to say that Mrs Nirta had every motivation to give false evidence in court, and that Mr Blackney could not possibly have had any motivation to do so.

67 The final issue is whose story is most consistent with the established facts and the contemporaneous documents? Again, while the evidence does not all go one way, the anomalies in the second loan documents and the letters of offer from AJ & Co lend powerful weight to Mrs Nirta's contention that her signature on the second loan documents was forged. First, as previously indicated, I am entitled to draw a *Jones v Dunkel* inference from the failure of Titles Strata to call Mr Joyce, the handwriting expert, and do so. Secondly, the positioning of Mrs Nirta's initials on each page of the loan agreement, and the positioning of her signatures on the mortgage documents and the two certificates is inconsistent, as a matter of sheer common sense, of her having signed the documents before Mr Nirta having done so. Further, the fact that the impugned signature is remarkably similar to the signature on Mrs Nirta's driver's licence, which both Mr Nirta and Mr Blackney, and possibly unknown others had access to, rather than other signatures commonly used by Mrs Nirta, while not conclusive, lends weight to Mrs Nirta's contention. Further, Mrs Nirta's evidence that the signature on one of the letters of offer from AJ & Co is not her signature, again, while not conclusive, casts suspicion on those involved in the financing and refinancing of the second loan, supports Mrs Nirta's contention that she was being kept in the dark, as well as Mr Nirta's evidence that he was deliberately keeping his financial troubles from his wife, and adds generally to the murky aura surrounding this series of

transactions. After all, it is not beyond the realms of possibility that Mr Nirta wanted to refinance the second loan without the knowledge of Mrs Nirta, and that documents were prepared to that effect.

68 I also found Mrs Nirta's evidence regarding the circumstances in which she came to learn about the second loan, and the serious financial predicament she and her husband were in to be convincing. She had a good recollection of the conversation and the approximate date it occurred, being just after Easter 2012.[21] She was able to link the date of the conversation to a significant family milestone, and the timing was consistent with the fact that an application was made on her behalf to set aside a default judgment against her on 20 April 2012. Her evidence about this conversation is also consistent with her contention that she was largely kept in the dark about her husband's financial dealings, but that once judgment had been obtained and a warrant of possession had been issued in respect of the pizza shop, he could no longer hide their problems from her.

69 Of course, there are some matters, apart from Mr Blackney's evidence, which are difficult to reconcile with Mrs Nirta's evidence that she knew nothing about the second loan until April 2012. In particular, Mrs Nirta denied having been served with the court documents in the proceeding brought against them in respect of the first loan, and this proceeding. She gave evidence that she could recall someone coming to the door on a Saturday morning in December 2011, but that she did not see that person, and her husband told her not to worry. Neither of the process servers who filed affidavits of service were called to give evidence, but I would be disinclined to draw a *Jones v Dunkel* inference from that.

70 It does seem odd that Mrs Nirta either denies, or fails to remember court documents being served upon her on two occasions, months apart. However, there are plausible explanations for her failure to receive, or remember receiving these documents. One or both of the process servers could have accepted an explanation from Mr Nirta that she was not available. Alternatively, she could have been handed documents but handed them over to her husband, who could have reassured her that they were nothing for her to be concerned about. These are inconsistencies with Mrs Nirta's version of

events, but are not, of themselves, enough to displace my conclusion that Mrs Nirta has given truthful evidence.

71 I do not consider references by Mrs Nirta during the course of the trial to the second loan as leading to a conclusion that she knew about the second loan at the time it was made, as urged upon me by counsel for Titles Strata. Of course she now knows about the second loan. That is the central issue in this proceeding, and all of the participants in the trial referred to the 'first loan', the 'second loan', and the 'third loan'.

72 As for Mr Nirta's apparent admission before Mukhtar AsJ, not much turns on that. Not only is Mr Nirta not the most reliable witness, he also strikes me as careless and somewhat imprecise in the language he uses.

73 The final apparent inconsistency is the occasion when Mr Blackney gave evidence in the witness box identifying Mrs Nirta as the lady he met in the Salt 'n' Pepa coffee shop. However, this would not, of itself, be of great significance. Mrs Nirta was sitting next to Mr Nirta at the bar table, and there were only a small number of people in the body of a large court room. Mr Blackney had previously seen an enlarged colour copy of Mrs Nirta's driver's licence: indeed, that document was an exhibit tendered through him.

74 For completeness, I should add that, in determining that I believe that Mrs Nirta's evidence that it was not her signature on the second loan documents, I placed little reliance upon Mr Nirta's evidence. Much of Mr Nirta's evidence lacked credibility, such as his assertion that he was to receive no financial benefit from the funds advanced to others from the proceeds of the first loan, the suggestion that he thought the second loan could go through without his wife's signature, and his failure to recall when he found out that Mrs Nirta asserted that her signatures on the second loan documents were a forgery. Mr Nirta's role in this whole transaction is of course, the elephant in the room. While Mr Nirta denied forging his wife's signature on the second loan documents, or having any knowledge of how those signatures came to be there, the circumstances in which the second loan documents came to be in existence, and the chain of events surrounding their execution means that it is quite possible that the

forgery of Mrs Nirta's signature was done by him, or by another at his request or with his connivance.

75 If anyone stood to benefit from the transaction, it was Mr Nirta. The second loan was required to refinance the first loan, which had been dissipated, perhaps by unscrupulous business associates, on some kind of speculative business venture. He was desperate to solve the problems he had created without alarming his wife, and I can infer that he would go to some lengths to achieve that. However, on the state of the evidence I cannot make any conclusive findings about Mr Nirta's role in the transaction.

76 Having regard to the evidence of Mrs Nirta, my belief that she was an honest and truthful witness, and the conclusions to be drawn from the features of the second loan documents themselves (along with other documents in evidence), I am comfortably persuaded that Mrs Nirta's contention that the signatures on the second loan documents are not hers is made out. I do not need to make any findings as to who forged her signature on the second loan documents for the purposes of this proceeding, and could not on the state of the evidence. However, given that there is a registered mortgage in Titles Strata's favour over the pizza shop, that is not the end of the matter.

Implications of the forgery

77 Having found that Mrs Nirta has discharged her burden of proving that the signatures on the second loan documents were forged, a number of issues remain for resolution. The first relates to the enforceability of the unregistered mortgage over the home, and is capable of a simple resolution: lacking the protection of indefeasibility conferred by registration, the mortgage is void, and simply falls away.

78 However, the position is different with respect to the mortgage over the pizza shop. It has been registered, and as such is protected by the indefeasibility provisions of the TLA. It will not lose its indefeasibility by reason of fraud unless the fraud or knowledge of the fraud can be sheeted home to Titles Strata, or its agent. Resolution of this issue has been complicated by gaps in the evidence, and Mrs Nirta's lack of legal representation. A critical gap in the evidence concerns the real doubts I have about the

authenticity of the registered mortgage. Given the evidence given by Mr Blackney regarding the signed and witnessed second loan documents being witnessed, and emailed and delivered to Pasha Legal, and the discrepancies between the version of the mortgage identified by Mr Blackney and the registered mortgage, there is arguably no evidence that the registered mortgage was signed by either Mr Nirta or Mrs Nirta, regardless of whether or not I found that Mrs Nirta's signatures on the second loan documents were forgeries.

79 At this stage it is convenient to turn to the pleadings of the parties. At paragraph 5 of the Amended Statement of Claim, Titles Strata alleged:

> By a mortgage between the plaintiff as mortgagee and the defendants as mortgagor the plaintiff took security over [the pizza shop] to secure payment of the amount lent by the plaintiff to the defendants pursuant to the loan agreement (mortgage).
>
> Particulars
>
> A copy of the mortgage registered in the Office of Titles in dealing number AJ291865H is in the possession of the plaintiffs.

80 In her defence, Mrs Nirta denied the allegation in paragraph 5 above, and said further that her signature appearing on the mortgage is a forgery and was not endorsed on the mortgage with her permission, knowledge or consent.

81 Further, at paragraph 21(c) of the defence, Mrs Nirta alleges:

> By reason of the matters aforesaid, [being the conduct of Mr Blackney] the plaintiff knew or ought to have known that the mortgage of the Barkly Street property was a forgery and accordingly the plaintiff (sic) registration of the [pizza shop] mortgage was fraudulent and ought be set off the Register Book pursuant to section 43 of the *Transfer of Land Act*.

82 Therefore, at the trial of the proceeding, Titles Strata was on notice that it was required to make good the allegations in the Statement of Claim, and that Mrs Nirta alleged that Titles Strata, by reason of the alleged relationship of agency between Titles Strata and Mr Blackney, had actual or constructive knowledge of the fraud perpetrated on Mrs Nirta, and thus was not entitled to rely upon the protection of indefeasibility conferred by s 42 of the TLA. Arguably, given the material differences between the mortgage said to have been witnessed by Mr Blackney and the registered mortgage, I could not be satisfied that the document was signed by Mrs Nirta, or for that matter

Mr Nirta, even if her signatures on the second loan documents were not forged.

83 Titles Strata did not call any evidence to explain the discrepancies between the two documents, despite having ample opportunity to do so (the issue having first been raised during the cross-examination of Mr Blackney on the second day of trial). There was no evidence, or even speculation, that two versions of the mortgage over the pizza shop were provided to Mr and Mrs Nirta to sign, or of any need to return to them to have another version signed. While I hesitate to engage in too much speculation regarding what might have occurred, one possibility is that, after Mr Blackney delivered the signed second loan documents to Pasha Legal, another version of the mortgage over the pizza shop was created by a person unknown and for reasons unknown, and lodged for registration in November 2011. However, as these things do not occur by accident, it is possible that the new version could have been created by or at the behest of Pasha Legal, the agent of Titles Strata. However, such an allegation was not pleaded in Mrs Nirta's defence, and she made no submission about this matter at trial, the anomaly having been identified by counsel for the Registrar. However, given the seriousness of such a finding, I would be loath to make any positive finding about the creation of the registered mortgage. Its provenance remains a mystery which is impossible to solve given the state of the evidence at trial.

84 Therefore, it is necessary to consider the status and the conduct of Mr Blackney. Mrs Nirta alleges (with the support of the Registrar) that he was the agent of Titles Strata. The authorities have generally considered that a finance broker is generally the agent of the borrower, not the lender, although more recently courts have been more willing to reach the opposite conclusion,[22] depending on the facts of the case. In the current case, the evidence clearly points to Mr Blackney as having been retained by Mr Nirta to arrange the second loan. However, I agree with counsel for the Registrar that there is at least a strong argument that given that Pasha Legal (undoubtedly the agent of Titles Strata) delegated the task of executing the loan documents to Mr Blackney, Mr Blackney was in effect appointed as the sub-agent of Titles Strata for a particular purpose.

85 The Registrar relied upon the statement of principle of G.E. Dal Pont in 'The Law of

Agency' in support of its contention that Mr Blackney acted, at various times for both parties to a transaction. The learned author stated:[23]

> The agent may have a limited agency in respect of one of the parties, but a more extensive one in relation to the other, and these need not necessarily conflict, but may co–exist.

86 The Registrar also relied upon a decision of the New Zealand Supreme Court, *Dollars & Sense Finance Ltd v Rerekohu Nathan*,[24] as authority for the proposition that where a lender (or the lender's solicitors) delegated the task of execution of a mortgage and related documents to another party, and that party forged the purported borrowers' signatures, that other party was more than a mere conduit, and that the fraud was within the scope of the agency as it was sufficiently connected with an authorised act. In that case, the lender was denied indefeasibility with respect to a forged mortgage when the lender's solicitors left the task of arranging the execution of the loan documents to the purported borrower's son, and the son forged his parents' signatures on the loan documents.

87 However, the question of what amounts to conduct sufficient to amount to fraud for the purposes of s 42 of the TLA, whether the relationship of a lender and intermediaries as a general rule (and in a particular case) amounts to a relationship of agency, and whether a principal can be liable for the acts of a sub–agent, is of factual and legal complexity.[25] In the current case, even if it were to be found that Mr Blackney was an agent of Titles Strata for certain purposes, there are some critical gaps in the evidence regarding the state of mind and conduct of Mr Blackney for me to be able to make a finding that he had acted with sufficient moral turpitude to constitute fraud within the meaning of s 42 of the TLA. Certainly, in delivering the signed second loan documents to Pasha Legal, he was putting the mortgage on the path to registration, indeed, that was his purpose in delivering the documents. However, there is no evidence that he knew, or had reason to suspect, that Mrs Nirta's signature was forged. Given the manner in which the case was conducted, it would not have been feasible to elicit any evidence about Mr Blackney's state of mind.

88 The authorities concerning what conduct amounts to fraud within the meaning of s 42 of the TLA for the purpose of defeating the indefeasibility of a registered instrument

are not easy to reconcile. While the authorities agree that there must be some element of dishonesty or moral turpitude on the part of the registered proprietor or its employees and/or agents, application of that principle has led to different results in similar situations. In *Russo v Bendigo Bank Ltd*,[26] the Court of Appeal considered a case where a client employed by the mortgagee's solicitor signed the attestation clause to the mortgagor's signature even though she was not present when the document had been signed, despite having been instructed by her principal not to sign any document as a witness unless the signatory was signing in her presence. She did not know that the signature was a forgery. The solicitor who actually put the mortgage on the path to registration had no knowledge of the forgery or the false attestation, and as such, the mortgagee bank had no actual or constructive knowledge of the fraud. Similarly, in *Macquarie Bank Ltd v Sixty–Fourth Throne Pty Ltd*,[27] the bank's solicitor had failed to check the signatures of the parties attesting to the affixation of a company seal against a company search. However, the Court found the solicitor's failure to make relevant enquiries was not fraud, because that failure did not amount to the necessary 'designed or calculated ignorance' to amount to wilful blindness.[28] Further, in *Pyramid Building Society (in liq) v Scorpion Holdings Pty Ltd*,[29] a failure to make relevant inquiries which would have revealed a fraud did not amount to fraud because the circumstances were not such that the mortgagee's suspicions were aroused and thus feared learning the truth.

89 On the other hand, in *Beatty v Australia and New Zealand Banking Group Ltd*,[30] a false attestation by a bank officer that she had witnessed a signature was sufficient to support a finding that the Bank was guilty of fraud. Similarly, in *Australian Guarantee Corporation Ltd v De Jager*,[31] it was sufficient for a finding of fraud that the bank's employees knew that the mortgagor's signature had not been properly witnessed.

90 In the current case, at its highest and best, all that can be concluded is that the person who delivered the executed second loan documents to the solicitors for Titles Strata had not witnessed the signature of one of the mortgagors, in circumstances where he may have had no reason to believe that the signature was a forgery, and where in fact the signature was very similar to the signature on the identification document in his

possession. I doubt that these facts and circumstances, without more, would support a finding that any fraud ought to be imputed to Titles Strata.

91 However, the question of whether the registration of the mortgage over the pizza shop has been invalidated by reason of Titles Strata's actual or constructive knowledge of the fraudulent character of the mortgage document may be largely academic if the submissions made on behalf of the Registrar, that the mortgage over the pizza shop 'secures nothing' are correct.

92 In the Registrar's Amended Defence to Counterclaim filed on 2 May 2014, the Registrar defended the claim for indemnity made by Mrs Nirta on the basis that, among other things, Mrs Nirta had failed to plead certain defences to Titles Strata's claim against her. In the particulars to paragraph 14 of the Amended Defence to Counterclaim, the Registrar contends as follows:

> First, the plaintiff by counterclaim has not raised in her Defence that, as a matter of construction, the registered mortgage in dealing number AJ291865H concerning the property at 305 Barkly Street, Footscray (Certificate of Title volume 10164 folio 598) on which the plaintiff relies 'secures nothing', as the alleged underlying loan agreement is not incorporated into the instrument of mortgage.
>
> The principle of indefeasibility does not enable the mortgagee to enforce the alleged debt unless the debt is contained in or is incorporated in the mortgage document.
>
> Although the mortgage provides that the provisions contained in Memorandum of Common Provisions Number 1-51 retained by the Registrar of Titles are incorporated in this mortgage, no such Memorandum of Common Provisions has ever been lodged with the Registrar of Titles under s 91A of the *Transfer of Land Act 1958*.
>
> There is no basis for incorporating the Business Loan Agreement Short Term Loan into the mortgage.
>
> The lack of the 'incorporation' into the mortgage of the obligation to repay the alleged loan is just as effective as a defence even if the mortgagor's signature was not forged. Such a mortgage, albeit it is valid instrument, still 'secures nothing', and so the mortgagee cannot exercise the statutory power of sale, but, in reliance on the debt and the concept of an equitable mortgage, must seek a judicial sale. In these circumstances, a mortgagor has sustained no loss by reason of the registration of that mortgage.

93 The Registrar relies upon a number of New South Wales authorities, including decisions of the New South Wales Court of Appeal, to support its contentions that where mortgage and loan documentation are forged, the principle of indefeasibility does not enable the mortgagee to enforce the alleged debt unless the covenant to pay

the debt is contained in or incorporated in the registered mortgage.

94 It is generally accepted that the determination of whether any, and if so what amount is secured by a covenant to pay in a mortgage is a question of contractual interpretation.[32] However, there has been some divergence in the approach taken by courts to the construction of the covenant to pay when faced with a forged mortgage and loan agreement, particularly where the mortgage is what is commonly known as an 'all monies' mortgage. The courts of New South Wales and New Zealand have generally adopted the approach that, in circumstances where the underlying instrument is forged and there is no separate express covenant to pay contained in the registered mortgage itself, but rather reference to an 'agreement' in either the mortgage or the memorandum of common provisions the covenant to pay had nothing to operate on. Therefore, the registered mortgage 'secured nothing'.

95 In *Perpetual Trustees Victoria Ltd v English*,[33] the New South Wales Court of Appeal set out the principles applicable to determining the nature of the interest protected by the principle of indefeasibility:

> 1. Registration of a mortgage does not transfer the fee simple estate, but the mortgage takes effect as a security over the land: *RP Act*, s 57(1). Upon registration, the land becomes liable as security in manner and subject to the covenants set forth in the mortgage: …
>
> 2. Registration of a forged mortgage confers an indefeasible title on the mortgagee, provided that the mortgagee has not been party or privy to the fraud and no other exception to indefeasibility applies: …
>
> 3. Registration of the mortgage does not necessarily ensure the validity of every term of the mortgage, irrespective of the relationship between the term and the estate or interest created by the mortgage itself. … Hence a personal right created by a covenant in a mortgage, such as a guarantee, is not rendered indefeasible by registration of the mortgage: …
>
> 4. In New South Wales, the view has been taken that a personal covenant in a registered but forged mortgage to pay the amount of the mortgage debt, where the debt exceeds the value of the property, is not protected by the indefeasibility provisions of the *RP Act*: …
>
> 5. The registration of a forged mortgage validates those terms of the mortgage which delimit or qualify the estate or interest of the mortgagee or are otherwise necessary to assure that estate or interest to the registered proprietor. …
>
> 6. It is necessary to construe the terms of a mortgage to determine the scope of the estate or interest in respect of which indefeasibility is conferred by registration of the mortgage: … Thus whether registration of a forged mortgage allows the mortgagee to enforce its security interest in the land in relation to a debt or obligation arising under an agreement separate from the mortgage is a

> question of construction of the mortgage: …
>
> 7. Generally speaking, if the mortgagee specifies a sum of money (plus interest) as the amount secured by the mortgage, the charge created by the mortgage will secure the amount so specified even if the document creating the indebtedness is void under general law principles: …
>
> 8. However, if as a matter of construction, the mortgage does not take effect as a security over the land in relation to a claimed debt or obligation, registration of the mortgage will not entitle the mortgagee to exercise remedies, such as the power of sale, to enforce any such claimed debt or obligation: … The question of construction may be particularly difficult where the registered mortgage refers to antecedent documentation which is not incorporated in the Torrens register and which may be invalid on general law principles.

96 While of course the task of construing the relevant mortgage may be different in different cases, depending upon the drafting technique utilised, a number of authorities have found that where a mortgage and loan agreement has been forged, and the mortgage document refers to 'you' or 'your', or 'your agreement', and the person who actually signed the loan agreement (being the forger) was not the mortgagor, the funds advanced under the loan agreement is not secured by the registered mortgage.[34]

97 However, in *Solak v Bank of Western Australia Ltd*,[35] Pagone J took a different approach to the New South Wales and New Zealand courts and reached a contrary conclusion. In *Solak*, Pagone J referred to the decision of this Court in *Vassos v State Bank of South Australia*,[36] as applied by the Court of Appeal in *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*,[37] and held that, based upon the proper meaning of the term 'you', as used in the relevant mortgage, memorandum of common provisions, and loan agreement, the registered mortgage incorporated the covenant to pay in the loan agreement. He stated:

> In the case before me the mortgage document refers to, incorporates, and intends to incorporate, the obligations in the collateral document upon the stated assumption expressed in all three agreements that the person assuming the obligation and mortgaging the property is the same.

98 Titles Strata relied upon *Solak* in the current case, submitting that as a question of construction of both mortgages, the second loan agreement had been incorporated into the mortgage by express or necessary implication. Counsel for Titles Strata submitted that

> …it would make a commercial mockery of the general principle of indefeasibility if it were held that a registered mortgage secures nothing.

99 In *Perpetual Trustees Victoria Ltd v Xiao and anor*,[38] which was determined after the trial of this proceeding but prior to the delivery of judgment, Hargrave J expressly disavowed the approach taken by Pagone J in *Solak*, stating that he would have reached a different result. He also endorsed the approach of the New South Wales and New Zealand courts, in circumstances where a mortgage, including a memorandum of common provisions referred to in a mortgage, refers to a 'secured agreement' and 'secured monies', finding that the terms of an underlying loan agreement were not incorporated into the mortgage if it was a forged, and thus void, instrument. Hargrave J rejected the proposition advanced by the mortgagee that the reasoning in *Solak* flowed directly from the emphasis upon the importance of the principles of indefeasibility underlying the TLA and the Torrens system in *Vassos* and *Pyramid Building Society*, and as such ought to be followed. His Honour noted, that the extent of the indebtedness secured by a forged mortgage did not appear to be in issue in *Vassos*, and in *Pyramid Building Society*, the covenant to pay was contained in the mortgage instrument, and thus no issue of incorporation arose.[39]

100 Further, he rejected[40] a submission that there was a material distinction between the relevant provisions of the *Real Property Act 1990* (NSW) and the TLA.

101 The tension between the authorities has not yet directly been resolved by either the High Court or the Court of Appeal of this State. If I was required to express a preference, given that, strictly speaking, the difference between the reasoning in *Solak* and the other authorities referred to above is one of approach and analysis rather than principle, I prefer the approach of Hargrave J, which in turn is consistent with the reasoning of intermediate appellate authority, and the Supreme Court of New Zealand in *Westpac v Clark*,[41] which rejected the reasoning in *Solak*, as 'not persuasive'. However, in the current case, in the absence of any document bearing the description 'Memorandum of Common Provisions 1-51 retained by the Registrar of Titles', it may well be that even adopting the more liberal approach to construction taken by Pagone J in *Solak* would not have led to finding that the terms of the second loan agreement were incorporated into the mortgage over the pizza shop. Indeed, no memorandum of common provisions, which might have contained an express covenant to pay, which

could be relied upon by Titles Strata to incorporate a covenant to pay into the registered mortgage, is even in evidence.

102 The registered mortgage contains the following provisions:

> The mortgagor mortgages to the mortgagee the estate and interest specified in the land subject to the encumbrances affecting the land including any created by dealings lodged for registration before the lodging of this mortgage. This mortgage is given in consideration of and to better secure loans, advances or financial accommodation provided by the mortgagee to the mortgagor or at the request of the mortgagor to the debtor (if specified) or to such other person as the mortgagor shall direct.
>
> …
>
> The mortgagor covenants with the mortgagee as follows:-
>
> 1. To pay the moneys secured to the mortgagee as and when demanded in writing.
>
> 2. Further covenants set out on the approved Annexure Page A1 (if attached) form part of this mortgage.

103 The authorities referred to by counsel for the Registrar and Titles Strata, including *Solak*, and *MDN Mortgages Pty Ltd v Caradonna*,[42] where it was found that a forged mortgage instrument, as a matter of construction, incorporated, by reference, an enforceable loan agreement, considered mortgages which incorporated detailed terms and covenants in registered memoranda of common provisions on many occasions referring to 'secured agreements' and 'secured money'.

104 In the current case, there is no 'approved Annexure Page A1', nor memorandum of common provisions which could contain terms which could be construed to incorporate the second loan agreement. The term 'moneys secured to the mortgagee' referred to in the covenant is so vague and circular as to be meaningless. Even the date on the registered mortgage is different from the date of the second loan agreement, even if one accepts the evidence of Mr Blackney that the date of 25 September 2011 was a mistake, and the correct date is 25 August 2011. The debtor is defined by the registered mortgage as being Mr and Mrs Nirta. But Mrs Nirta is not a debtor, by reason of the forgery.

105 I reject the contention of counsel for Titles Strata that applying the ordinary objective test of construction, and having regard to the meaning of the mortgage instrument,

taken together with the collateral document, being the loan agreement, and the surrounding circumstances, that the clear intention of the parties was that the funds would be advanced upon security. I accept the submissions of counsel for the Registrar that when determining whether an all monies mortgage can be construed to incorporate a covenant to pay, one is confined to the mortgage instrument itself, along with any document incorporated into the mortgage instrument by express reference. There is simply nothing in the language of the registered mortgage which, in the absence of a memorandum of common provisions, incorporates the terms of the second loan agreement. Indeed, the registered mortgage secures nothing.

Is Titles Strata entitled to be subrogated to the rights of the lender under the first loan?

106 No doubt in anticipation of a possible finding by this Court that the mortgage over the pizza shop might be found to be ineffective to secure the funds advanced by it to Mr and Mrs Nirta, Titles Strata amended its statement of claim to claim an entitlement to be subrogated to the rights and interests of STSL, on the basis that the funds advanced by Titles Strata were used to pay out the first loan. There is no dispute about the validity or efficacy of the mortgage over the pizza shop held by STSL, or that this mortgage was discharged following the payment to it of the funds advanced by Titles Strata.

107 The principle of subrogation provides an equitable remedy to a party, including, among others, a party who advances funds to discharge a mortgage, to assume, at least to some extent, the rights and interests of a mortgagee whose security has been discharged. It has been described as

> a legal fiction, by force of which an obligation extinguished by a payment made to a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another.[43]

108 There can be no doubt as to the applicability of the doctrine of subrogation to the current case. The evidence establishes that Mr Blackney, in his capacity as the agent of Mr Nirta, made known to Mr Koprivjnak the purpose for which the funds were to be advanced. The cheques at settlement were made out to STSL, and STSL's mortgage was discharged at settlement. No funds passed through the hands or accounts of Mr or

Mrs Nirta. Indeed, both Mr and Mrs Nirta conceded on a number of occasions during the course of the trial that Titles Strata is entitled to recover the funds it advanced to them. Accordingly, insofar as Titles Strata is entitled to be subrogated to the rights of STSL, and in particular, STSL's security interest over the pizza shop, Titles Strata is entitled to an order that there be a sale of the pizza shop to recover the amount paid by it to STSL in the absence of payment of that amount by the Nirtas.

109 The critical question is, what is the amount of the debt owing to Titles Strata by the Nirtas? Titles Strata claims to be entitled to be subrogated to all of the rights and entitlements of STLS, including its contractual right to payment of interest at a rate of 72 per cent per annum, calculated daily on the outstanding balance of the loan, and charged to the account on a monthly basis. While these terms yield a lower outstanding debt than that claimed by Titles Strata in its primary claim, the outstanding debt would still dwarf the funds originally advanced, and amount to many millions of dollars.

110 There is no clear guidance from the authorities as to whether a third party payer of an extinguished debt is entitled to the benefit of all of the contractual rights of the original lender. However, while there is some dispute between the English and Australian courts regarding the doctrinal foundation for the principle of subrogation,[44] there is no doubt that it is at heart an equitable remedy, founded upon considerations of conscience. Titles Strata did not refer me to any authorities in support of its contention that by reason of the principle of subrogation it was entitled to assume not only the proprietary rights of STSL, but also the contractual rights of STSL, including its rights to charge an unusually high rate of interest.[45] Understandably, Mrs Nirta made no submissions on the point, save to say that while she acknowledged that it was fair that Titles Strata be repaid its money, it was not fair that she be liable for all of the interest and other costs claimed by Titles Strata. The Registrar was naturally not concerned with this issue, and made no submissions on the point.

111 Accordingly, I conducted my own research into the matter, and found limited judicial discussion on the point and a divergence of practice. In 'Subrogation: Law and Practice',[46] the authors comment:

> …the law governing interest awards in subrogation cases is inconsistent, and

> rests on uncertain foundations.

112 Essentially, the courts have adopted two different approaches: the first, more common in English cases, being to award pre-judgment interest based upon the interest charged in accordance with the loan agreement giving rise to the discharged principal debt, and the second, more common in Australian cases, but also not unusual in England, where the Court has exercised its own power under the relevant legislation to award pre-judgment interest upon the subrogated amount, sometimes at the statutory maximum, or some other rate, selected at the Court's discretion, and usually by no reference to the basis upon which that award was made.

113 One authority which has squarely considered the point is *Western Trust & Savings Ltd v Rock*,[47] where an innocent victim of a fraud found to be liable upon the principles of subrogation to pay out a lender, contended that there ought to have been no award of interest, or alternatively, simple interest only at the rate charged by the first lender, being 11.25 per cent per annum, not compound interest. The Court of Appeal disagreed, with Balcombe LJ holding that:

> The rights of the [first lender], to which the [second lender] is subrogated, included a right to interest and to compound interest at the rate to which I have mentioned.

Gibson LJ agreed, stating:

> If the charge is preserved for the bank as if it were the equitable assignee of the charge, why should not the bank take the benefit of the rights under the charge, including the right to interest? Prima facie, the bank succeeds to the whole security, and that means the rights relating to capital and interest. Even without authority, I would have thought it obvious that the assignee would be entitled to that interest, unless of course there were special circumstances which made it inequitable for the assignee to take the same rate of interest as to that to which the original owner of the charge was entitled.

114 This approach was endorsed and adopted by the Court of Appeal in *Castle Phillips Finance v Piddington*[48] and *Filby v Mortgage Express (No 2) Ltd.*[49]

115 However, the only Australian authority which I could locate which has directly considered the point is *McColl's Wholesale Pty Ltd v State Bank of New South Wales and ors* [50] where Powell J stated:

> However, although by virtue of the doctrine of subrogation, a surety may become entitled to the benefit of any security given by the principal debtor, he does not, so it seems to me, necessarily obtain the benefit of all the covenants on

> the part of the principal creditor which may be contained in the instrument conferring the security. That this should be so is due to the fact that the ultimate purpose of subrogation is not to put the surety in the identical position in which the creditor formerly stood, but to enable the surety to enforce his right to an indemnity by resort to the securities formerly held by the creditor … If any demonstration of this be needed, it is readily provided by the fact that, although, as I have earlier recorded, the court will usually allow interest in respect of moneys paid by a surety pursuant to his guarantee, it is by no means automatic that interest will be allowed at the rate provided for in the contract between the creditor and the principal debtor.

116 While Powell J was dealing with a right to subrogation claimed by a guarantor, rather than a third party payer, one would not expect a court to reach a different view based upon the capacity in which the claimant established a right to subrogation. The above passage was referred to with apparent approval by a single judge of the Supreme Court of Queensland in *Re Octaviar Ltd (No 8)*,[51] but in support of a different proposition.

117 A survey of the Australian authorities where an award has been made on the basis of the principle of subrogation reveals limited discussion of the basis upon which interest is to be awarded, and practices vary. In *Commonwealth Bank of Australia v Horvath*,[52] O'Bryan J held that a plaintiff who succeeded on a claim based upon subrogation was entitled to pre-judgment interest at the statutory penalty interest rate. In *Hill v ANZ Banking Group Ltd and anor*,[53] Riley J awarded a rate of five per cent, without explaining how this rate was arrived at, and in *Rogers v RESI Statewide Ltd*,[54] Von Doussa J awarded interest at the lower of the rates charged by it and the original lender.

118 In both *McColl Wholesale Pty Ltd* and *AE Goodwin Ltd v AG Heating Ltd*,[55] there was some debate about whether the court ought to apply a 'commercial' rate, or a 'trustee' rate of interest to the principal debt. In *Gertsch v Atsas*,[56] interest was awarded at the Supreme Court scale, while in *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd*,[57] the Court exercised its discretion not to award interest at all, on the basis that the creditor to which the claimant was subrogated charged a one-off amount by way of interest, and there were no circumstances which otherwise warranted the award of interest. In *Morgan Equipment Co v Rodgers (No 2)*,[58] Giles J considered the decisions of Powell J in *McColl Wholesale* and *AE Goodwin Ltd v AG Heating Ltd*,[59] and determined that in the circumstances of the proceeding before him, a commercial rate was more appropriate than a trustee rate. Each of these cases were

heard in the Equity Division of the New South Wales Supreme Court, which apparently has an established practice of awarding interest on either a lower 'trustee' rate, or a higher 'commercial' rate.

119 Accordingly, there is no binding authority which would require me to accede to Titles Strata's claim that it is entitled to stand in the shoes of STSL in every respect, and I believe there are sound reasons of principle as to why I should not do so. First, subrogation is an equitable remedy, not a contractual remedy. As stated by the New South Wales Court of Appeal in *Registrar General v Gill*:[60]

> The equitable principles relating to subrogation aim to adjust the interests of three parties, such as a creditor, a debtor and an insurer or surety, in such a way as to avoid the unconscionable result of double recovery by the creditor or inequitable discharge of the liability of the debtor.

120 It is trite law that the Court should strive to do the minimum it needs to do to achieve equity between the parties. In some cases, that may mean giving relief to the effect that a subsequent payer ought stand in the shoes of the creditor whose liability has been discharged. However, in my view, the question of whether the subsequent payer ought to be allowed interest, and if so, at what rate and on what basis, should, if possible, be determined according to the principles of equitable compensation. In *Talacko v Talacko*, [61] Kyrou J stated as follows:

> The Court, in its equitable jurisdiction, has the power to award compensation for breach of fiduciary duty.
>
> As an equitable remedy, the award of compensation is discretionary and it is subject to the usual equitable defences, such as laches or acquiescence, that the Court may consider before granting relief.
>
> The objective of the remedy is to place the innocent party, as much as possible, in the position in which he or she would have been had there been no breach of duty. Equitable compensation is conceptually different from common law damages in that it involves restitution for the loss and damage suffered by the innocent party as a result of a breach of duty.

121 In the current case, applying these principles requires an order which compensated Titles Strata for the loss of use of the funds advanced to pay out STSL, including the funds advanced for the purpose of paying the various fees and commissions associated with the second loan.

122 There was very limited evidence before the Court as to how Titles Strata calculated the

default interest rate of eight per cent per month as contained in the second loan agreement ('default rate'). Mr Koprivnjak gave evidence that he set the default rate at that amount because he wanted to receive a rate higher than that charged by STSL, and because he wanted to encourage prompt repayment, having had difficulties in recovering funds lent to others by him in the past. No evidence was led of any losses Titles Strata has suffered by reason of being held out of its money, or alternative ways in which the funds advanced may have been able to be deployed if repaid on time. Accordingly, the question of what interest ought to be payable by the Nirtas is a matter of the Court's discretion, having regard to the fact the Court is exercising its equitable jurisdiction in allowing Titles Strata to assume the proprietary rights of STSL with respect to the pizza shop.

123 It can hardly be consistent with equitable principle, in the current case, to allow Titles Strata to assume the benefit of a mere contractual entitlement of a stranger which is, on its face, 'extravagant, exorbitant or unconscionable'.[62] While the question of whether the first loan was enforceable against Mrs Nirta or whether the interest chargeable under the first loan was a penalty was not the subject of pleadings or evidence, a rate of six per cent per month, is so far outside the range of usual commercial lending rates that it would no doubt be considered an unenforceable penalty in the absence of special circumstances. It could hardly be a proper exercise of the Court's equitable jurisdiction to give relief of such a nature.

124 The authorities which have held that the party entitled to be subrogated to an earlier lender are entitled to interest at the rate charged by the earlier lender have done so on the basis that the debtor ought not be relieved of the obligation to pay interest on funds advanced to them for their benefit. There is a sound basis for that reasoning, which will shape the orders I ultimately make. However, to suggest that the Nirtas would remain liable to pay STSL interest under the first loan contract for a matter of years is inherently unlikely. STSL were undertaking recovery action at the time the second loan was made, which presumably would have been resolved in a matter of months. Further, I note that the interest rules which were under consideration in *Western Trust & Savings Ltd v Rock* and like cases were rates which appeared to be in the range of

normal commercial rates (eg 11.25% per annum), not rates in the range charged under the first loan or the second loan.

125 Accordingly, in the absence of any evidence from Titles Strata regarding an appropriate amount of interest it ought to receive on compensatory grounds, I propose to exercise my powers under s 58 of the *Supreme Court Act 1986* (Vic), and award interest at the statutory rate, being the rate payable under s 2 of the *Penalty Interest Act 1983* (Vic) ('statutory rate') from the date that Titles Strata made a demand for payment, being 24 November 2011, the date of the default notice served upon the Nirtas to Titles Strata.

126 Section 58(1) of the *Supreme Court Act* provides as follows:

> If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* or, in respect of any bill of exchange or promissory note, at 2% per annum more than that rate from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date and time certain) or, if payable otherwise, then from the time when demand of payment was made.

127 The authorities suggest that interest on a judgment sum should be payable at the statutory rate (which varies from time to time and is currently 10.5 per cent per annum). In *Hodgson v Amcor Ltd (No 9)*,[63] Vickery J stated:

> …the settled practice in Victoria is that, unless good cause to the contrary is shown, the statutory maximum rate is used.

128 In the current case, I cannot see how the Nirtas could show that there is 'good cause to the contrary'. Mrs Nirta concedes that Titles Strata is entitled to be repaid its money. Despite that, there appears to have been no attempt by the Nirtas to take steps to repay at least part of the money claimed by Titles Strata, such as by selling or giving up possession of the pizza shop.

129 As for the time from which interest ought to run, the second loan agreement provided for the loan to be repaid on 25 October 2011. However, the second loan agreement is void, at least as against Mrs Nirta. Accordingly, the proper time from which interest ought to run is the date that Titles Strata made a demand for payment, being 24 November 2011.

130 I have considered the question of whether interest ought to be calculated on a simple basis, which is the usual practice, or a compounding basis. In *Talacko v Talacko*,[64] Kyrou J (as he then was) considered the principles governing the Court's inherent jurisdiction in equity to award interest, including, in appropriate cases, making an award of interest calculated on a compounding basis. He stated:[65]

> The Court has inherent equitable jurisdiction to award interest when the interests of justice so demand, including in circumstances where money has been withheld or misappropriated by a fiduciary. The right to interest exists independently of statute.

and, further:[66]

> Equity does not award interest in order to punish the defaulting fiduciary. Rather, interest is awarded in order to restore to the innocent party the benefit derived by the defaulting fiduciary from his or her use of the property.

131 There is limited evidence before me of what benefits the Nirtas have received by reason of the failure to repay the funds advanced by Titles Strata. The evidence of Mr Nirta suggests that the Nirtas have been receiving rent from the pizza shop, which is applied to the repayments of their home loan with the Commonwealth Bank. Kyrou J's analysis of the authorities shows that, in exercising the Court's equitable jurisdiction, an award of compound interest would ordinarily only be made where the fiduciary had been guilty of fraud or serious misconduct.[67] In the current case, Mrs Nirta is a victim of fraud, not a perpetrator. Accordingly, an award of interest at the statutory rate on a simple basis is appropriate, whether I was exercising the power under s 58(1) of the *Supreme Court Act*, or the power to award interest under the Court's equitable jurisdiction.

132 Given my findings above, it is, strictly speaking, not necessary for me to determine the remaining issues in the proceeding, being Mrs Nirta's defence that the interest charged under the second loan agreement was an unenforceable penalty, and Mrs Nirta's counterclaim against the Registrar of Titles for compensation pursuant to s 110 of the TLA. However, in the event that I am found to be wrong in finding that the second loan documents were forged, and/or that the registered mortgage 'secured nothing', I will do so.

Is the interest chargeable under the second loan agreement a penalty?

133 Clause 5 of the second loan agreement deals with the calculation and payment of interest, as follows:

5.1 Calculation of Interest

Interest is payable by the Borrower on the Secured Money until it is repaid in full and finally discharged. The interest rate applied each day is equal to the annual percentage rate applicable to the loan at the time divided by 365 and interest is compounded daily and capitalized monthly. If the loan goes into default, interest on the full outstanding balance (including any unpaid interest and charges) shall be charged at the Higher Interest Rate immediately, which shall be compounded daily and capitalized monthly.

5.2 Interest Rate

The interest that is payable by the Borrower on the Secured Money is calculated at the following rates:

(a) If any sum, or any part of any sum, payable by the Borrower under this Agreement (including the interest payment) is not paid to or as directed by the Lender on or before its due date for payment, or if another Event of Default subsists – the Higher Interest Rate; or

(b) Subject to clause 5.3(c), in any other case – the Lower Interest Rate.

(c) Despite anything contained in this clause or acceptance by the Lender of interest payable at the Lower Interest Rate, if the Borrower does not comply with clause 7.1 of this Agreement, or the Secured Money is to be repaid pursuant to clause 11.1 of this Agreement, interest at the Higher Interest Rate will apply from the date of default in accordance with clause 5.1 until the date that the Secured Money is repaid in full.

5.3 Capitalisation of interest by Lender

(a) The Lender may at any time during the currency of this Loan, without prejudice to its other rights or remedies, add to the principal amount of the Secured Money any part of any interest which is not paid on date for payment.

(b) Interest (including interest payable after judgment) will be payable in accordance with this document upon interest that is capitalised and compounded pursuant to clause 5.1 and 5.4(a) from the date that the interest was due for payment.

5.4 Interest Payable on Judgement

If the Borrower's liability to pay or repay the Secured Money becomes merged in any judgment, order, deed or other thing, the Borrower must pay interest on the amount owing from time to time under that judgment, order, deed or other thing at the higher of the rates:

(a) payable under this Agreement; or

(b) fixed by or payable under that judgment, order, deed or other thing.

134 Items 7 and 8 of the Schedule A to the second loan agreement provides as follows:

ITEM 7:	**LOWER INTEREST RATE:**	_3_% per month
ITEM 8:	**HIGHER INTEREST RATE/Penalty for late interest payment**	Penalty rate of 8% will apply in the event of a default for a period of 2 months commencing on the repayment date.

135 In the current case, Titles Strata is not entitled to rely upon the line of authority which suggests that where a loan contract specifies that a certain rate of interest is charged upon the balance outstanding on the loan, but a lower rate is charged if payments are made on time, the higher rate cannot be found to be a penalty. Titles Strata has not utilised this drafting technique, and is thus unable to take advantage of this established (although often criticised) line of authority.[68]

136 In *Ringrow Pty Ltd v BP Australia Pty Ltd*,[69] the High Court endorsed the following passage from *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [70] as being applicable to the question of whether an agreed sum in a contract payable upon breach is a penalty:

> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage …
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach …
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach …

137 However, in *Ringrow* the High Court rejected the proposition that the agreed sum must be merely disproportionate to the real loss which might be suffered by the party seeking to rely upon a liquidated clause, stating:[71]

> The propounded penalty must be judged 'extravagant and unconscionable in amount'. It is not enough that it should be lacking in all proportion. It must be 'out of all proportion'.

138 As noted in paragraph 122 above, there was very limited evidence before the Court

regarding the calculation of the default rate under the second loan agreement. No evidence was advanced on behalf of Mrs Nirta to support her contention that the default interest charge was a penalty. Counsel for Titles Strata submitted that Mrs Nirta had not discharged the onus upon her to establish that the default interest charge was a penalty.

139 It is accepted that the onus of proof is on Mrs Nirta to establish that the default interest charge is a penalty. This much was confirmed by Diplock LJ in *Robophone Facilities Ltd v Blank*.[72] However, Diplock LJ went on to say (footnotes omitted):

> …The terms of the clause may themselves be sufficient to give rise to the inference that it is not a genuine estimate of damage likely to be suffered but is a penalty … Thus it may seem … that the stipulated sum is extravagantly greater than any loss which is liable to result from the breach in the ordinary course of things, i.e., the damages recoverable under the so-called 'first rule' in *Hadley v Baxendale*. This would give rise to the prima facie inference that the stipulated sum was a penalty. But the plaintiff may be able to show that owing to special circumstances outside 'the ordinary course of things' a breach in those special circumstances would be liable to cause him a greater loss of which the stipulated sum does represent a genuine estimate. In the absence of any special clause … this enhanced loss … would not be recoverable … as damages for the breach under the so-called 'second rule' … unless knowledge of the special circumstances had been brought home to the defendant at the time of the contract'.

140 In *Ronstant International Pty Ltd v Thomson*,[73] the Court of Appeal upheld a trial judge's finding that in the absence of special circumstances, an interest rate of five per cent per month charged upon unpaid invoices was excessive, and did not embody a genuine pre-estimate of loss.

141 Of course, the rate charged under the second loan agreement has to be viewed in the context of the fact that Titles Strata was making a short term loan to parties which were already facing court action over an unpaid loan. One would expect interest to be charged at a higher than usual rate for funding of this nature. In *Yarra Capital Group Pty Ltd v Sklash*,[74] the Court of Appeal found that a fixed daily charge levied upon a loan in default was not a penalty; and emphasised the principle that a court should be slow to relieve freely contracting parties from the consequences of their bargains. The apparently high rate of interest was enforceable in part because the parties were experienced commercial parties, operating in a high risk short term lending market, and the advances were in effect unsecured. However, in the current case, Titles Strata

advanced no evidence with respect to any genuine pre-estimate of its loss. Further, Titles Strata held (or at least it thought it held) ample security for the money advanced, being mortgages over the pizza shop and the home, with a loan to valuation ratio of approximately 60 per cent.

142 Accordingly, in accordance with the principles laid down by Diplock LJ in *Robophone*, in the absence of any evidence of any special circumstances which warrant the charging of such a high rate of interest, I would declare that, to the extent necessary, the default interest clause is unenforceable as a penalty. There was no evidence before me as to Titles Strata's actual loss and damage by reason of being held out of its money, although counsel for Titles Strata urged me to apply a rate of 3 per cent per month in the event that I found that the default rate of 8 per cent per month was an unenforceable penalty. That still leaves a very high rate of 48 per cent per annum, for a well secured loan, and I decline to do so. However, I can infer that Titles Strata has suffered damage by way of the loss of use of the funds advanced, and would order interest at the statutory rate from the date of the demand.

Claim against the Registrar

143 In her counterclaim, Mrs Nirta has claimed indemnity for any loss she has suffered by reason of the registration of the mortgage over the pizza shop. This claim is only maintainable if it is found that, notwithstanding the fact that Mrs Nirta's signatures on the second mortgage were forged, the mortgage was protected by the principles of indefeasibility, and was found to have secured the funds advanced by Titles Strata under the second loan agreement.

144 Mrs Nirta made no submissions in relation to her claim against the Registrar of Titles. The Registrar made the following submissions:

(a) if it were found that Mrs Nirta's signatures on the loan documents were forged, and that Mr Blackney was involved in the fraud, the mortgage over the pizza shop would not be protected by the principle of indefeasibility because Mr Blackney was appointed as the agent of Titles Strata for the purpose of obtaining the signatures of the Nirtas on the second loan documents;

(b) in any event, Mrs Nirta would have suffered no loss from the registration of the mortgage over the pizza shop as it 'secures nothing';

(c) the measure of loss under s 110(4) of the TLA, based upon authorities considering analogous provisions in other Australian jurisdictions,[75] is for compensation for losses actually sustained by the victim, who is to be put in the same position as if the wrongful act had not been done;

(d) Mrs Nirta, as a joint tenant of the pizza shop with Mr Nirta, may well be precluded from seeking an indemnity under s 110 of the TLA by reason of the fact that the joint tenancy has not been severed, either by way of an application to VCAT under Part IV of the *Property Law Act 1958* (Vic), or by an order for the sequestration of Mr Nirta's estate (noting that no attempt appears to have been made by Titles Strata to recover the outstanding judgment debt against Mr Nirta alone);

(e) on the assumption that if the joint tenancy were severed, Mrs Nirta would be found to have a half share of the pizza shop, then based upon the principles of assessment of loss referred to above, then Mrs Nirta's loss by reason of the registration of the mortgage over the pizza shop by reason of fraud is $28,497.50 (being the difference between the amount advanced by Titles Strata, and the amount paid out to STSL pursuant to the first loan), plus interest; and

(f) no claim by Mrs Nirta could be made against the Registrar with respect to the unregistered mortgage over the home, as it will not be registered if Mrs Nirta's signatures on the second loan documents were found to be forged, and the Mrs Nirta's rights under s 110 are only enlivened by registration of a fraudulent instrument. Similarly no claim can be made against the Registrar for any amounts said to be owing by the Nirtas to Titles Strata under the principles of subrogation, as Titles Strata's entitlements to assume the security interest of STSL do not arise out of registration of the mortgage over the pizza shop.

145 As noted in paragraph 90 above, while I have found that it was at least arguable that Mr Blackney was acting as the agent of Titles Strata, at least for the purpose of

facilitating the execution of the second loan documents, I could not be satisfied, on the state of the evidence, that Mr Blackney's conduct was of sufficient moral turpitude to make a finding that knowledge of the fraud ought to be sheeted home to Titles Strata. Accordingly, if the registered mortgage is effective and enforceable, then Mrs Nirta is entitled to compensation under s 110 of the TLA.

146 However, having reviewed the authorities referred to by counsel for the Registrar concerning the issue of the joint tenancy, I agree with the Registrar's contention that no loss crystallises until after severance of any joint tenancy, although cautiously given that there was no contradictor to enable proper argument on the point. However, on the assumption that severance ought to be relatively easy to effect, and based upon Mr Nirta's evidence that he and Mrs Nirta owned the pizza shop '50/50', I would agree with the Registrar's submissions regarding the principles applicable to the assessment of loss and damage in respect of claims under s 110 of the TLA, and the approach taken to the calculation of the quantum of Mrs Nirta's loss. Further, were it have been necessary to do so I would have awarded interest on the amount of $28,497.50 at the statutory rate from the date of the commencement of the counterclaim.

147 I will hear further from the parties on the question of the form of orders and the question of costs.

SCHEDULE OF PARTIES

TITLES STRATA MANAGEMENT PTY LTD (ABN 32001119331)	Plaintiff
FRANK NIRTA	First Defendant
LUISA NIRTA	Second Defendant

AND BETWEEN

LUISA NIRTA	Plaintiff by Counterclaim
TITLES STRATA MANAGEMENT PTY LTD (ABN 32001119331)	First Defendant by Counterclaim
REGISTRAR OF TITLES	Second Defendant by Counterclaim

[1] Exhibit AA is a Notice to Admit filed and served on behalf of the Registrar on 7 March 2014.
[2] CB 117. Most of the documents in evidence were tendered by agreement, hence the references to pages of the Court Book.
[3] At CB 320A.
[4] At CB 407.
[5] Exhibit B.
[6] CB 318.
[7] CB 117.
[8] CB 407 and CB 320A.
[9] CB 318 and CB 117 respectively.
[10] CB 407 and CB 320A.
[11] CB 357.
[12] *Jones v Dunkel* (1959) 101 CLR 298.
[13] CB 407.
[14] (1938) 60 CLR 336, 362.
[15] (1992) 110 ALR 449, 449–450.
[16] At 361.
[17] Ibid 350 (Rich J).
[18] Ibid 343 (Latham CJ).
[19] Ibid 356 (McTiernan J).
[20] See *Fox v Percy* [2003] 214 CLR 118, 128–129.
[21] In 2012, Good Friday was on 6 April.
[22] *Perpetual Trustees Australia Ltd v Schmidt* [2010] VSC 67.
[23] At [1.48].
[24] [2008] NZSC 20 [24]–[26] and [48].
[25] See the observations of Hargrave J in *Perpetual Trustees Victoria Ltd v Xiao and anor* [2015] VSC 21 [150]–[153].
[26] [1999] 3 VR 376.
[27] [1998] 3 VR 133.
[28] Ibid, [46].
[29] [1998] 1 VR 188.
[30] [1995] 2 VR 301.
[31] [1984] VR 483.
[32] See, *Perpetual Trustees Victoria Ltd v Xiao and anor* [2015] VSC 21 [82]–[86], and the authorities referred to therein.
[33] [2010] NSWCA 32, [68], omitting citations.
[34] See, for example, *Perpetual Trustees Victoria Ltd v English* [2010] NSWCA 32; *Perpetual Trustees Victoria Ltd v Tsai* [2004] NSWSC 745; *Chandra v Perpetual Trustees Victoria Ltd* [2007] Aust Torts Reports 81-896;

Yazgi v Permanent Custodians Ltd (2007) ANZ ConvR 566.

[35] [2009] VSC 82.

[36] [1993] 2 VR 316.

[37] [1998] 1 VR 188.

[38] [2015] VSC 21.

[39] At [101]–[102].

[40] At [107].

[41] [2010] 1 NZLR 82.

[42] [2010] NSWSC 1278.

[43] R Meagher, D Heydon and M Leeming *Meagher, Gummow & Lehanes's Equity Doctrines & Remedies*, (Lexis Nexis Butterworths, 4th ed, 2002) 351 [9-005].

[44] see *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

[45] The authority referred to me by counsel for Titles Strata, a decision of the New South Wales Court of Appeal in *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* [2013] NSWCA 393, contained a useful summary of the principles for determining when a party is entitled to be subrogated to the rights of another, but did not deal with the question of whether those rights extended to the contractual rights of that other.

[46] C Mitchell and S Watterson, *Subrogation Law and Practice* (Oxford University Press, 2007) 304 [9.121].

[47] [1993] NPC 89 (CA).

[48] (1995) 70 P & CR 592 (CA).

[49] [2004] 2 P & CR D616.

[50] [1984] 3 NSWLR 365.

[51] (2009) 73 ACSR 139.

[52] [1996] ANZ ConvR 501.

[53] [1974] 4 ALR 634.

[54] (1991) 32 FCR 344, 354.

[55] (1979) 7 ACLR 481.

[56] (1999) 10 BPR 18, 431.

[57] (2003) 59 NSWLR 452.

[58] (1993) 32 NSWLR 467, 486-487.

[59] (1979) 7 ACLR 481, 497.

[60] [1994] NSWCA 261 (6 August 1994).

[61] [2009] VSC 533, [117]-[119].

[62] *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* (1915) AC 79, 87.

[63] [2012] VSC 205.

[64] [2009] VSC 579. See also *Kirk and ors v PBP Accounting Solutions* [2015] VSC 173.

[65] At [10].

[66] At [15].

[67] At [15].

[68] See, for example, *Kellas-Sharpe v PSAL Ltd* [2012[QCA 371 and the authorities referred to at paragraphs [32]-[38].

[69] (2005) 224 CLR 656, 662.

[70] (1915) AC 79.

[71] *Ringrow*, [32].

[72] [1996] 1 WLR 1428.

[73] [2002] VSCA 75.

[74] [2006] VSCA 109.

[75] see, for example, *The Registrar of Titles v Spencer* (1909) 9 CLR 641 and *Franzon v Registrar of Titles* [1975] WAR 107.