Supreme Court

New South Wales

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| Case Name: | Wassell v Ken Carr Bobcat & Tipper Hire Pty Ltd |
| Medium Neutral Citation: | [2021] NSWSC 1415 |
| Hearing Date(s): | 6 and 7 September 2021 |
| Decision Date: | 3 November 2021 |
| Jurisdiction: | Equity |
| Before: | Robb J |
| Decision: | The plaintiffs' claims are dismissed. See pars [203], [222], [227], [233] and [283]. The parties should consider this judgment and provide appropriate short minutes of order to the Associate to Robb J to give effect to the reasons herein. |
| Catchwords: | CORPORATIONS — Contracts — Formalities — Statutory assumptions — Whether documents were properly executed to bind the defendant company — Where the plaintiffs argued that they were entitled to rely upon the assumptions in s 129 of the Corporations Act with respect to the purported proper execution of documents by two directors of the defendant — Where the apparent signatures of the two directors had been forged and every apparent communication between the plaintiffs, their agent and the defendant had been fraudulently undertaken by a person who had no authority to act in any way on behalf of the defendant — Whether the plaintiffs had dealings with the defendant for the purpose of s 128 of the Act — Where the Court found that the plaintiffs were not entitled to rely on the assumptions in s 129 because the plaintiffs had no dealings with the defendant — Where the Court held that the plaintiffs have failed to establish that the defendant is precluded from denying that it is bound by the documents |

EQUITY — Equitable interests in property — Priority disputes — Earlier legal interest — Where the plaintiffs claimed that they had an equitable interest in property in circumstances where their registered mortgage did not on its proper construction and in the events which had happened secure the advance made by the plaintiffs — Where the plaintiffs' interest in the defendant's property was created by the fraud of a third party — Where the plaintiffs argued that the defendant's conduct disentitled it from asserting its priority as the registered proprietor of the property over the plaintiffs' equitable interest — Whether the earlier legal interest of the defendant would lose its priority to the later equitable interest of the plaintiffs — Where the Court found that the plaintiffs have not established that the defendant lost its entitlement to priority as the registered proprietor

LAND LAW — Torrens title — Compensation for loss of interest in land — Torrens assurance fund — Where the plaintiffs claimed that, in the event the Court found that the registered mortgage was not effective to secure the amount advanced and that their later equitable interest did not have priority over the defendant's legal interest, they are entitled to be paid compensation from the Torrens assurance fund on the basis of s 129(1)(e) of the Real Property Act — Whether the loss or damage that the plaintiffs would suffer would be as a result of the operation of the Act — Where the Registrar-General submitted that the plaintiffs are not entitled to compensation because the loss or damage would arise from the plaintiffs conduct rather than as a result of the operation of the Act — Where the plaintiffs argued that the Court should conclude that the plaintiffs will suffer loss as a result of fraud in that they will be deprived of an estate or interest in the property as a consequence of fraud — Where the Court found that the loss or damage that the plaintiffs will suffer is not as a result of the Act — Where the Court held that the plaintiffs' claim for compensation from the Torrens assurance fund must be dismissed

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| | LAND LAW — Torrens title — Exceptions to indefeasibility — Fraud — Where the plaintiffs claimed that they had a registered mortgage over the defendant's property — Where the registered mortgage was procured by the fraud of a third party — Whether the plaintiffs' registered mortgage was indefeasible — Where the Court found that the mortgage in effect did not secure any money — Where the Court held that the plaintiffs' registered mortgage was indefeasible but that because it secured nothing, the defendant is entitled to an order that the mortgage be discharged |
| Legislation Cited: | Corporations Act 2001 (Cth)<br>Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW)<br>Law Reform (Miscellaneous Provisions) Act 1946 (NSW)<br>Law Reform (Miscellaneous Provisions) Act 1965 (NSW)<br>Real Property Act 1900 (NSW) |
| Cases Cited: | Abigail v Lapin (1934) 51 CLR 58<br>Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd [2013] NSWCA 459; (2013) 282 FLR 351<br>Australia Capital Finance Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd [2017] NSWCA 99<br>Barry v Heider (1914) 19 CLR 197<br>Brocklesby v The Temperance Permanent Building Society [1895] AC 173<br>CEG Direct Securities Pty Ltd v Wang [2021] NSWCA 76<br>Chandra v Perpetual Trustees Victoria Ltd [2007] NSWSC 694; (2007) 13 BPR 24,675<br>Derry v Peek (1889) 14 App Cas 337<br>Farrand v Yorkshire Banking Company (1888) 40 Ch D 182<br>Heid v Reliance Finance Corporation Pty Ltd (1983) 154 CLR 326<br>Joslyn v Berryman (2003) 214 CLR 552; [2003] HCA 34<br>Kumar v Registrar-General of New South Wales [2021] NSWSC 1103<br>Lapin v Abigail (1930) 44 CLR 166 |

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| | Northern Counties of England Fire Insurance Co v Whipp (1884) 26 Ch D 482<br>Perry Herrick v Attwood (1857) 2 De G & J 21; 44 ER 895<br>PT Ltd v Maradona Pty Ltd (1992) 25 NSWLR 643<br>Saltoon v Lake [1978] 1 NSWLR 52 |
| Texts Cited: | J D Heydon, M J Leeming and P G Turner, Meagher, Gummow & Lehane's Equity Doctrines & Remedies (5th ed, 2015, LexisNexis Butterworths) |
| Category: | Principal judgment |
| Parties: | David Ian Wassell (first plaintiff/ cross-defendant on the first cross-claim/ cross-claimant on the second cross-claim)<br>Ya Jun Jiang Wassell (second plaintiff/ cross-defendant on the first cross-claim/ cross-claimant on the second cross-claim)<br>Ken Carr Bobcat & Tipper Hire Pty Ltd (defendant/ cross-claimant on the first cross-claim)<br>Registrar-General of New South Wales (third cross-defendant on the first cross-claim/ first cross-defendant on the second cross-claim) |
| Representation: | Counsel:<br>J Baird (first and second plaintiffs/ cross-defendants on the first cross-claim/ cross-claimants on the second cross-claim)<br>D Weinberger (defendant/ cross-claimant on the first cross-claim)<br>L A Walsh (third cross-defendant on the first cross-claim/ first cross-defendant on the second cross-claim)<br><br>Solicitors:<br>Ronayne Owen Lawyers (first and second plaintiffs/ cross-defendants on the first cross-claim/ cross-claimants on the second cross-claim)<br>Keystone Lawyers (defendant/ cross-claimant on the first cross-claim)<br>F Harris (third cross-defendant on the first cross-claim/ first cross-defendant on the second cross-claim) |
| File Number(s): | 2020/216914 |

## JUDGMENT

1 By their amended statement of claim, the plaintiffs, Mr David Ian Wassell and Ms Ya Jun Jiang Wassell, seek judgment for possession of certain land at Thornton in this State (the Property), as well as leave to issue a writ of possession forthwith.

2 The defendant, Ken Carr Bobcat & Tipper Hire Pty Ltd (the Company), is the registered proprietor of the Property.

3 The plaintiffs sue the Company to enforce a mortgage purportedly granted by the Company to them on 11 November 2019 to secure repayment of the sum of $185,000 that the plaintiffs assert they had loaned to the Company for a period of six months under a written loan agreement dated 11 November 2019.

4 The plaintiffs plead that the loan agreement required the Company to repay the loan within six months, that interest would accrue on the loan at the rate of 8% per month, but that while the Company was not in default, interest would accrue at the concessional rate of 3% per month, and that six months' interest at the concessional rate was prepaid from the principal sum of $185,000 on the date the loan was made.

5 The plaintiffs also plead that the Company executed a general security agreement in their favour on 11 November 2019. However, it will not be necessary to refer to this agreement further in any detail as no party placed reliance on its terms.

6 The plaintiffs allege that, on or about 11 November 2019, they advanced the sum of $185,000 at the direction of the Company in accordance with the loan agreement.

7 The plaintiffs specifically allege, in par 11 of the amended statement of claim, that the loan agreement, the mortgage and the general security agreement were executed in accordance with s 127 of the *Corporations Act 2001* (Cth), and that the plaintiffs were entitled to make the assumptions set out in s 129 of the *Corporations Act* in relation to the execution of those documents and the plaintiffs' dealings with the Company.

8 The plaintiffs plead that the Company is indebted to them for the total amount of $187,443.90 and that they have taken the relevant steps required by law to entitle them to exercise their power of sale under the mortgage.

9 The plaintiffs had pleaded the same claim for relief in their initial statement of claim and relied upon the allegations summarised above to support their claim. The Company responded by filing a defence, the primary effect of which was to deny that any of the documents relied upon by the plaintiffs were valid on the basis that they had not been executed by the Company and had been fraudulently executed by a person called Anthony Lyons. The Company denied that the plaintiffs were entitled to rely upon the sections of the *Corporations Act* pleaded by the plaintiffs.

10 The plaintiffs, in turn, responded to this defence by filing their amended statement of claim in which they added par 19, whereby they allege that, if it is found that the loan agreement, the mortgage and the general security agreement were not executed by the Company, but were executed by Anthony Lyons, then Mr Lyons was at all material times the agent of the Company, and the Company armed Mr Lyons with apparent authority to deal with the Property.

11 The facts that the plaintiffs relied upon to establish that Mr Lyons had the apparent authority to deal with the Property without any restriction centred upon the allegation that, on or about 23 October 2019, the Company, at the request of Mr Lyons, provided the original certificate of title for the Property to Dawson & Co, solicitors in Tamworth: see the particulars to par 19(b) of the amended statement of claim. It is alleged that this enabled that firm, purporting to act as solicitors for the Company, to provide the certificate of title to the plaintiffs as security for the loan of $185,000. The plaintiffs allege that, by reason of this conduct, the Company permitted Mr Lyons to represent himself as the Company's agent to Dawson & Co, so that the Company is estopped from denying the authority and agency of Mr Lyons in respect of the steps that he took, as purported agent of the Company, that led the plaintiffs to rely upon the apparent authority of Dawson & Co to act as the solicitors for the Company in verifying to the plaintiffs' solicitors that the directors of the Company had duly

executed on its behalf the loan agreement, the mortgage and the general security agreement. The result was that the plaintiffs advanced the amount of $185,000 in the belief that they were making a loan to the Company and that the documents had validly been executed.

12 For these reasons, the plaintiffs allege that the Company is estopped from denying the authority of Dawson & Co to act for the Company and to deliver the original certificate of title to the plaintiffs in return for the principal amount advanced by it on settlement, or from denying the validity of each of the loan agreement, the mortgage and the general security agreement.

13 In the particulars to par 19 of the amended statement of claim, the plaintiffs include the following claim:

> (f) Further or in the alternative to subparagraph (e) above, by reason of the matters aforesaid the Plaintiff is entitled to a pledge over the Property and to retain the Certificate of Title as security for the principal amount advanced by it of $185,000.

14 Although this allegation is out of place as a particular to an estoppel claim, it was relied upon by the plaintiffs as a basis for a claim that, by reason of their possession of the certificate of title for the Property, they have an equitable mortgage by deposit of title deed.

15 At the commencement of the oral addresses, the Court was informed of an agreement between the plaintiffs and the Company concerning the quantum of the plaintiffs' claim if they were successful against the Company. First, it was agreed that the amount of the principal advanced was $185,000. Secondly, the plaintiffs would be entitled to interest at court rates from the date of default. Thirdly, the plaintiffs' entitlement will be limited to the value of the Property, so that the plaintiffs will bear any shortfall if the amount of principal plus interest is more than the net sale price.

16 By its amended first cross-claim, the Company seeks declarations that the relevant transaction documents are unenforceable and, in the alternative, an order for payment of compensation from the Torrens Assurance Fund by the Registrar-General. No details of the basis of that claim were pleaded.

17 The Registrar-General's defence to the first cross-claim filed by the Company simply denied the Company's entitlement to compensation.

18 The plaintiffs then filed a second cross-claim in which they also sought compensation from the Torrens Assurance Fund, if the Company succeeded in its first cross-claim against them.

19 The Registrar-General denied that the plaintiffs are entitled to compensation and alleged specifically that if the mortgage is set aside, any loss or damage that the plaintiffs will suffer is not as a result of the operation of the *Real Property Act 1900* (NSW).

**Forgery of transaction documents**

20 At the hearing, the plaintiffs did not concede that the transaction documents were void on the ground that they had been forged by Mr Lyons. However, they acknowledged that they were not able to tender any evidence to contradict the evidence given by the directors of the Company, Mr Kenneth Thomas Carr and Ms Cheryl Gai Fayers, to the effect that neither of them had placed their signatures on any of the transaction documents, that the Company had not received the amount advanced by the plaintiffs, and that they only became aware of the purported transaction after the event, when they learned that an item of equipment owned by the Company was purportedly the subject of the general security agreement.

21 The plaintiffs did not challenge the testimony of the directors of the Company on these issues in cross-examination.

22 It is clear that all of the transaction documents were forged by Mr Lyons, and that the whole of the circumstances that led to the loan being made and the transaction documents forged was an elaborate plot engaged in by Mr Lyons to cause the amount of the advance to be paid into a bank account nominally in the name of Mr Carr, but controlled by Mr Lyons.

23 The consequence is that the transaction documents are void and of no effect at common law. None of the transaction documents gave rise to a valid loan repayable by the Company, unless there is some relevant exception to the application of the common law principles.

24 Mr Lyons pleaded guilty to an appropriate criminal charge in relation to the forgery. On 29 September 2020, he was sentenced to 26 months imprisonment

commencing on that day, with a non-parole period of 14 months that will expire on 15 January 2022.

**Transaction documents**

25 The only transaction documents that require analysis are the loan agreement and the mortgage, both of which were dated 11 November 2019. Mr Lyons forged the signatures of Mr Carr and Ms Fayers on both documents to make it appear as if they had been executed by the directors of the Company in accordance with s 127 of the *Corporations Act*.

26 It is to be noted that the address of each of the directors was stated in the loan agreement to be at a place in Lambton in this State.

27 The parties to the loan agreement were stated to be the plaintiffs as Lender and the Company as Borrower. The address of the Company was stated to be the same address as that of its two directors. The schedule attached to the loan agreement, which was headed 'Commercial Details', specified the address for notices addressed to the Borrower as the residential address of the directors.

28 Clause 2.1 of the loan agreement provided:

> Facility
>
> Subject to the Borrower complying with the Conditions Precedent, the Lender, relying on the representations and warranties made by the Borrower set out in this Agreement, must make available to the Borrower the Facility and will advance the Principal Sum in accordance with the terms of this Agreement.

29 "Facility" is defined in the Definitions in Part 1 of Schedule 1 as being: "the financial accommodation provided by the Lender to the Borrower, including the Principal Sum and any Further Monies". The "Principal Sum" is defined in the same part of the loan agreement as meaning "the amount specified in the Reference Schedule and such other amount agreed to between the parties from time to time". The Reference Schedule, in fact headed 'Commercial Details', states that the Principal Sum is $185,000.

30 Clause 2.4 of the loan agreement required the Borrower to "draw down the Principal Sum on the Advance Date or as soon as reasonably practicable thereafter". The "Advance Date" is defined in Schedule 1 as meaning "the date specified in the Reference Schedule or such other date as agreed between the

parties from time to time". The Advance Date is specified in the Commercial Details as: "The date that the Lender makes the advance to the Borrower, which will not be before 8 October 2019."

31 The significance of the provisions of the loan agreement considered above is that, taken together, they required the Lender to make the advance to the Borrower. This is of consequence because the plaintiffs actually paid the advance under the loan agreement to Mr Lyons, by paying the money into an account with the Commonwealth Bank of Australia (CBA), which had fraudulently been opened by Mr Lyons in Mr Carr's name, but in respect of an address that was not the address of the Company or its directors, and which was controlled by Mr Lyons. To the extent that the loan agreement may have required the plaintiffs to pay the money advanced to the Company, that did not happen.

32 The loan agreement also contained the following terms concerning repayment of what was called the “Debt”. Clause 2.3 provided:

> Security
>
> Each Security shall secure the Debt now or at any time secured or payable to the Lender under any of the Transaction Documents and/or any of the Securities.

33 “Security” was defined in Schedule 1 as meaning "each and all of the securities, documents and instruments specified as such in the Reference Schedule". In the Commercial Details, the Securities identified were a registered first mortgage over the Property, an unlimited guarantee and indemnity from Mr Carr and Ms Fayers, and a general security agreement granted by the Company.

34 “Debt” was defined in Schedule 1 as including the Principal Sum and any interest payable under clause 4 of the loan agreement.

35 Clause 3.1 of the loan agreement provided for repayment of the Debt as follows:

> 3.1 Repayment Date
>
> The Borrower must, unless required under another provision of this Agreement to repay the Debt at an earlier date, repay the balance outstanding of the Debt to the Lender on the Repayment Date.

36 This term may be read as imposing on the Company an obligation to pay the Debt to the plaintiffs, although – consistently with the obligation on the plaintiffs to advance the Principal Sum to the Company – clause 3.1 uses the word "repay" in relation to the balance outstanding of the Debt, which reinforces the appearance that the loan agreement required that the Principal Sum be paid to the Company.

37 “Repayment Date” is provided for in the Commercial Details as requiring: "The Debt must be repaid in full by the date which is six (6) months after the Advance Date”. That is therefore the date that is six months after the plaintiffs made the advance to the Company.

38 Clause 4.1 required the Borrower to pay interest to the Lender as specified in the Reference Schedule. The Commercial Details stipulated a “standard rate of 8.00% per month, but while the Borrower is not in default under the Facility, the Lender will accept interest at the concessional rate of 3.00% per month".

39 The mortgage that was forged by Mr Lyons contained the following agreement as Annexure A to the Mortgage Form that was created for the purpose of registering the mortgage against the title to the Property. The agreement provided:

> Agreement
>
> You (the mortgagor) agree with us (the mortgagee) as follows:
>
> 1. The Mortgage Common Provisions in this annexure are incorporated in this mortgage. You acknowledge that you received, read and understood a copy of the Mortgage Common Provisions before signing this mortgage. A reference to "this mortgage" in the coversheet, this Annexure A, or in any other annexure to this mortgage is a reference to the mortgage constituted by the cover sheet and those annexures including the Mortgage Common Provisions.
>
> 2. You acknowledge giving this mortgage and incurring obligations and giving rights under it for valuable consideration received from us.
>
> 3. You acknowledge that, as at the date of this mortgage, we have agreed to lend $185,000 to you or at your request. This amount, together with any further advances and other amounts more fully described in the Mortgage Common Provisions, is called the *secured money*.
>
> 4. You acknowledge indebtedness to us for the *secured money* and agree to pay to us the *secured money*, together with interest and all other money due to us at the times agreed with us, or failing agreement on demand. You agree that the covenants set out in the facility agreement(s) in respect of the *secured money* are deemed to be covenants included in this mortgage.

40 The Mortgage Common Provisions included the following terms:

> 2.1 Charge: The Mortgagor hereby charges the Secured Assets to the Mortgagee to secure payment of the Secured Money.
>
> 2.2 Comply with mortgage: Without limiting any specific terms in the Mortgage, the Mortgagor must perform all of its obligations promptly, at its own cost, and in accordance with the reasonable directions of the Mortgagee.
>
> 2.3 Secured money: The Mortgage secures payment of the Secured Money. The Mortgagor must pay to the Mortgagee the Secured Money on the date agreed between the parties or, if there is no agreement, on demand.
>
> …
>
> 13.1 Definitions: In the Mortgage unless the context otherwise requires:
>
> Collateral Documents means:
>
> (a) any present or future loan agreement…;
>
> Secured Money means all money (and any part of that money) which directly, indirectly, contingently, or otherwise at any time is or becomes due by the Mortgagor (whether alone or not) to the Mortgagee for any reason and includes any money due:
>
> (a) pursuant to the Mortgage or a Collateral Document;
>
> …

41 It should be recorded that, by a guarantee and indemnity dated 11 November 2019 that was forged by Mr Lyons, Mr Carr and Ms Fayers as guarantors guaranteed the obligations of the Company to the plaintiffs. The plaintiffs have not sought to enforce the guarantee in these proceedings. It is only relevant in so far as the plaintiffs paid the amount of the loan into an account in the name of Mr Carr, rather than the Company, because the plaintiffs took the view that it was legitimate for them to make the advance into an account in the name of the Company or a guarantor of the loan.

**CEG Direct Securities Pty Ltd v Wang**

42 When the plaintiffs commenced these proceedings, they may have thought that the effect of s 42 of the *Real Property Act* was that, upon registration of the mortgage against the title to the Property, the plaintiffs' mortgage interest in that land would be indefeasible and that, under the terms of the mortgage and the collateral documents whose terms were incorporated into the mortgage, the mortgage would secure repayment by the Company of the Debt as defined in the loan agreement.

43 However, at the hearing in these proceedings, the plaintiffs accepted that the terms of the transaction documents in this matter were relevantly identical to the terms of the documents considered by the Court of Appeal in *CEG Direct Securities Pty Ltd v Wang* [2021] NSWCA 76 (*CEG Direct Securities*), a decision handed down on 7 May 2021, and that the decision was dispositive of the equivalent issues raised in the present proceedings.

44 The principal judgment in *CEG Direct Securities* was given by Brereton JA, with Bathurst CJ and Meagher JA agreeing.

45 As Brereton JA explained at [3], “under the Torrens system, absent fraud on the part of the mortgagee, the registration of a forged mortgage confers on the mortgagee an indefeasible estate and interest in the land for the interest described in the mortgage”. His Honour then discussed the authorities that establish that, although s 42 of the *Real Property Act* has the effect that the estate or interest in the land the subject of the mortgage is indefeasible, registration does not validate all of the terms and conditions of the instrument that is registered. As Giles J (as he then was) observed in *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 679, registration "validates those [terms] which delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietor". The personal covenant to repay the loan, in so far as that is required on the proper construction of the mortgage, is a term that is necessary to delimit or qualify the estate or interest that is made indefeasible by registration of the mortgage. This is a reflection of the essential reality of a mortgage, whereby if the instrument creating it provides that the mortgage secures a covenant to repay money, that covenant is necessarily a term to which effect must be given if the estate or interest created by the mortgage is to exist in the manner contemplated by the instrument.

46 At [16] to [20], Brereton JA set out the material parts of the mortgages that were being considered by the Court of Appeal, which were substantially the same as the terms of the mortgage in the present case that have been set out above.

47 His Honour then stated the essence of his reasons as follows, before his Honour considered a number of other authorities dealing with the same subject for the purpose of explaining why he did not consider that the reasoning in those authorities affected the conclusions that he had drawn:

> What if anything do the mortgages secure?
>
> [21] The mortgagor's obligation is to be found primarily in clause 4 of the 'Agreement' page of Annexure A, by which the mortgagor acknowledges indebtedness for the "secured money" and agrees to pay the mortgagee the "secured money", interest, and all other money due. That directs attention to the meaning of "secured money".
>
> [22] Ultimately, CEG did not seek to derive assistance from the definition of "secured money" in clause 13.1 of the Mortgage Common Provisions. The only conceivably relevant provision was:
>
> > (a) pursuant to … a collateral document.
>
> However, the introductory words of the definition in clause 13.1 limit the definition to money due *by the mortgagor* to the mortgagee, and CEG did not submit that there was any collateral document which would assist it.
>
> [23] Accordingly, the issue turned on the definition of "secured money" in clause 3 of Annexure A, set out above. In short, CEG contended that the words "this amount" in clause 3 referred to the sum of "$200,000" *simpliciter*; whereas the respondents submitted that it referred to the sum of $200,000 lent (or advanced) to the mortgagors or at their request.
>
> [24] In my judgment, the respondents' construction is to be preferred. First, the reference to "this amount" naturally refers back to the phrase "we have agreed to lend $200,000.00 to you or at your request". Secondly, this impression is fortified by the reference to "any further advances" in the second sentence, which indicates that "this amount" refers "to the amount of $200,000.00 advanced to you or at your request". Thirdly, to construe the mortgage as securing the sum of $200,000 *simpliciter*, regardless of whether or not it was "lent … to you or at your request", would be to give it an entirely uncommercial and one-sided operation, and for that reason ought not readily be adopted.
>
> [25] Clause 2 does not tell against this construction: the "valuable consideration" received does not import actual receipt of the advance, but refers to the agreement to make the advance "to you or at your request".

48 As appears from this extract, Brereton JA was influenced by the inclusion of the wording "we have agreed to lend" in clause 3 of the mortgages under consideration to prefer a construction of the mortgages that had the effect that the mortgages only secured an amount if lent or advanced to the mortgagors or at their request, rather than the alternative, being that the mortgages secured an obligation by the mortgagors to pay the amount of $200,000 (as it was in that case) "*simpliciter*". As is evident from his Honour's reasons, he preferred that construction notwithstanding that the amount of $200,000 was stated in

bold letters, and clause 3 of the mortgages called "this amount" the "*secured money*". Then, in clause 4, the mortgages contained an acknowledgement of indebtedness for the secured money and an agreement to pay the mortgagee the secured money. These latter provisions were capable of being understood as having the effect of creating an obligation on the mortgagors to pay the $200,000 to the mortgagee, but this was not the construction preferred by the Court of Appeal.

49 The decision in *CEG Direct Securities* is relevant to the determination of this case in two ways. First, counsel for the plaintiffs explained in his submissions that it was the plaintiffs' interpretation of the decision that the Court of Appeal did not have regard to the terms of the collateral documents – in particular the loan agreement – in deciding whether the mortgages imposed on the mortgagors an obligation to pay $200,000 to the mortgagee, whether or not the $200,000 was actually advanced to the mortgagors, because all of the collateral documents were invalid forgeries, which were not given indefeasible status by s 42 of the *Real Property Act*.

50 The plaintiffs' principal submission was that the present case can be distinguished on its facts from *CEG Direct Securities*. That is because of two reasons. First, in the present case, the Company had engaged in 'disentitling conduct' that had the effect that the Company is estopped from denying the validity of the loan agreement. Secondly, as in this case the mortgagor is a company, the circumstances in which the loan agreement was signed on behalf of the Company permitted the plaintiffs to assume that the loan agreement was validly executed pursuant to ss 127 and 129 of the *Corporations Act*.

51 Thus, while the Court of Appeal in *CEG Direct Securities* had found that although the mortgages in that case were in principle indefeasible in relation to the estate that they created in the land, in the events that happened and on the proper construction of the mortgages they did not secure any debt. According to the plaintiffs' submissions, the position is different in the present case. That is because, if the forged loan agreement is found to be valid and enforceable, it creates the debt that was found to be missing in *CEG Direct Securities*.

52 The basis of that submission is the existence in the loan agreement of clauses 2.3 and 3.1 that, according to the plaintiffs, have the effect of a covenant by the Company to pay the Debt to the plaintiffs. The plaintiffs' argument is that this covenant is independent of any provision in the loan agreement or the mortgage that required the plaintiffs to make the advance to the Company.

53 Two observations may be made about this submission at this stage. First, it proceeded on the assumption that the Court of Appeal did not have regard to the terms in the loan agreement for the purpose of construing the mortgages because the loan agreement was not, so to speak, indefeasible and it was void because the signatures of the mortgagors had been forged. It is at least debatable that the Court of Appeal proceeded on that basis. As appears from the extract of the reasons of Brereton JA above, his Honour observed at [22] that "CEG did not submit that there was any collateral document which would assist it." That appears to be a statement that the appellant did not make a submission that the Court of Appeal was entitled to construe the mortgages having regard to particular terms in the loan agreement that were incorporated into the mortgages by reason of the terms of those instruments. Rather, Brereton JA appears to have proceeded upon the basis that the appellant did not submit that the terms of any collateral document improved its position in relation to the proper construction of the mortgages. However, as I am not privy to the conduct of the appeal in *CEG Direct Securities*, I would hesitate to express any conclusions concerning the reasoning of the Court of Appeal in so far as it depended upon submissions made by the appellant.

54 Secondly, it may be observed that even if the plaintiffs are correct in their submissions that the apparently invalid loan agreement may be validated in the manner for which the plaintiffs contend, and even if the reasoning in *CEG Direct Securities* permits the mortgage in this case to be construed having regard to the terms of the loan agreement, the plaintiffs must still contend with the terms of the loan agreement that appear to have obliged the plaintiffs to have advanced the Principal Sum under the loan agreement to the Company.

55 It may be that even if the loan agreement is validated, the plaintiffs must address essentially the same situation as the appellant faced in *CEG Direct*

*Securities*, where the Court of Appeal preferred the construction of the mortgages that placed greater weight on the term that required the advance to be made to the mortgagors or at their direction. If the focus of construction is moved from the terms of the mortgage to the terms of the loan agreement, the same duality is found consisting of terms that appear to require the advance to be made to the Company and terms that may be construed as imposing on the Company a covenant to repay the Debt whether or not it received any part of the Principal Sum. I will return to this question below in my determination of the issues.

56 The second way in which *CEG Direct Securities* is significant is that, in so far as it may have the effect in this case that the mortgage is nominally indefeasible because of the application of s 42 of the *Real Property Act*, though it does not secure anything, that may have a determinative effect on the plaintiffs' application for compensation from the Torrens Assurance Fund under s 129 of the *Real Property Act*. If s 42 would make the mortgage indefeasible as an estate in the Property, but the reason why the mortgage is ineffective to protect the plaintiffs is the proper construction of the terms of the mortgage or some collateral document, then any loss suffered by the plaintiffs as a result of Mr Lyons' fraud may not have been "a result of the operation of this Act" within the meaning of s 129(1) of the *Real Property Act*. I will return to this issue when I come to consider the plaintiffs' claim against the Registrar-General.

**Consideration of the evidence**

57 I will now consider the evidence concerning Mr Lyons' fraudulent activities in procuring the payment to him of the proceeds of the loan given by the plaintiffs in the context of the forgery by Mr Lyons of the transaction documents and the registration of the mortgage against the title to the Property.

**Plaintiffs' evidence of the loan transaction**

58 It will be appropriate to start by making a number of observations concerning the nature of the evidence led by the plaintiffs with respect to the circumstances in which the application for the loan was made and the transaction implemented.

59 Mr Wassell gave evidence for the plaintiffs by affidavit and he was cross-examined. Mr Wassell was clearly a candid witness, although it is apparent that there was little relevant evidence that he could give.

60 Although there was no direct evidence on the subject, it appears that Mr Lyons initially approached a company called Stronghurst Black Securities (Stronghurst), which is apparently a finance broker or the like. That company is described as "Introducer" in the Application for Mortgage Finance (the Application) that I will consider below.

61 The evidence also suggests that Stronghurst made the application to Directline Express Business Finance (Directline), which is a company with an address in Melbourne. It seems likely that Directline's business includes acting as an intermediary between investors such as the plaintiffs, who wish to earn income by making loans to borrowers on mortgage security, and borrowers who wish to be the beneficiary of such loans.

62 Mr Wassell gave evidence that the loan in the present case was introduced to the plaintiffs by Directline by an email with an outline of an investment proposal. Mr Wassell's contact at Directline is Sacha Caller. It appears from Mr Wassell's cross-examination that Directline provided him with the Application. Mr Wassell accepted that he was not provided with the borrower's profit and loss details or balance sheet beyond the information contained in the Application. The plaintiffs had, by around October 2019, made approximately five or six loans through Directline. It may be noted that the address of the plaintiffs as stated in the loan agreement was "Directline Finance Pty Ltd" at its Melbourne address. Mr Wassell accepted in cross-examination that the only previous occasions in which he had been offered a loan with an interest rate of 3% per month was in relation to "a second mortgage or what is described as a caveat loan" (T 12.47).

63 Mr Wassell was asked questions about the Conditional Approval for Finance (the Conditional Approval) that I will also consider below. He said that he had not received the document from Directline and obtained it after legal action had been commenced.

64 Mr Wassell said that he never gave any thought to the possibility that the borrower was somewhat desperate to procure a relatively small amount of money in light of unencumbered assets to the value of about $2.5 million.

65 The following exchange took place in the cross-examination of Mr Wassell at T 16.24:

> Q. I think I asked you whether you were aware prior to the funds being advanced that the funds, settlement instructions directed the funds to be paid directly to Tony Lyons and I think you said you were not aware of that. Is that a fair summary of your earlier evidence?
>
> A. Yes.
>
> Q. What I want to suggest to you is that had you been aware of that, that is the existence of settlement instructions, for loan funds to be paid directly to Tony Lyons in circumstances where the purpose of the loan was to raise business capital, you would not have authorised the release of the loan funds. Do you agree?
>
> A. Yes.
>
> Q. Because that would've at the very least, may be suspicious that the purpose of the loan was unrelated to the interests of the defendant borrower, agree?
>
> A. Yes.

66 This evidence is of little significance because it is clear that, apart from approving a proposal made by Directline and providing the funds that were necessary to enable the loan to be made on the completion of the transaction, the plaintiffs had very little to do with the transaction. The transaction was managed by Directline through solicitors nominated by Directline to act for the plaintiffs.

67 Exhibit DIW-1 was tendered through Mr Wassell's affidavit. The documents were evidently obtained from the plaintiffs' solicitors' file and were tendered without explanation. The exhibit included all the relevant transaction documents.

68 The exhibit also included the identity agent certifications prepared on 16 October 2019 and signed by Ms Dawson in which Ms Dawson certified that she had witnessed Mr Carr and Ms Fayers executing the completed mortgage and loan documentation. The provision of these certifications by Ms Dawson to the plaintiffs' solicitors was a necessary condition to their decision that it was safe

to complete the transaction. The declarations were false and deceitfully prepared. I will consider the significance of this circumstance below.

69 The exhibit included forged statutory declarations by Mr Carr and Ms Fayers that they had received independent legal advice and that they had thereafter freely and voluntarily signed the transaction documents. Ms Dawson certified that she had seen the face of the persons signing the declarations at the time they were executed, even though the declarations stated that they were made at Lambton and Ms Dawson's office was at Tamworth.

70 One of the documents in the exhibit was a settlement instruction forged by Mr Lyons in the name of Mr Carr and Ms Fayers that directed that the balance of the loan funds be paid into an account in the name of Tony Lyons at Greater Bank.

71 Finally, for present purposes, the exhibit contained a letter written by the CBA dated 25 October 2019 addressed to Mr Carr at an address in Merewether, New South Wales. That was not the address of Mr Carr as stated in any of the transaction documents or the identification documents provided by Ms Dawson to the plaintiffs' solicitors. There is evidence that it was Mr Lyons' address. The letter stated that the account had been opened in Mr Carr's name on 24 October 2019.

72 The plaintiffs' solicitor, Mr Luke Kenneth Owens, also gave evidence in the plaintiffs' case by means of an affidavit in which he said that, on 11 November 2019, after receiving the original certificate of title, the transaction involving the making of the purported loan to the Company was completed on the PEXA system.

73 The following cross-examination of Mr Owens took place at T 20.39 concerning whether the direction to pay the loan funds to Mr Carr that is referred to above ought to have put him on notice that the loan was not to raise business capital:

> Q. You understood that the direction was to pay the loan funds not to the defendant borrower but to an account bearing the name Kenneth Carr, correct?
>
> A. That's right.
>
> Q. What I want to suggest to you is that must have put you on notice that the purpose of the loan funds was not to raise business capital.

A. I don't agree with that.

Q. It must have been or it may well have been for Mr Carr's personal benefit rather than the benefit of the defendant.

A. I don't agree that that follows. I, it's a director - Kenneth Carr is a director of a company. I don't agree with that.

74 Mr Owens gave a similar answer at T 22.18. Mr Owens was also asked about the direction received by his firm that the loan funds be paid directly to Mr Lyons at T 22.41:

Q. You will see that the settlement instructions at one point directed that the loan funds be paid to Tony Lyons, do you see that?

A. Yes.

Q. What I want to suggest to you is, is that that should have put you on notice that the purpose of the loan funds was not as described in the loan application as you understood it?

A. I don't agree with that. There's, there's a lot of situations where we're directed to pay third parties and for the procedure that we require funds to go to the borrower or a party to the loan.

Q. But in those circumstances you were advised that the purpose of the loan is to pay a third party or creditor, isn't that the case?

A. No. We were given a direction.

75 Exhibit LKO-1, which was tendered through Mr Owens, included a number of emails exchanged between Mr Owens' firm, acting for the plaintiffs and Ms Dawson, the solicitor who purported to act for the Company. The exhibit included the documents by which the transaction was completed. Finally, the exhibit included a copy of a letter dated 30 September 2019 addressed by a property consultant to Mr Caller, that provided an appraisal of the Property at between $280,000 and $295,000. Mr Owens said that he was provided with the appraisal by Directline on 3 September 2021.

76 No evidence was given by any representative of Stronghurst or Directline. At least in the case of Directline, Mr Caller may be regarded as a witness within the plaintiffs' 'camp'. Apart from the appraisal referred to in the previous paragraph and the Application referred to above, there was no evidence at all about the circumstances in which Mr Lyons sought the loan on behalf of the Company, or any evidence about inquiries made to confirm the identity of the borrower or the legitimacy of the transaction or the capacity of the borrower to repay the loan.

77 Exhibit TD-1, which was admitted through Ms Dawson's affidavit, included copies of email correspondence exchanged between Ms Dawson and the plaintiffs' solicitors during the loan transaction.

78 Ms Fayers included in Exhibit CF-1 at pages 79 to 86 of her 27 November 2020 affidavit an email from Directline containing the Application. This was the only evidence of the creation of the Application.

**Directline Application for Mortgage Finance**

79 There is no evidence of the circumstances preceding the Application in which Mr Lyons applied for the loan that was ultimately given by the plaintiffs. The Application is a document prepared on the letterhead of Directline that was purportedly signed by Mr Carr on 27 August 2019 and by Ms Fayers on 30 September 2019.

80 As with all other documents purportedly signed by Mr Carr and Ms Fayers, Mr Lyons forged their signatures on this document.

81 It appears from the first box in the Application that it was introduced by Stronghurst. As noted, no evidence was given by Stronghurst and it is not known how Mr Lyons, purportedly on behalf of the Company, made the application and secured the introduction.

82 The full names, dates of birth, residential addresses, phone numbers and mobile numbers of Mr Carr and Ms Fayers were set out in the Application in the box for individual applicants. The same number was replicated in the fields for phone numbers and mobile numbers for both Mr Carr and Ms Fayers, while the email addresses inserted were different, being 'kcarr49@gmail.com' and 'kencarr784@gmail.com' respectively.

83 The names of Ms Dawson and her firm, Dawson & Co Solicitors, were inserted in the box provided for financial information.

84 In the box for Company/Business Details, the Company's name, ACN and registered office were inserted together with Mr Carr's name as well as a mobile phone number and an email address, kcarr49@gmail.com, which falsely purported to be the email address of Mr Carr. The principal activity of

the Company was described as “Heavy Vehicle, Earth Moving Equipment Hire”.

85 The address of the Property was given in the box for Security Details and described as “Industrial Warehouse 220m²” with an apparent value of “$285K”.

86 Intriguingly, Mr Lyons’ name and mobile phone number were stated under the heading “Contact Person (for access)”. As no witness from Stronghurst or Directline was called to give evidence, it cannot be known whether either company noticed the reference to Mr Lyons’ name or made any enquiry of him in relation to access to the Property.

87 In the box for Statement of Assets and Liabilities, the Property was stated as having an unencumbered value of $285,000. The total assets, described as being “MV/Equipment/Business”, were stated to have a value of $2,525,000 with no liabilities.

88 In the box for Loan Purpose & Details, the amount required was “150K nett” for “6 mths” and the funds were required “ASAP”. The purpose of the loan was described as: “Raise Business Capital” and the repayment strategy was: “Sale of property”. On the following page of the Application, there is a second box with the heading: “Specific Loan Purpose Stated Here.” The purpose stated was: “Raise business capital whilst waiting on payments from Debtors”.

89 There is no evidence as to the precise way in which Mr Lyons approached Directline and what, if anything, was done to investigate Mr Lyons’ authority to act on behalf of the Company or Mr Carr or Ms Fayers, or to investigate the authenticity generally of the transaction that was proposed by Mr Lyons. There is also no evidence of whether Stronghurst or Directline noticed the apparent inconsistency between the two repayment strategies, one being the sale of property and the other being the receipt of debtors.

90 As noted above, the purported signatures of Mr Carr and Ms Fayers appear on this page against the printed dates 27/08/2019 and 30/09/2019.

91 The same signatures and dates appear later in the Application at the end of a series of terms under the heading ‘Declaration and Privacy Information Consent and Agreement’. Among other things, an agreement was included to

charge the Company's "interest in any and all assets and real property" to "secure payment of the search and due diligence fees".

92 The final page in the Application appears to be a Loan Settlement Statement that described the borrower as being the Company, identified the Property as the subject property, and stated the Settlement Date to be 11 November 2019. The loan amount was $185,000 and the electronic transfers required following settlement were described as:

| | | |
|---|---|---|
| 1 | Application fee | $6,105.00 |
| 2 | Legal Fees | $4,400.00 |
| 3 | Prepaid interest | $33,300.00 |
| 4 | Broker fee Acc name: Stronghurst Black Sec | $9,450.00 |
| 5 | Acc name: Kenneth Carr | $131,745.00 |
| | BSB:062 948 Acc no: 2311 0258 | |

93 The prepaid interest of $33,300 for a six-month period represents interest at the rate of 3% per month. As no evidence was given on behalf of Stronghurst or Directline, there was no explanation as to what those companies thought about why the Company, with $2,500,000 in assets and no liabilities, would have a need to borrow short term finance at an interest rate of 36% per annum.

94 Not only was there no evidence about the circumstances in which the Application was prepared, there was also no evidence that either Stronghurst or Directline made any attempt to verify the Application by contacting Mr Carr or Ms Fayers in person. I infer that no such contact was effected as no evidence of such a contact was given by either the plaintiffs, Mr Carr or Ms Fayers.

95 There is some doubt about whether the Loan Settlement Statement was prepared at the same time as the balance of what I have called the Application. As I have said, the documents were put into evidence as an exhibit to Ms Fayers' affidavit without any explanation, because the documents had been provided to her by Directline. Ms Fayers evidently thought that the documents constituted the one Application, but they appear to have been attached separately and were described in Directline's email to Ms Fayers as

"APPLICATION FOR MORTGAGE FINANCE2.pdf; Loan Settlement Statement", which is consistent with the documents being separate.

96 The Loan Settlement Statement contained a direction that the balance of the loan funds be paid into the CBA bank account purporting to be in the name of Mr Carr that the CBA letter dated 25 October 2019 stated was opened on 24 October 2019. That suggests that Mr Lyons must have communicated the account details to Directline on or after 24 October 2019 to enable the Loan Settlement Statement to be prepared. As no witness from Directline was called, it is not known whether Mr Lyons provided the CBA letter to Directline. There is no direct evidence that the Loan Settlement Statement was given to the plaintiffs' solicitors, although the solicitors must have been provided with some explicit instructions concerning how the loan funds were to be disbursed.

**Conditional Approval and Letter of Offer**

97 The next document in time that is in evidence is a document dated 1 October 2019 that is composed of a 'Conditional Approval for Finance' and a 'Letter of Offer: Conditions Precedent'.

98 The Letter of Offer is signed by Mr Caller as Managing Director of Directline. As noted, Mr Caller did not give evidence. He was probably the person most able to give a proper explanation of any due diligence steps that Directline may have taken to ensure that the application for finance contained in the Directline Application was a genuine one made on behalf of the Company.

99 Mr Lyons had no legal connection to the Company. An ASIC search of the Company would not have suggested that Mr Lyons had any authority to act for it. As the Conditional Approval was issued on 1 October 2019, the only information supplied by the Company that Mr Lyons could have used to create the false impression that he was an agent of the Company was information supplied before that date. As the examination of the evidence conducted below will demonstrate, the only information that the Company had provided was what Ms Fayers described as the 100 points of ID, being the photographs of Mr Carr's and Ms Fayers' drivers' licences, Medicare cards and passports. Those documents could not sensibly have been used by Mr Lyons to support a ruse that he was the agent of the Company.

100 I will also consider below a page of an agreement with Stronghurst dated 14 August 2019 that was attached to Mr Lyons' 16 August 2019 email to Mr Carr and Ms Fayers. Mr Lyons must have initiated the application to Stronghurst before the Company had provided him with any information that would have assisted him to impersonate Mr Carr and Ms Fayers.

101 Although the evidence shows that Ms Fayers provided an array of documents to Mr Lyons, there is no suggestion that the Company provided Mr Lyons with any document that was capable of making him the Company's agent for the purpose of negotiating the loan that was ultimately given by the plaintiffs.

102 This all suggests that Mr Lyons must have been able to make an application to Stronghurst by some electronic means by which he impersonated one or both of Mr Carr and Ms Fayers. There was no evidence that either Stronghurst or Directline made any direct contact with either Mr Carr or Ms Fayers to confirm that the application was a genuine one made by the Company.

103 The Conditional Approval for Finance listed terms that were generally consistent with the Application. The Letter of Offer contained forged signatures dated 7 October 2019 by Mr Carr and Ms Fayers on their own behalves and Mr Carr on behalf of the Company.

104 Although Mr Wassell gave evidence that he did not receive the Letter of Offer until after the commencement of legal proceedings, as it is the first document in the exhibit to his affidavit, being the documents provided to him by his solicitors, it is likely that the Letter of Offer was sent to him. In any event, it was probably the means by which Directline gave instructions to the plaintiffs' solicitors.

**Dealings of Mr Carr and Ms Fayers with Mr Lyons**

105 It will be convenient at this point to consider the dealings between Mr Carr and Ms Fayers and Mr Lyons in the period leading up to the completion of the loan transaction.

106 Mr Carr gave evidence that he was the manager of a soccer team in which Mr Lyons played in the late 1980s.

107 In October 2018, Mr Carr met Mr Lyons again at a soccer reunion and was told by Mr Lyons that his "life has really gone off track in the past few years".

108 On about 24 October 2018, according to Mr Carr's evidence, Mr Lyons called Mr Carr and asked if he would guarantee a business loan for a period of three months to enable Mr Lyons to buy a Pizza Hut. Mr Carr declined but said that he would lend Mr Lyons cash until he could get a loan in his own name.

109 Mr Carr annexed to his affidavit an email addressed to the Company from Mr Lyons dated 14 February 2019. The email stated:

> Hey Cheryl/Kenny.
>
> How's things?? How are you guys? Things going good here. Been busy. I've attached a letter I got from the bank saying I've been pre approved.
>
> Also I attached another business Outback Jacks at Maitland (it's in old brewery spot) which I'd like to buy as it's ridiculously cheap at 25k. I was seeing if I could borrow this amount off you guys to buy? I've been to check it out etc n it's dirt cheap. Just want to build a little portfolio if I can. Ill have the loan all paid back to you by either the 8th or 15th March as that'll be just a week or 2 over the 3 months. So if you can that will make that I owe you 100k.
>
> If Kenny's around tomorrow arvo I was going to pop in n have a beer with him. If you see this can you let me know as I can wrap this up asap n I'll call later tonite or first thing in the morning.

110 The attached letter from Greater Bank advised that Mr Lyons had been pre-approved for a loan of $125,000. The letter that was annexed to Mr Carr's affidavit appears to be on Greater Bank letterhead and addressed to Mr Lyons at his Merewether address. The attachment is strange because it is not dated or signed. The letter said:

> The Greater Bank is pleased to advise that your application for business loan has been pre approved for up to and not limited $125,000.00. This as discussed is viable to the following conditions.
>
> 1. Trading for a minimum of 3 months
>
> 2. Up to date trading figures
>
> 3. Confirmation letter from your accountant
>
> Once we have received and verified these documents we will transfer the loan amount into your business account.

111 The letter does not appear to be authentic and it was not prepared in a professional way. However, no suggestion was made at the hearing that the letter was not authentic or that Mr Carr should not have treated it as being authentic.

112 Mr Carr also annexed a two-page document that appears to be an advertisement on Gumtree for the purchase of "Outback Jacks Maitland".

113 Ms Fayers gave evidence that, during the period from late October 2018 to late October 2019, she made a number of cash loans to Mr Lyons by electronic funds transfer to his bank account. There were 19 payments ranging in amounts from $20,000 down to $625. The total amount of the loans was $162,225. Ms Fayers supported her evidence with records of the funds transfers that describe the payments as having been made to Tony Lyons.

114 Ms Fayers also gave evidence of having made a further loan to Mr Lyons of $45,000 in response to an email from Mr Lyons dated 9 April 2019, which stated:

> Hi Cheryl/Kenny,
>
> As you can see by letter I'm in massive shit. There is an arrest warrant out on me. This is from a years ago after I got divorced we had a loan with commonwealth n because I've moved, changed jobs, numbers etc I forgot about it. Completely my fault.
>
> I've just been to see a solicitor as I'm due in court on Thursday. He tells me it can all go away if paid by Thursday or they'll take my businesses, put a black mark on my file, charge huge amounts of interest n I won't be able to borrow for years and I will basically lose everything including the kids once the ex knows.
>
> The amount owing is $57438.27. I have now say 13k which leaves 45k. I know I am a pain in the ass but I have no options left as I don't want to lose everything. So would I be able to borrow the 45k n then that would make it I owe you 150k which I'll have no issues borrowing once this is done.
>
> I own 90k + say this 45k = 135k +15k interest = 150k
>
> Thanks guys
>
> Yogi

115 There was evidence that Mr Lyons was customarily called Yogi.

116 Ms Fayers' evidence was that Mr Lyons told her on about 14 June 2019 that he had been approved for a loan of $150,000 and that the bank needed $3,000 to be paid before the loan could be released. At Mr Lyons' request, Mr Carr and Ms Fayers proceeded to lend Mr Lyons a further $3,000.

117 Ms Fayers gave evidence of a similar conversation with Mr Lyons on about 8 July 2019 in which he said that all he needed to do to finalise the loan was to

pay a credit card debt of $2,500. Mr Carr and Ms Fayers then loaned Mr Lyons the additional $2,500.

118 According to Ms Fayers, on about 29 July 2019, she had a conversation with Mr Lyons in which he said that he had organised $160,000 to be paid directly into her account. Ms Fayers annexed to her affidavit an email from Mr Lyons dated 16 August 2019, which stated:

> Hey Kenny/Cheryl,
>
> Just wanted to show you I'm here at bank now signing all the paperwork to finish this.
>
> The guy just said to me I still owe $1,935.86 to finish off that loan n they won't release funds until I do. Can I borrow this off you to finish this thing n get $165,000 to you guys finally.
>
> I've trued to call Kenny but comes up private for some reason. I'll call him tonight after work.
>
> Thanks heaps for everything
>
> Yogi

119 Ms Fayers' evidence was that Mr Lyons had attached to this email a "photo to show he was signing the paperwork to finalise the loan with the bank". The attachment is a one-page document bearing a date 14 August 2019. The letterhead is not included in the copy as it appears to have been poorly scanned. It is part of an agreement between a "Borrower" and a "Broker". The name Stronghurst Black Securities Pty Ltd appears at the bottom of the document. As noted above, this company was the "Introducer" of the loan. A close reading of the document would not support its description as relating to a loan from a bank. It appears to be part of an agreement with a finance broker for the purpose of arranging a loan.

120 Ms Fayers gave evidence of a further conversation with Mr Lyons on 9 September 2019, in which Mr Lyons told her that the broker had said that the money was in the trust account but that Mr Lyons needed to pay another $5,000 so that "the money could be finally released to you". Ms Fayers said to Mr Lyons that, if she and Mr Carr loaned the additional amount, they would need assurance that that would definitely be the end and that they would get all of their money back straight away.

121 On 28 September 2019, Ms Fayers received an email in the following terms from Mr Lyons:

> Hey Cheryl
>
> How are you?? Got a call yesterday from Max the broker re the loan. Can you said me 100 points of your ID please (passport, license, Medicare).
>
> They just want to verify you as I nominated you fir the money to go straight into your account.
>
> I think it's fair enough as they said they just want to verify you so it's not like I'm doing a dodgy or ripping anyone off. I'm at work today so can you email thru please n I'll forward on to Max so it's there for Monday to go. Not sure if they will but they might also call you to verify. Then we're done finally
>
> Thanks heaps
>
> Yogi

122 The next day, Ms Fayers sent an email to Mr Lyons that said: "ID's attached". The identification documents that were attached were separate pages for each of Ms Fayers and Mr Carr that contained copies of their drivers' licences, Medicare cards and passports.

123 On 10 October 2019, Ms Fayers received another email from Mr Lyons, this time requesting a copy of the Company's equipment list for the bank. The email stated:

> Hi Cheryl,
>
> Got a call from the broker yesterday. I think he thinks I'm doing a dodgy here n I've told him to call you. Anyway Can you send me a copy of your equipment list (like bobcat, tipper, truck name, model etc etc) and who everything is insured with so I can send them n go see as I've told you it's fully legit business.
>
> I guess the thing that worries them was that arrest warrant for that money I owed. Sorry to be a pain in the ass with this but when you send it over n I forward on they can finally have no issue n release the money to you guys.
>
> Thanks heaps
>
> Yogi

124 Ms Fayers responded on the same day by emailing to Mr Lyons the Company's 2019 equipment insurance policy which listed its equipment.

125 On 12 October 2019, Ms Fayers received a further email from Mr Lyons in the following terms:

> Hey Cheryl,

> I know I'm becoming a real pain in the ass n believe me I'm getting over this n it's causing me heaps of stress. I lost it on Max the broker yesterday. So I need 2 things for this to be absolutely finished with.
>
> 1. Loan application fee $2,750. He never told me I had to pay this upfront n I said it should be included in the loan. Because of all that shit with the ex it's hurt my credit. Can you transfer this amount please n I will forward on asap as he works Saturday's.
>
> 2. This one is odd I know.. but I know he doesn't fully trust me even tho I've supplied everything for me n forwarded on stuff from you. They need a clear photo of you n Kenny holding your license to confirm/verify identities. Can you email them to me please.
>
> This is where I lost it n blew up as I thought it was all done n finished. Didn't do myself any favours. Anyway he sent me a email saying this is the final step.
>
> I can't thank you guys enough.
>
> Yogi

126 That same afternoon, Ms Fayers sent an email to Mr Lyons which attached the photographs with licences and advised that she had transferred the $2,750.

127 The attached photographs are of each of Mr Carr and Ms Fayers holding their drivers' licences next to their faces.

128 On 16 October 2019, Mr Lyons sent a further email to Ms Fayers that said:

> Hi Cheryl,
>
> This is it I promise finally. Can you send me a copy of the certificate of title – not sure what that means, for your warehouse at Thornton please. That dickhead Max wants to know if I knew someone for extra security for just in case. He asked if I knew anyone with extra security n I said you guys with the warehouse as I remembered from before.
>
> There's definitely nothing on you guys it's all on me as he is worried from all the shit before. Everything is in my name n it's all on me now n he just wants 2 months of payment from me in the schedule that's set for me. But we just need this certificate to satisfy he's checklist as he keeps going on about banking reforms n my past.
>
> The funds can be released to you guys asap n then it's all done n I can finish with this dickhead too.
>
> Sorry to be a pain but I just need this over n done with.
>
> Thanks so much for everything guys you have no idea how much you've helped n saved me.
>
> Yogi

129 On 23 October 2019, Ms Fayers received another email from Mr Lyons that said:

> Hey Cheryl,

> Here I am again sorry. This Max guy is really pissing me off n causing me so much grief over this I don't need it. He wants that certificate you sent to be the original n get their solicitor to certify it as original.
>
> He doesn't believe anything I send that's not original. I keep saying to him how can it not be what do you think I'm making these docs up. All because of the past where the ex wife stitched me up with stuff n I didn't look into it properly which was my fault. He's like we can't get it done until you do this.
>
> Anyway can you get your conveyancer to Express Post the original Today please to the following:
>
> Name -– Dawson & Co Solicitors
>
> Attention – Tina Dawson
>
> Address – [address in Tamworth]
>
> If he can send today she'll get it tomorrow certify it n send back n money will be transferred n then we can move on n be over this.
>
> Sorry again to be more of a pain but it's just about done.
>
> Yogi

130 Ms Fayers gave evidence that, on about 23 October 2019, she posted the certificate of title to Dawson & Co. The exhibit to Ms Fayers' affidavit simply had a copy of the certificate of title. Ms Fayers gave evidence in cross-examination that the certificate of title for the Property had been in safekeeping with the Company's conveyancer. Ms Fayers initially obtained a photocopy from the conveyancer, and later when the original certificate was required, she arranged to collect the original from the conveyancer.

131 On 30 October 2019, Mr Lyons sent a further email to Ms Fayers. It said:

> Hey Cheryl,
>
> Spoke to that Max late yesterday. The only thing he needs is a copy of strata managers insurance certificate for the warehouse. Can you send me a copy please.
>
> He said that's it for everything on the list. He reckons he sent me the list which is crap n I made it clear to him yesterday to tell me if there's anything else n he told me there's nothing else. So if you can send this morning please n I'll forward it on asap n we'll finally get this done n I don't feel like a pain to you.
>
> Thanks so much
>
> Yogi

132 Ms Fayers then sent to Mr Lyons the Company's copy of the strata manager's certificate of currency for the strata scheme of which the Property is a part.

133 Ms Fayers' evidence was that she and Mr Carr did not learn about the loan given by the plaintiffs until mid-November 2019, when, in the course of trying to

trade in a used bobcat owned by the Company, they became aware that the bobcat was subject to a security interest on the PPSR.

**Evidence of Mr Carr and Ms Fayers**

134 Mr Carr and Ms Fayers are an older couple who have succeeded over the years in establishing the business of the Company, which involves making available for hire equipment such as bobcats, tippers, loaders and dump trucks.

135 Mr Carr and Ms Fayers do not claim to be commercially sophisticated or experienced with financing transactions. It is clear that Mr Carr was inexperienced in financial matters, other than the day to day operation of the business of the Company. He left the bookwork to Ms Fayers. His cross-examination included the following, at T 62.47:

> Q. Do you have any recollection of copies of those insurance certificates being provided, either by yourself or by Ms Fayers to Mr Lyons on or about 10 October 2019?
>
> A. No I've got no recollection of it.
>
> Q. Is that something you left to Cheryl?
>
> A. Cheryl done it all. I didn't have a clue. I was the shovel man mate.

136 That was a fair self-assessment by Mr Carr.

137 Both Mr Carr and Ms Fayers were cross-examined about a number of properties that they or the Company had purchased in addition to the Property. There were five such properties purchased at different times from 1999 at prices of $235,000, $175,000, $291,000, $205,000 and $233,000. Ms Fayers gave evidence, which I accept, that these properties were purchased with the aid of conveyancers, and that the couple had never retained or been advised by a solicitor. She left the paperwork to the conveyancer, who retained the certificates of title.

138 Mr Carr gave the following evidence concerning his knowledge of the certificate of title for the Property, at T 54.25:

> Q. May I ask this; in September of 2019 where was the original certificate of title for [the Property]?
>
> A. Well, this is what I can't tell you because Cheryl looks after all that.
>
> Q. Is your answer --

A. She’s got all that - she’s got - she does all that stuff for me, mate.

Q. I understand. It was a simple question. Is your answer you don’t know?

A. Well, I don’t know because unless, unless you talk to her, you’ll find out.

Q. Do you have any recollection at this time as to whether or not there was a mortgage over that property, [the Property]?

A. No, no, I didn’t, no.

Q. I’m asking you, to put it in layman’s terms, whether you knew it was unencumbered or whether, alternatively, it was subject to a mortgage

A. I don’t know that either.

139 Ms Fayers was not sure of the purpose of a certificate of title although she had an idea of what a title deed was. The following exchange took place in the cross-examination of Ms Fayers, at T 80.38:

Q. You've never used a solicitor at all?

A. No, we've only had dealings with purchase of property and we've always gone through a conveyancer.

Q. Never a solicitor?

A. No.

Q. So you've never received any advice from a solicitor as to what a certificate of title is?

A. No.

Q. You've never received any advice as to how a mortgage works, is that right??

A. No. Well - no, no, no. Maybe in very basic terms I knew that a mortgage was to a property but I didn't - we never discussed certificate of titles or anything, no.

Q. Have you heard of the term "title deeds"? Have you heard of that phrase?

A. Probably, yes.

…

Q. So my question before the break, I asked you whether you'd heard the phrase "title deeds", do you recall that?

A. Yes.

Q. You said that you had, is that right?

A. Yes, I've heard of the phrase "title deeds".

Q. Do you know what that means?

A. Deed to a property.

Q. What do you understand in terms of a deed to a property?

A. I didn't really - owns that property.

140 Mr Carr explained the reasons why he and Ms Fayers loaned money to Mr Lyons in the following terms, at T 55.26:

> Q. Then you proceeded to lend a substantial amount of money to Mr Lyons over the next year and a half or thereabouts, is that right?
>
> A. That's right.
>
> Q. It's not in your affidavit but for your assistance can I tell you that your partner, Ms Fayers, has listed a large number of payments between 5 November 2018 and 29 October 2019 which total approximately $162,000 odd, are you aware of that?
>
> A. Yes, I am.
>
> Q. In what circumstances did you tell Ms Fayers to transfer those moneys to Mr Lyons? How did it happen?
>
> A. Well, I'll tell you how it happened. It was from the conversation he, he looked like he was going to neck himself and I tried to get him out of trouble. That's why I lent him the money. But obviously it's the worst thing I could have done because now he's caused pain and sickness to me, righto. I wish I wouldn't have done it. But that's what you do for trying to help people.

141 Further, in cross-examination by counsel for the Registrar-General, at T 66.14:

> Q. Is it the case that at least at that time when you were lending him money, you considered him to be a mate, a friend?
>
> A. He was a mate. He was a mate. We'd been through soccer and he'd got the training and he'd done well, he ended up a coach. But something went wrong that I didn't know about and one of our boys was really sick and we had a benefit night for him. And I see him there and I was talking to him and I bought him a beer, and we're just having a yarn, and he said, "Oh," he said, "I've got a, (untranscribable) saying you've got to get out there and get something that brings your money in, and I'm looking to Pizza Hut at Cessnock." He'd come from Cessnock. And I said, "Well, that could be a good idea for you, mate, because you know a lot of people in the town and you know, you get a few people that you know," and it continued on." But obviously he was setting me up.

142 Mr Carr was asked in cross-examination whether he was suspicious about the information he received from Mr Lyons, at T 59.6:

> Q. Didn't it strike you as somewhat suspicious that Mr Lyons had firstly asked you to be a guarantor in purchasing a Pizza Hut business in October 2018 and then was claimed to buy the Outback Jacks at Maitland in March 2019?
>
> A. Yeah but the whole story - the whole story was he's done me. He's done me easy because he's told me this and he could buy it cheap and I still went along to give him a hand. But I'm not worrying about that. I'm worrying about the one where I haven't even got a bank account in the Commonwealth Bank.

143 Further, at T 64.44:

> Q. You were very trusting of Mr Lyons weren't you?

A. I was because he was a good kid and I don't know with his marriage separation buggered him up but it did.

Q. You trusted him to repay you moneys over an extended period of time?

A. Of course I would because I had him when he was younger. I watched him go through his go.

Q. And he hadn't repaid you any of the moneys that you had lent him right?

A. No but because we were giving him a chance to get on his feet. You don't make money out of a, a Pizza Hut overnight. It takes a while, look at me. It took me 40 years to buy a bobcat.

Q. You'd lent him $20,000 on the proviso that he'd pay it back by 15 March 2019?

A. Yes.

Q. But he hadn't done that had he?

A. No, well he was struggling and I just let it go.

Q. Was there any point in time prior to November 2019 that you suspected that Mr Lyons might not be telling you the truth in relation--

A. Well.

…

WITNESS: Yep righto, that's all right. I never knew anything until I traded a bobcat in and I got a phone call to say your bobcat's on, on hold. I've said "On hold for what?" He said - I said "Mate I've owned it for ten years, what do you mean, I own it?" So I had to pay him back 16,000. I, that's the first time I knew that this bastard got hold of me.

144 Ms Fayers was asked whether she had heard of identity theft at T 73.22:

Q. You've heard of identity theft, have you not?

A. Yes.

Q. It's been in the news for a number of years about fraudsters creating false identities, right?

A. Yes.

Q. Did it not cross your mind at the time that you created the documents on pages 25 and 26 that those copies might be used for some fraudulent purpose?

A. No, it did not cross my mind.

145 Ms Fayers explained her preparedness to continue supplying the further information requested by Mr Lyons in the following way, beginning at T 75.29:

Q. Can you explain to the Court why would you be forwarding an equipment list through to Mr Lyons in order for you to receive a payment?

A. Because he requested it and he said there that it - so they - so it's - can - he can prove that we're a fully legitimate business.

Q. I asked you some questions about identification and photographs a moment ago and you told me that Mr Lyons had explained to you that the payer needed 100 points of ID in order to make a payment to you, right?

A. Yes, yes.

Q. I ask you this; what has an equipment list got to do with your identity?

A. Well, I think I - the, the identity was to prove that we existed and then the equipment list was to prove that we were a business. I mean, this is all given in the fact that we were not aware in any way, shape or form that a loan was being taken out in our company name and that the lender was requiring company information to give Tony Lyons this loan.

Q. What I'm putting to you was that it was entirely foreseeable, wasn't it, that that's exactly what was happening when you provided the documents at page 27 to 40 to Mr Lyons?

A. No, I did not know that was happening.

Q. But it was foreseeable, wasn't it? It's the obvious explanation?

A. No, it's not the - it might be obvious to you, it's not obvious to me and it was not obvious to me at that time.

…

Q. Why on earth, with respect, would you provide a copy of a strata manager's insurance certificate for the warehouse in order to receive a payment?

…

WITNESS: Tony Lyons said that these things were required for the broker's checklist due to banking reforms so that he could - that we - so that we could get the money paid directly to us.

…

Q. I'm asking you why you would supply a certificate of currency for insurance in relation to a piece of property that the company owned in order for the company to receive a payment?

A. Because that's what was asked.

Q. So you simply trusted Mr Lyons?

A. I did trust Mr Lyons, yes.

146 The final exchange in cross-examination between Ms Fayers and counsel for the plaintiffs was, at T 79.43:

Q. I'll put the final question. Would you not agree with me that it was entirely foreseeable that with all the identification documents and the original certificate of title that you'd provided to Mr Lyons he might be able to use those documents to obtain a loan on the security of the property without your otherwise consent?

A. No, don't agree.

Q. You don't think it was foreseeable at all?

A. In hindsight - in hindsight. Not at the time, no.

147 I accept the truthfulness of the evidence given by Mr Carr and Ms Fayers. No submissions were made that the Court should not do so.

148 I find that both Mr Carr and Ms Fayers are warm-hearted and generous people who have lacked commercial experience beyond the operation of an equipment hire business that they have established over the years, and the purchase of a small number of properties with the aid of conveyancers. I find that, in their dealings with Mr Lyons, they believed and trusted him. Their conduct in making a substantial number of moderately large loans to Mr Lyons was imprudent, but the fact is that they made the loans. I am satisfied that they genuinely believed that an old acquaintance was down on his luck and that generosity required them to support him. I am also satisfied that Mr Carr and Ms Fayers had no suspicion that Mr Lyons was engaging in an elaborate plot to deploy the fruits of their good intentions in creating the artifice that would lead to Mr Lyons receiving the loan monies and the loss lying wherever it fell as between the plaintiffs and the Company.

149 From the perspective of a lawyer with considerable commercial experience, the explanations given by Mr Lyons for the delays in completing the loan transaction and the need for the provision of evermore information and records were all implausible. From that perspective, a consideration of the reasons and, for example, the terms of the Stronghurst agreement dated 14 August 2019, would quickly have exposed Mr Lyons' subterfuge. However, it is difficult to understand the significance of these events from the perspective of people whose worldview is less sophisticated and who have not acquired a background knowledge of commercial practices that would be sufficient to enable them to detect falsehoods. It is also difficult to judge fairly the true degree of fault of people who have acted under the influence of fraud. Once the reality is exposed, the imprudence and gullibility in succumbing to the fraud may seem obvious. Hindsight is a dangerous guide in this context.

150 I accept Ms Fayers' evidence that she only sent a copy of the certificate of title to Mr Lyons and that she sent the original by post in accordance with Mr Lyons' instructions, but not to Mr Lyons himself. Ms Dawson said in par 28 of her affidavit that she was told by Mr Lyons in late October 2019 that he had

received the original certificate of title from Ms Fayers, and that Ms Fayers told him to send the title deed to the plaintiffs' solicitors. If he made that statement, it is not inconsistent with Mr Lyons having asked Ms Fayers to send the original certificate of title directly to Dawson & Co. I accept Ms Fayers' evidence that she thought that Dawson & Co were the solicitors for the lender to Mr Lyons who would pay the loan monies to the Company in repayment of the loans made to Mr Lyons.

151 Ms Fayers was not cross-examined in any detail about what she understood the significance to be of sending the Company's original certificate of title to a solicitor. A person in her position would very likely have replied that in view of the professional duties of solicitors there was little risk that the certificate of title would be misused. Ms Fayers was not asked whether she considered the risk that the solicitor would misuse the certificate of title by deceitfully certifying that she had advised Mr Carr and Ms Fayers in person and that she witnessed the execution by them of the transaction documents and the provision of the identification evidence, when that was a complete fabrication.

**Emails between the plaintiffs' solicitors, Ms Dawson and Mr Lyons**

152 On 8 October 2019, the plaintiffs' solicitors sent a letter by email to Ms Dawson in which they advised that they acted for the plaintiffs in relation to a loan advance of $185,000 to the Company.

153 The letter enclosed for execution the transaction documents, together with a settlement instruction, an identity agent certification and agent's acknowledgement and declaration for each of the directors, and a certificate of independent legal advice for each guarantor. The letter advised that the plaintiffs required each guarantor to obtain independent legal advice and required the legal practitioner who provided the advice to verify the identity of the guarantors in accordance with the attached declaration. It also advised that the documents would not be accepted unless they were completed and executed strictly in accordance with the instructions in the letter. The letter included the following requirement:

> 4. Provide a colour photograph of each guarantor taken at the time of identity verification, together with confirmation of the date, time and place that the

photograph was taken, and the contact details for the person who took the photograph.

154 The settlement requirements listed in the letter included a certificate of currency of insurance for the full reinstatement value of all improvements, noting the interest of the plaintiffs as mortgagee. The requirement that the interest of the plaintiffs be noted was underlined in the letter. Copies of the current council rates notice and land tax assessment as well as the "Original Certificate of Title 3/SP75683" were also required. Finally, partial PPSR releases over the security property from a number of lenders, being National Australia Bank, CBFC Ltd, Westpac Banking Corporation and Newcastle Permanent Building Society Ltd were required. The numbers of the PPSR registrations were listed against the names of each lender.

155 The Application and the Conditional Approval for Finance only referred to the Property by street address and not by folio number. They did not refer to any chattels of the Company that were to be charged and which were the subject of any existing PPSR registrations.

156 As appears from an email dated 9 October 2019 to Ms Dawson from Hannah Gibson, the solicitor acting on the transaction for the plaintiffs, it had been advised that the loan documents may require amendment. On 10 October 2019, Ms Gibson attached amended loan documents to an email to Ms Dawson.

157 Ms Dawson advised Ms Gibson by email dated 15 October 2019 that she anticipated sending signed scanned copies of the loan documentation to Ms Gibson the next morning with the originals to follow in the post.

158 On 17 October 2019, Mr Lyons sent an email to Ms Dawson that said: "See attached Certificate of Title". The attachment was necessarily a copy of the certificate of title.

159 Ms Gibson reminded Ms Dawson on 18 October 2019 that the executed loan documents had not been received and requested information as to when they would be returned to the plaintiffs' solicitors' office.

160 On the same date, Ms Dawson sent an email to Ms Gibson that attached the executed loan documents and advised that the originals would be posted to the plaintiffs' solicitors' Sydney office.

161 Ms Gibson responded on 21 October 2019. Following her review of the scanned documents, she noted that the following were missing:

> Identity Agent Certification and Agent's Acknowledgement and Declaration, *attached* for your reference.
>
> We require funds to be transferred directly to the borrower and or guarantor. Please provide bank account details for the borrower the bank account details are for a party not named in the loan facility.
>
> Items 2, 4 and 6 in our *attached* cover letter in relation to the security property.
>
> Please ensure the certificate of title is the original.
>
> Copy of 2019/20 council rates, the rates notice provided is for 2018/19.

162 The source of the instruction in the second bullet point must have been the settlement instruction referred to above that required the balance of the loan funds to be paid to an identified account of Mr Lyons at Greater Bank.

163 On 22 October 2019, Ms Dawson sent an email to Ms Gibson that attached a rates notice. It asked for clarification on the basis that Ms Dawson had already sent back items 2, 4 and 6. It also advised that the original title deed would be provided shortly and said:

> In respect of payment of the advance to a third party, can our clients execute a statutory declaration confirming the third party account to which it is to be paid?

164 By email dated 22 October 2019, Ms Gibson explained that the outstanding requirements in relation to the security property were items 2, 4 and 6, being the certificate of currency of insurance noting the interest of the plaintiffs, the land tax assessment, and the partial PPSR releases. The email also stated:

> The bank account details will need to be details for either the borrower or guarantor a statutory declaration will not suffice.

165 Ms Dawson apparently forwarded this email to Mr Lyons. On 22 October 2019, Mr Lyons replied to Ms Dawson:

> Hey thanks for sending the letter to Natalie. But re the below.
>
> 1. It's Strata so it's covered by managers insurance n there's no need for certificate of currency??

2. Do you know what's this requirement is??

3. That's their equipment for their business they won't want to do this n why do they??

Can you let me know n call me in the morning please

166 After the plaintiffs' solicitors had received the original documents from Ms Dawson, Ms Gibson sent a further email to Ms Dawson on 23 October 2019 in which she explained the matters that were outstanding. Apparently, Ms Dawson had only sent the execution pages for some of the loan documents. Ms Gibson asked for Ms Dawson's authorisation to marry the execution pages with the balance of the loan documents, save for the mortgage, which was required to be sent to Ms Gibson in complete executed form.

167 In that same email, Ms Gibson advised that there remained outstanding the original executed identity agent certification and agent's acknowledgement and declarations, the original certificate of title, the bank account details for the borrower and/or guarantor, the certificate of currency of insurance noting the interest of the plaintiffs, the land tax assessment and the partial PPSR releases.

168 On 29 October 2019, Ms Dawson advised Ms Gibson that she had forwarded the original executed identity agent certification and agent's acknowledgement and declarations to the solicitors' office and that the original title deed was also on its way. Ms Dawson also authorised Ms Gibson to attach the execution pages to the balance of the loan documents.

169 On 29 October 2019 at 2:28 PM, Mr Lyons sent an email in the following terms to Ms Dawson:

> You emailed a copy of bank details on Friday. So they have that
>
> It's a strata title so Certificate of currency is in the managers insurance. They don't need this.
>
> All the other stuff is their equipment (bobcats etc) they don't need that.
>
> There's no land tax assessment as the value is under the threshold.. They should know that
>
> Hannah sent an email last week just asking for title n bank account which has been sent.
>
> Just let me know what or if they come back with anything n I'll chase up as I know Their away from Friday as their going to Melbourne Cup week.

170 By further email dated 29 October 2019 at 2:39 PM, Ms Dawson explained to Ms Gibson:

> I am further instructed:-
>
> 1. I sent you the bank details last Friday.
>
> 2. The secured property is strata title and therefore the certificate of currency is in the manager's insurance.
>
> 3. All of the PPSR registrations referred to is in respect of their equipment only.
>
> 4. There is no land tax applicable as the value is under the threshold.

171 Ms Gibson replied on 29 October 2019 at 3:11 PM, saying:

> 1. We confirm receipt of updated bank details
>
> 2. Please provide a copy of strata insurance certificate, it does not need to note the lender's interest
>
> 3. Our client has agreed to waive the requirement for partial releases of PPSR charges.
>
> 4. We will require written confirmation from Revenue NSW or a clear land tax certificate confirming that no land tax is payable.

172 The updated bank details referred to in point 1 must have been the CBA's letter addressed to Mr Carr at Mr Lyons' address that stated that the account had been opened on 24 October 2019. That is established by an email from Ms Gibson to Mr Owens dated 7 September 2021 that forwarded an email from Ms Dawson to Ms Gibson dated 25 October 2019 that attached the CBA's 25 October 2019 letter: see exhibit P2.

173 It is evident that Ms Gibson did not see anything strange in the original instruction being to pay the loan monies to Mr Lyons and then, upon her insisting upon an instruction to pay the monies to the Company or a guarantor, receiving an instruction addressed to Mr Carr at a different address to his address on the loan documents that referred to an account having been opened two days after Ms Gibson's advice that the loan monies could not be paid to Mr Lyons.

174 It may be noted that points 2 and 3 of Ms Gibson's email had the effect that the transaction could be completed without the borrower providing information that, if insisted upon, would most likely have had the result that Mr Carr and Ms Fayers would have learned of the transaction, or that it would not have gone

ahead. It is difficult to see how the plaintiffs' interest as mortgagee could have been noted on any insurance policy without the Company's express consent. The Company's consent would also have been required before any partial release of the PPSR registrations could have been made. The reason why Ms Gibson waived these requirements was not explained at the hearing.

175 After Ms Dawson received Ms Gibson's email on 29 October 2019 at 3:11 PM, she forwarded the whole chain of emails from Ms Gibson's first 8 October 2019 email to Mr Lyons and asked him to get a copy of the strata manager's insurance. She said that she would obtain a land tax clearance certificate.

176 Mr Lyons responded on 29 October 2019 at 3:28 PM, saying:

> Yeah ok I'll give Ken/Cheryl a call n get it organised

177 On 1 November 2019 at 10:01 AM, Mr Lyons sent an email to Ms Dawson in which he said: "I've printed out 2 sets as requested." He asked whether, when he had signed both sets, he should express post one set to Ms Gibson and one set to Ms Dawson. There were further email exchanges between Mr Lyons and Ms Dawson on that date in relation to the posting of the documents.

178 There was an apparent delay in Ms Gibson receiving the outstanding documents and she exchanged emails with Ms Dawson to follow up the issue. Ms Gibson advised Ms Dawson on 8 November 2019, copying in Stronghurst and Mr Caller, that she was required to have the original certificate of title in her possession when lodging the mortgage, so that settlement could not take place until it was received. Strangely, it was Stronghurst that advised Ms Gibson by email on 11 November 2019 that the certificate of title had been delivered to her GPO Box. Ms Gibson confirmed receipt of the original certificate of title to Stronghurst on 11 November 2019 and copied in Ms Dawson. Ms Gibson sent a separate email to Stronghurst and Ms Dawson on 11 November 2019 advising that the matter had settled with the funds being disbursed in accordance with the settlement instructions and bank account details provided.

179 It is instructive that none of the emails in evidence received by Ms Gibson were sent by the plaintiffs, and the plaintiffs were not copied in on any of the emails sent by Ms Gibson. Mr Caller of Directline was copied in on Ms Gibson's 8

October 2019, 23 October 2019, 4 November 2019, 6 November 2019 and 8 November 2019 emails. Even Stronghurst was sent or copied in on Ms Gibson's 6 November 2019, 7 November 2019, 8 November 2019 and 11 November 2019 emails. This evidence tends to confirm the appearance that Directline, assisted by Stronghurst, managed the transaction on behalf of the plaintiffs.

**Identity Agent Certifications**

180 The exhibit to Mr Wassell's affidavit included the identity agent certifications prepared on 16 October 2019 and signed by Ms Dawson, in which Ms Dawson certified that she had witnessed Mr Carr and Ms Fayers executing the completed mortgage and loan documentation. Ms Dawson gave evidence that the certification was false and that she did not witness either signatory executing any of the documents. Ms Dawson listed the identity documents produced to her as being the signatories' drivers' licences, Medicare cards and Australian passports. I have explained above how Ms Dawson acquired those documents. Ms Dawson supported her certification with the photographs of Mr Carr and Ms Fayers holding their drivers' licences near their faces bearing the false statements: "Photo taken at 10am on 16/10/19 at Lambton by Tina Dawson". Lambton is the place of residence of Mr Carr and Ms Fayers. Ms Dawson's office is in Tamworth, some 3 hours away.

181 Ms Dawson made a false declaration in respect of each signatory in which she acknowledged that she had been directed by the plaintiffs' solicitors to use the Verification of Identity Standard and said:

> (a) I have agreed to act as *Identity Agent* on behalf of [the plaintiffs' solicitors] and [the plaintiffs].
>
> (b) I have conducted a face to face in person interview with the *Person Being Identified*, and I am satisfied that the *Person Being Identified* is a reasonable likeness to the *Person* depicted in the identification documents produced.
>
> (c) I have cited the original identification documents marked below in connection with the *Identity Agent Certification* completed for the *Person Being Identified*.
>
> (d) I have taken all reasonable steps to verify that the *Person Being Identified* is one and the same person as the person set out in the identification documents produced, and that the *Person Being Identified* has authority to deal with the property specified in the mortgage and loan documentation, which were executed in my presence.

(e) At the time that the *Identity Agent Certification* was completed, I took a photograph of the *Person Being Identified*, a copy of which is attached to this document.

(f) I declare that the details set out in this document are true and correct.

182 The Verification of Identity Standard in the declaration refers to the rules for the verification of identity and the necessary supporting evidence in the NSW Participation Rules for Electronic Conveyancing determined by the Registrar-General under s 23 of the *Electronic Conveyancing National Law*, being the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW). As such, the Verification of Identity Standard is a critical component of the procedures that have been put in place to permit the secure implementation of electronic conveyancing transactions.

183 This declaration is fundamentally deceitful according to the principles in *Derry v Peek* (1889) 14 App Cas 337.

184 I will consider the significance of Ms Dawson's actions below. For the present, it may be noted that Ms Dawson accepted in her evidence that she had never seen or spoken with Mr Carr or Ms Fayers and that she dealt solely with Mr Lyons. Ms Dawson did not conduct a face-to-face in person interview with either person. Although she had sighted original identification documents, she had not taken any steps to verify that the persons were the same persons set out in the identification documents, other than to rely upon the identification documents. Although Mr Carr and Ms Fayers did have authority to deal with the Property, Ms Dawson did not make any enquiry of them to confirm that authority. The mortgage and the loan documentation were not executed in Ms Dawson's presence. Ms Dawson did not take the photographs of Mr Carr and Ms Fayers at the time the declaration was completed.

185 The significance of this evidence is in what it proves concerning the extraordinary conditions that had to be satisfied before the careless acts of Mr Carr and Ms Fayers, being the provision of photographs of themselves with their drivers' licences, copies of their Medicare cards and passports as well as the original certificate of title and the other documents, could have the causal effect of persuading the plaintiffs' solicitors that it was safe to complete the purported loan transaction with the Company. It was not just a matter of those

records being used. Given the modern practice of requiring strict proof of execution and identity encompassed by the Verification of Identity Standard, it was necessary for Ms Dawson to go to the extreme lengths of deceitfulness inherent in her declarations before the documents that Mr Carr and Ms Fayers were fraudulently persuaded to give to Mr Lyons could have facilitated the completion of the loan transaction.

186 It is also relevant to the plaintiffs' claim that the Company armed Ms Dawson with the ability to represent to their solicitors that she acted for the Company that there is no evidence that Ms Dawson attempted to obtain a proper retainer from the Company. Even if the conduct of the Company may have facilitated Ms Dawson acting as if she was the solicitor for the Company, nothing was brought home to the Company that ought to have caused it to understand that Ms Dawson was claiming to act on its behalf.

187 I have not thought it necessary to analyse the affidavit evidence given by Ms Dawson or her cross-examination in any detail. Ms Dawson appeared to be remorseful, and she has cooperated with the Company in defending these proceedings. She also appears to have provided a statement to the Police. It appears that Mr Lyons also deceived Ms Dawson into believing that he was authorised to give her instructions on behalf of the Company for the purpose of the Company acquiring the loan from the plaintiffs and executing the transaction documents. Mr Lyons apparently lied to Ms Dawson by saying that Mr Carr and Ms Fayers could not contact her directly because they were overseas and desperate for the money. Mr Lyons was able to use the identification documents and the photographs supplied by Mr Carr and Ms Fayers to persuade Ms Dawson that his claims were true.

188 However, given the specificity of the requirements for witnessing and confirming the identity of her supposed clients, Ms Dawson's conduct involved a most serious breach of her professional obligations. She apparently took no step to ensure that she was properly retained by the Company. Her representations that she advised Mr Carr and Ms Fayers personally, that they had signed the transaction documents on behalf of the Company in her presence, and that she personally took photographs of Mr Carr and Ms Fayers

at the time of execution of the documents is so unforeseeable a breach of professional duty that it would be hard to expect Mr Carr and Ms Fayers to conduct themselves on the basis that there was a real possibility that some solicitor unknown to them would deal with the documents they supplied in the manner in which Ms Dawson dealt with the documents.

**Priority as between the plaintiffs and the Company**

189 As the plaintiffs accepted that the construction by the Court of Appeal of the mortgages in *CEG Direct Securities* applied equally to the construction of the mortgage in the present case, they were faced with the problem that, even though in principle they had a registered mortgage over the title to the Property that was indefeasible by the operation of s 42 of the *Real Property Act*, the mortgage did not secure any debt owed by the Company. Consequently, the Company is entitled to a discharge of the mortgage as it is in the very nature of a mortgage that it cannot be sustained absent a secured debt.

190 The plaintiffs sought to avoid this outcome by distinguishing the facts in *CEG Direct Securities* on two grounds. The first of those grounds was that, unlike the facts in *CEG Direct Securities*, where the registered proprietors had no involvement in the forgery of the mortgage and the loan documents, in the present case, the Company was said to have engaged in conduct that permitted Mr Lyons to defraud the plaintiffs, and that conduct disentitled the Company from asserting its priority as the registered proprietor of the Property over what the plaintiffs claimed to be their equitable interest in the Property.

191 As I have noted above when explaining the effect of the pleadings, in their amended statement of claim, the plaintiffs appeared to put this aspect of their claim on the basis that the Company's cooperation with Mr Lyons in the course of action that enabled him to defraud the plaintiffs – particularly the provision of the original certificate of title – gave rise to an estoppel against the Company because the Company's conduct amounted to a representation that Ms Dawson had its instructions to represent the Company in the loan transaction, and the plaintiffs acted on the faith of that representation in completing the loan transaction and paying the loan monies into an account controlled by Mr Lyons.

192 However, at the hearing, the plaintiffs focused their argument on authorities that established that the conduct of the holder of a prior interest may lose priority to a later equitable interest by reason of engaging in 'disentitling conduct' in relation to the circumstances in which the later interest was created.

193 The plaintiffs relied upon a number of decisions of high authority to support this submission. It will only be necessary to refer to sufficient passages from those authorities to explain the basis of the plaintiffs' submission. In *Lapin v Abigail* (1930) 44 CLR 166, Gavan Duffy and Starke JJ (in dissent) said at 196-7 (footnotes omitted):

> … In the cases, inquiries are made as to the better equity, as to the better right to the legal estate, as to which party was the more vigilant or careful, and whether the conduct of a party estops him from the assertion of a prior title, and so on. But, however the matter is approached, the question must ultimately come down to a consideration of the words or actions of *the person having the prior equitable title*, and whether those words and actions have caused another to alter his position. "In other words," as Lord Selborne L.C. said in *Dixon v. Muckleston*, "the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations, if it be a case of express representation—he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts—he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power." (emphasis added)

194 Their Honours said further, at 198:

> In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of Abigail to the extent allowed by the Supreme Court.

195 The plaintiffs also relied upon the following extract from the judgment of Dixon J at 204 (footnotes omitted):

> The question, therefore, is whether, for any reason appearing in evidence, the appellants lost their priority. In general *an earlier equity is not to be postponed to a later one* unless because of some act or neglect of the prior equitable owner. "In order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and … it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been

> produced" (per Lord Cairns L.C., *Shropshire Union Railways and Canal Co. v. The Queen*). The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority. This, in effect, generally means that his act or default must in some way have contributed to the assumption upon which the subsequent legal owner acted when acquiring his equity. (emphasis added)

196 The plaintiffs cited the advice of the Privy Council upholding the dissenting judgment of Gavan Duffy and Starke JJ in *Abigail v Lapin* (1934) 51 CLR 58 at 64, 68, 71 and 72, to the same effect as the extracts from the decision of the High Court that are set out above. The plaintiffs also relied upon the following extract from the judgment of Mason and Deane JJ in *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326 at 339 (as well as passages at 345 342) (footnotes omitted):

> Where the merits are equal, the general principle applicable to *competing equitable interests* is summed up in the maxim qui prior est tempore potior est jure — priority in time of creation gives the *better equity*. But where the merits are unequal and favour the later interest, as for instance where the owner of the later equitable interest is led by conduct on the part of the owner of the earlier interest to acquire the later interest in the belief or on the supposition that the earlier interest did not then exist, priority will be accorded to the later interest: *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd. (In liq.*); *Abigail v. Lapin*; *I.A.C. (Finance) Pty. Ltd. v. Courtenay*.
>
> A common illustration of conduct on the part of *the owner of an equity which postpones his interest* is the arming of a third person with the indicia of title, such as the delivery of title deeds and an instrument of transfer of the property containing or accompanied by an acknowledgement that the third party has paid the consideration for it in full… To use the words of Lord Selborne L.C. in *Dixon v. Muckleston*, words which have often been repeated in the cases to which we have referred, the owner of the first equity is said to have "armed" the third party "with the power of going into the world under false colours". (emphasis added)

197 See also the decision of Ward JA (as her Honour then was) in *Australia Capital Finance Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd* [2017] NSWCA 99.

198 The difficulty that exists in the plaintiffs' reliance upon these authorities is that they concern circumstances where the interests competing for priority are both equitable. This appears clearly from the parts of the judgments that I have extracted that have been emphasised. The rule in such a case is that where the equities are equal, the first in time prevails. Conduct on the part of the holder of the prior equitable interest may 'disentitle' that holder to priority over

the holder of the later equitable interest. A common situation that involves such disentitling conduct is where the holder of the prior equity 'arms' the party who creates the second equitable interest with the capacity to represent to the later holder that the party has full right and authority to create the later interest. The problem for the plaintiffs is that the rule does not apply in this case because the Company's prior interest was not an equitable one. The Company is the registered proprietor of the Property, which in practical terms is a statutory form of legal ownership.

199 The rule that must be applied in the present case is that which governs a competition for priority between an earlier legal interest and a later equitable one. The rule that is applied is different to the one that is relevant to competing equitable interests, as common law title has historically been recognised as a stronger title than an equitable interest, as it is thought to be good against the whole world, and does not depend upon the enforcement by equity of some entitlement to the benefit of the property that falls short of legal ownership.

200 The learned editors of Meagher, Gummow and Lehane's Equity Doctrines & Remedies (5th ed, 2015, LexisNexis Butterworths) explain at [8-220] the limited circumstances in which a subsequent equitable interest will be held to have priority over the title of the legal owner at the time of the creation of the interest. The first of these circumstances is not applicable, because the Company did not itself execute the mortgage or the other loan documents. The second does not apply because it cannot be said that the Company fraudulently connived at the creation of the subsequent equity. The third circumstance is (footnotes omitted):

> … The third case arises where the legal owner failed to get in the title deeds from the vendor to the legal owner, thereby enabling the vendor to hold himself or herself out to a third party as the legal owner of the land, or (at least) as authorised to deal with it: *Walker v Linom* is an example of this. There, the trustee's legal estate was deferred to the subsequent equity of a purchaser from a mortgagee, whose interest was fraudulently created by the trustee's vendor. But it is decidedly not the law that any act of carelessness or imprudence on behalf of the legal owner will (in the absence of fraud) suffice to postpone the legal owner's interest. This is so even if that act of carelessness or imprudence could reasonably be described as 'gross'. The clearest example of this is *Northern Counties of England Fire Insurance Co v Whipp*. There, the plaintiff's manager executed a legal mortgage to the plaintiff of his own freehold land. The deeds were handed over to the company, which placed them in a safe the key to which was entrusted to the manager himself. He

> utilised his opportunity to remove all the deeds except the mortgage. He then obtained an equitable mortgage from the defendant on the strength of them. The Court of Appeal held that the company's title was unaffected by the later equity. In *Saltoon v Lake*, the Court of Appeal of New South Wales, approving the statement of law set out in this paragraph, held that the mortgagee of a horse (being the legal owner) did not lose his priority to the assignees of the equity of redemption, his conduct not having contributed to their purchase of their interest in the horse, adding that for him to take subject to the equity of the latter 'only carelessness in failing to get in instruments of title suffices, and even then the carelessness must take the form of failure to get in the deeds from the conveyor'.

201 The Court of Appeal in *Saltoon v Lake* [1978] 1 NSWLR 52 at 57, in particular, accepted that part of the decision in *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482 where it was said at 494: "But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."

202 In *Farrand v Yorkshire Banking Company* (1888) 40 Ch D 182, North J distinguished *Northern Counties of England Fire Insurance Co v Whipp* on the basis that the priority rule discussed in that case applied to a contest between an earlier legal and later equitable interest, and not competing equitable interests, as in the case before his Lordship. North J said at 189 (footnotes omitted):

> … Mr. Crackanthorpe relied on some observations in the judgment of the Court of Appeal, delivered by Lord Justice Fry, in *Northern Counties of England Fire Insurance Company v. Whipp*, to the effect that nothing but fraud, or negligence which the Court considers to be evidence of fraud, is sufficient to postpone a legal mortgagee to an equitable mortgagor, and argued that *pari ratione* the same doctrine must apply as between two equitable mortgagees. The distinction, however, between the two cases is clear, and it cannot be better stated than in the judgment of Lord Justice Cotton in *National Provincial Bank of England v. Jackson*, where, after referring to Lord Justice Fry's judgment in *Northern Counties of England Fire Insurance Company v. Whipp* as recognising the difference between the case of a contest between equities and one between an equitable title and the legal estate, he quoted this passage: "The question is, not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate," and he added, "And the judgment in *Kettlewell v. Watson* is to the same effect. As between equitable claims the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other"…

203 In the present case, even allowing for the lack of commercial sophistication on the part of Mr Carr and Ms Fayers, and the fact that they acted benevolently

and on the basis of trust, it must be accepted that their conduct was careless and imprudent in the circumstances. However, it cannot be said that they connived in the fraudulent conduct of Mr Lyons. Although Ms Fayers sent the original certificate of title to Dawson & Co believing it to be the plaintiffs' solicitors, that is not the same conduct as a failure to get in the certificate of title at the time of the acquisition of a property. Consequently, the plaintiffs have not established that the Company lost its entitlement to priority as the registered proprietor of the Property by reason of the conduct of Mr Carr and Ms Fayers.

204 For completeness I should add that I do not accept that the plaintiffs have established that the Company made the representation pleaded in the amended statement of claim, to the effect that Ms Dawson was its solicitor who had been retained to act for the Company to implement the loan transaction. The Company's conduct may arguably have 'armed' Mr Lyons with the ability to defraud both Ms Dawson and the plaintiffs, but the acts of Mr Carr and Ms Fayers were entirely disconnected from the loan transaction, of which they had no knowledge or reason to suspect. Even if careless and imprudent, the provision of the documents to Mr Lyons, on the understanding that they were required to be given to a finance broker or the solicitor for a lender to satisfy current banking practices, to enable the lender to pay the loan directly to the Company, did not have the effect that the Company was making a representation to the world that Ms Dawson had whatever authority to act on behalf of the Company that Mr Lyons may have persuaded Ms Dawson to exercise.

205 It will also be appropriate to consider the fourth circumstance identified in Meagher, Gummow and Lehane as to when a prior legal owner may lose priority to a subsequently created equitable interest in the property. The learned editors said (footnotes omitted):

> The fourth, and final, case is where the legal owner has given to another authority to deal with a third party, and such authority has been exceeded. Instances of this include *Perry-Herrick v Attwood* where the first mortgagee, being a legal mortgagee of property, permitted his mortgagor to obtain possession of the title deeds for the purposes of raising a limited amount of money on the security of the mortgaged land — although the limitation was not made generally apparent. The mortgagor raised one amount within the

> limitation, but subsequently regained possession of the deeds and raised a second amount quite outside his authority. Likewise, in *Brocklesby v Temperance Permanent Building Society*, a father authorised his son to collect certain title deeds and raise £2250 on them; he was held liable for the full amount of £3500 actually raised by his son. Also, in *Barry v Heider*, the plaintiff, owing to a third party's fraudulent misrepresentation, handed a memorandum of transfer of certain land to that third person. That third person raised money on the strength of it. He gave an equitable mortgage over the land to his lender, the defendant. The High Court held Barry's interest would take subject to the lender's equity, notwithstanding that he was the registered proprietor of a legal estate in fee simple. In this case, the legal owner may be affected by notice even though the principal's authority has not only been exceeded by the agent, but is also an act of a kind different from that authorised. The principle does not apply where the principal does no more than vest the property in the name of a nominee or trustee. And where the documents of title are in trust to an agent and used by the agent to raise money, the mere possession of those documents by the agent is not enough to raise an estoppel against the principal. In addition there must either be negligence on the part of the principal in parting with the documents, or the agent must have been given actual authority to use them as security.

206 In *Barry v Heider* (1914) 19 CLR 197, the High Court held that an equitable interest in property under the Torrens system created by relevant acts of the registered proprietor may be enforceable against the registered proprietor, notwithstanding that registration had created an indefeasible title in that proprietor. In that case, the plaintiff had executed a transfer of part of the property the subject of the registered title to a fraudster and delivered the transfer to the fraudster. The fraudster procured a loan from one of the defendants on the security of a mortgage over the property. The plaintiff had also delivered to the solicitor for the defendant an authority to the Registrar-General, who was in possession of the certificate of title, to deliver the certificate to the defendant’s solicitor. The transfer was ultimately held to be void because of the conduct of the fraudster. However, prior to the transfer being set aside, it was held that it operated as a representation by the plaintiff that the fraudster had an assignable interest in the property. A majority of the Justices held that the authority to the Registrar-General also constituted a representation as to the title of the fraudster. The High Court held that the effect of the reliance of the defendant on the actions of the plaintiff in representing that the fraudster had an assignable interest in the property was that the equitable mortgage granted by the fraudster to the defendant took priority over the plaintiff’s registered, or legal, title to the property.

207 The conduct of Mr Carr and Ms Fayers in this case in sending the certificate of title to Dawson & Co, in the expectation that it was a step necessary before the money that they had agreed to loan to Mr Lyons would be repaid directly to the Company does not, in my view, constitute the making of a representation with the same consequences as in *Barry v Heider*.

208 In *Perry-Herrick v Attwood* (1857) 2 De G & J 21; 44 ER 895, Lord Cranworth LC began by emphatically stating the rule governing priority as between an earlier legal and a later equitable estate in land that I have considered above, in the following terms, at 901:

> … I consider it to have been established beyond doubt that the law is, that the person having the legal estate without the title-deeds is not to be postponed to a subsequent incumbrancer having the title-deeds, unless he has been guilty of something which the law calls fraud or gross negligence. I agree that this rule may very often lead to great hardship on persons who have taken conveyances relying on the possession of the title-deeds as evidence of unencumbered ownership in the conveying party. Such, however, is the law, and I must act upon it until it is otherwise settled…

209 In that case, the owner of property granted a mortgage to secure an existing debt, but with the authority of the mortgagees, he retained the title deeds with the expectation, to the knowledge of the mortgagees, that he would use the title deeds for the purpose of borrowing additional funds on subsequent mortgages of the property. In fact, the owner borrowed a greater amount from the second mortgagee than he was authorised by the first mortgagees to borrow. The Lord Chancellor held, at 902, that the subsequent mortgagee had priority because: "…it is a case in which the mortgagees did deliberately and intentionally leave the deeds in the hands of the mortgagor, in order that he might raise money. To hold that a person who advances money on an estate, the title-deeds of which are under such circumstances left in the hands of the mortgagor, is not to have preference, would be to shut our eyes to the plainest equity."

210 This decision was followed by the House of Lords in *Brocklesby v The Temperance Permanent Building Society* [1895] AC 173. As stated by Lord Macnaghten, at 84, the rule is that: "if a person permits title-deeds, which belong to his security, to be dealt with for the purpose of creating a preferential charge of a definite amount and the limit is exceeded, he cannot, as against

innocent third parties who have advanced their money without notice of the limit, complain that the authority which he gave has been exceeded in that respect".

211 As I read the authorities relevant to the fourth circumstance raised in *Meagher, Gummow and Lehane*, it does not extend to the case where an owner merely parts with possession of the certificate of title, , or where the owner does not provide the certificate of title to an agent with limited authority to enter into some transaction on behalf of the owner. In any event, even if it could be said that Mr Carr and Ms Fayers provided the certificate of title to Mr Lyons as agent with limited authority to act on their behalf, Mr Lyons was not given any actual authority to use the certificate of title as security.

212 It is not necessary in the circumstances for the Court to make a finding as to whether the conduct of the Company would have been 'disentitling' if the applicable rule for determining priority as between the Company and the plaintiffs had been the one that governs competing equitable interests in the same property. It will suffice to note that it is not clear that the Company's actions were sufficient to cause it to lose priority to the plaintiffs. The Company parted with the original certificate of title under the influence of the deceit practised by Mr Lyons on Mr Carr and Ms Fayers. As I have acknowledged, their conduct was imprudent and careless, but it is not clear that they 'armed' Mr Lyons or Ms Dawson with the means of defrauding the plaintiffs. Sending the original certificate of title to the law firm believed to be the plaintiffs' solicitors was a necessary condition to the fraud being successful, but in my view, it would be wrong for the Court to focus on the Company's conduct out of its full context.

213 First, the certificate of title could not be used to perfect the fraud without the unforeseeable intervention of Ms Dawson abrogating her duties as a solicitor in the way in which she did.

214 Secondly, the plaintiffs seek to place all of the blame on the imprudent conduct of the Company, without calling any evidence from Stronghurst or Directline as to how they allowed themselves to be deceived by Mr Lyons, without apparently making any real attempt to communicate with the Company to

satisfy themselves that the loan application was genuine. There is force in the submissions made on behalf of the Company that the circumstances in which the Application was apparently made by the Company were suspicious. There is no evidence that either Stronghurst or Directline sought or were given evidence as to why a company with assets of $2.5 million and no liabilities would need to borrow $185,000 on a registered first mortgage for six months, at an interest rate of 36% per annum and the risk of the rate rising to 96% per annum. I would not have accepted the claim that the Company's conduct was 'disentitling' in circumstances where the plaintiffs called no evidence to explain the conduct of their own agents in accepting the fraudulent application made by Mr Lyons.

215 For completeness, I note that the plaintiffs did not appear in final submissions to press that they were entitled to an equitable mortgage over the Property by deposit of title deeds if their priority claim against the Company did not succeed. As Mr Lyons did not have any authority from the Company, he was not authorised to deliver the certificate of title to the plaintiffs as security for the making of the loan.

**Assumption that the loan documents had been validly executed**

216 The second argument adopted by the plaintiffs to support the validity of the loan agreement was to rely upon the operation of ss 127(1)(a), 128(1) and 129(5) of the *Corporations Act*. These sections relevantly provide:

> s 127(1) A company may execute a document without using a common seal if the document is signed by:
>
> (a) 2 directors of the company…
>
> s 128 (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
>
> s 129(5) A person may assume that a document has been fully executed by the company if the document appears to have been signed in accordance with subsection 127(1) …

217 The plaintiffs sought to argue that the conduct of Mr Carr and Ms Fayers in providing the documents to Ms Dawson, either directly or through Mr Lyons, in circumstances where those documents were then provided by Ms Dawson to the plaintiffs' solicitors constituted a dealing by the plaintiffs with the Company.

Consequently, as all of the transaction documents were apparently signed by the directors of the Company in accordance with s 127(1)(a), the plaintiffs were entitled to assume that the transaction documents had been fully executed by the Company, and the Company was not entitled to deny the truth of that assumption in these proceedings.

218 As submitted on behalf of the Company, the application of these provisions of the *Corporations Act* in the present circumstances depends upon whether the requirement in s 128(1) that the assumption was in relation to dealings with the Company is satisfied.

219 By this submission, the plaintiffs sought to rely on a statutory entitlement to assume that the transaction documents had been fully executed by the Company, in circumstances where the apparent signatures of the two directors had been forged and every apparent communication between the plaintiffs, their agent and the Company had been fraudulently undertaken by a person who had no authority from the Company to act in any way on its behalf, or to enter into negotiations for any purpose on behalf of the Company, or to bind the Company in any transaction. The effect of the plaintiffs' submissions is that the s 129(5) assumption can be made where the dealings relied upon are fraudulent, as well as where the purported signatures of the directors are forged. If this submission was correct, it would effectively validate all wholly fraudulent dealings involving the affairs of any company; at least where the fraudster procured from the company information and records that assisted the fraudster in creating the false impression of authority to act on behalf of the company. That is because the use by the fraudster of the information and records provided by the company for some other purpose would itself be treated as sufficient to satisfy the requirement that there be a dealing between the party asserting the validity of the transaction and the company.

220 I consider that this submission is answered by the judgment of the Court of Appeal in *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* [2013] NSWCA 459; (2013) 282 FLR 351, in the reasons of Meagher JA (Macfarlan and Barrett JJA agreeing):

> **Were the dealings required to be with someone having actual or ostensible authority to enter into the guarantee?**

[39] The primary judge answered this question in the affirmative: [47]. He did so on the basis of a wrong understanding of a statement made by Hodgson CJ in Eq in *Soyfer v Earlmaze* [2000] NSWSC 1068 at [82]. That statement was made with respect to an earlier observation of Gleeson CJ (with whom Cripps JA agreed) in *Story v Advance Bank Australia Ltd* at 733 to which it is necessary to refer.

[40] In *Story*, the bank took a mortgage over property owned by a company, the directors and shareholders of which were a husband and wife. The wife's signature as director to the affixing of the company's common seal was forged by her husband without her knowledge of the relevant transaction. The bank relied upon s 68A of the Companies (NSW) Code. On behalf of the company its was argued that the bank did not have any dealings with it within the meaning of s 68A(1). That submission was rejected by Gleeson CJ (with whom Mahoney and Cripps JJA relevantly agreed) on the basis that the wife permitted the husband to have de facto control of the conduct of the company's business and part of the loan moneys were in fact applied for purposes of the company. Those facts were sufficient to justify the conclusion that when the bank negotiated and agreed with the husband to take the mortgage it was having dealings with the company. Gleeson CJ then observed (at 733):

> It should be added that, since the subject matter of s 68A, by hypothesis, includes dealings with purported company agents who lack actual authority, and, by virtue of s 68D, extends to forged instruments, the concept of having dealings with a company must embrace, subject to the qualifications contained in the legislation, purported dealings. If the statutory provisions only extended to cases where the person representing the company had actual authority then they would be largely unnecessary.

[41] The same observation may be made with equal force with respect to the provisions of Pt 2B.2 of the Act with which this case is concerned. *Story* was not a case in which it was necessary to consider how the relevant provisions might operate with respect to an act which occurred or instrument which came into existence in circumstances where there had been no relationship between the party asserting that it had dealt with the company and someone who had actual or ostensible authority to do anything for or on behalf of the company. In his judgment, Mahoney JA (at 741–742) expressly reserved that question for further consideration.

[42] The question was the subject of the following observation by Hodgson CJ in Eq in *Soyfer* at [82]:

> In fact, some protection to the company is given by the requirement that the person must be engaged in dealings with the company in the first place; which in my opinion means that there must be dealings (in the sense of negotiations or other steps in relation to a contemplated transaction) with someone on behalf of the company which are dealings authorised by the company, and the document in respect of which the assumptions may be made must be a document which is "in relation to" those authorised dealings (and I take this to extend to a document arising out of authorised negotiations or other steps). I note that in *Story* at 733, Gleeson CJ suggested that the concept of having dealings with a company must embrace purported dealings, because if the provisions only applied where the person representing the company had actual authority, they would be largely unnecessary. I

> take this as meaning that it is not necessary that the person representing the company have authority from the company to commit the company to the relevant transactions or execute the relevant documents; but in my opinion, it is necessary that the person have authority to undertake some negotiation or other steps, so that the dealings, in relation to which the document is executed, are properly considered to be dealings with the company.

[43] Having referred to the passage from the judgment of Gleeson CJ and this observation of Hodgson CJ in Eq in *Soyfer*, the primary judge continued at [47]:

> If I may, with respect, expand slightly on the explanation of his Honour of the suggestion of Gleeson CJ, I understand his Honour to mean that the person representing the company must have ostensible authority to bind the company to the particular transaction by virtue of his actual authority to take steps of that or a related kind. In the present case, where Robert (assuming him to have been the agent in question) was only a director amongst others, that office did not give any actual authority to bind the company in respect of a guarantee, nor did it confer any ostensible authority to do so.

[44] The statements of Gleeson CJ and Hodgson CJ in Eq in fact are to the opposite effect of this last observation of the primary judge. Gleeson CJ pointed out that if the provisions of s 68A only applied where the person representing the company had actual authority to enter into the transaction in relation to which the assumptions may be made they would be, in his words, "largely unnecessary". Hodgson CJ in Eq agreed and emphasised that whilst it followed that the person representing the company need not have authority to commit the company to the relevant transaction or execute the relevant document, that person must at least have authority "to undertake some negotiation or other steps" so that the relevant negotiation or other step which constitutes the dealing is properly considered to be a dealing with the company.

[45] In this case, for the reasons I have already given, Robert did have actual or ostensible authority to undertake communications and negotiations with ANZ on behalf of the company. For that reason, those communications and other steps were "dealings with the company". The primary judge erred in concluding otherwise.

221 The dealings with the company required by s 128(1) must be actual or real dealings engaged in by an agent of the company who has appropriate authority to undertake negotiations in respect of the relevant transaction on behalf of the company. It is not necessary that the agent have actual or ostensible authority to enter into the very transaction sought to be enforced on behalf of the company. If that were required, there would be no need to create the statutory right to assume that the documents to give effect to the transaction have been duly executed by the company. The requisite dealings will be absent where the negotiations relied upon as dealings are fraudulent and entirely unauthorised. It will make no difference if the company has provided its information and records

to the fraudster if that conduct is not sufficient in all of the circumstances to vest ostensible authority in the fraudster.

222 Consequently, the plaintiffs have failed to establish that the Company is precluded from denying that it is bound by the loan agreement.

**Proper construction of the loan agreement**

223 As the plaintiffs have not established that they are entitled to enforce the loan agreement against the Company, it is not necessary to determine whether the loan agreement created a debt owed by the Company to the plaintiffs that is secured by the mortgage registered against the title to the Property.

224 However, as I have observed above, the loan agreement contains terms that, considered in isolation, would make the Company liable to pay what was defined as the Debt to the plaintiffs, irrespective of whether the loan monies had actually been paid by the plaintiffs to the Company. That said, the loan agreement also contained terms similar in effect to clause 2.1 which required that the Lender "must make available to the Borrower the Facility". The Principal Sum was required to be advanced in accordance with the terms of the loan agreement, and clause 2.4 stated: "The Borrower must draw down the Principal Sum on the Advance Date…"

225 I am not called upon to express a view as to the proper construction of the mortgage in this case. As explained, the plaintiffs have accepted that the mortgage should be construed in the same manner as was the case in *CEG Direct Securities*. That being the case, the result is that the mortgage did not secure the Debt because the loan monies were not paid to the Company. Even if this Court had found that the Company was bound by the loan agreement, notwithstanding that it was forged, the Court would, in substance, have the same choice as did the Court of Appeal. Although I am not bound in construing the loan agreement by the construction of the mortgages in *CEG Direct Securities* that was preferred by the Court of Appeal, as the plaintiffs have accepted that the same construction should be given to the mortgage in this case, that brings into play the need for the Court to construe all of the documents created to give effect to the one transaction as consistently as possible. I can see no good reason why, if the mortgage did not create a debt

in the absence of the loan monies being paid to the Company, the loan agreement should be construed with opposite effect. Although there are terms in the loan agreement that appear to make the obligation on the Company to repay the Debt absolute and independent of the manner in which the loan monies were disbursed, there are provisions in the mortgage that could be construed with the same effect. However, they have not been so construed, and so the loan agreement should not be so construed so that it operates consistently with the mortgage. The wording of the loan agreement is not sufficiently clear to require a contrary construction.

**The plaintiffs' claim for compensation from the Torrens Assurance Fund**

226 The plaintiffs claim that they are entitled to be paid compensation from the Torrens Assurance Fund, on the basis that s 129(1)(e) of the *Real Property Act* applies in the circumstances of this case:

> (1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from—
>
> …
>
> (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud…

227 It has been established that Mr Lyons procured the loan transaction by fraud and that he forged all of the transaction documents including the mortgage. Consequently, although as a result of the mortgage having been registered against the title to the Property, the mortgage is indefeasible by the operation of s 42 of the *Real Property Act*, as the mortgage has been construed not to secure repayment of any debt by the Company, and as the other transaction documents including the loan agreement are void because they are forgeries, the indefeasible mortgage does not secure any debt. As a result, the Company is entitled to an order that the mortgage be discharged.

228 The situation therefore is that while the *Real Property Act* operates to give the plaintiffs an indefeasible mortgage, the plaintiffs cannot avoid an obligation to discharge the mortgage because it does not secure any debt. That results from the wording in the mortgage that has given rise to the construction preferred in *CEG Direct Securities*.

229 The Registrar-General submits that the plaintiffs are not entitled to compensation from the Torrens Assurance Fund, because the loss or damage that they have suffered has arisen from their having paid the mortgage monies to Mr Lyons, rather than the Company, under forged transaction documents that do not impose any obligation on the Company to repay the debt. The loss or damage is not "a result of the operation of this Act" for the purposes of the chapeau to s 129(1). The wording of the mortgage was a choice of the plaintiffs and its effect has nothing to do with the operation of the Act.

230 As Darke J observed in *Kumar v Registrar-General of New South Wales* [2021] NSWSC 1103 (*Kumar*) at [74]:

> [74] The requirement that a plaintiff claiming compensation from the Torrens Assurance Fund has suffered loss or damage as a result of the operation of the Act has been described by Bryson J (as his Honour then was) as the "overall control mechanism" of s 129(1) (see *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 59 NSWLR 452; [2003] NSWSC 1072 at [74]). His Honour observed that the workings of indefeasibility would usually play a part in the plaintiff's rights being in a worse situation than they would be but for the operation of the Act. Earlier, in *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (supra), Windeyer J stated at [37]:
>
> > … Nevertheless the purpose of compensation by access to the Fund is to balance disadvantage which can otherwise be brought about by indefeasibility of title. In principle I can see no reason to restrict access to the Fund to persons claiming that their interest has been lost through registration of some subsequent dealing as a result of fraud. There is no particular logical reason why compensation should not be available to persons suffering damage as a result of fraud which has enabled the proprietor of a registered interest to maintain an indefeasible title to such interest based upon its continuation registration. Such damage seems to me to arise out of the operation of the Act.

231 The plaintiffs' response to the Registrar-General's submission was to submit that the chapeau to s 129(1) of the *Real Property Act* should not be read separately from the paragraphs that follow it. As I understand the plaintiffs' submission, put at T 139.48 to T 140.27, it is to the effect that the Court should look at all of the evidence compendiously and, having done that, the Court should conclude that the plaintiffs have suffered loss as a result of fraud in that they were deprived of an estate or interest in the Property as a consequence of fraud. That is because they were entitled to expect that they would have a valid mortgage and it was the fraud that deprived them of that estate. It was submitted that the mortgage was not void from its inception and, that at least

from the time of registration, it created an indefeasible estate in the Property. The submission then was: “It secured nothing. The operation of the Act then provides for the mortgage to be discharged because of its securing nothing”.

232 I am unable to accept this submission. There is only one cause of the loss suffered by the plaintiffs, considered as a matter of common sense, and that is that the plaintiffs disbursed the loan monies to Mr Lyons and not the Company, when the mortgage according to its terms only obliged the Company to repay the loan if the loan had actually been made to the Company. Both the act of paying the money to Mr Lyons and the drafting of the mortgage, as well as the other transaction documents to the extent that they are relevant, were acts of the plaintiffs and their agents that had nothing to do with the operation of the *Real Property Act*. Even the requirement that the plaintiffs execute a discharge of the mortgage in favour of the Company is not something that will occur by operation of the *Real Property Act*. The Company has, independently of the Act, a right in equity to redeem the mortgage because it does not secure any debt payable by the Company. Although Mr Lyons’ fraud had the effect that the plaintiffs were deprived of the valid, effective and indefeasible mortgage over the Property that the plaintiffs expected, the defeat of their expectation came about because of conduct that had nothing to do with the operation of the *Real Property Act*. As noted, the Act applied to give the plaintiffs their expected estate in the Property, but extraneous events have made that estate worthless.

233 Consequently, the plaintiffs’ claim for compensation from the Torrens Assurance Fund must be dismissed.

**The Company’s claim for compensation from the Torrens Assurance Fund**

234 As I have found that the plaintiffs are not entitled to the relief that they claim against the Company, it is not strictly necessary for the Court to determine whether the Company would have been entitled to compensation from the Torrens Assurance Fund under s 129 of the *Real Property Act* if the Court had found that the plaintiffs were entitled to a mortgage over the Property that effectively secured the debt in priority to the Company’s right as registered proprietor.

235 Against the possibility that my conclusion is wrong, I will now explain the finding that I would have made as to the Company's entitlement to compensation if the issue had arisen.

236 If the plaintiffs had succeeded, the Company would have been a person who suffered loss as a result of the operation of the *Real Property Act* in respect of the Property. That loss would have arisen as a result of the Company being deprived of the land as a consequence of fraud, within the meaning of s 129(1)(e) of the *Real Property Act*.

237 The question then becomes whether compensation is not payable to the Company because of the operation of s 129(2)(a) of the *Real Property Act*, which provides:

> (2) Compensation is not payable in relation to any loss or damage suffered by any person—
>
> (a) to the extent to which the loss or damage is a consequence of any act or omission by that person…

238 Darke J has recently considered the operation of this provision in *Kumar*. His Honour's application of the provision in *Kumar* was by way of *obiter* for the same reason as it is in this case. I respectfully agree with his Honour's reasons although, as I will now explain, on the facts of this case I have reached the conclusion that the application of the provision would have led to a different result than that which commended itself to his Honour in *Kumar*.

239 I consider that the wording of s 129(2)(a) is problematic. It does not effectively enact the stated purpose of the Parliament in including the provision in s 129 of the *Real Property Act*, and the concepts upon which it is based do not readily permit the Court to apply the provision in a manner that fairly achieves that apparent purpose.

240 As Darke J recorded in *Kumar* at [110], the Second Reading Speech for the *Real Property Amendment (Compensation) Act 2000* (NSW) included the following:

> Also, the exceptions to the liability of the Torrens Assurance Fund are clearly stated. For the most part, these exceptions are the same as those that presently exist, either in the Real Property Act, or under common law. The exceptions provided in proposed sections 129(2)(b), (2)(f) and (2)(g) are already made by the existing legislation. However, proposed section 129(2)(a)

> is new. It will allow contributory negligence of a claimant to be considered when determining the liability of the Torrens Assurance Fund. Under the new provision, compensation is not payable in relation to any loss or damage suffered by any person to the extent to which the loss or damage is a consequence of any act or omission by that person.
>
> This provision acknowledges the fact that claimants can, by their own actions or inactivity, be responsible to some degree for any loss they may suffer. Accordingly, the Torrens Assurance Fund is not liable to pay compensation where the loss is attributable to the conduct or negligence of the claimant. As pointed out by the Law Reform Commission, where a registered proprietor voluntarily signs a transfer under the influence of fraud or otherwise contributes to the loss, there is a strong case for reducing or excluding compensation. In such cases, the victim is assumed to have control over what is occurring. Otherwise, the State might be required to compensate a proprietor who has exercised poor judgment or made an unfavourable bargain.
>
> It is noteworthy that contributory negligence is available to the Registrar-General as a defence in a claim on the assurance fund in New Zealand, Victoria and Queensland. Proposed section 129(2)(c) is based on the general law rule that a person should, where possible, take action to mitigate, or lessen, any loss. Accordingly, under the new provision a claimant will be required to take all reasonable and prudent steps to mitigate a loss for which compensation is payable from the Torrens Assurance Fund. The Torrens Assurance Fund will not be liable for any damages incurred as result of the claimant's failure to mitigate.

241 It appears from this extract that it was contemplated that s 129(2)(a) would introduce a qualification to the deprived claimant's right to compensation where the claimant's contributory negligence was a cause of the loss. The claimant was to be disqualified "to the extent to which the loss or damage is a consequence of any act or omission by that person". The use of the expression "to the extent" may suggest an intention that the right to compensation will be reduced proportionately to the claimant's contributory negligence. However, in the second paragraph of the extract, there is reference to the loss being "attributable to the conduct or negligence of the claimant". The use of the expression "conduct or negligence" raises the issue of what conduct may be disentitling if it is not negligent. The suggestion in the second paragraph that, where a claimant "voluntarily signs a transfer under the influence of fraud or otherwise contributes to the loss, there is a strong case for reducing or excluding compensation" is troubling on a number of grounds. First, it is difficult to understand what it means to say that a claimant has voluntarily signed a transfer under the influence of fraud. The law generally treats such a transfer as void, and, if this proposition were given effect, it would largely destroy the operation of s 129(1)(e), the very purpose of which is to create a right to

compensation for the consequences of fraud. Secondly, the reference to reducing compensation suggests that the disqualification may only be partial. That is a result that can only be achieved if there is some apportionment mechanism.

242 Consequently, I respectfully agree with Darke J, where he says in *Kumar* at [111] that the relevant parts of the Second Reading Speech are not helpful in interpreting the provision to the extent that it may be regarded as ambiguous.

243 Section 129(2) of the *Real Property Act* contains 16 separate grounds that may disqualify a claimant from entitlement to the compensation that would otherwise be available under s 129(1). All but four of the grounds operate "where the loss or damage arises from" the satisfaction of the particular criterion for disqualification. That form of words suggests that the disqualification is intended to be complete if the criterion is satisfied – the right to compensation is all or nothing. However, the criteria for disqualification from the right to compensation in sub-pars (a) to (d) of s 129(2) only operate "to the extent to which the loss or damage" is a consequence of the particular criterion. The use of the expression "to the extent" naturally suggests that the presence of the criterion may in some cases only lead to a partial reduction in the compensation payable.

244 This may not be problematic in the case of sub-pars (b) to (d). Under s 129(2)(b), the compensation is reduced to the extent that the loss or damage is compensable under an indemnity given by a professional indemnity insurer, where the loss or damage is caused by any fraudulent, wilful or negligent act or omission by a solicitor, licensed conveyancer, real estate agent or information broker. The amount of the indemnity will be a specific amount determined by the terms of the policy. The extent of the reduction of the compensation payable will be a simple matter of arithmetic. If s 129(2)(c) applies, the compensation will be reduced to the extent that the claimant has failed to mitigate the loss or damage. That means the claimant will be disentitled to compensation for that part of its loss that it could have avoided by taking reasonable action. While there may be forensic difficulty in determining the amount of the loss that could have been avoided, once the determination has

been made, the assessment of the reduction in compensation is an arithmetic one. The same is true with the application of s 129(2)(d), where the compensation is reduced by the extent to which the loss or damage has been offset by some countervailing benefit to the claimant that has arisen from the same circumstances that caused the loss or damage.

245 Although there may sometimes be practical difficulties in the application of sub-pars (b) to (d), those provisions do not introduce conceptual difficulties. That is not the case with s 129(2)(a). Although that provision provides that compensation is only to be reduced to the extent to which the loss or damage is a consequence of any act or omission by the claimant, which on its face contemplates the possibility of a partial reduction, three problems arise. First, the use of the indefinite article in the expression "is *a* consequence" suggests that, if the loss or damage is caused by any act or omission of the claimant, even if the fraudulent conduct of a third party is the predominant cause of the loss or damage, the right to compensation is wholly lost. Secondly, nothing in the provision expressly requires that the disentitling act or omission must involve fault on the part of the claimant or identifies the nature of that fault. Thirdly, at common law, the presence of any contributory negligence on the part of a claimant was a complete defence to an action against a party whose negligence had caused the claimant to suffer loss. Section 129(2)(c), in so far as it appears to establish a disqualification based solely on the causation of loss or damage by the claimant's conduct, reintroduces a result that the common law struggled for centuries to remedy, which was ultimately achieved by the enactment of legislation that abrogated the defence of contributory negligence and empowered the courts to apportion responsibility for the loss or damage on the basis of what was determined to be just and equitable, given the concurrent contribution of the negligence of the defendant and the contributory negligence of the claimant. As Darke J observed in *Kumar* at [109], the "language of the provision seems directed to a question of causation of the relevant loss or damage, not to an attribution, on some basis, of responsibility for the loss or damage" as, for example, in s 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and s 9(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW).

246 In *Kumar*, Darke J responded to the difficulty in interpreting the meaning of s 129(2)(a) of the *Real Property Act* as follows:

> [107] In *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; [2007] NSWSC 694 at [52] Bryson AJ said that s 129(2)(a) operates where the act or omission to which it refers "arises through fault in some sense" (see also his Honour's statement in the later decision in *Chandra v Perpetual Trustees Victoria Ltd* [2008] NSWSC 178 at [11]). At [53] Bryson AJ said he was inclined to the view that the act of a servant or other agent acting within authority should be regarded as "any act or omission by that person" within the meaning of s 129(2)(a). At [59], his Honour considered the words "to the extent to which" which appear in s 129(2)(a) (and also in sub-paragraphs (b) to (d)) and the question whether they require an apportionment of responsibility. Bryson AJ stated:
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> > I do not favour the view that s 129(2)(a) requires apportionment based on deciding the extent to which the loss or damage was a consequence of any act or omission by the person claiming compensation and the extent to which the loss or damage was a consequence of any act or omission by some other person or a consequence of something else: loss or damage is a consequence of an act or omission either wholly or not at all, whether or not other causes also operate, and it is unlikely that the legislature set about creating a new apportionment regime without in some way stating the principle or basis to be applied, as other apportionment legislation does.
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> [108] I was not referred to any authority which casts doubt upon the correctness of the views expressed by Bryson AJ, but it was suggested by the plaintiff, and not clearly disputed by the Registrar-General, that s 129(2)(a) would allow the Court to reduce an amount of compensation otherwise payable, on the basis of an apportionment of responsibility to the claimant. However, no case where this had occurred was cited, and I am not aware of any such case.
>
> [109] For the reasons that follow I think that I should follow the view expressed by Bryson AJ that s 129(2)(a) does not establish an apportionment of responsibility regime. The words "to the extent to which" are apt to allow a reduction in an amount of compensation otherwise payable, but a reduction is only permitted to the extent the loss or damage is "a consequence" of relevant conduct of the claimant. The language of the provision seems directed to a question of causation of the relevant loss or damage, not to an attribution, on some basis, of responsibility for the loss or damage (cf s 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and s 9(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW)). I appreciate that the legislature has employed the expression "to the extent to which" in s 129(2)(a) (and also in sub-paragraphs (b) to (d)) rather than the word "where" that is found in sub-paragraphs (e) to (p). However, the expression when used in s 129(2) does not seem to me to be suggestive of anything more than a reduction in compensation (or preclusion of compensation) if the specified circumstances exist. So, s 129(2)(a) would operate to reduce the compensation to nil (or entirely preclude compensation) if the whole loss or damage is a consequence of relevant conduct of the claimant. If only an identified part of the loss or damage is a consequence of relevant conduct of

> the claimant, s 129(2)(a) would operate to reduce the compensation (or preclude compensation) to that extent.

247 In *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694; (2007) 13 BPR 24,675, Bryson AJ said, in relation to the concept of fault being required in the application of s 129(2)(a) of the *Real Property Act*:

> [52] In my opinion s 129(2)(a) of the Act operates where the act or omission to which it refers arises through fault in some sense. A completely literal approach would subvert the whole scheme of compensation for which ss 120 and 129 of the Act provide, as it would be the usual case that some act or omission by a registered proprietor could be shown to be a cause of the loss or damage. The Registrar-General did not argue for the completely literal or strict approach. The Registrar-General accepted that fault must be involved but did not accept that fault is to be equated with contributory negligence. On the facts it is obvious that s 129(2)(a) of the Act could not apply to the plaintiffs, regardless of whether or not it requires fault.

248 I respectfully agree that some concept of fault should be implied into the operation of s 129(2)(a) of the *Real Property Act*, because otherwise compensation would be denied in all cases where any act or omission on the part of the claimant, however innocent and however insubstantial, was a contributory cause of the loss or damage. That outcome would largely subvert the effect of s 129(1), as compensation would only be available where nothing was done by the claimant that was a cause of the loss or damage.

249 However, an implication by the courts – born of necessity – of a requirement of fault on the part of the claimant in the operation of s 129(2)(a) does not resolve the difficulty. It is still necessary to determine the nature and degree of culpability of the conduct that will constitute a disentitling fault. It also must be recognised that the provision speaks in terms of causation and not fault, and it is necessary to identify the principle that determines when an act or omission by the claimant is a relevant cause of the loss or damage. Strangely, the Court may be required to imply an element of fault into the operation of a provision expressed only in terms of causation, at least while it cannot imply an apportionment mechanism so that compensation is only reduced based on proportionate responsibility.

250 How these questions should be addressed may be approached by comparing the result in *Kumar* with the circumstances of the present case. In that case, the claimant appointed an attorney who prepared a withdrawal of caveat form,

signed it as the attorney of the claimant, left it in a drawer in an office to which the fraudster had the key, and failed to take any steps to secure possession or control of the form or formalise the conditions upon which the fraudster could make use of the form. The fraudster then lodged the withdrawal of caveat without the attorney's authority.

251 Had it been necessary for Darke J to decide the claimant's entitlement to compensation from the Torrens Assurance Fund on the basis of the application of s 129(2)(a), then the following considerations would have applied:

> [116] The plaintiff did not dispute that the acts or omissions of Mr Paligaru were relevantly the acts or omissions of the plaintiff. The plaintiff submitted that for the purposes of s 129(2)(a) relevant acts or omissions must involve fault in some way. The plaintiff seemed to accept that the conduct of Mr Paligaru in relation to the withdrawal of caveat form involved some imprudence on his part, although not recklessness. It was submitted that the ultimate cause of the loss was the fraudulent conduct of Mr Adams and that if there was an apportionment of responsibility, Mr Adams should be held to be about 80% responsible for the loss.
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> [117] However, as I have said, s 129(2)(a) is in its terms directed to questions of causation, namely, whether either the whole or some identified part of the claimed loss is "a consequence" of any relevant act or omission of the claimant. It is not directed to questions of apportionment of responsibility for the claimed loss.
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> [118] In my opinion, the whole of the claimed loss or damage should be regarded as a consequence of the acts or omissions of the plaintiff for the purposes of s 129(2)(a). The conduct of Mr Paligaru, as the plaintiff's agent, in relation to the withdrawal of caveat form created the very means by which Mr Adams was able to perpetrate his fraud upon the plaintiff. The form was physically made available to Mr Adams. Its execution by Mr Paligaru as the plaintiff's attorney gave the form an apparent authenticity. Mr Adams only needed to fill in the appropriate number of the caveat to be withdrawn in order to make use of the form. Any unauthorised use of the form by Mr Adams would be more difficult to prove in circumstances where there was a lack of any clear written record of the conditions placed upon Mr Adams' use of the form.
>
> [119] To the extent that fault is required it is present here. The conduct of Mr Paligaru was in my view plainly negligent. He failed to take reasonable care for the interests of the plaintiff. That is particularly the case in circumstances where from November 2017 Mr Paligaru was not only aware of Bargo's breaches of its obligations under the contract for sale, but also had concerns about Mr Adams' dealings with respect to the Dural property. To make the signed withdrawal of caveat form available to Mr Adams in those circumstances strikes me as conduct that was very negligent, if not reckless.
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> [120] Mr Adams utilised the means that were made available to him in order to carry out the fraud of which the plaintiff complains. Applying a common sense approach, the conduct of Mr Paligaru should be regarded as a cause of the claimed loss or damage. To my mind, it is a cause of the loss as much as the conduct of Mr Adams himself. It is a case where there are truly successive

> causes of the loss. It should thus be concluded that the whole of the claimed loss or damage was "a consequence" of the acts or omissions of the plaintiff within s 129(2)(a) of the Act.
>
> [121] For these reasons, had the plaintiff established that he suffered loss or damage that fell within s 129(1)(e), no compensation would be payable in relation to such loss or damage due to the operation of s 129(2)(a).

252 It should be noted that the attorney's conduct was not itself caused by the fraud. It was freely initiated by the attorney, and the effect of the attorney's conduct was to create the very means that enabled the fraud to be perpetrated. Had the withdrawal of caveat form not been prepared and left with the fraudster, the claimant's loss could not have occurred. The attorney's conduct authenticated the form. The attorney did not place any constraint on the use of the form. So far as fault was concerned, the attorney's conduct was found to be negligent, if not reckless. Applying the common sense approach now appropriate to questions of causation, the attorney's conduct was not only a cause of the loss or damage, as much as the act of the fraudster, but as this was a case where there were truly successive causes of the loss, the attorney's conduct could be treated as the cause of the whole loss, as that loss could not have occurred at all without that conduct.

253 I respectfully agree with Darke J that, in a case where the conduct of the claimant, or an agent of the claimant, is negligent in creating the risk of the occurrence of loss or damage of the type of interest protected by s 129(1) of the *Real Property Act*, and that conduct creates an opportunity for the fraudulent destruction of that interest that would otherwise not have existed, then the whole of the loss or damage may be attributed to that conduct for the purposes of s 129(2)(a) of the *Real Property Act*. Given the terms of the provision, that may be a relatively clear example of its application. In stating my agreement with the conclusion in *Kumar*, I do not mean to suggest a rule that s 129(2)(a) can only be satisfied where those conditions exist. The application of the provision will depend upon the facts of each case.

254 What complexion then is to be put on the facts of the present case? To start with, in no real sense did the Company create the opportunity for the perpetration of the fraud, even if aspects of its conduct were a necessary condition of the fraud being successful. The plaintiffs, by their agent, Directline,

initiated the loan application process without taking any, or at least any adequate, step to verify that the application made by Mr Lyons was an authentic and authorised act of the Company. The total absence of any evidence of Mr Lyons' dealings with Stronghurst and Directline prevents the Court from forming any clear view of the way in which Directline may have been defrauded by Mr Lyons. Mr Lyons' personal involvement appeared in the reference in the Application to Mr Lyons being the person to give access to the Property, and in the initial instruction to pay the loan monies into his personal account. The significance of these subtle pointers to reality were not noticed by those acting for the plaintiffs. In the present case, the Company's own conduct was caused by Mr Lyons' fraud. The conduct of the Company in delivering the certificate of title to the firm it believed to be the plaintiffs' solicitors would have had no damaging consequences in respect of the Company's registered ownership of the Property, were it not for the gross and deceitful misconduct of Ms Dawson in subverting the formal regulatory process for verifying the execution of documents for registration and the authenticity of transactions.

255 In my view, these facts provide a good demonstration of how difficult it may be for the Court to apply s 129(2)(a) of the *Real Property Act* in a way that gives effect to the apparent purpose of the creation of the Torrens Assurance Fund, and that is fair and rational in the circumstances. Given these difficulties, the proper approach must be for the Court to consider how the provision should apply on the particular facts of each case having regard to the apparent purpose of both Part 14 of the *Real Property Act* and the creation of the Torrens Assurance Fund.

256 Confining myself to the application of the relevant provisions, the apparent object of s 129(1)(e) is to provide compensation to claimants who, by the operation of the Act, are deprived of estates or interest in land under the Torrens system "as a consequence of fraud". The expression "as a consequence of" is mirrored in s 129(2)(a).

257 As noted, the problem with the application of s 129(2)(a) is that, if it is applied to any act or omission of the claimant that has a causal effect on the deprivation of the estate or interest in the land, and if it is applied literally, any

conduct of the claimant that has the consequence that the loss or damage is suffered by the claimant will be sufficient to deprive the claimant of the entitlement to compensation.

258 That is because, unless different acts or omissions create distinct and independent losses, each cause that in a common sense way has the consequence that the loss or damage occurs is a cause of the whole loss.

259 If s 129(2)(a) requires that approach to be taken and, as in the present case, the conduct of the claimant is itself caused by the deceit of the fraudster, then the exception in s 129(2)(a) will destroy the rule in s 129(1)(e). It is not, in my view, consistent with the apparent statutory intention that compensation is to be available to a claimant for deprivation of an estate or interest as a consequence of fraud, but not if the fraud causes the claimant to act in a way that is a cause of the deprivation in the sense of a necessary link in the chain of causation.

260 The problem is the absence of any statutory mechanism to apportion loss between successive or concurrent causes on some appropriate basis, for example on the basis of relative responsibility, or the justice and equity of the result.

261 There is less of a problem where there are consecutive causes and the claimant's conduct is the first cause. Where the loss would not have happened at all absent the consequences of the claimant's conduct, it is reasonable to regard the claimant's conduct as the cause of the loss if, on a common sense basis, the claimant's conduct has created the opportunity for the fraud, and the claimant has not acted with an appropriate degree of care to protect the claimant's own interests. *Kumar* is an example of this situation.

262 The difficulty arises where the claimant's conduct cannot reasonably be regarded as the real, effective cause of the loss or damage.

263 As the claimant will usually be a registered proprietor and have a legal title, absent the indefeasibility provisions of the *Real Property Act*, the claimant would only lose priority on the basis of the rule considered above with respect to *Northern Counties of England Fire Insurance Company v. Whipp*. Priority

over subsequent equitable estates or interests would only be lost in relatively extreme cases.

264 Under the *Real Property Act*, any dealing registered as a result of the fraud (absent fraud on the part of the party with the benefit of the dealing) will *pro tanto* destroy the claimant's registered interest in the land. If s 129(2)(a) is applied literally, the claimant would be worse off under the *Real Property Act* than at common law. Any conduct that is a cause of the registration of the dealing will deny compensation, which will have the same effect as the loss of priority at common law.

265 That is not a consequence of s 129 of the *Real Property Act* that could reasonably have been intended. It would have the effect that the claimant would only be entitled to compensation for fraud in cases where the fraudster was able to perpetrate the fraud without any participation by the claimant at all.

266 The question is: how can s 129(2)(a) be interpreted, consistently with proper principle, in a manner where the exception does not in most cases destroy the rule?

267 Section 129(2)(a) operates to preclude the right to compensation where "the loss or damage is a *consequence of* any act or omission by that person".

268 If it is legitimate for the Court to imply some requirement of fault into the operation of this provision, as I agree that it is, it is in my view also legitimate for the Court to differentiate "a consequence" that should be treated as effective to disqualify the claimant from those consequences that are not so effective. That is, it is legitimate to distinguish between acts or omissions that should be treated as being consequential for the purposes of the disqualification, and those that should not.

269 As the purpose of s 129(1)(e) is to protect claimants from the consequences of fraud, in cases where the conduct of the claimant is itself a consequence of the fraud, in that it is induced by the deceit that leads to the deprivation of the estate or interest in land, it is not necessary for the Court to treat the conduct of the claimant as being a separate cause of the loss or damage. That is, where the deceitful enterprise of the fraudster ultimately leads to the registration of the

dealing that causes loss or damage, s 129(2)(a) does not require the Court to identify every aspect of conduct by all parties who are involved in the enterprise, and treat that conduct as being a separate source of causation, so that if some of the conduct is the conduct of the claimant, and that conduct is a cause of the loss or damage, the right to compensation is lost. Put more simply, if in fact it is the deceit of the fraudster that causes the claimant to engage in the conduct that is a cause of the loss or damage, the Court is not compelled to treat that as a separate disentitling cause. The objective of s 129(1)(e) in providing compensation for fraudulent deprivation of an estate or interest in land is best served by treating the conduct of the deceived claimant as simply being part of the consequence of the fraud.

270 If that reasoning is correct, it may be that some restraint should be imposed on the outcome dependent upon the possibility that the claimant has failed to avoid being deceived by some fault on the claimant's part. If the implication of a requirement of fault on the part of the claimant is made, it is then necessary to identify the nature and degree of culpability required, without any assistance from the statutory wording. Should the degree of fault be imprudence, carelessness, negligence or recklessness?

271 At common law, in the context of determining whether a plaintiff in a claim to recover damages caused by the negligence of the defendant has been guilty of contributory negligence, the principle is: “The test of contributory negligence is an objective one. Contributory negligence, like negligence, ‘eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question’”: see *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 per McHugh J at [32].

272 Where, however, the claimant for compensation has been deceived by the fraudulent conduct of another party into engaging in some act or omission that is a link in the chain of causation that has the consequence that the claimant is deprived of an estate or interest in land as a consequence of that fraud, the effect of the deceit on the mind of the claimant is inherently subjective and not objective as is material to the determination of tort claims in negligence. In that other context, the negligence of the defendant and the contributory negligence

of the plaintiff are independent causes of the loss. Where the fraudulent enterprise deceives the claimant into engaging in conduct necessary to cause the loss or damage, the fraud and the conduct are successive causes. Where the subjective framework in which the claimant makes the choice as to how to act is corrupted by deceit, it may be difficult to make a principled judgment as to whether the choice of conduct departed from some relevant standard. How is it to be determined when it is unreasonable to be deceived?

273 In my view, where the issue is whether fault on the part of a deceived claimant that has led the claimant to act in a manner that is a link in the chain of causation flowing from the fraudulent enterprise, in determining whether fault on the part of the claimant disqualifies the claimant from the entitlement to compensation, the Court should make allowance for the individual subjective circumstances and capacities of the claimant in determining whether the claimant should be treated as being responsible for the claimant's own loss, with the result that the loss or damage suffered by the claimant being treated for the purposes of s 129(2)(a) of the *Real Property Act* as a consequence of the claimant's conduct.

274 On that basis, if I had been required to do so, I would not have found that the Company is in this case disqualified from the right to compensation that it has claimed from the Torrens Assurance Fund.

275 Even if that conclusion would have been in error, there is an additional factor in the present case that I consider, operating in augmentation of the above reasons, would have justified an order for compensation in favour of the Company.

276 That factor is the conduct of Ms Dawson in purporting to act on behalf of the Company without having any proper retainer from the Company at all, and in certifying that she had advised Mr Carr and Ms Fayers face-to-face, that she had witnessed their execution of the transaction documents on behalf of the Company personally, and that she had taken the photographs of Mr Carr and Ms Fayers that she delivered to the plaintiffs' solicitors.

277 A party in the position of the Company, even if it imprudently or carelessly was deceived into parting with the original certificate of title and providing the

evidence of identity given to Mr Lyons by Mr Carr and Ms Fayers, ought not reasonably have thought that a solicitor of this Court would purport to act for the Company without a retainer and engage in such a flagrant breach of professional obligation as did Ms Dawson in this case. That, I concede, is a value judgment, but in the context of the general fraudulent enterprise engaged in by Mr Lyons, in the course of which Stronghurst, Directline, Mr Carr and Ms Fayers, Ms Dawson, the CBA and the plaintiffs' solicitors were all deceived by Mr Lyons, the duty delegated by the plaintiffs' solicitors to Ms Dawson, and accepted by her, to comply with all of the strict requirements for the authentication of the transaction documents was of such obvious importance that, in the context of the issue being whether the intent of Part 14 of the *Real Property Act* was to disqualify the Company from its right to compensation from the Torrens Assurance Fund, Ms Dawson's breach of duty should be given the effect of a *novus actus interveniens* at common law.

278 This is not a conclusion based simply on a personal view as to where the line should be drawn between when the consequence of the Company's conduct was to cause the loss and damage from which it suffered, and when Ms Dawson's breach of duty intervened as the cause that should be treated as the consequential one. Section 56C(1) of the *Real Property Act* relevantly provides:

> **Mortgagee must confirm identity of mortgagor** Before presenting a mortgage for lodgment under this Act, the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf the mortgage was executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.

279 The section provides that the requirements of this subsection are satisfied if the mortgagee has taken the steps prescribed by the conveyancing rules and requires the mortgagee to keep records of the steps taken to comply with subsection (1) for a prescribed period. Breach by a mortgagee of the requirement may lead to the cancellation of the registration of a mortgage.

280 In my view, given the formality of the requirements established by s 56C of the *Real Property Act*, and the operation of the Verification of Identity Standard more generally, it is at least a proper factor to be taken into account in judging

whether conduct by a claimant should be treated as the operative cause of loss or damage suffered by the claimant, by reason of the deprivation of an estate or interest in land caused by the fraud of another party, that persons having estates or interests in land under the *Real Property Act* should be entitled to proceed upon the basis of having a high level of confidence that, in so far as a mortgagee or a solicitor of this Court must certify the authenticity of a mortgage purportedly granted by that person, the certification process will be implemented faithfully.

281 The Registrar-General initially put a submission that the Company was not entitled to compensation from the Torrens Assurance Fund because there was no evidence of the value of the Property. I understand that this submission was based upon the limit placed upon the compensation that is payable by s 129A of the *Real Property Act*, which is primarily the market value of the land at the date on which compensation is awarded. In fact, there was some evidence of value, albeit not expert valuation evidence as at the date of the hearing. However, as I have recorded above, the plaintiffs and the Company agreed that, if the plaintiffs' case succeeded, they would only be entitled to receive an amount that was limited to the value of the Property upon its actual sale. That agreement had the effect of confining the amount of compensation that would be payable to the Company from the Torrens Assurance Fund to the limit prescribed by s 129A.

282 Consequently, had I been required to do so, I would not have found in the present case that the deprivation of the Company's registered ownership of the Property would have been caused by any relevant act or omission by the Company. Accordingly, the Company would have been entitled to compensation from the Torrens Assurance Fund.

283 The parties should consider these reasons for judgment and provide appropriate short minutes of order to my Associate to give effect to the reasons. If the parties cannot agree to the orders, including as to the orders for costs that should be made, I will hear the parties further on those issues.

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