

# SUPREME COURT OF QUEENSLAND

CITATION: *Bendigo and Adelaide Bank Limited v Boothbuck International Pty Ltd & Ors; Bendigo and Adelaide Bank Limited v Irongrow Corporation Pty Ltd (in liq) & Ors*  
[2019] QSC 153

PARTIES: In File No BS 1981/19:

**BENDIGO AND ADELAIDE BANK LIMITED**

**ABN 11 068 049 178**

(applicant)

v

**BOOTHBUCK INTERNATIONAL PTY LTD**

**ACN 110 295 424 AS TRUSTEE UNDER INSTRUMENT**

**708818888**

(first respondent)

AND

**IRONGROW CORPORATION PTY LTD**

**ACN 108 561 959 (IN LIQUIDATION)**

(second respondent)

AND

**THE REGISTRAR OF TITLES**

(third respondent)

In File No 2942/19:

**BENDIGO AND ADELAIDE BANK LIMITED**

(plaintiff)

v

**IRONGROW CORPORATION PTY LTD**

**ACN 108 561 959 (IN LIQUIDATION) AS TRUSTEE**

**UNDER INSTRUMENT 708818888**

(first defendant)

AND

**JOHN WILLIAM BUCKBY**

(second defendant)

AND

**BRONWYN JEAN BOOTH**

(third defendant)

FILE NO/S: BS 1981/19  
BS 2942/19

DIVISION: Trial

PROCEEDING: Originating Application/Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2019

JUDGE: Flanagan J

ORDER: **In respect of proceeding 1981 of 2019:**

**1. the Court declares that:**

- (a) transfer number 719014396 was not executed by the second respondent.**
- (b) transfer number 719014396 was at all times void and of no effect and, accordingly, the current particulars in the freehold land register for Lot 21 on Registered Plan 71363 (Title Reference 13054072) are incorrect.**
- (c) by and throughout September 2018, the first respondent had actual or constructive knowledge that:**
  - (i) the second respondent was in liquidation;**
  - (ii) Transfer Number 719014396 was not executed by the second respondent; and**
  - (iii) Transfer Number 719014396 was invalid.**
- (d) the first respondent would suffer no prejudice in the event of a correction of the freehold land register by the third respondent reinstating the second respondent as registered proprietor of Lot 21 on Registered Plan 71363 (Title Reference 13054072).**

**2. the Court orders that:**

- (a) the first respondent pay the applicant's costs of the proceeding.**
- (b) the applicant pay the third respondent's costs of the proceeding up to and including 13 March 2019.**

**In respect of proceeding 2942 of 2019, the Court orders that:**

- 1. the plaintiff recover as against the first defendant possession of all that piece or parcel of land described as Lot 21 on Registered Plan 71363, being the whole of the land contained in Title Reference Number**

**13054072.**

- 2. the plaintiff recover as against the second and third defendants possession of all that piece or parcel of land described as Lot 21 on Registered Plan 71363, being the whole of the land contained in Title Reference Number 13054072.**
- 3. the first, second and third defendants pay the plaintiff's costs of the proceeding.**

CATCHWORDS:

CORPORATIONS – LEGAL CAPACITY AND RELATIONS WITH OUTSIDERS – EXECUTION OF DOCUMENTS – GENERALLY – where a husband and wife entered into a loan with a bank – where the bank procured a guarantee and mortgage from the husband and wife's company, which owned the family home as trustee – where the trustee company was the subject of a winding up order – where, following the winding up order, the husband lodged for registration a transfer of the family home to another company as incoming trustee – where the husband signed the transfer on the outgoing trustee's behalf as its sole director and secretary – where the transfer was registered – whether the outgoing trustee executed the transfer – whether the transfer was void and of no effect

REAL PROPERTY – TORRENS TITLE – REGISTRATION – AMENDMENT OR VARIATION OF TITLE RECORD – RECTIFICATION GENERALLY – where the bank seeks declarations to facilitate the registrar's exercise of the discretion to correct the freehold land register – where the husband and wife were also the directors of the incoming trustee – where the husband and wife controlled and managed the affairs of the incoming trustee – where they received letters from the bank notifying them that the outgoing trustee was the subject of a winding up order – where, prior to the purported execution of the transfer, the husband ceased being a director of the incoming trustee – whether the incoming trustee is taken to have had actual or constructive knowledge that the outgoing trustee was in liquidation and that it did not execute the transfer and that the transfer was invalid – whether the incoming trustee would be prejudiced if the freehold land register was corrected

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – GENERALLY – where the bank applies for summary judgment to recover possession of the family home on the ground that the winding up order constituted a default under the mortgage – where the outgoing trustee has not filed a

defence – where the husband and wife, as occupiers of the family home, have filed a defence – where the husband and wife raise arguments in their capacity as borrowers and not as occupiers – where the husband and wife argue that the *National Credit Code* applies to the mortgage – where the mortgagor, the outgoing trustee, is incorporated under the *Corporations Act 2001 (Cth)* – whether summary judgment should be granted

*Corporations Act 2001 (Cth)*, s 127, s 198G  
*Land Title Act 1994 (Qld)*, s 15, s 61, s 63, s 161  
*Uniform Civil Procedure Rules 1999 (Qld)*, r 69, r 286, r 292

*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, cited  
*Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, cited  
*El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685, cited  
*Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473, cited  
*In the matter of Day & Night Online Transport Pty Ltd (in liq)* [2018] NSWSC 796  
*Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606, cited  
*National Australia Bank Ltd v Nikolaidis & Ors* (2011) NSW Conv R 56-284, cited  
*Re Crompton* [2000] QSC 386  
*Re Rock Bottom Fashion Market Pty Ltd (in liq)* [2000] 2 Qd R 573, cited

COUNSEL:

In BS 1981 of 2019:

C A Wilkins with D V Ferraro for the applicant  
 J W Buckby (with the sole director's consent) for the first respondent  
 No appearance for the second respondent  
 D D Keane for the third respondent

In BS 2942 of 2019:

C A Wilkins with D V Ferraro for the applicant/plaintiff  
 No appearance for the first respondent/defendant  
 The second and third defendants were self-represented

SOLICITORS:

In BS 1981 of 2019:

Colin Biggers Paisley for the applicant  
 The first respondent was self-represented  
 No appearance for the second respondent  
 Crown Law for the third respondent

In BS 2942 of 2019:

Colin Biggers Paisley for the applicant/plaintiff  
No appearance for the first respondent/defendant  
The second and third defendants were self-represented

- [1] The applicant, Bendigo and Adelaide Bank Limited, seeks orders in two separate proceedings. First, in proceeding 1981 of 2019, the applicant seeks declaratory relief in respect of a registered transfer number 719014396 (**the transfer**) which purported to transfer real property from Irongrow Corporation Pty Ltd (in liquidation) (**Irongrow**) as outgoing trustee of the “Soul Mates Trust” (**the Trust**) to Boothbuck International Pty Ltd (**Boothbuck**) as incoming trustee. The applicant is the registered mortgagee of the real property. The declaratory relief is sought to facilitate the Registrar of Titles exercising the discretion under s 15(1) of the *Land Title Act* 1994 (Qld) to correct the freehold land register in respect of the purported transfer.
- [2] Secondly, in proceeding 2942 of 2019, the applicant, as registered mortgagee, seeks judgment for recovery of possession of land. Judgment is sought against Irongrow, as first defendant, in default of pleadings pursuant to r 286 of the *Uniform Civil Procedure Rules* 1999 (Qld). As to the second and third defendants, Mr Buckby and Ms Booth, the applicant seeks summary judgment pursuant to r 292 of the UCPR. Mr Buckby and Ms Booth have filed a defence to the applicant’s claim for recovery of possession of land.

### **Factual background**

- [3] On or about 22 September 2015, the applicant issued a letter of offer to Mr Buckby and Ms Booth for an “Interest Only Term Loan” in the amount of \$920,000. A credit contract was executed by Mr Buckby and Ms Booth on 24 September 2015.<sup>1</sup>
- [4] On 1 October 2015, Irongrow, in its own right and as trustee of the Trust, executed in favour of the applicant a guarantee and indemnity by which it guaranteed the liability of Mr Buckby and Ms Booth to the applicant under the credit contract.<sup>2</sup>
- [5] On 1 October 2015, Ms Booth and Irongrow executed in favour of the applicant a deed of covenant by which Ms Booth, in her capacity as appointor under the Trust, agreed not to remove Irongrow, appoint any person or company to act as trustee of the Trust in place of Irongrow or appoint another appointor without the applicant’s consent.<sup>3</sup>
- [6] On 18 November 2015, Irongrow, as trustee for the Trust, executed in favour of the applicant, as mortgagee, a mortgage over the property at 120 Esplanade, Toorbul in the State of Queensland, more particularly described as Lot 21 of Registered Plan 71363,

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<sup>1</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 3.

<sup>2</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 4; exhibit SA-2.

<sup>3</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 7; exhibit SA-6.

Title Reference 13054072.<sup>4</sup> This is the real property which was purportedly transferred and for which recovery of possession is sought.

- [7] On 3 December 2015 this mortgage was registered.<sup>5</sup>
- [8] On 27 March 2018, the Federal Court made an order for the winding up in insolvency of Irongrow and appointed a liquidator.<sup>6</sup>
- [9] The liquidation of Irongrow constituted a default under the credit contract by Mr Buckby and Ms Booth. The applicant informed them of this on 5 April 2018.<sup>7</sup>
- [10] On 5 April 2018, Mr Buckby responded to the applicant via email, attaching a copy of a document entitled “Deed of Variation of the Soul Mates Trust” (**the First Deed**) bearing the date 17 September 2017.<sup>8</sup> The First Deed purported to change the trustee of the Trust by replacing Irongrow with Boothbuck. Mr Buckby was a director of Boothbuck until his resignation on 26 August 2018. Ms Booth had been a director of Boothbuck since 30 July 2004 and has been the sole director since 26 August 2018.<sup>9</sup>
- [11] The applicant by letter dated 7 May 2018 responded to Mr Buckby’s email of 5 April 2018. The applicant referred to the deed of covenant that was executed by Ms Booth on 1 October 2015, which prohibited any change in the trustee of the Trust without the applicant’s prior written consent. The letter further stated:<sup>10</sup>
- “Based on the above and the information provided to date the Deed of Variation of the Soul Mates Trust dated 17 September 2017 appears to be ineffective and [Irongrow] appears to remain as the trustee. Please provide additional documentation should you believe this is not the case.”
- [12] On 15 May 2018, the then solicitors for the applicant sent a letter of demand to Mr Buckby and Ms Booth for \$935,581.48.<sup>11</sup> A letter of demand in the same amount was also sent to Irongrow as guarantor.<sup>12</sup> On 4 June 2018, the applicant’s solicitors sent a further letter of demand to Irongrow, this time in its capacity as mortgagor, for repayment in the amount of \$938,971.37.<sup>13</sup> The applicant has received no repayment.
- [13] On 15 June 2018, the applicant demanded possession of the property from Mr Buckby and Ms Booth, as the applicant understood each of them to be a tenant of Irongrow.<sup>14</sup> The demand for possession required them to vacate within two months.

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<sup>4</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 5.

<sup>5</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 6; exhibits SA-3 and SA-4.

<sup>6</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 8; exhibit SA-7.

<sup>7</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 9; exhibit SA-8.

<sup>8</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 10; exhibit SA-9.

<sup>9</sup> Exhibit CM-9 to the affidavit of Courtney Macdade filed 11 March 2019, page 17.

<sup>10</sup> Exhibit SA-11 to the affidavit of Scott Allen filed 25 February 2019.

<sup>11</sup> Exhibit GWW-1 to the affidavit of Glen Walter Williams filed 25 February 2019.

<sup>12</sup> Exhibit GWW-2 to the affidavit of Glen Walter Williams filed 25 February 2019.

<sup>13</sup> Exhibit GWW-3 to the affidavit of Glen Walter Williams filed 25 February 2019.

<sup>14</sup> Exhibit GWW-4 to the affidavit of Glen Walter Williams filed 25 February 2019.

- [14] On 12 September 2018, the applicant commenced a proceeding in the District Court against Irongrow to recover possession of the property. The District Court proceeding was transferred to this Court and is now proceeding 2942 of 2019. Irongrow has not filed a defence in 2942 of 2019 and the liquidator consents to judgment. Mr Buckby and Ms Booth have filed a defence pursuant to r 143 of the UCPR as persons in possession of the property. They oppose summary judgment.<sup>15</sup>
- [15] On 27 September 2018, the transfer, which was dated 25 September 2018 and purported to transfer the fee simple interest in the property from Irongrow to Boothbuck, was lodged for registration.<sup>16</sup> Mr Buckby executed the transfer on Irongrow's behalf as its sole director and secretary. The transfer was registered on 29 September 2018.<sup>17</sup> The applicant became aware of the registration of the transfer on 20 December 2018.<sup>18</sup>
- [16] The transfer was accompanied by a deed of variation that purported to effect a change to the trustee of the Trust as between Irongrow (the outgoing trustee), Boothbuck (the incoming trustee) and Ms Booth (the appointor) bearing the date of 17 September 2017 (**the Second Deed**). Although both the First Deed and the Second Deed bear the same date of 17 September 2017, the latter differs from the former because the latter is executed by Ms Booth not by Mr Buckby.<sup>19</sup> Although Mr Buckby was cross-examined in relation to this apparent discrepancy and submissions were made by counsel for the applicant as to Mr Buckby's credibility, it is unnecessary for the Court to make any findings in this respect. This is because Mr Buckby concedes that he was not authorised to sign the transfer on behalf of Irongrow as it was in liquidation when he signed.<sup>20</sup>
- [17] The applicant did not consent to, nor did it ratify, the removal of Irongrow and the appointment of Boothbuck as the trustee of the Trust.<sup>21</sup>

### **Proceeding 1981/19**

- [18] In the context of the factual background set out above, the applicant seeks the following declaratory relief:
1. A declaration that the transfer was not executed by Irongrow.
  2. A declaration that the transfer was at all times void and of no effect and, accordingly, the current particulars in the freehold land register for Lot 21 on RP 71363 (Title Reference 13054072) are incorrect.
  3. A declaration that, by and throughout September 2018, Boothbuck had actual (or, alternatively, constructive) knowledge that:
    - (a) Irongrow was in liquidation;

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<sup>15</sup> Applicant's Outline of Argument filed 22 March 2019, paragraph 18.

<sup>16</sup> Affidavit of Glen Walter Williams filed 25 February 2019, paragraph 17; Exhibit GWW-13, pages 55-62.

<sup>17</sup> Affidavit of Glen Walter Williams filed 25 February 2019, paragraph 17; Exhibit GWW-14.

<sup>18</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 18.

<sup>19</sup> Applicant's Outline of Argument filed 22 March 2019, paragraph 22.

<sup>20</sup> Affidavit of John William Buckby filed 3 May 2019, paragraph 4.

<sup>21</sup> Affidavit of Scott Allen filed 25 February 2019, paragraph 21.

- (b) the transfer was not executed by Irongrow; and
  - (c) the transfer was invalid.
4. A declaration that Boothbuck would suffer no prejudice in the event of a correction of the freehold land register by the third respondent reinstating the second respondent as the registered proprietor of Lot 21 on RP 71363 (Title Reference 13054072).

Certain alternative declaratory relief is sought which, in light of Mr Buckby's concession that he was not authorised to sign the transfer on behalf of Irongrow, does not require any further consideration.<sup>22</sup>

- [19] I note that in relation to the declaratory relief sought by the applicant, the Registrar of Titles abides the order of the Court, save as to the question of costs which has been agreed.<sup>23</sup>

***(a) Was the transfer executed by Irongrow?***

- [20] In light of the Registrar's position and the concession made by Mr Buckby and for the reasons developed below, it is appropriate that the Court make the first declaration sought, namely that the transfer was not executed by Irongrow.
- [21] Ordinarily, a company with a sole director who is also the sole company secretary can execute a document if it is signed by that director.<sup>24</sup> This is what Mr Buckby purported to do by signing the transfer as Irongrow's sole director and secretary. However, s 198G(1) of the *Corporations Act 2001* (Cth) provides that "[w]hile a company is under external administration, an officer of the company must not perform or exercise a function or power of that office". Section 198G(2) further provides that an officer of a company in external administration commits an offence if he or she "purports to perform or exercise a function or power of that office." The predecessor to s 198G was s 471A(1) of the *Corporations Law*, which was considered by the Queensland Court of Appeal in *Re Rock Bottom Fashion Market Pty Ltd (in liq)*.<sup>25</sup> The Court of Appeal observed as follows:

"On the face of it the section is perfectly general and is wide enough to deprive Mr Innes of any power he might otherwise have had to file a notice of appeal against the winding-up order, since he has neither the written approval of the liquidator, nor the approval of the Court."

The provisions of s 198G(1)-(2) do not apply if the officer is acting as the external administrator, with the approval of the external administrator or the Court, or where otherwise authorised under the *Corporations Act*: see s 198G(3).

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<sup>22</sup> See Amended Originating Application filed 13 March 2019, paragraphs 2C(a) and (b).

<sup>23</sup> Submissions of the Third Respondent filed 15 May 2019, paragraph 2.

<sup>24</sup> *Corporations Act 2001* (Cth), s 127(1)(c).

<sup>25</sup> [2000] 2 Qd R 573 at 574.

[22] The Registrar, in written submissions, suggests that s 198G does not deprive directors of their powers but rather creates only an offence (subject to certain exceptions). The effect of s 198G ultimately turns upon its proper construction. In my view, its effect is indeed to deprive officers of the exercise of their functions and powers once the relevant company enters into external administration. This is consistent with the conventional understanding of directors' roles – or lack thereof – during a winding up: “The effect of a winding-up order is that the powers of the directors of the company cease”.<sup>26</sup> It is also consistent with the construction of s 198G(1) and (2) when read together. If s 198G(1) were simply to create an offence rather than deprive an officer of his or her functions and powers, what work would subsection (2) be left to do? Further, the fact that subsection (2) makes it an offence to “purport” to perform or exercise a function or power tends to suggest that an officer of a company under external administration is in fact incapable of exercising a power or function of his or her office.

[23] Accordingly, by reason of s 198G, Mr Buckby could not exercise the powers or functions of his office once Irongrow was in liquidation, including the ability to execute a document on Irongrow's behalf by signing as its sole director and secretary. Irongrow was already in liquidation when he purported to sign the transfer on Irongrow's behalf. He did not receive the liquidator or the Court's approval to do so, and was not otherwise empowered under the *Corporations Act*. This means that Irongrow did not execute the transfer.

***(b) Was the transfer void and of no effect?***

[24] The second declaration sought raises for consideration whether the transfer was at all times void and of no effect. The Registrar accepts that if the Court was to make such a finding it would be appropriate to declare that the current particulars in the freehold land register for the property are incorrect.<sup>27</sup>

[25] The starting point is s 61(1)(a) of the *Land Title Act* which provides that an instrument of transfer for a lot or an interest in a lot must, among other things, be validly executed. Section 161(1) provides that:

“(1) For a corporation, an instrument is validly executed if—

- (a) it is executed in a way permitted by law; or
- (b) the instrument is sealed with the corporation's seal in accordance with the *Property Law Act 1974*, section 46.”

[26] In the present case the transfer was not executed in a way permitted by law in that Mr Buckby, as the sole director and secretary of Irongrow, had no authority to execute the transfer in circumstances where the company was in liquidation. This is for the reasons already provided above.

[27] The Registrar submits that the possibility of the Court authorising a director's actions *nunc pro tunc* tends towards the conclusion that the transfer is voidable, as opposed to

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<sup>26</sup> *Re Dallhold Investments Pty Ltd (in liq) (Rec and Mgrs Apptd)* (1994) 53 FCR 339 at 342 per Sackville J.

<sup>27</sup> Submissions of the Third Respondent filed 15 May 2019, paragraph 17.

void.<sup>28</sup> It is trite that a transaction that requires the Court's intervention in order for it to be set aside is voidable, however, that principle does not work in the reverse. An ineffective transaction cannot properly be described as voidable if there remains the possibility that the Court can authorise the act that would give effect to the transaction. As things stand, Irongrow has not executed the transfer. Mr Buckby did not obtain the liquidator's consent to execute the transfer on Irongrow's behalf, and nor is there an application before the Court to permit Mr Buckby's actions *nunc pro tunc*. Consequently, the transfer is void and of no effect.

- [28] As to whether the freehold land register is incorrect, the applicant submits that there is obvious logic in the proposition that the register will be incorrect if it records and gives effect to a transfer which the transferor never in fact made or executed and which was, at all times, void and of no effect.<sup>29</sup> I accept that the freehold land register is incorrect because it records that the registered proprietor of the fee simple interest in the relevant property is Boothbuck when in fact that interest was never transferred to Boothbuck by Irongrow.<sup>30</sup>

***(c) Did Boothbuck know of the circumstances behind the purported transfer, and would it suffer prejudice if the freehold land register was corrected?***

- [29] The third and fourth declarations sought by the applicant relate to the provisions of s 15(1) and (8) of the *Land Title Act*, which provide:

**“15 Registrar may correct registers**

- (1) The registrar may correct any register kept by the registrar if the registrar is satisfied that –
- (a) the register is incorrect; and
  - (b) the correction will not prejudice the rights of the holder of an interest recorded in the register.

...

- (8) For subsection (1)(b), the rights of the holder of an interest recorded in the register are not prejudiced if the holder acquired or has dealt with the interest with actual or constructive knowledge that the register was incorrect and how it was incorrect.”

- [30] Section 15(8) informs section 15(1)(b) in the sense that a correction will not prejudice the rights of the holder of an interest recorded in the register if the holder acquired or has dealt with the interest with actual or constructive knowledge that the register was incorrect and how it was incorrect. In the context of the present case, the relevant factual enquiry is whether Boothbuck acquired its interest in the property with actual or constructive knowledge that Mr Buckby, as the sole director and secretary of Irongrow, had no authority to execute the transfer on Irongrow's behalf. Before I consider the evidence in this respect, there are two preliminary observations that should be made.

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<sup>28</sup> Submissions of the Third Respondent filed 15 May 2019, paragraph 13, citing *In the matter of Day & Night Online Transport Pty Ltd (in liq)* [2018] NSWSC 796.

<sup>29</sup> Applicant's Outline of Argument filed 22 March 2019, paragraph 34.

<sup>30</sup> Applicant's Outline of Argument filed 22 March 2019, paragraph 38.

First, under s 15(1) it is the Registrar of Titles who holds the discretion to correct the freehold land register. McPherson J (as his Honour then was) in *Medical Benefits Fund of Australia Ltd v Fisher*, in considering the predecessor provision to s 15(1)<sup>31</sup> observed as follows:<sup>32</sup>

“The discretion conferred by s 11(4) is cast in a form that makes it clear that the Registrar and not the court is entitled to exercise it. The court would not interfere with his exercise of that discretion unless it exceeded the limits of the power properly interpreted; or was exercised on some wrong principle; or, perhaps, if the Registrar had wrongly refused to exercise the power. In the present case the Register has neither exercised, nor refused to exercise, the power under s 11(4); nor has he been asked to do so. In the circumstances it is beyond my province to give him advice, without his asking for it, about whether or how he should exercise that discretion, or about the consequences of his doing so.”

- [31] To similar effect are the observations of Holmes J (as her Honour then was) in *Re Crompton*.<sup>33</sup> Her Honour in considering s 15(1) of the *Land Title Act* noted that “[t]here is nothing in the Act to suggest that the registrar may be directed in the exercise of that discretion by the court.”
- [32] None of the declaratory relief sought by the applicant envisages the discretion under s 15(1) being exercised by the Court or any person other than the Registrar of Titles. The applicant seeks the declarations on the basis that they are likely to assist the Registrar in making a decision about whether to correct the register under s 15 of the *Land Title Act*. This is in circumstances where the Registrar has indicated that she will abide the order of the Court. It must be emphasised, however, that in granting any of the declaratory relief sought by the applicant, the Court does not purport to direct the Registrar as to how the discretion under s 15 should be exercised.
- [33] The second preliminary observation concerns the doubts raised by the Registrar as to the necessity of proceeding 1981 of 2019. The Registrar submits that the applicant, instead of seeking declaratory relief, could have simply applied to join Boothbuck as a party pursuant to r 69 of the UCPR to the recovery of possession proceedings.<sup>34</sup> The Registrar in previous correspondence to the applicant has made reference to s 63 of the *Land Title Act* which provides that “[i]f a lot, or an interest in a lot, subject to a registered mortgage is transferred, the transferee is liable ... to comply with the terms of the mortgage and the terms implied by an Act”.<sup>35</sup> By reference to s 63(1) the Registrar also suggested that the applicant lacked the necessary standing to seek the declaratory relief. I deal with the issue of standing below.
- [34] The applicant submits that it would not have been appropriate simply to join Boothbuck as a party to the recovery of possession proceeding. The applicant points to the contractual arrangements that were in place, which included the deed of covenant by

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<sup>31</sup> *Real Property Act 1861-1981* (Qld), s 11(4).

<sup>32</sup> [1984] 1 Qd R 606 at 611-612.

<sup>33</sup> [2000] QSC 386 at [8].

<sup>34</sup> Submissions of the Third Respondent filed 15 May 2019, paragraphs 27-28.

<sup>35</sup> Exhibit PAL-6 to the affidavit of Paul Andrew Luck filed 28 May 2019, page 53.

which Ms Booth, in her capacity as appointor under the Trust, agreed not to remove Irongrow or appoint any other company to act as trustee of the Trust without the applicant's consent. Further, apart from those contractual arrangements which sought to ensure that the applicant would at all times be dealing with Irongrow as mortgagor, any application under r 69 to join Boothbuck as a party would, according to the applicant, constitute an acceptance of an invalid instrument of transfer.<sup>36</sup> The third declaration sought by the applicant concerns Boothbuck's actual or constructive knowledge that the transfer was invalid. I accept that in those circumstances the applicant has sufficient reason to seek the declaratory relief rather than proceed by way of joining Boothbuck to the recovery of possession proceeding. The applicant's decision in this respect does not, in my view, constitute any impediment to granting the declaratory relief.

- [35] I also accept that the applicant has sufficient standing to seek the declaratory relief. Although Boothbuck is, pursuant to s 63(1) of the *Land Title Act*, liable to comply with the terms of the registered mortgage, the utility of the declaratory relief extends beyond Boothbuck's liability established by s 63(1). The applicant submits, and I accept, that it has a distinct interest in obtaining the declarations having regard to the recovery of possession proceeding and the contractual arrangements it put in place for the trustee of the Trust not to be changed without its prior consent.<sup>37</sup> The applicant refers to the judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission*.<sup>38</sup>

“It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which ‘[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.’ However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have ‘a real interest’ and relief will not be granted if the question ‘is purely hypothetical’, if relief is ‘claimed in relation to circumstances that [have] not occurred and might never happen’ or if ‘the Court’s declaration will produce no foreseeable consequences for the parties’.” [citations omitted]

Although the declarations sought by the applicant cannot fetter the exercise of discretion by the Registrar under s 15(1) of the *Land Title Act*, it may facilitate and assist in the exercise of that discretion by the Court making the necessary factual findings implicit in the declarations sought. Such factual findings include that Boothbuck had actual or constructive knowledge that the transfer was invalid and that therefore Boothbuck “acquired or has dealt with the [fee simple interest in the property] with actual or constructive knowledge that the register was incorrect and how it was incorrect”.<sup>39</sup>

- [36] Based on the evidence before the Court, including the oral testimony of Mr Buckby, I find that Boothbuck had actual knowledge that:

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<sup>36</sup> Transcript of Proceedings, 28 May 2019, 1-44, line 26 to 1-45, line 40.

<sup>37</sup> Applicant's Outline of Argument filed 22 March 2019, paragraph 39(c).

<sup>38</sup> (1992) 175 CLR 564 at 581-582.

<sup>39</sup> *Land Title Act* 1994 (Qld), s 15(8).

- (a) Irongrow was in liquidation;
- (b) the transfer was not executed by Irongrow; and
- (c) the transfer was invalid.

- [37] The evidence establishes the following. The registered office of Boothbuck is 120 Esplanade, Toorbul, which is the property the subject of the mortgage granted by Irongrow.<sup>40</sup> Mr Buckby was a director of Boothbuck from 30 July 2004 until his resignation on 26 August 2018. Ms Booth also became a director of Boothbuck on 30 July 2004 and since Mr Buckby ceased to be a director Ms Booth has been the sole director since 26 August 2018.<sup>41</sup> Mr Buckby's oral evidence was that he and his wife, Ms Booth, controlled and managed the affairs of Boothbuck.<sup>42</sup> The winding up order for Irongrow was made on 27 March 2018. The applicant sent a letter to Mr Buckby and Ms Booth advising them of the winding up order and that a liquidator had been appointed.<sup>43</sup> A further letter to similar effect was sent on 7 May 2018.<sup>44</sup> In light of the above, I am prepared to accept that Mr Buckby and Ms Booth knew that Irongrow was in liquidation prior to the purported execution of the transfer. That knowledge should be sheeted home to Boothbuck on the basis that Mr Buckby and Ms Booth were its directing mind and will.
- [38] This evidence demonstrates that Mr Buckby executed the transfer on 25 September 2018 purportedly on behalf of Irongrow in circumstances where he had until 26 August 2018 been a director of Boothbuck, together with his wife. Further, at the time the transfer was executed both Mr Buckby and Ms Booth knew that Irongrow was in liquidation.
- [39] Boothbuck is not protected from actual knowledge that the transfer was not executed by Irongrow simply because Mr Buckby had resigned as a director on 26 August 2018, that is, prior to his purported execution of the transfer. His resignation "did not deprive [Boothbuck] of its continuing knowledge in relation to" the transfer.<sup>45</sup> As observed by the New South Wales Court of Appeal in *Fightvision Pty Ltd v Onisforou*:<sup>46</sup>

"A corporation can not cause itself to shed knowledge by shedding people, and it can not be that a head of sporting acquisitions can sign up a sporting identity whom his predecessor could not sign up simply because of the change in personnel. There may be limits to the continuation of corporate knowledge, for example, by regard to the transaction as suggested by what Hoffman LJ said [in *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685], but in the present case the knowledge of Mr Dodds and Mr Lyons in our view would persist as knowledge of Sky Channel when the question of signing up Mr Tszyu arose."

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<sup>40</sup> Exhibit CM-9 to the affidavit of Courtney Macdade filed 11 March 2019, page 16.

<sup>41</sup> Exhibit CM-9 to the affidavit of Courtney Macdade filed 11 March 2019, page 17.

<sup>42</sup> Transcript of Proceedings, 28 May 2019, 1-20, line 35 to 1-21, line 3.

<sup>43</sup> Exhibit SA-8 to the affidavit of Scott Allen filed 25 February 2019.

<sup>44</sup> Exhibit SA-11 to the affidavit of Scott Allen filed 25 February 2019.

<sup>45</sup> *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 at 700 per Nourse LJ.

<sup>46</sup> (1999) 47 NSWLR 473 at 527.

- [40] To reiterate, Boothbuck knew that Irongrow was in liquidation when Mr Buckby purported to execute the transfer on Irongrow's behalf. From this, Boothbuck must have known, or at least have had constructive knowledge, that Irongrow could not have executed the transfer by virtue of Mr Buckby signing the transfer in his capacity as sole director and secretary of Irongrow. Boothbuck must also be taken to have known that the transfer was invalid (in the sense that it was void and of no effect) as the fact that Irongrow did not execute the transfer was the *sine qua non* of the invalidity.
- [41] In light of the above findings, it is appropriate that the third and fourth declarations be made.

### **Proceeding 2942/19**

- [42] As Irongrow has failed to file a defence in this proceeding and as the liquidator of Irongrow consents to judgment, there should be judgment for the applicant against Irongrow for recovery of possession of the property pursuant to r 286 of the UCPR.
- [43] Mr Buckby and Ms Booth filed a notice of intention to defend on 8 October 2018. In paragraphs 10 and 11 of the defence they allege as follows::

“10. Whilst the banking accommodation was set up whereby the property was held on trust by the First Defendant [Irongrow] the Plaintiff is and was at all times aware that the true nature of the accommodation was that of an ordinary domestic personal loan (not for business purposes) but the Plaintiff has not afforded the Second and Third defendants the ordinary and legal courtesies afforded to customers in genuine hardship:

10.1 Such financial and emotional hardship has been caused or contributed to by serious medical difficulties suffered by the Second Defendant; all of which have been clearly notified to the Plaintiff who has offered no genuine support and misled me.

10.2 The Second and Third Defendants have also sought the involvement of the Banking Ombudsman and seek to further involve the Banking Ombudsman and so demand all options available to them[.]

11. Further or in the alternative the Plaintiff advanced and continued the loan without making proper and appropriate enquiries to justify that the Second and Third Defendants could maintain the loan and the Plaintiff has accordingly caused or contributed to its own loss.”

- [44] The applicant applies for summary judgment pursuant to r 292 of the UCPR on the basis that:
- (a) Mr Buckby and Ms Booth have no real prospect of successfully defending all or a part of the claim; and
  - (b) there is no need for a trial of the claim or part of the claim.<sup>47</sup>

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<sup>47</sup> Plaintiff's Outline of Argument filed 22 March 2019, paragraphs 15 and 16, citing *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232.

- [45] In paragraph 2 of the defence, Mr Buckby and Ms Booth plead that the proceeding was flawed because Irongrow was not the trustee of the Trust at the time of the commencement of the claim. In light of Mr Buckby's concession that he had no authority to execute the transfer on behalf of Irongrow and given my factual findings above, there is no substance to this allegation.
- [46] Mr Buckby and Ms Booth are parties to the proceeding as persons "in possession of the [property] either directly or by a tenant" pursuant to r 143(1) of the UCPR. The applicant refers to *National Australia Bank Ltd v Nikolaidis & Ors* where McCallum J noted that the right of an occupier to uphold his or her rights as an occupier as against a plaintiff does not place the occupier in the shoes of the mortgagor.<sup>48</sup> As correctly submitted by the applicant, the allegations raised by Mr Buckby and Ms Booth, in particular in paragraphs 10 and 11 of the defence, are grievances they raise as borrowers and not in protection of their rights as occupiers of the property.<sup>49</sup>
- [47] In their outline of argument, Mr Buckby and Ms Booth allege that the guarantee and mortgage provided by Irongrow are each regulated by the *National Credit Code (NCC)*, given the residential and personal nature of the loan. They submit that the credit contract, the mortgage and the guarantee constitute documents which were drawn together, signed together and "were clearly part of the same suite of documents designed to secure the same transaction".<sup>50</sup> In his affidavit filed 3 May 2019, Mr Buckby identifies a number of matters in support of the allegation that the true nature of the loan was residential and personal in nature, irrespective of any declaration being signed by them that the loan was for business purposes. The difficulty with this allegation is that even if the NCC were to apply to the credit contract in respect of Mr Buckby and Ms Booth, neither the guarantee nor the mortgage provided by Irongrow are regulated by the NCC. As correctly submitted by the applicant, the guarantee and mortgage would only be regulated if Irongrow were a natural person or a strata corporation.<sup>51</sup> Irongrow is not a natural person nor is it a strata corporation as defined in s 204 of the NCC. Irongrow was registered under the *Corporations Act*.
- [48] I further accept that the issue raised by Mr Buckby and Ms Booth concerning the purpose of the loan is irrelevant to the applicant's right to recover possession of the property. Under the mortgage, the making of an order for the winding up of Irongrow was expressly identified as an event which entitled the applicant to recover possession of the property.<sup>52</sup> Even if there is a factual dispute raised by Mr Buckby and Ms Booth as to the circumstances concerning the execution of the declaration that the loan was for business purposes, such a factual issue does not affect the applicant's entitlement to recover possession of the property upon Irongrow being placed into liquidation.
- [49] In those circumstances, summary judgment should be granted to the applicant against Mr Buckby and Ms Booth pursuant to r 292 of the UCPR.

## Disposition

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<sup>48</sup> (2011) NSW Conv R 56-284 (55,238) at [13].

<sup>49</sup> Plaintiff's Outline of Argument filed 22 March 2019, paragraph 21.

<sup>50</sup> Second and Third Defendants' Further Outline of Argument filed 20 May 2019, paragraph 3.

<sup>51</sup> Plaintiff's Further Outline of Argument filed 14 May 2019, paragraph 2(b); NCC, ss 7(1) and 8(1).

<sup>52</sup> Plaintiff's Further Outline of Argument filed 14 May 2019, paragraph 3.

[50] In respect of proceeding 1981 of 2019:

1. the Court declares that:
  - (a) transfer number 719014396 was not executed by the second respondent.
  - (b) transfer number 719014396 was at all times void and of no effect and, accordingly, the current particulars in the freehold land register for Lot 21 on Registered 71363 (Title Reference 13054072) are incorrect.
  - (c) by and throughout September 2018, the first respondent had actual knowledge that:
    - (i) the second respondent was in liquidation;
    - (ii) Transfer Number 719014396 was not executed by the second respondent; and
    - (iii) Transfer Number 719014396 was invalid.
  - (d) the first respondent would suffer no prejudice in the event of a correction of the freehold land register by the third respondent reinstating the second respondent as registered proprietor of Lot 21 on Registered 71363 (Title Reference 13054072).
2. the Court orders that:
  - (a) the first respondent pay the applicant's costs of the proceeding.
  - (b) the applicant pay the third respondent's costs of the proceeding up to and including 13 March 2019.

[51] In respect of proceeding 2942 of 2019, the Court orders that:

1. the plaintiff recover as against the first defendant possession of all that piece or parcel of land described as Lot 21 on Registered Plan 71363, being the whole of the land contained in Title Reference Number 13054072.
2. the plaintiff recover as against the second and third defendants possession of all that piece or parcel of land described as Lot 21 on Registered Plan 71363, being the whole of the land contained in Title Reference Number 13054072.
3. the first, second and third defendants pay the plaintiff's costs of the proceedings.

[52] In granting summary judgment, I am cognisant that to enforce such an order against Irongrow, the applicant will first require a favourable exercise of the Registrar's discretion to correct the freehold land register so as to reflect Irongrow's status as registered proprietor of the fee simple interest in the property, rather than Boothbuck.