# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Commonwealth Bank of Australia v Perrin* [2011] QSC 274 |
| PARTIES: | **COMMONWEALTH BANK OF AUSTRALIA**<br>**ACN 123 123 124**<br>(Plaintiff)<br><br>v<br><br>**NICOLE KATHLEEN PERRIN**<br>(Defendant) |
| FILE NO/S: | BS 4192 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court |
| DELIVERED ON: | 19 September 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16-20, 23-24 and 26 May 2011 |
| JUDGE: | McMurdo J |
| ORDER: | **The plaintiff's claim against the defendant be dismissed.** |
| CATCHWORDS: | REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – FRAUD OR FORGERY – AGAINST REGISTERED PROPRIETOR – where the plaintiff bank lent money to the defendant's husband – where the defendant was the sole registered proprietor of the matrimonial home – where documents including mortgages and guarantees were executed in the name of the defendant – whether the defendant signed the documents<br><br>CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – AUTHORITY OF AGENTS – IN GENERAL – whether the defendant's husband had express or implied authority to sign the documents on her behalf<br><br>CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – RATIFICATION – WHAT AMOUNTS TO – whether the defendant ratified the transactions arising from the forged documents – whether a forgery is capable of ratification<br><br>REAL PROPERTY – TORRENS TITLE – AMENDMENT OR VARIATION OF TITLE RECORD – POWERS OF COURT – what orders the court may make under s 187(1) of |

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| | the *Land Title Act 1994* (Qld) – whether the court may alter the legal entitlements and obligations of the parties |
| | *Evidence Act 1977* (Qld), s 59<br>*Land Title Act 1994* (Qld), s 11A, s 75, s 184, s 185(1A), s 187<br>*Property Law Act 1974* (Qld), s 11(1)(a) |
| | *Brook v Hook* (1871) LR 6 Ex 89, cited<br>*Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, cited<br>*City Bank of Sydney v McLaughlin* (1909) 9 CLR 615, applied<br>*Greenwood v Martins Bank* [1932] 1 KB 371, cited<br>*Imperial Bank of Canada v Begley* [1936] 2 All ER 367, cited<br>*Klement v Pencoal Ltd & Ors* [2000] QCA 152, distinguished<br>*Petersen v Moloney* (1951) 84 CLR 91, cited<br>*Press v Mathers* [1927] VLR 326, cited<br>*Rowe v B & R Nominees Pty Ltd* [1964] VR 477, cited<br>*Theodore v Mistford Pty Ltd* [2003] QCA 580, cited<br>*Theodore v Mistford Pty Ltd* (2005) 221 CLR 612, cited<br>*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, applied |
| COUNSEL: | KE Downes SC with SB Hooper for the plaintiff<br>JC Bell QC with M Hoch for the defendant |
| SOLICITORS: | Henry Davis York Lawyers for the plaintiff<br>Shand Taylor Lawyers for the defendant |

[1] In June 2008, the plaintiff bank lent $10 million to Mr Matthew Perrin, a Gold Coast businessman and former solicitor. In August of that year, the bank lent him a further $3.5 million. By March of 2009, Mr Perrin was a bankrupt and he had repaid nothing.

[2] The bank made these loans upon the faith of what appeared to be a guarantee by the defendant, who was then married to Mr Perrin, and mortgages over the house in which they lived and which she owned. But she claims that her signatures on these documents are forgeries and that she was unaware of the transactions.

[3] The bank sues to recover under the guarantee in excess of $10 million[1] and seeks declaratory relief as to the enforceability of the mortgages. It does so on several alternative bases. First, the bank alleges that the defendant did sign these documents. Secondly, it suggests that if they were signed instead by Matthew Perrin, that was done with her express authority, pursuant to a power of attorney which the bank says was signed by the defendant in about 2001, although no such document is in evidence. Thirdly, the bank says that Matthew Perrin had her implied authority to sign for her, from the circumstance that she left to him all

[1] The bank has recovered some of the principal debt by enforcing securities given by Mr Perrin and another guarantor.

matters of their finances and property. Fourthly, it is said that if these documents were not signed by her or with her actual authority, she became bound by them by ratifying them.

[4] The bank's fifth point is that it was granted at least an equitable mortgage, by being provided with the certificate of title for the house. Matthew Perrin had been able to deliver it to the bank having collected it from the law firm which held it on behalf of the defendant. That was the firm where his brother, Fraser Perrin, practised. It is Fraser Perrin who was the apparent witness to the defendant's signature on the critical documents. But he was called, remarkably in the bank's case, to say that what appears in each case as his signature was a forgery.

[5] The bank's final argument is that any order by which the registration of the mortgages is set aside, should be upon terms that the defendant pay something towards the principal debt. To explain that, if the mortgages were not executed, authorised or ratified by the defendant, the bank concedes that it is not entitled to rely upon the indefeasibility from the registration of these mortgages, because it concedes that it failed to take reasonable steps to ensure that it was the defendant who executed them, as required by s 11A of the *Land Title Act 1994* (Qld). In that event, s 185(1A) would apply, depriving the mortgages of indefeasibility. Section 187 provides that in a number of circumstances, including where s 185(1A) applies, "the Supreme Court may make the order it considers just". The defendant applies for an order under s 187 for the removal of the mortgages from the register. The bank's argument is that an order for the removal of the mortgages would be "just" only upon the basis of some contribution to the debt by the defendant. In broad terms, the bank's argument is that it was partly her fault that such a fraud was able to be perpetrated.

[6] Before going to those arguments, I will set out the relevant facts, which because of some of the bank's arguments, begin many years prior to these transactions.

**Chronology**

[7] After leaving school, the defendant undertook a course in beauty therapy in 1991, and with financial assistance from her father, she acquired a beauty salon in 1992. She said that it was a successful venture. She sold the business in late 1997 after she became pregnant. She was not employed or engaged in any business from then until after the events in question.

[8] The defendant and Matthew Perrin married in 1996, the year in which he was admitted as a solicitor. He had an outstanding academic record, winning a university medal in law. Shortly after his admission, he left the firm where he had been articled and joined Perrin Pointon, solicitors, where his brothers Fraser and Scott Perrin practised.

[9] In 1996, the couple purchased a house at Benowa Waters. The price was approximately $365,000, funded largely by borrowings from Colonial State Bank.

The house was purchased in the name of a company called S & M Pty Ltd, acting as trustee for a discretionary trust controlled by them.

[10] Shortly after the birth of their first child in 1998, they incorporated a company which they called Christie Qld Pty Ltd ('Christie'). It became the trustee of the so-called Christie Billabong Trust, the beneficiaries of which included the defendant, Matthew Perrin and their children. The defendant and Matthew Perrin were its directors and shareholders.

[11] In 1998, whilst he was working at Perrin Pointon, Matthew Perrin became involved in what was then a privately owned clothing business called Billabong. The business was owned by Mr Gordon Merchant and his estranged wife when Matthew Perrin and his brother Scott acquired her 49% interest. Before long, Matthew Perrin had ceased practice as a solicitor and he was employed full time in the Billabong business, becoming its Chief Executive Officer in 1999.

[12] In May 1999, the couple decided to purchase a house at 15 Southern Cross Drive, Cronin Island. The land was described as Lot 15 on RP 119510 and it is now part of the land which is subject to the disputed mortgages. It was purchased in the defendant's name. I accept her evidence that this was done because he said that lawyers did that "in case they should get sued and for the security of the family." The price was $1.45 million, which for the most part was borrowed from First Mortgage Managed Investments Limited and secured by a mortgage executed by the defendant. The purchase price was settled in February 2000.

[13] In mid-2000, the Billabong company was publicly floated. It was a highly successful float and immediately the Perrins were very wealthy, holding tens of millions of dollars of shares. The loans on the Benowa Waters and Southern Cross Drive properties were then repaid, and the Perrins set about demolishing the house at Southern Cross Drive and building a new house there.

[14] In August 2000, Allen Allen & Hemsley, solicitors, were asked to prepare wills and enduring powers of attorney to be made by each of the Perrins. It was this firm for which Matthew Perrin had worked during his articles. Undoubtedly he was involved in giving instructions to them. But so too was the defendant, who made at least one call to the solicitors about the enduring power of attorney which they had proposed to be signed by her.

[15] On 20 September 2000, Allens sent drafts of a will and a power of attorney to the defendant, as well as similar documents to be signed by Matthew Perrin. He signed them in 2000 and thereby appointed the defendant and Scott Perrin as his attorneys for financial and other matters.[2] But it would appear that the defendant did not sign what had been sent for her execution, because in April 2001, Allens wrote to her saying that the drafts of her will and power of attorney had not been returned and reminding her of the importance of the documents. In May 2001, the defendant gave telephone instructions to Allens to the effect that she approved the form of the

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[2] Exhibits 118 and 203.

documents which had been sent to her in September 2000 and she asked again that they be sent to her for execution. Allens wrote to her on the following day, enclosing further copies for her signature. But nothing signed by the defendant was returned to them.

[16] In 2010, Matthew Perrin claimed that he had just located what he said was a copy of a power of attorney which had been signed by the defendant and dated 10 May 2001. The defendant denies signing such a document and alleges that the purported copy was fabricated. Upon her case, Matthew Perrin photocopied her signature from an unrelated document which she had in fact signed, and by an exercise of cut and paste, produced what he represented was a copy of her power of attorney. Ultimately the bank abandoned its pleaded case that this particular document was truly a copy of a power of attorney signed by her. But the bank pressed its alternative case, being that the defendant did sign in 2001 another document in the same terms. The fabricated document, the bank argued, is explained on the basis that Matthew Perrin had a genuine recollection of the defendant signing a power of attorney in these terms, such that he felt justified in manufacturing a replica of it.

[17] I return to the chronology. During the construction of the new house at Southern Cross Drive, adjoining land was offered for sale. The Perrins decided to purchase it, but did so in the name of the defendant's sister so as to keep from the vendor the fact that they were the buyers. Shortly after the property was purchased by the defendant's sister, it was transferred to the defendant.

[18] In 2003, Matthew Perrin left the employ of Billabong, having sold most of the Perrins' shares in the company. He became self-employed, managing their investments. In the following years he invested in a number of ventures overseas, at least one of which was to bring about his financial demise.

[19] In April 2003, the defendant signed documents which authorised her husband to exercise all of her rights in respect of her bank accounts with the bank.

[20] In 2005, the adjoining properties at Southern Cross Drive were amalgamated and a certificate of title was issued for the new lot. It was collected from the Registry by Fraser Perrin's firm (Perrin Partners) who then held it for the defendant until the transactions in question in 2008.

[21] In October 2005, Matthew Perrin purchased an apartment at Mermaid Beach for $4.375 million. It was used as an alternative house for the Perrins and their children, on weekends and for some holidays. No money was borrowed for this purchase. It was purchased in his name.

[22] The first of the documents upon which the defendant says her signature has been forged were dated in December 2006. They are not the documents upon which the bank claims against her: her purported signature was not upon her own behalf but as a director of Christie. The facility was a line of credit to Matthew Perrin of

$2,000,500. There were two relevant documents, dated 11 and 14 December 2006.[3] Each was purportedly signed "N. Perrin". There was no purported witness to these signatures.

[23] The amount of this facility was increased in September 2007, to $3,000,700. Again, it was made upon the security of a guarantee by Christie. The purported signature of the defendant, as a director of Christie, appeared on at least three documents, dated 11 or 17 September 2007.[4] Again the defendant's evidence was that these were not her signatures but were forgeries. There was no purported witness to these signatures. There was also a deed of guarantee, stamped as received by the bank on 29 October 2007, which was purportedly executed by Christie to secure this increased facility.[5] That had the purported signatures of the defendant (signing for Christie) and of Fraser Perrin as a witness to her signature (as well as what appears as Matthew Perrin's signature). She denies that she signed this document, as does Fraser Perrin.

[24] In May 2008, Mr Perrin was proposing to increase the facility to $5 million. The bank prepared documents for execution by him, the defendant and Christie in relation to that facility. They included one of the mortgages the subject of the bank's claim.[6] The documents for the defendant's execution were placed into a separate envelope which was addressed only to her.[7] With an envelope containing the documents to be executed by Mr Perrin, it was delivered to the Perrins' house at Southern Cross Drive by the bank's Mr Parker on 16 May 2008.

[25] Unfortunately for the bank, Mr Parker did not hand the defendant's envelope to her. He had discussed this increase in Mr Perrin's facility with Mr Perrin but not with the defendant. He had told Mr Perrin that the bank required a mortgage over the house in the defendant's name and that it would require the certificate of title to be produced. He says that when he arrived at the Perrins' house on 16 May 2008, he met a woman who he now knows to be the defendant. He asked to see only Mr Perrin. She said that she was unsure whether he was home and asked him to place the envelopes in the letterbox. He was unable to do that because of their size but then he noticed Mr Perrin at the side of the house. He handed both envelopes to Mr Perrin in the course of a brief conversation.

[26] On the same day, the certificate of title was released by Perrin Partners into the custody of Matthew Perrin. Apparently no signature of the defendant was required by the solicitors. Although Fraser Perrin was called in the bank's case, and extensively cross-examined, he was not asked to explain how his firm had seen fit to release to Matthew Perrin a document which was not held for him.

[27] It was probably on 16 May 2008 that the certificate of title, together with the documents which had been delivered to the house on 16 May, were handed to the

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3 Exhibits 129 and 130.
4 Exhibits 131, 132 and 133.
5 Exhibit 123.
6 Exhibit 120.
7 Exhibits 110, 120, 126 and 134 to 137.

bank. They included the first of the mortgages relied upon by the bank, as well as the other documents requiring her signature, each apparently signed by her. The apparent signature by the defendant upon the mortgage and her guarantee had been purportedly witnessed by Fraser Perrin.[8] The bank executed the mortgage on 3 June 2008.

[28] On 19 May 2008, the bank posted a letter about the guarantee, addressed to the defendant at the house.[9] On the following day, Mr Parker took some further documents to the house. Mr Parker said that he placed those documents in the letterbox. They related to a temporary increase in the facility to a limit of $7 million. The documents to be signed included a guarantee by the defendant, a guarantee by Christie to be signed on its behalf by her and a letter from the bank to be countersigned by her and others.[10] What purports to be her signature was placed upon these documents. The purported signature of Fraser Perrin, as a witness to the signatures of Matthew Perrin and the defendant, also appears.

[29] At about this time, the bank was provided with a one page document, described as a "Consolidated Balance Sheet as at 3rd June 2008" of Mr and Mrs Perrin and "related entities".[11] It was apparently signed by Mr and Mrs Perrin. It represented that their net worth was about $56 million, made up of $63.6 million worth of assets less about $7.56 million owing to the bank. The assets included the house at Southern Cross Drive to which a value of $15 million was attributed.

[30] In June 2008, Matthew Perrin made a further agreement with the bank. This provided for a new facility (apparently in lieu of the existing one) to a limit of $10 million. This facility was for a term of one year to expire on 20 June 2009 and was an interest only loan. Yet more documents were sent to the Perrins at their house. Mr Parker could not recall whether he delivered or posted them. He said that again the documents would have been within different envelopes for Mr Perrin and the defendant, in accordance with the bank's usual practice. The documents were returned to the bank, apparently signed by the Perrins.[12] They included the second of the mortgages upon which the bank now relies, on which there was the apparent signature of the defendant and the apparent signature of Fraser Perrin as the witness.[13] A signature purporting to be hers also appeared upon her personal guarantee and a guarantee by Christie.[14] The purported signature of Fraser Perrin appeared on the guarantees next to the guarantor's signature.

[31] In August 2008, the bank agreed to increase the amount of that facility to $13.5 million. Documents for signing by the defendant and Christie were left for collection at the bank on 14 August 2008. They were returned on that date, apparently signed by the defendant for herself and for Christie. What purported to

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8 Exhibits 120 and 126.
9 Exhibit 42.
10 Exhibits 112, 124, 125 and 138.
11 Exhibit 139.
12 The mortgagor's signature was dated 23 June 2008.
13 Exhibit 121.
14 Exhibits 145 and 150. See also Exhibits 140 to 144.

be Fraser Perrin's signature as a witness appeared on one but not all of these documents.[15]

[32] By 28 August 2008, the bank had advanced $13.5 million to Mr Perrin under this (extended) facility. On that day, Mr Parker and another bank employee, Ms Strathmoore, went to lunch with Mr and Mrs Perrin at a Gold Coast restaurant. Mr Perrin had suggested the lunch, telling Mr Parker that he and the defendant would like to express their gratitude for the bank's providing the facilities. Ms Strathmoore's evidence is that at the restaurant, Matthew Perrin said words to the effect that "this lunch is to thank you very much for your hard work that you've done for us". In her evidence in chief, she said that he had described that work as "in regard to the deal or the loans".[16] In cross-examination, she agreed that the word loans may not have been used.[17] But also in her evidence in chief, Ms Strathmoore said that after her husband expressed their thanks, the defendant said "Yes, we want to thank you very much. It was very quick."[18] That evidence was not challenged, at least directly, in cross-examination. It was put to her that Matthew Perrin had said "Thank you both for the work you have done. Now, lets not talk any more about business." (or words to that effect). Ms Strathmoore answered "There was an 'interlude' in between the thanks and the comment that they should not talk any more business." In the defendant's evidence, she did not claim to have a good recollection of what was said on this occasion. She said that she had not been interested in the conversation at the lunch and left the restaurant relatively early.

[33] I come now to the events of January 2009, when the defendant says she became aware of the forged documents. On her evidence, she was told about the forgeries by her husband on 20 January 2009, in a conversation involving only them and which occurred at the house. He told her that he was "broke" and had "done a lot of bad things" and that he would be going to jail.[19] She says that she responded by telling him not to worry because whatever happened they would still have the house and that he then said "you don't understand".[20]

[34] At that point, the doorbell rang and he went to answer it. She then went downstairs where a number of people had arrived. There was her father Mr Bricknell, Fraser Perrin, Scott Perrin and a man called Grenville Thynne. In their presence, Matthew Perrin was sitting on the floor with his hands to his head, shaking and crying, saying that he had done "so many bad things" and that he was going to jail.[21] He said "I have mortgaged the house".[22] She said that she could recall Matthew Perrin saying to his brother Fraser "this implicates you as well" and "Fraser, you are a witness as well on the mortgages".[23]

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15 Exhibits 146 and 147.
16 T 3-36.
17 T 3-40.
18 T 3-36.
19 T 5-26.
20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.

[35] The defendant said that Fraser Perrin left the meeting at some point and went back to his office, which was within walking distance nearby, before returning with some documents. The documents had what appeared to be his signature and her signature on them. Fraser Perrin asked her "is that your signature?", to which she answered it was not.[24] Fraser Perrin said it was not his signature either and, she recalled, they each wrote signatures down on a piece of paper and gave them to Scott Perrin, Mr Thynne and Mr Bricknell. This is said to have prompted Scott Perrin to admonish his brother for implicating Fraser Perrin.

[36] Mr Bricknell recalled the same meeting. He recalled Matthew Perrin saying words to the effect that he would go to jail because he had forged the defendant's signature and that he had "lost everything".[25]

[37] Fraser Perrin was called as a witness in the bank's case. He recalled a telephone call from Matthew Perrin asking him to attend a meeting at his house urgently. He said this was "in early to mid January 2009".[26] He recalled the presence at the meeting of the defendant, Matthew Perrin, Scott Perrin, Grenville Thynne, Mr Bricknell and perhaps the defendant's mother, Mrs Bricknell (in that last respect, he appears to have been mistaken because Mrs Bricknell was called to give some brief evidence about another point and was asked no questions about this meeting). On Fraser Perrin's version, his brother said that "he had mortgaged the house". Fraser Perrin said that after this there was "no real necessity in inquiring anymore. I think the rest was clear to those in the room".[27] Towards the end of the meeting, Matthew Perrin turned to him and said "Fraser, you are involved as well because your name appears as witness on the mortgage document".[28] In cross-examination, he agreed that the meeting could have taken place on 20 January 2009. Then when asked whether Matthew Perrin was indicating at the meeting that the defendant had had no knowledge of the mortgage he answered:

> "I don't think he said anything to that – to that effect, and there was nothing indicated to me, it was simply the matter of he indicated that he had mortgaged the house and the house was subject to a mortgage, and that was one issue of many issues that created the whole disaster and that was being discussed at that time."[29]

He had no recollection of Matthew Perrin using the word "forged" or "forgery".[30] He did remember his other brother, Scott Perrin, saying "Matthew, how could you do that to Fraser?" and that "Fraser and [the defendant] will tell the truth".[31] The defendant's counsel did not put to him the version subsequently given in her evidence, insofar as that involved Fraser Perrin going to his office and returning to the meeting with documents or he and the defendant writing out specimen signatures.

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24 T 5-27.
25 Exhibit 211.
26 T 2-56.
27 T 2-57.
28 Ibid.
29 T 3-24.
30 T 3-25.
31 Ibid.

[38] I accept that there was a meeting attended by the three Perrin brothers, the defendant, Mr Bricknell and Mr Thynne, at which Matthew Perrin said words to the effect that he was broke and that he had caused the house to be mortgaged. I am not persuaded to accept the defendant's evidence that it was only immediately before this meeting, in a conversation with her husband upstairs, that she was told of these things. That is because of what occurred with the movement of money through the Perrin accounts, and the defendant's admitted involvement in that, on the morning of 20 January 2009.

[39] The defendant had a bank account in her name alone in which the credit balance in the first half of January was no more than $12,000.[32] On 19 January, the account was credited with what was described as a "funds transfer" of $6.6 million. This was a transfer from an account in the name of Matthew Perrin.[33] On the same day, there was a transfer from his account in favour of Mr Bricknell in an amount of $1,084,383.56. Mr Bricknell explained that this was the return of an investment he had made through his son-in-law. As to the $6.6 million paid to the defendant, this transaction was reversed on 20 January. There is no direct evidence which links the defendant to that transfer or its reversal.

[40] On 20 January 2009, the sum of $10.6 million was paid from Matthew Perrin's account to an account in the name of Christie.[34] Prior to that deposit to Christie's account, it had a credit balance of $101,057.70. The defendant said that she knew nothing of this transaction.

[41] But she knew of, and indeed effected, the next relevant transaction, which was the transfer of $10,607,382 from Christie's account to her own account. The bank statements for each account show this transfer as occurring on 21 January 2009. However, it is clear it was on 20 January that she instructed the bank to make the transfer. That was her evidence, as it was the evidence of Ms Strathmoore and it is supported in that respect by the documentary evidence. On that date, Ms Strathmoore wrote:

> "good morning Nicole, your transfer has been effected today. the current balance of your account is $10,619,883.33 credit."[35]

Ms Strathmoore said that it was not a "regular thing" to write such a message and that she had done so in this case because the customer had requested it.

[42] The defendant's explanation for this transfer is as follows. Early on 20 January, her husband rang her from a gym and asked her to meet him in Broadbeach. As it happened, she had an appointment in Broadbeach that morning at a place which was not far from the gym so she met him at a nearby café. When they met, he was looking around and behaving strangely and said "it's too – this is too public. I can't talk to you here … I'll talk to you later".[36] He then left suddenly without explaining

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32 The defendant's bank statements are Exhibit 65.
33 Matthew Perrin's bank statements are Exhibit 67.
34 Christie's bank statements are Exhibit 66.
35 Exhibit 45.
36 T 5-24.

himself. The defendant says that she then believed that he intended to end their marriage. To put that in context, her evidence was that their marriage had been troublesome from 2006. They undertook some counselling in that year at which time the defendant suspected him of being unfaithful. Her evidence referred to various incidents and signs of his extra marital affair emerged over 2006 and 2007 which it is unnecessary to set out here. She confronted him about this on many occasions, he at first denying the affair, before saying that it had occurred but had finished. In the course of these conversations, she had told him that she was concerned for her financial security and that of the children (if he left her) and he had assured her that she would always be secure because she had the house. It was against that background, she said, that she interpreted their unusual conversation at the café on 20 January as a sign that he would leave her.

[43] With that apprehension, she said that she immediately went to the bank at Broadbeach and saw Ms Strathmoore, asking her about how much money was in the Christie account. She said that Ms Strathmoore went away for a short time and then returned telling her that the balance was "10 point something million".[37] The defendant says that she was shocked by the amount, although she believed there was "a lot of money in that account" and that she said to Ms Strathmoore that she would like to transfer everything from that account to her own account, except for $50,000, and she would also like to withdraw $3,000 in cash.[38] Having given those instructions, the defendant left the bank for a short time before returning and collecting the cash. She told Ms Strathmoore it was important that she had confirmation that the money had been transferred. In response, Ms Strathmoore handed her the document to which I have referred.[39] It is in the form apparently used within the bank for a fax, but it contains no fax number and I accept that it was handed to the defendant.

[44] The balance which remained in Christie's account after this transfer to her account was $50,029.70. The cash of $3,000 was withdrawn from the defendant's own account.

[45] The defendant's evidence was that when her husband told her later that day that he was broke and had mortgaged the house, she realised that she had been mistaken in thinking that he was going to leave her. She then told him that she had transferred the funds from the Christie account.

[46] After the meeting downstairs involving the defendant, the three Perrin brothers, Mr Bricknell and Mr Thynne, there was a subsequent conversation between the defendant and her husband, perhaps as early as that evening, in which they discussed how the remaining funds might be applied. She had learnt that a friend of theirs, Mr Doohan, was owed $4 million by Matthew Perrin. This made her "distraught" and she asked him "how could you have stolen money off our friend?".[40] She had also learnt that an entity called SAI, which apparently was related to Mr Perrin's failed venture in China, was owed $1.5 million and "they

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37 T 5-25.
38 Ibid.
39 Exhibit 45.
40 T 5-28.

needed to be paid to keep them off our backs".[41] She also learnt that there were many other creditors. On her evidence, she said to her husband: "Well, let's use the money I transferred to my account to pay back Mick Doohan and if SAI need to be paid let's pay them and let's work out how we can best do this".[42] She then says that "in a day or two after this meeting", she wrote a cheque for $1.5 million to SAI and at about the same time asked her husband whether he wanted her to ring the bank to organise a transfer of $4 million to Mr Doohan, to which he replied that he had already done so.

[47] The relevant statement for her bank account shows a debit of $4,068,001.28 on 21 January, and there was a corresponding credit on the same date to Christie's account. In turn, that amount was debited, again on 21 January, to the Christie account by a payment to a company called Orkdale Pty Ltd, which was related to Mr Doohan.

[48] According to the bank statements, it was on 23 January that the next relevant transaction occurred. An amount of $6,450,446 was then debited to her account and credited to Christie's account, from which it was paid out on the same day to Matthew Perrin's account.

[49] On 28 January, $450,000 was paid from Matthew Perrin's account to Christie's account, which enabled $439,000 to be transferred on the same day from there to the defendant's account.

[50] On 29 January, $600,000 was paid from his account to Christie's account, enabling $512,000 to be transferred from the Christie account to her account on the same day.

[51] On 30 January, $1,500,000 was paid from Matthew Perrin's account to an entity called "SAI Asia Property FU", about which her evidence about SAI being owed $1.5 million would be relevant. On the same day, $3,160,000 was transferred from his account to Christie's account, enabling a transfer of $3,100,000 to be made on the same day by Christie to the defendant's account.

[52] The result, as of the end of January 2009, was that the balance in her personal account was in excess of $4.15 million and the balance in Christie's account was a credit balance of $215,761.70. The balance in Matthew Perrin's account was then a credit balance of $91,426.09.

[53] On 30 January 2009, the defendant, having taken legal advice, wrote to the bank.[43] She revoked any authority which had enabled any other person to operate her account and she requested that any accounts in the name of Christie be frozen until further notice.

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41 Ibid.
42 Ibid.
43 Exhibit 46.

[54] After several withdrawals from her own account in early February (including two withdrawals each in the sum of $50,000 and a further withdrawal of $150,000), the defendant paid $3,900,000 (almost all of the account's balance) to a new account she had opened in her name with another bank. Matthew Perrin continued to make a number of withdrawals from his account such that its balance by late March was about $3,500.

[55] The defendant's evidence is not entirely consistent with the documentary evidence, which reliably proves the movement of funds. The remaining cash at the Perrins' disposal was not applied as she said she and her husband had decided on or immediately after 20 January 2009. Instead, in net terms over $4 million was added to her own account over the 10 days from 20 January, all of which seems to have been at her disposal from that point, rather than being used for his creditors.

[56] Further, there is the remarkable coincidence that on the very morning on which she had thought to withdraw funds from Christie's account because of an apprehended separation from her husband, the Christie account had been swelled by a deposit made by her husband in the sum of $10,600,000. For some years, on her evidence, there had been some marital discord and on her evidence there would have been many occasions on which she must have thought that a separation was likely. Yet it was only on this day, of all days, that she thought it was so imminent that she should take steps to secure available funds. And just why she thought that $50,000 or thereabouts should remain in Christie's account was not explained. This gives the impression that the defendant's version about these payments is reconstructed from the bank statements.

[57] In my view, it is more probable overall that the instructions which were given by the defendant to the bank on the morning of 20 January were given after she had learnt of her husband's financial misfortune. It is likely that she gave those instructions after learning of his financial position and perhaps according to what she and her husband had discussed should occur with the funds. I am left with the impression that she was less than accurate in her recollection of the circumstances of that transfer and of the subsequent movements of money through these accounts over the next week or two, which I infer was because of a concern about another case in which she might be called upon to account for them. Be that as it may, this does not mean that her evidence as a whole is to be rejected.

[58] To return to the chronology, at the end of January 2009 the defendant retained solicitors, and specifically Mr Broadley. Matthew Perrin retained other lawyers. But there was a considerable ongoing cooperation between the couple and it was not until 2 October 2009 that he ceased to live in the house at Southern Cross Drive. The name of the company, Christie, was changed by a resolution signed by each of them on 5 February 2009, as was the trust of which it was a trustee, in each case the apparent intention being to remove reference to the name "Christie". The defendant resigned as an officeholder of Christie in late February 2009 and at the same time the Perrins resolved that it be wound up. It was wound up on 3 March 2009. On the following day, Matthew Perrin filed a petition for his bankruptcy.

[59] The bank made demand upon the defendant by a letter of 9 March 2009.[44] On 17 March 2009, Mr Broadley wrote to the bank that the purported signatures of the defendant upon the two mortgages, the guarantee of 16 June 2008 and the extension of the guarantee of 14 August 2008 were forgeries.[45] He wrote that the signatures were not made either by her or with her authority, knowledge and consent. He suggested an immediate mediation but subject to certain steps being taken, and in particular the procuring of "the necessary handwriting evidence". Mr Broadley's firm had already instructed a forensic document examiner, Mr Heath, who was one of two such experts called in the defendant's case. His first report is dated 27 March 2009.

[60] In June 2009, the bank exercised its power of sale over the property in Matthew Perrin's name at Mermaid Beach. With the receipt of those funds, and what remained in the accounts of Mr Perrin and Christie, the principal debt was reduced to about $10.7 million. With default rates of interest compounding, the balance as at the first day of this trial was $13,717,598.06.

[61] I have referred already to the document, in the form of a copy of an enduring power of attorney purportedly signed by the defendant in 2001 in favour of Matthew Perrin, which he produced in early 2010. Ultimately there was no challenge to the defendant's case that this was a fabricated document. There was abundant evidence to that effect. The power of attorney, of which this purported to be a copy, was apparently signed by the defendant and witnessed by Ms Julie King, a commissioner for declarations. She worked for Matthew Perrin in the period of 2000 – 2002. Ms King, an independent witness, denied signing this document and said that at no time did she witness any signature of the defendant.[46]

[62] There was also the unchallenged evidence of Glenys Hodges, who was employed by Allen Allen & Hemsley in 2000 and 2001, and who was involved in the preparation of draft wills and powers of attorney for execution by the Perrins.[47] As already discussed, the defendant did not return an executed will or enduring power of attorney to Allens in 2000 or 2001.[48] Ms Hodges was still working for that firm on 8 February 2010, when she received a telephone call from Matthew Perrin. He told her that he wanted to collect his will and power of attorney and a copy of the file. On the following day, she spoke to him again. She said words to him to the effect that as both he and the defendant had been the firm's clients, it was necessary to also obtain the defendant's authority to deliver to him a copy of the file. She faxed to him a form of authority with a covering note saying that it was for the defendant's signature and that it would also be necessary for the defendant to call Ms Hodges before the file could be released to him. Later that day, Ms Hodges received a telephone call from someone saying she was the defendant. Later still on that day, a fax was received by Ms Hodges which included what appeared to be an authority to release the file signed by the defendant. So the file was released to Matthew Perrin on the afternoon of 9 February 2010. On the following day, he

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44 Exhibit 9.
45 Exhibit 54.
46 T 3-72.
47 Exhibit 203.
48 At paragraph [15] above.

emailed Ms Hodges, thanking her for her assistance and adding a request that she not discuss the file with anyone or release anything from it without his consent.

[63] Also on 9 February 2010, Matthew Perrin was obtaining further documents. He contacted an employee of the school which was attended by the daughters of the Perrins. He asked for a copy of a document by which permission had been given for one of the girls to participate in a particular sport. It had in truth been signed by the defendant. He collected a copy from the school.

[64] According to the evidence of Mr Marheine, a forensic document examiner called in the defendant's case, the signature on the authority to deliver documents which was faxed to Allens is the same signature as the signature on the school's document, meaning that it is identical to and superimposable upon the other signature.[49]

[65] There was also unchallenged evidence that on the evening of 9 February 2010, Mr Perrin was "waving a document around", which he said was a power of attorney which the defendant had signed in his favour and which he had just found having recently recalled that the document existed.[50]

[66] This document which purported to be a copy of a power of attorney signed by the defendant, was delivered to Fraser Perrin's office by Matthew Perrin on or about 22 February 2010. Fraser Perrin had never seen, nor had in his possession, an original of such a document. He produced it to the State of Queensland (which was then a third party in these proceedings) in response to a notice of non-party disclosure. In the meantime, lawyers acting for Matthew Perrin wrote to the defendant's solicitors (on 26 March 2010), enclosing this document amongst the documents which they said constituted a copy of the file which Matthew Perrin had obtained from Allens. Both Mr Heath and Mr Marheine gave evidence to the effect that what purported to be two separate signatures of the defendant on different pages of this document are in fact identical, as are what appeared to be three separate signatures of Ms King.[51]

[67] From all of this, it is clear enough that by a process of cut and paste, Matthew Perrin produced what appeared to be a copy of a power of attorney signed by the defendant on 10 May 2001.

[68] As I have said, ultimately the bank did not contend that this was truly a copy of a power of attorney signed by the defendant. But it was necessary to set out that evidence to demonstrate the deceitful conduct of Matthew Perrin involved in this fabrication. That is because the defendant submits that the fact and circumstances of this fabrication make it probable that she did not sign the documents upon which the bank sues. It is also submitted that these events of 2010 make it more probable that if he signed the 2008 documents, he did so without any authority from her. I accept that these events are relevant to those questions. They are particularly relevant to the question of whether it was the defendant or Matthew Perrin who

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49 Mr Marheine's reports are exhibited to his Affidavit filed 4 May 2011 which is Exhibit 207 here.

50 Exhibit 205.

51 Exhibit 207 and 208.

signed the 2008 documents. The fact that he went to such extraordinary lengths in 2010 to produce a document which would represent that he had signed upon her behalf with due authority, indicated that he and not the defendant had signed the critical documents.

**Did the defendant sign?**

[69] The defendant gave clear and unambiguous evidence that she did not sign the documents which are relied upon and had no knowledge of them. Her case is supported by the evidence of each of the document examiners, who expressed the opinion that the purported signatures were not hers. Further, there was the evidence of Fraser Perrin that he did not sign in the places where his purported signature appears. Against all of this evidence, it is argued, there is no contrary evidence that the defendant did sign them. It is correct to say that there is no direct evidence that she signed the documents.

[70] The bank's case is that I should not accept the evidence in her favour, and that there are circumstances indicating the contrary. As to the onus of proof, the defendant appears to accept the bank's submission that she bears the onus on this question, seeking as she does to make out an exception to the indefeasibility of the bank's registered mortgages. But the bank must also enforce the guarantee for otherwise the mortgages secure no obligation. At least in that respect, the bank bears the onus of proof.

[71] It is convenient to discuss first the position of Fraser Perrin as the purported witness. It was in the bank's case that he was called, and in examination in chief he gave evidence that these were not his signatures. There was no attempt by the bank to seek to challenge that evidence. Nor was there any submission that I should not accept it. I am not bound to accept that evidence. But I see no reason to reject it. There is no indication that, for example, Fraser Perrin tailored his evidence to help the defendant. I find that he did not sign the mortgages, the guarantees and the other documents for which he gave the same evidence.

[72] The fact that Fraser Perrin's signature was forged does not mean that the defendant must be believed that her signature was forged. But the question of whether she signed is certainly affected by it. In particular, the bank's case must be that for some reason the defendant did sign the documents but that someone, presumably Matthew Perrin, on several occasions saw fit to forge his brother's signature as a witness.

[73] The bank's argument did not suggest any reason why Fraser Perrin's signature was forged, although the defendant did sign. In theory, two explanations come to mind. One is that the defendant did not sign in front of a qualified witness, because it was inconvenient to do so, and that Matthew Perrin realised that there would have to be a signature of a witness and so he signed as his brother. That is a possibility. But the due execution of these documents should not have caused any inconvenience. The Perrins lived within walking distance of Fraser Perrin's office. In any case, he was not the only qualified witness and Mrs Perrin was not the busiest person. And

it was not as if his signature was forged on only one occasion. It was consistently forged on transactions occurring over a period from October 2007 to August 2008.

[74] Another possibility, in theory, is that Matthew Perrin forged Fraser Perrin's signature (but not that of the defendant) because he did not want his brother to know that he was having to borrow money. It is not unrealistic to think that he did wish to keep this information from his brother, preferring to give the impression that he remained very wealthy and not inviting any fraternal query as to his welfare. But there was no necessity for his brother's name to appear as a witness. He could have arranged for the documents to be duly executed in the presence of a competent witness, well removed from his brother's firm.

[75] Although these are theoretical possibilities, they could not be accepted when neither was suggested in the bank's argument in its cross-examination of the defendant or in its examination of Fraser Perrin.

[76] At one point in the bank's argument, this possibility was suggested: the Perrins wanted to keep open the option of claiming that these documents were forgeries, so that the defendant set about signing them in a way which would provide some such dissimilarities from her usual signature. In theory, that would provide an explanation for the forgery of Fraser Perrin's signature. However, this is quite unlikely. It is highly improbable that they would have planned for the contingency of Matthew Perrin's insolvency by setting up a case which would inculpate him in serious criminal offences. I reject this possibility.

[77] The result is that there is no apparent and likely explanation for the forgeries of his signature which is consistent with the defendant actually signing the documents.

[78] I turn now to whether the disputed signatures appear to be the defendant's signatures. A comparison of the disputed signatures can be made with documents which were undoubtedly signed by her. Although there is evidence from Mr Marheine and Mr Heath which makes this comparison, it is one which can be made by the Court itself. Section 59 of the *Evidence Act 1977* (Qld) provides:

> "59 Comparison of disputed writing
>
> (1) Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses and such writings and the evidence of witnesses respecting the same may be submitted as evidence of the genuineness or otherwise of the writing in dispute.
>
> (2) A court may compare a disputed writing with any writing that is genuine and act upon its own conclusions in relation thereto."

[79] For the bank it was submitted that the specimen signatures which were relied upon by the document examiners were not a reliably representative sample. It was said that the process of selection of specimen signatures which became briefed to these witnesses was flawed, because it is likely that the defendant provided a group of specimens which would indicate a lesser variation in her genuine signature than was truly the case. I accept that an exercise of comparison of specimen signatures with the disputed signatures would be affected by the reliability of the samples of specimen signatures. But the bank has had the means to investigate this matter by access to its own records as well as the process of disclosure and non-party disclosure and ultimately, the bank put forward only a handful of documents which it said should have been amongst the specimens.[52]

[80] Mr Marheine was briefed with about 50 specimen signatures, from which he selected 12 for his "signature chart", which he said "illustrated the natural range of variation in the signature".[53] That sample of 12 contained documents of various dates from 2000 to 2010. Mr Heath produced a signature chart which contained some 36 specimen signatures.[54] They included some of the documents used by Mr Marheine in his chart. The combination of the two charts thereby provides a larger sample. I have referred to those two charts, and also to the five documents produced by the bank as further specimen signatures, in making a comparison of what is truly the defendant's signature with those appearing on the disputed documents. I am satisfied that this collection of specimen signatures is a reliable sample.

[81] Two of the disputed signatures are upon documents dating from December 2006.[55] Some are more similar to the specimen signatures than are others. For example, the two signatures upon documents given by the bank in December 2006, to my eye, are quite dissimilar to the specimen signatures, and are also different from one another.

[82] The second set of disputed signatures are upon the documents of September/October 2007.[56] They are similar to one another, although there are some differences. For example, two of them have a continuous run of ink between the "P" and the "e" in "Perrin". But the other two do not have that feature. That continuity does not appear in any of the specimen signatures.

[83] The next set of disputed signatures are those of May 2008, which include the first of the mortgages and the purported guarantee of 16 May 2008.[57] Overall, these show a greater similarity with the specimen signatures than do the 2006 and 2007 documents. But with one possible exception, they differ from each of the specimen signatures in a way which I consider significant. In the specimen signatures, the completion of each "r" and the latter "i", as the ink runs into the next letter, is what I would describe as a freely flowing and even line. In the disputed signatures, and in

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52 The five signatures shown on Exhibit 200.
53 Exhibit 207.
54 Mr Heath's reports are exhibited to his Affidavit filed 5 May 2011 which is Exhibit 208 here.
55 Exhibits 129 and 130.
56 Exhibits 123, 131, 132 and 133.
57 Exhibits 120, 124 to 126 and 134 to 138.

particular that upon the first mortgage,[58] the end of each "r" seems to have been made by the pen moving downwards on the page to a point from which it sharply changes direction as it moves up to form the second "r" or the letter "i". Another way of describing this is that there is a smooth "u" shape at the end of each "r" in the specimen signatures, but a "v" shape in the disputed signatures. To my eye that strongly suggests a different motion of the pen from that which appears in each of the specimen signatures. This is one of the matters identified by Mr Heath, when he said that "the specimen signatures display a more even 'wave' like construction in the "rri" formations and actually bear little real resemblance to the "rri" formations in the [disputed] signatures".[59] I have mentioned one possible exception. It is the document entitled Acknowledgment and Consent Proof of Identity Details (Guarantor).[60] Each of the "r" letters ends with something of that "wave" motion. But the letter "i" does not.

[84] Next there are the documents of mid June 2008, which include the second mortgage.[61] In no case does the purported signature of the defendant exhibit that "wave" formation. The same applies to the documents of August 2008.[62]

[85] The testimony of each of the document examiners was strongly challenged as unreliable and lacking any weight. For example, it was said that the process of reasoning was not apparent but that instead the witness had simply stated his conclusion as to whether something was or was not the defendant's signature. That criticism went too far: the witnesses did identify features of the specimen and disputed signatures which were said to be significant. It is unnecessary to discuss in detail the bank's arguments about the evidence of these witnesses. It is sufficient to say that their evidence was helpful by the collation of the specimen and disputed signatures and by their identification of points of similarity and dissimilarity. Ultimately, I have relied upon my own comparison, helped in those ways by the witnesses.

[86] Otherwise there are limitations upon the utility of the evidence of her true signatures, not the least of which is that there will be some differences from one genuine signature to another, especially over a period of some years, and also because of other factors such as the circumstances in which a signature was written.

[87] I have mentioned particular features which distinguishes the disputed signatures from the specimen signatures. To this I would add that the specimen signatures show a clarity and fluency of handwriting which is not found within at least most of the disputed signatures of the defendant. Overall the disputed signatures are sufficiently different from the specimen signatures for the comparison to provide substantial support for the defendant's case.

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58 Exhibit 120.

59 Fourth report of Mr Heath dated 12 April 2011 at page 5 which is Exhibit 208 here.

60 Exhibit 134.

61 Exhibits 121 and 139 to 145.

62 Exhibits 146 and 147.

[88] Remarkably, the dissimilarity between the specimen and purported signatures of the defendant is not nearly as great as in a like comparison of the specimen and purported signatures of Fraser Perrin. The purported signatures of Fraser Perrin consistently appear quite different from his actual distinctive signature. That is not the case with many of the documents purportedly signed by the defendant. That is why Mr Marheine described the signatures upon the mortgages as "very good forgeries".[63] This raises the question of why such care would be taken by someone in signing as the defendant, but not as Fraser Perrin. One explanation might be that it was anticipated that the bank would compare the signature of the defendant with its own specimens of her signature, but the same was not anticipated in the case of Fraser Perrin. It might also be relevant that the defendant's signature is in relatively plain handwriting, whereas Fraser Perrin's is more elaborate and difficult to replicate.

[89] Then the circumstances which may have induced Matthew Perrin to forge his wife's signature must be considered. The defendant gave evidence of their marital problems and of the occasions upon which she confronted him about his affair and of his responses to the effect that she should feel secure, and specifically, financially secure from the fact that the house was in her name. There is little by way of independent evidence which supports that evidence. Mr Bricknell said something about the problems in their marriage, but he was not an entirely independent witness. The defendant sought to rely upon things that she had written to him at the time as evidence of this discord.[64] On their face, they do not provide much support for this part of her evidence. But ultimately I am persuaded to accept that there were these difficulties in the marriage which she related. The circumstances of their marriage were then relevant to the likelihood that he would ask her to sign documents which put at risk the family home and the only substantial property in her name.

[90] It is also likely that he was disinclined to reveal to her the true state of their finances, and in particular the need to urgently borrow millions of dollars. She had left all of the management of their fortune to him. After the Billabong float, they were very wealthy and I accept that she would have had no expectation that they would ever have to borrow money again. Their lifestyle was extravagant and their wealth was sometimes referred to in the media. Their net worth was put at $132 million in the *Business Review Weekly* in late 2007. As his fortunes declined, there was no change in the way they lived which would have caused her any concern for their financial security. The disclosure by him to her that he was at least without liquidity, such that he had to borrow millions of dollars on the security of the house in her name, would have greatly concerned her. As she well understood, the house had been put in her name against the contingency that he might experience or be threatened with insolvency. Particularly in the context of a less than happy marriage, it is likely that he considered that if he asked her to guarantee his borrowings and mortgage the house, she would have declined. In turn, it is likely that this would have affected his relationship with the bank, and quite possibly brought about his financial demise somewhat earlier.

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63 T 7-35.

64 Exhibits 184 and 185.

[91] Accordingly, the evidence demonstrates circumstances which explain why he would look to avoid the risk of her refusal of assistance by instead forging her signature. In his mind, he may well have thought that this was for their common benefit, in that he hoped to revive his fortunes by this short term borrowing.

[92] The defendant signed some documents in November 2006 relating to one of Matthew Perrin's investments but unrelated to the bank.[65] She signed as a director of Christie but also as an individual. But she was not then personally guaranteeing any debt or mortgaging the house. She gave evidence that these documents were signed under some particular pressure, in that her husband arrived at a school function and asked that she sign them urgently. The fact that she was prepared to do so without understanding them at least in full, is of some relevance when assessing whether she did the same in relation to the documents upon which the bank sues. But as I have said these documents involved no personal guarantee by her. And it is significant that her signatures upon those documents are entirely consistent with the other specimen signatures, and quite dissimilar from the documents which bear her purported signature in late 2006 which were provided to the bank.

[93] I have also considered the extent to which Matthew Perrin acted to prevent his wife learning of these transactions. She might have learnt of them by opening the envelopes distinctly addressed by the bank to her at the house. But possibly Matthew Perrin, who worked from the house, was not concerned that she would look at the documents or even open the envelope. She left all of the matters of property and finance for his attention. The defendant was not a person who paid any attention to the investment of their fortunes, with the probable exception of their racehorses.

[94] There is also the evidence of the lunch with Mr Parker and Ms Strathmoore in late August 2008. If Matthew Perrin had forged his wife's signature, this may seem to have been a risky occasion for him. Against that, again she took no real interest in what was being done with their money and he was probably confident that he could steer the conversation away from anything which would have revealed to her what had been done in her name. On the evidence of Ms Strathmoore, he succeeded in doing so. I accept the evidence of Ms Strathmoore that the defendant said something at this lunch by way of expressing their appreciation. But this was not compelling evidence for a case that the defendant knew of the actual transactions. It is quite likely that her husband told her something general and to the effect that the bank had assisted with some business venture, and that she should support him in his expressing his appreciation.

[95] The bank's written submissions extensively addressed what were said to be weaknesses in the defendant's testimony. Many of those criticisms are valid. As should appear from my findings in relation to the movement of money in January 2009, I do not accept the defendant as an entirely reliable witness. I should mention here the bank's submissions which have some particular force.

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65 Exhibit 201.

[96] As already discussed, the defendant's evidence of the meeting of 20 January 2009 included an account of Fraser Perrin leaving the meeting to go to his office and returning with documents. She said that she and Fraser Perrin wrote their signatures on pieces of paper and gave them to Scott Perrin, Mr Thynne and Mr Bricknell. But Mr Bricknell gave no evidence of that and nor did Fraser Perrin. Nothing was put to Fraser Perrin by the defendant's counsel in cross-examining him about those events. That suggests some embellishment on the part of the defendant.

[97] There are some inconsistencies between her evidence here and evidence which she gave in 2009 in the Magistrates Court when examined in relation to Matthew Perrin's bankruptcy. She said in the Magistrates Court that she became a signatory to "all the accounts" in case she ever needed to "access large amounts of money".[66] She said that this was in 2006 but there was no milestone which might help her remember the date. In her evidence here, it was the discovery of her husband's affair which she said had made her require that she be a signatory. She effectively admitted that she had not given a full account in the Magistrates Court. She explained that at that time she did not want their personal lives to be exposed.[67]

[98] Also in that evidence in the Magistrates Court, she said that she was unaware of who transferred $4,068,001.28 from her account on 21 January 2009 and was unaware that the amount had been transferred until seeing her bank statement. She said that she did not make a decision to transfer $6,450,446 from her account to Christie's account on 23 January 2009 and that she believed that the amount of $10,607,382 which she had paid to her account on the morning of 20 January 2009 would have remained there. That evidence was inconsistent with her testimony here, which was that she and her husband discussed what should happen to the application of the funds which she had transferred to her account. In cross-examination here she admitted that her evidence in the Magistrates Court was incorrect in that respect.

[99] I should discuss some other submissions about her evidence. The bank submitted that there was an unexplained failure in the defendant's case to call relevant witnesses and to lead relevant evidence from the witnesses who were called. For example, it was said that she should have called a man whose wife had been the other party in the affair with Mr Perrin, to corroborate her evidence about that matter. The defendant is now in a relationship with him. Her failure to call him in these circumstances is not inexplicable.

[100] It was said to be telling that she did not call any member of the Perrin family to corroborate her evidence as to the nature of Matthew Perrin's unusual behaviour in the few days before the meeting and events of 20 January. This is part of the behaviour which, she says, made her so concerned on the morning of 20 January that he was about to leave her that she transferred over $10 million into her own account. But I have rejected that part of her evidence.

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66 Exhibit 77.

67 T 6-39.

[101] Neither Scott Perrin nor Grenville Thynne was called about the meeting of 20 January 2009. Nevertheless, I am prepared to accept her evidence, insofar as it is consistent with that of Fraser Perrin, as to what occurred at that meeting.

[102] The bank was critical of the absence of Matthew Perrin as a witness. The immediate answer to that point is the likelihood that Matthew Perrin would have claimed privilege against self-incrimination. For the bank it is argued that it is not established that he would have done so. However, the likelihood of that is confirmed by his responses, through lawyers, to some of the pre-trial procedures. He was joined as a third party in this case but took no steps to defend the matter. It was also submitted that there may have been some evidence which Matthew Perrin could have been required to give in that it would be outside any proper claim for privilege. But it is difficult to identify what that evidence could have been.

[103] Taken together, the bank's submissions fairly made the point that the defendant was not an entirely reliable witness. But they did not demonstrate that she was untruthful on the core questions of whether she did sign these documents or approve the transactions. Those questions must be answered with regard not only to her evidence but also other evidence which, taken as a whole, persuades me on the balance of probabilities that she did not sign the documents upon which the bank sues. Further, I would find that she did not sign any of the documents the subject of the so-called disputed signatures.

[104] In summary, the reasons for my conclusion are as follows. The signatures of Fraser Perrin are forgeries. There is no likely explanation for the defendant truly signing these documents but with the signatures of the purported witness to her signatures being forged. Of course, there is an obvious explanation for the forgery of the signature of the witness if the defendant's signature was a forgery. There are the dissimilarities between the disputed signatures and the specimen signatures. It is unnecessary to speculate as to whether that of itself would have been sufficient to make the findings I have made. But in the context of the other evidence, the differences in the handwriting make the defendant's case more persuasive. In the personal circumstances of this couple and the circumstance of the financial pressure which must have been bearing upon Matthew Perrin, there is an explanation for his deciding to forge her signatures.

**A power of attorney?**

[105] Some of the events relevant to this issue have been referred to already. In 2000, Allen Allen & Hemsley were instructed, both by Matthew Perrin and by the defendant, to prepare wills and powers of attorney. At first, the defendant said that she wanted a will prepared, but not a power of attorney. She did so by the way in which she completed a "will planner" which she faxed to the solicitors on 24 August 2000.[68] On the next day, the solicitors wrote to her strongly advising that she appoint an attorney.[69] On 15 September 2000, the defendant telephoned Ms Hodges at Allens and instructed her to prepare her will and an enduring power of

[68] Exhibit 170.
[69] Exhibit 171.

attorney. There was a further telephone discussion between them on that day, in which the solicitors sought instructions as to who was to be the defendant's attorney for personal matters and the defendant gave those instructions. On 20 September 2000, a draft will and draft enduring power of attorney was sent to the defendant for her consideration.[70] But no executed documents were returned by the defendant. At this time the defendant was about to give birth to her second child (or had just done so) and she is likely to have been preoccupied with other matters.

[106] Allens sent a draft will and enduring power of attorney for the execution of Matthew Perrin on 30 August 2000.[71] On 12 September 2000, he told the solicitors that he was speaking to the defendant as to who would have guardianship of the children. The next day he rang Ms Hodges, instructing her to the effect that whatever the defendant said with respect to guardians was acceptable to him. On 19 September 2000, the solicitors again sent to Matthew Perrin a draft will and enduring power of attorney for his execution. He did not return these promptly. Ms Hodges tried to call him on 25 October 2000 and the next day he telephoned her. He said he would sign his will and would remind the defendant about her will. But it was not until 30 November 2000 that Allens received the original of Matthew Perrin's will, under cover of a letter from Ms King.[72] The original of his enduring power of attorney was sent to Allens on 7 December 2000.

[107] On 12 April 2001, Allens sent a letter to the defendant saying, amongst other things, that they had not heard from her about the will and the power of attorney and that it was very important that she attend to these documents. On 2 May 2001, the defendant telephoned Ms Hodges saying that she had received Allens' letter and that, as Ms Hodges then noted, the documents were "all okay as sent".[73] The defendant asked her to send a further set for execution. On the following day, Ms Hodges did so. At the same time she advised the defendant as to how the documents should be executed and managed. Ms Hodges wrote that once the will was executed, it should be returned to Allens to ensure that it had been executed correctly and it would then be placed in Allens' retention facility unless they received instructions to the contrary. Similarly, the defendant was asked to return the enduring power of attorney to Allens for them to check whether it had been properly executed. The defendant was told that Allens would keep the document in its retention facility if she wished.

[108] The solicitors heard or received nothing from the defendant. Therefore on 21 June 2001, they wrote to the defendant:

> "We refer to our letter of 3 May 2001 enclosing your will and enduring power of attorney for signing. As we have not heard from you, we presume you do not require our further assistance and are closing our file.

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70 Exhibit 172.
71 Exhibit 203.
72 Exhibit 118.
73 Exhibit 203.

> When you have signed your will and enduring power of attorney, you may wish to return either or both of them to us for keeping in our document retention facility."[74]

Ms Hodges then closed her file. Allens heard nothing further from the defendant.

[109] From those events, it is clear that the defendant was minded to make a will and to sign a power of attorney. She gave specific instructions as to the contents of each document such that the solicitors believed that their drafts were ready for execution. In her evidence however, the defendant said that she was still discussing with her husband the matter of who should be the guardians of their children in the event that they both died. She said that she wanted her family to be the guardians and he preferred his family, and in particular Scott Perrin. She said that this involved a "really big difficult discussion" and that she was "not comfortable with it at all and … chose to just ignore going ahead with it because I just couldn't make that decision".[75] She added that she was simply "too busy" and that "it was too much for me".[76] That evidence is unpersuasive.

[110] The draft will which was sent for her execution, both in 2000 and in 2001, provided for her parents to be the guardians of their children in the event that her husband predeceased her or failed to survive her for 30 days. It provided that if either or both of her parents were unable to or unwilling to act as guardians, then Scott Perrin and his wife would be the joint guardians. In the will planner which she returned to Allens on 24 August 2000, she specified as the proposed guardians her mother, Scott Perrin and her sister. As Ms Hodges noted shortly after speaking to the defendant on 15 September 2000, the defendant gave instructions about the identity of the guardians (and other matters) which were then accurately reflected in the drafts sent to her for execution. I accept that at some point the defendant and her husband were undecided as to who should be the guardians and that they discussed this matter. I do not accept that the defendant remained undecided, at least after 15 September 2000.

[111] The bank argues that more probably than not the documents sent to her in May 2001 were executed, and duly executed, by the defendant. It points to the documents being in accordance with her instructions and to her specific request that they be sent to her again. It points to the obvious importance that these documents, or at least a will and a power of attorney, be executed by her in her circumstances as being a very wealthy woman and with two young children.

[112] The enduring power of attorney was also to be executed by the attorneys. They were her parents and Scott Perrin as well as Matthew Perrin. Her parents gave evidence that they did not sign such a document. Scott Perrin was not called, from which the bank submits that it can be inferred that his evidence would not have assisted her case. However, that may be because he simply had no recollection about whether he signed or not, which would not be unsurprising given the passage

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74 Ibid.

75 T 5-5 to 5-6.

76 T 5-6.

of time. Of course the evidence of Mr and Mrs Bricknell has limited weight given that they would be minded to support the defendant's case.

[113] In my conclusion it is more probable than not that the documents, and critically the power of attorney, were not executed by her. Nothing was returned to the solicitors. They had written that the documents had to be returned to them, so that they could check that they had been duly executed. It is unlikely that the defendant would have taken the trouble to have the documents executed by others as well as by herself and then not return them to the solicitors as they had advised.

[114] More probably than not, she simply neglected the task of executing these documents, just as she had in 2000. A neglect of that kind is not rare even in the case of lawyers who should attend to their personal affairs. In this case, for example, Matthew Perrin took some months to return his documents.

[115] In theory, it is possible that she executed the documents as did the attorneys appointed by her, including Matthew Perrin, but that the documents remained, for example, at the house. But that is relatively unlikely. If the point was reached where Matthew Perrin signed the power of attorney, more probably he would have had the documents returned to the solicitors, just as he had returned his own documents.

[116] The dealings between the solicitors and the defendant in April and May 2001 do not appear to have involved Matthew Perrin. He may have been unaware that the documents had been re-sent to her in May 2001 and so he did nothing to assist her with their execution and return. Of course he later fabricated a power of attorney, which he thought to date as 10 May 2001. But he did that with the benefit of the solicitors' file.

[117] The result is that the bank's second argument, which was that he signed under the express authority of a power of attorney, fails.

**Implied authority**

[118] The bank's case here is that the relationship between the Perrins was such that by implication he was authorised to deal with her property and to incur financial obligations on her behalf.

[119] The legal principles as to implied authority are not in dispute. The authority need not derive from a contract but it must derive from the parties' consent. It is unnecessary that they consent to the relationship of principal and agent itself but the requisite consent may be to a state of facts upon which the law imposes the consequences which result from agency: *Branwhite v Worcester Works Finance Ltd* per Lord Wilberforce.[77]

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77 [1969] 1 AC 552 at 587.

[120] In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, the High Court said:

> "As Dixon A-J said in *Press v Mathers*,[78] 'in any ordinary case the question whether one person authorised another to do an act or series of acts on his behalf is best answered by considering for whose benefit or in whose interest it was intended it should be done.' Such a consideration may not be conclusive, but it is a useful practical starting point."[79]

Citing that passage, the defendant argued that the guarantee and mortgages were for the benefit of Matthew Perrin only, because they were provided to secure loans to him. In my view, that is too narrow a view of the circumstances. Possibly these loans could never have benefited the defendant by saving or increasing the family fortune. But at least in the early period of their considerable wealth, the Perrins' assets appear to have been treated as simply one holding by them, and it is far from clear that these loans could have been of no possible benefit to the defendant as well as to her husband.

[121] The defendant further submitted that the claim of an implied authority to execute the mortgages fails for want of compliance with s 11(1)(a) of the *Property Law Act 1974* (Qld) which provides:

> "11 Instruments required to be in writing
>
> (1) Subject to this Act with respect to the creation of interests in land by parol –
>
> (a) No interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent lawfully authorised in writing, or by will, or by operation of law;"

The grant of a mortgage is the creation of an interest in land, so that express written authority is required to execute a mortgage instrument: *Theodore v Mistford Pty Ltd*.[80] But this point would not affect the enforceability of the guarantee.

[122] The bank's case points to the way in which the Perrins managed their financial affairs from the beginning of their marriage and particularly upon their achieving great wealth from the Billabong float. Matthew Perrin was a highly intelligent and well educated solicitor and businessman. The defendant had relatively little education and had shown no interest in business affairs, with the exception of acquiring racehorses (to the extent to which that was regarded by them as a business rather than a personal pursuit). Her interest in racehorses appears to have derived from her upbringing, her father being a bookmaker. As I have noted, she had her salon for about five years before she became a mother but from then on she pursued

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78 [1927] VLR 326 at 332.

79 (2004) 219 CLR 165 at 190 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

80 [2003] QCA 580 at [6], [52] and [60]; see also *Theodore v Mistford Pty Ltd* (2005) 221 CLR 612 at 623.

no business interests. Although much of the Billabong wealth was put into her name, or that of the company Christie of which she was a director, in practical terms the management of this wealth was left to her husband.

[123] In her evidence she agreed that her husband was allowed to transfer funds between banks accounts of Christie and other accounts, entirely at his discretion. At one stage he became a signatory upon all of the accounts and she said that "apart from my account, Matthew, I think, was the one working the accounts".[81]

[124] The defendant said that from time to time the couple discussed investments which he was making.[82] However, she had little knowledge of or interest in where the funds were being invested. She was content to leave that entirely to her husband who must have seemed to her to be eminently qualified to look after the fortune which he had made.

[125] In June 2000 she signed a document conferring upon him the right to vote in respect of such shares in Billabong as were registered in her name.[83] By that document she also agreed that she would not dispose of those shares without his prior approval. This document gives the impression that it was created for the purpose of satisfying third parties as to his control of the shares, rather than something which the Perrins had thought should be signed to record some agreement which they had made for the purposes of their own relationship. Nevertheless it is significant that there was this express authority in the case of this particular property (the Billabong shares) but not other property in her name. It is also significant that this document did not authorise him to sell or encumber the Billabong shares.

[126] There was some cross-examination of the defendant about the sale which was made of the Billabong shares in her name. She said that she believed that she had signed documents to effect that sale. She was asked whether she was certain about that, but it was not suggested to her that the sales had been made without her signing something. She agreed that her husband had "organised the detail of the sale" of those shares.[84] She was also asked questions as to what she would have done had he simply presented her with documents to sign to sell the shares, without explaining them. But it was not put to her that her shares had been sold without any reference to her. I accept that the commercial decision to sell the shares would have been made by Mr Perrin only. But this does not establish that she had allowed him to dispose of the shares without reference to her.

[127] It is common ground that in April 2003, the defendant authorised her husband to operate a certain bank account held in her name and to have access to and receive and give valid receipts for any securities, packets, boxes, deeds, scrip, debentures or other documents or property held by the bank in the name of the defendant.[85]

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81 T 6-35.
82 T 6-32.
83 Exhibit 19.
84 T 6-27.
85 Exhibit 156.

[128] In January 2000, when the defendant made a loan application to the Colonial State Bank for the purchase of the property at Southern Cross Drive, she nominated her husband as the person to receive any notices and documents on her behalf.[86] Her evidence in this respect was that her husband "handled this sort of part of our life".[87] The bank appeared to place some reliance upon the fact that the defendant gave a mortgage to secure the loan which was obtained to purchase Southern Cross Drive, when that was a loan for which she and her husband were jointly liable. She gave some authority to him in respect of the documentation of that transaction, but specifically an authority to act as her solicitor. Importantly, it was the defendant who signed this mortgage. This hardly provides then any support for an implied authority to further mortgage the property, particularly by forging her signature. This was, of course, the loan which was necessary to acquire the land.

[129] Its acquisition was a decision which was made by the two of them. That was also the case with the acquisition of the adjoining land in 2001. Matthew Perrin was active in organising that transaction. But it was a joint decision to acquire that land and it is not suggested that she did not sign any necessary documents.

[130] Similarly the amalgamation of Lots 15 and 16 was organised by him but she signed what was required to be signed by her. The defendant gave evidence that she would not have been happy for him to have handled the Certificate of Title for (the adjoining) Lot 16, for the purposes of this amalgamation, "without her authorisation".[88] I do not accept that evidence: there was no reason why she would have been concerned with his using the Certificate of Title to effect that amalgamation, of which she knew and approved. On or about 8 June 2005, she signed an application for the issue of a Certificate of Title in respect of the amalgamated lot, which was in terms that it be held for collection by Perrin Partners. But again it is significant that she signed the document rather than Matthew Perrin signing it in her name. It is not likely that she gave much thought about what would happen to the Certificate of Title once it was in the hands of the solicitors.

[131] There was some litigation in this Court which was brought by neighbours of the Perrins at Southern Cross Drive, complaining of damage to their property in the course of the construction of the Perrins' new house. Necessarily it was brought against her, as the proprietor of the Perrin property. The instructions for the defence of this case were given by Matthew Perrin, from its commencement in 2002 until it was settled some years later by a payment to the neighbours. The defendant agreed that she was unaware of the terms of settlement and that she had had nothing to do with it.[89]

[132] The bank relies upon the fact that on at least two occasions, the defendant signed documents at her husband's request without reading them. It points in particular to the various documents which became Exhibit 181. But two things must be noted about these events. The first is that it was still the defendant who signed these

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86 Exhibit 14.
87 T 5-58.
88 T 5-73.
89 T 6-57.

documents and not her husband signing in her name. Secondly, the transactions did not involve the incurring of a personal obligation on the part of the defendant. She signed in her capacity as a director of Christie. Amongst the documents which became Exhibit 201, there are Deeds of Subordination dated 2 November 2006 and 15 June 2007 which were signed by her also in her personal capacity. But these were agreements by which her interests as a creditor were to be subordinated to that of another creditor. That did not involve the incurring of a personal obligation to pay money. I accept that when she signed these documents, she had little understanding of them and was prepared to act on her husband's assurance that they were in order for her to sign.

[133] The bank's argument also suggests that Matthew Perrin acted in a manner which was consistent with the existence of the implied authority for which the bank contends. In particular, it is said that he did not ask Ms Strathmoore or Mr Parker to provide him with the documents or to deliver them to a place where they could not have been seen by the defendant. It is likely that Matthew Perrin was concerned that the bank would have been alerted to an absence of authority from the defendant had he asked for the documents to be sent somewhere else. Probably Mr Perrin was confident that he could do what in fact he did, which was to intercept the documents upon their delivery. The defendant was unlikely to have taken any particular interest in anything which was delivered or posted to the house which was of an apparent business nature. Another circumstance relied upon by the bank in this respect is the fact that both Perrins went to the lunch with the bank officers. As I have already said, probably Mr Perrin was confident that he could steer the conversation away from business as indeed he did. It is likely that he was confident in that from the fact that the defendant had no interest in any of the detail of the management of their fortune.

[134] The defendant relies upon conversations which she said occurred between the Perrins in early 2008, in which he is said to have assured her that noone could ever affect her ownership of the house. The submissions of the bank make a number of criticisms of this evidence. I am not persuaded that there were conversations that went particularly to the ownership of the house. But as I have already found, there were conversations between them as to the state of their marriage and his affair. I accept also that in these circumstances the defendant was conscious of the fact that she owned the house.

[135] The bank argues that it can be inferred that had Mr Perrin asked the defendant to sign the mortgages and guarantee, she would have done so or expressly consented to him doing so. I am not persuaded to draw that inference. Such a hypothesis must include the premise that she would have received a full and proper explanation of the circumstances of his loans. These circumstances are not disclosed by the evidence. But it sufficiently appears that by mid-2008, there had been a huge downturn in the Perrins' financial position, or that there was then at least a likelihood of that occurring. She would have been very surprised to hear that her net wealth had or was likely to markedly decrease. In my view she would have been alarmed by the prospect that the house would be put at risk by further financial misfortune. She had taken a great interest in the acquisition of the original house at Southern Cross Drive and had been very closely concerned in the design and

construction of the new house. It was the family home and she saw her role as a "homemaker".

[136] In any event, that hypothetical inquiry is somewhat beside the point. Had I been persuaded that her likely response would have been to agree to these transactions, it does not follow that absent that agreement, he was impliedly authorised to effect them in her name.

[137] In my conclusion Matthew Perrin did not have the implied authority of the defendant to sign the documents upon which the bank relies. The property at Southern Cross Drive had been acquired in her name because, as they had discussed, this would protect it from any financial misfortune which might fall upon him. Originally, that was in the context of his being a practising lawyer. But the purpose of her owning the family home was still relevant although he went into business and their financial decline became at one stage very difficult to imagine. This asset, the family home, was quite different from any other property within their assets. It was acquired and had been improved entirely for personal purposes. It was something to which the defendant must have had a strong emotional attachment. By leaving him free to manage the business assets, she in no way indicated that he could deal with this asset.

[138] Moreover she in no way indicated that he could impose a very substantial personal obligation upon her, as he purported to do by the guarantee given to the bank. He not only put at risk the family home but put at risk her own personal solvency.

[139] As a former solicitor, he could not be excused for thinking that it was in any way regular to forge his wife's signature upon these documents and to forge that of his brother as the purported witness. He must have known that this was highly irregular. He took some trouble in forging his wife's signature, effecting in some cases a reasonable likeness to her true signature. That is a powerful indication of his own state of mind, and of the lack of a relationship between the parties from which it could be said that he had implied authority to make these transactions upon her behalf.

**Ratification**

[140] The bank argues that absent any authority in Mr Perrin to sign these documents, the transactions were ratified by the defendant. To a large extent, the alleged ratification was not by any positive act, but by the defendant's doing nothing for about eight weeks after her learning of the transactions and the extent of the indebtedness on or about 20 January 2009. It was not until 17 March 2009 that the defendant, by her solicitors, told the bank that her signature had been forged and that she would not be bound by the documents.[90]

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90 Exhibit 54.

[141] The circumstances relied upon by the bank are largely not in dispute. They are that by late January or early February 2009, the defendant was aware of the existence of the mortgages, that her husband had forged or caused to be forged her signature, that they secured a loan to him of about $13.5 million and that the bank would take steps to enforce the mortgages if he became bankrupt or Christie went into liquidation. It is said that in the period when she was aware of these matters but had not told the bank of the true position, she deliberately refrained from contacting the bank. That too must be accepted: it was not as if she meant to tell the bank but overlooked it. The bank argues that she did not tell the bank until she had to do so, in response to a letter of demand, and that she refrained from volunteering the truth to the bank because she wished to allow as much time to pass as possible, perhaps in the hope that a default in payment of the principal (which was due in mid-2009) would be avoided and her husband's fraud would be undetected. The bank's case also relies upon her involvement in the movement of money between various accounts, commencing on 20 January, which I have discussed above.[91]

[142] There are several likely reasons, none of which would have existed in isolation, for her not volunteering the truth to the bank earlier. One was that she was obtaining legal advice. As already discussed, she retained Mr Broadley's firm by the end of January. Part of his advice was to obtain the opinion of a forensic document examiner, and he retained Mr Heath. That was an understandable course. The defendant's position could have been put to the bank more strongly with the benefit of a favourable opinion from a document examiner. As it happened the defendant's position had to be disclosed before Mr Heath's report was forthcoming, because the bank's demand intervened.

[143] The ratification argument relies upon positive acts of the defendant, as distinct from an omission to disclose the fraud, only in relation to the movement of moneys. Otherwise it is said that her failure to speak up and tell the bank of the forgeries means that she became bound just as if she had authorised her husband to sign these documents.

[144] The first difficulty for the bank in this argument is in the notion that a forgery might become binding upon an innocent party by a ratification of the document. This is contrary to authority: *Brook v Hook*;[92] *Greenwood v Martin's Bank*;[93] *Imperial Bank of Canada v Begley*;[94] and *Rowe v B & R Nominees Pty Ltd*.[95] There are two suggested bases for a forgery being incapable of ratification. One is that a forgery is a nullity so that it is incapable of being given some life by a ratification. The second, which appears to be the better view, is that favoured by the authors of *Bowstead & Reynolds on Agency* (17th ed, 2001) at [2-057], which is that "... the forger who counterfeits a signature or seal makes no profession of being an agent, so that agency doctrines do not apply to him." Similarly in GH Treitel, *The Law of Contract* (10th ed, 1999) at page 669, the point is put in this way:

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91 See paragraphs [38] to [57] above.
92 (1871) LR 6 Ex 89.
93 [1932] 1 KB 371.
94 [1936] 2 All ER 367.
95 [1964] VR 477.

> "If an agent forges his principal's signature he does not say 'I am signing for my principal' but 'this is my principal's signature'. The principal cannot ratify it because the agent did not purport to act on his behalf. But if the principal stands by knowing that his agent will forge his signature he may be estopped from denying its genuineness."[96]

[145] No estoppel is advanced by the bank. Accordingly the ratification argument should fail at least because the documents relied upon are forgeries. But in any case, the defendant's conduct, whether by act or an omission, did not show an intention to adopt the transactions. The positive acts, involving the movement of moneys on and after 20 January, did not adopt the purported guarantee and mortgages. The loans had been made months prior to these transfers of money, and the bank does not suggest that the money lent by it can be identified amongst the money which the defendant caused to be paid to herself on 20 January or which she caused to be transferred from her account with the bank to another bank in early February 2009. It was not at all necessary for her to become bound to the bank by adopting these transactions to secure the funds as she did in 2009. Had these transfers of funds in 2009 prejudiced the bank's position, the transfers may have been relevant to an estoppel claim by the bank. But no such prejudice is claimed and, as I have said, there is no argument for an estoppel.

[146] Acquiescence may constitute evidence of ratification but as with positive acts, what is relied upon must be unequivocably referable to an intention to adopt and be bound by the transaction: *Petersen v Moloney*.[97] Similarly in GE Dal Pont, *The Law of Agency* (2nd ed, 2008) at [5.31] the matter is put this way:

> "[R]atification of an agent's unauthorised act can be implied from silence or acquiescence of the principal, provided that the silence or acquiescence cannot be explained sensibly on grounds other than an intention to adopt the agent's act. In other words, for evidence of acquiescence to amount to ratification, it must be equivalent to a clear adoptive act."

[147] An intention to adopt and be bound by the transaction may be more readily inferred by acquiescence or silence where there is a duty to speak. In that context, silence may be "…excellent evidence of assent" as Isaacs J said in *City Bank of Sydney v McLaughlin*.[98] In the same case Griffith CJ and Barton J said:

> "In general a man is not bound actively to repudiate or disaffirm an act done in his name but without his authority. But this is not the universal rule. The circumstances may be such that a man is bound by all rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in the position of disadvantage, from which, if he speaks or acts at once,

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96 Citing *Imperial Bank of Canada v Begley* [1936] All ER 367.

97 (1951) 84 CLR 91 at 101.

98 (1909) 9 CLR 615 at 633.

> they can extricate themselves, but from which, after a lapse of time, they can no longer escape."[99]

[148] The bank's submissions do not seem to go so far as to suggest a duty upon the defendant to immediately notify the bank of the forgeries. There was no legal relationship between the bank and the defendant of which such a duty is an element. It was incumbent upon the defendant to inform the bank in case the bank suffered detriment and the circumstances gave rise to an estoppel. Thus in *Klement v Pencoal Ltd & Ors*,[100] the Court said that the appellant in that case was obliged to inform the respondent on learning of the forgery "if the appellant wished subsequently to be allowed to rely himself on that circumstance". The Court there referred to several authorities concerned with the doctrine of estoppel and it was upon that basis that the appeal was determined.[101] The Court also referred to the primary judge's finding of ratification and held that the appellant's deliberate silence (over a period of some three years) had amounted to a ratification. But what was there said was not necessary for the outcome, and there was no consideration given to the legal question of whether ratification could be relevant in circumstances such as these.

[149] Because no estoppel is argued, the relevance, if any, of her silence cannot be that it has caused some change of position on the part of the bank such that she should now be precluded from speaking up. The defendant's silence is relevant, if at all, only as evidence of an intention to adopt and be bound by the transactions.

[150] Did her silence then provide any evidence of an intention to be bound by these transactions? That question must be answered by reference to the circumstance that there was nothing to be gained by becoming bound by the transactions. It was not as if, for example, some further moneys were to be drawn under a facility secured by these mortgages and guarantee. There was potentially something to be gained by delaying in informing the bank of the forgeries. But that was different from saying that there was something to be gained from being bound by the mortgages and becoming personally obliged to pay to the bank more than $13 million. An inference that the defendant did intend to be so bound is not at all open. This ratification argument fails.

**Section 185(1A)**

[151] The defendant has thereby proved that s 185(1A) of the *Land Title Act 1994* (Qld) is engaged. That section provides:

> "(1A) A registered proprietor of a lot (the relevant mortgagee) who is recorded in the freehold land register as a mortgagee of the lot or an interest in the lot does not obtain the benefit of section 184 for the relevant mortgagee's interest as mortgagee if –

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99 Ibid at 625.
100 [2000] QCA 152 at [21].
101 Ibid at [21] – [25].

(a) the relevant mortgagee –

(i) in relation to the instrument of mortgage or amendment of mortgage, failed to comply with section 11A(2); or

(ii) in relation to a transfer of the instrument of mortgage, failed to comply with section 11B(2); and

(b) the instrument of mortgage or amendment of mortgage was executed other than by the person who was, or who was about to become, the registered proprietor of the lot or the interest in a lot for which the instrument was registered."

The bank concedes that paragraph (a) is satisfied. The issues discussed thus far have concerned subparagraph (b). The bank submitted that if the defendant did not sign the mortgages, but they were signed with her actual authority or she became bound by them by a ratification, subparagraph (b) would not be satisfied. But on my findings, in no sense was the mortgage executed by or on behalf of the defendant. Section 185(1A) is engaged and the bank has no indefeasible title. Subject to the bank's argument as to a discretion under s 187, the mortgages should be removed from the register. Before going to that question it is necessary to mention the bank's further argument, which was that it is an equitable mortgagee.

**No equitable mortgage**

[152] According to s 75 of the *Land Title Act 1994* (Qld) an equitable mortgage may be created by leaving a certificate of title with the mortgagee or in other ways according to the general law. The bank argued that if for some reason it lacked an indefeasible title, it was nevertheless entitled to an equitable mortgage arising from the delivery to it of the certificate of title, at least together with the other documents on which the bank sues. But as the bank argument correctly conceded, this is premised upon the delivery of a certificate of title and other documents having been made by or with the authority of the defendant. On my findings they were delivered without her authority. There is no equitable mortgage to which the bank is entitled.

**Relief and s 187**

[153] From what I have said so far, it follows that the bank's claim against the defendant must be dismissed. It also follows that the bank has no cause of action by which it is entitled to be paid anything by the defendant. In particular there is no obligation which could be the subject of the security in the form of these two registered mortgages. It would appear to be indisputable then that the mortgages should not remain registered against the defendant's title. Yet the bank submitted that in the event that its case is entirely unsuccessful, the mortgages should be removed from

the register not by its own act, but only by an order of the Court and upon terms which would require the defendant to pay part of the debt owing by Mr Perrin.

[154] The defendant seeks orders under s 187 which is in these terms:

> "187 Orders by Supreme Court about fraud and competing interests
>
> (1) If there has been fraud by the registered proprietor or section 185(1)(c), (d), (e), (f) or (g) or (1A) applies, the Supreme Court may make the order it considers just.
>
> (2) Without limiting subsection (1), the Supreme Court may, by order, direct the registrar –
>
> (a) to cancel or correct the indefeasible title or other particulars in the freehold land register; or
>
> (b) to cancel, correct, execute or register an instrument; or
>
> (c) to create a new indefeasible title; or
>
> (d) to issue a new instrument; or
>
> (e) to do anything else."

[155] The bank argues that it is "just" that there be an order directing the registrar to remove the mortgages from the register only upon condition that the defendant pays to the bank one half of the amount outstanding to it under the loans made to Mr Perrin. The bank argues that the defendant contributed to the present position by permitting the certificate of title to be released by Perrin Partners to her husband and thereby providing him with the means to defraud the bank.

[156] The bank suggested that the defendant "either expressly or impliedly authorised [Mr Perrin] to deal with the Certificate of Title on her behalf, including by obtaining it and deciding where it should be kept." But upon my findings he was not authorised, expressly or impliedly, to take the document away from Perrin Partners in order to use it as he did. It did not appear to be submitted for the bank that the defendant authorised Perrin Partners to release the Certificate of Title to her husband (other than by authorising her husband to take it from the solicitors). The bank did not seek to prove that the solicitors had that authority.

[157] In any event there is a more fundamental problem with this argument, in that it misstates the content of the discretion given to the Court under s 187. This provision is engaged where there has been fraud by the registered proprietor or in any of the other circumstances referred to in s 187(1). One of those circumstances is where there is something awry in the particulars of a registered easement.[102]

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[102] s 185(1)(c).

Another is where there is some misdescription of a lot such that it includes land in which another registered proprietor has an interest.[103] But in all of the cases in which s 187 is engaged, it is not by the operation of s 187 that a registered proprietor is denied the benefit of the indefeasibility which ordinarily is conferred by s 184 of the Act. Rather it is by s 184(3)(b) or s 185 that the benefit of that indefeasibility is lost. Section 187 applies where the proprietor's title, although registered, is not indefeasible. In that circumstance, the registered proprietor must establish its title, if any, other than by relying upon the state of the register. Thus in the case of a person entitled to the benefit of an easement, the particulars of which have been misdescribed in the register, that person must establish his or her interest as the holder of the dominant tenement by reference to the true terms of the grant and other relevant circumstances.

[158] Section 187 provides a remedy, by way of an order of the Court, directing the registrar to affect the state of the register. The purpose of this power is to facilitate the rectification of the register so that it will correspond with the relevant rights and interests of affected parties. So in the case where indefeasibility is lost through the operation of s 185(1)(g) (which is where the description of a lot wrongly includes land of another registered proprietor), s 187 permits the rectification of the register by a direction that one or more of the things within subsection (2) be done. But it does not empower the Court to alter the respective legal entitlements of the two landowners.

[159] Thus the power to make "the order it considers just" does not empower the Court to override existing entitlements and obligations and, in particular, to affect the interests of a registered proprietor (in this case the defendant) by encumbering her title in a way for which there is no legal basis. Rather it is a power which is to be exercised only in accordance with the respective legal positions of the parties which will be affected by the order. In the present case, the bank has no indefeasible title. And it has no title otherwise, because there was no transaction between it and the defendant. There is no power to make the order in the terms for which the bank contends, which would effectively create a charge over the defendant's land.

**Conclusion**

[160] The plaintiff's claim against the defendant will be dismissed. The defendant has established that the register should be corrected to remove the bank's mortgages. In the submissions for the defendant, I was asked to hear the parties as to the precise form of order to put paid to the mortgages, in the event that I reach these conclusions. I will hear the parties as to other orders, including as to costs.

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[103] s 185(1)(g).