

SUPREME COURT OF QUEENSLAND

CITATION: *Young & Ors v Hoger & Ors* [2001] QCA 453

PARTIES: **WILLIAM IAN YOUNG**
DELICE YOUNG
GARY ALAN GRANT
EVELYN JEAN GRANT
LAKE MAPLE PTY LTD ACN 010 800 281
(plaintiffs/appellants)
v
ELVIN JOHN HOGER
(first defendant/first respondent)
MERLE EDITH HOGER
(second defendant/second respondent)
STATE OF QUEENSLAND
(third party/third respondent)

FILE NO/S: Appeal No 175 of 2001
SC No 8689 of 1998

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 October 2001

DELIVERED AT: Brisbane

HEARING DATE: 23 August 2001

JUDGES: McMurdo P, Davies JA and Holmes J
Judgment of the Court

ORDER: **1. Appeal allowed.**
2. Set aside orders made below.
3. Order that the appellants recover possession of the land situate at Lot 2 on Registered Plan 152209 County of Canning Parish of Mooloolah and being the whole of the land contained in Title Reference 15519089.
4. Order that the respondents pay the appellants' costs of the trial of this action and of this appeal.

CATCHWORDS: CONVEYANCING - LAND TITLES UNDER THE TORRENS SYSTEM - INDEFEASIBILITY OF TITLE: CERTIFICATE AS EVIDENCE - EXCEPTIONS - FRAUD OR FORGERY - husband and wife registered owners as joint tenants of the subject property - wife and daughter complicit in forging security documents and procuring mortgage - appellant's title as mortgagees indefeasible unless "there has

been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest" - whether subject mortgage was procured by fraud in which a solicitor acting for the mortgagors was involved

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCES WITH JUDGE'S FINDINGS OF FACT - IN GENERAL - whether finding of fraud against the solicitor on the basis of wilful blindness was sustainable - whether finding of actual dishonesty sustainable - where trial judge formed an adverse view of the solicitor's credit and at an early stage expressed the view that the solicitor had committed a gross dereliction of duty - failure to give sufficient weight to the context in which the acts or omissions of the solicitor took place

Land Titles Act 1994 (Qld), s 184(3)(b)

Assets Co Ltd v Mere Roihi [1905] AC 176, cited

Butler v Fairclough (1917) 23 CLR 78, cited

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170, considered

Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd [1988] 1 VR 188, cited

COUNSEL: J A Griffin QC with B G Cronin for appellants
D J Campbell for first respondent
No appearance for second respondent
R J Douglas SC with B J Clark for third respondent

SOLICITORS: Walsh & Partners (Gold Coast) for appellants
J J Riba & Company (Maroochydore) for first respondent
No appearance for second respondent
C W Lohe, Crown Solicitor for third respondent

- [1] **THE COURT:** This is an appeal from a judgment in the Trial Division of this Court dismissing the appellants' action for recovery of possession of land, directing the Registrar of Titles to remove their mortgage from the freehold land register and to cancel the mortgage and ordering the appellants to pay damages to the first respondent in the sum of \$42,250. Consequential orders were made in respect of interest and costs.
- [2] The primary question in the trial and this appeal is whether a registered mortgage, in favour of the appellants, over land owned by the first and second respondents, a rural property at Diddillibah Road, Woombye, was procured by fraud in which Mark Ashley Parker, a solicitor acting for the appellants in the transaction, was involved. The learned trial judge held that it was. If his Honour's conclusion on that question was correct, questions of election and estoppel arise. It is, however, convenient to postpone discussion of these questions until after consideration of the primary question. That question arose in the following way.

- [3] The third respondent, the State of Queensland, against whom the first respondent sought compensation under the *Land Titles Act* in the event that the appellants succeeded against him, was given leave to defend the action and did so at trial and in this appeal. The first and second respondents were, at the time of the relevant transaction, husband and wife. Denice Hoger was their adult daughter.
- [4] The first and second respondents had, for many years, been the registered owners as joint tenants of the rural property. In 1992 they mortgaged it to the Commonwealth Bank for \$50,000 to enable Denice and another daughter Leanne to purchase a fish and chips shop. That shop was sold in 1994. The proceeds of sale were used by the second respondent and Denice, improperly and without the first respondent's knowledge, for their own purposes.
- [5] Unbeknown to the first respondent, the second respondent and Denice, in February 1997, conspired to and did obtain an advance of \$350,000 from a company, Park Avenue Nominees Pty Ltd, by deed of loan and mortgage of the rural property, the mortgage being registered on 28 February 1997. That mortgage was obtained by the second respondent forging the first respondent's signature on the mortgage. She also forged his signature on a Deed of Loan. His signature on the mortgage purported to be witnessed by a Justice of the Peace, Mr Cawthorne. The first respondent had no knowledge of this mortgage until the time when he also discovered the forgery the subject of the present proceedings.
- [6] The sum of \$350,000 was used for three main purposes: to discharge the earlier mortgage; to purchase a residential property in Woombye in the names of the second respondent and Denice, which was also mortgaged as security for the advance, that mortgage also being registered on 28 February 1997; and otherwise for their own purposes. The second respondent told the first respondent that Denice had purchased the residential property in Woombye.
- [7] The subject mortgage bears the date 16 February 1998.¹ Again it appeared to be executed by each of the respondents in the presence of Mr Cawthorne, a Justice of the Peace. In fact, on this occasion, it was not executed by either of them; the signatures of both were forged by Denice though with the second respondent's consent. A mortgage of the residential property, also dated 16 February 1998, was apparently executed by the second respondent and Denice but the second respondent's signature was, with her consent, forged by Denice. The signatures on it also appeared to be witnessed by Mr Cawthorne JP. The first of these mortgages stated as its principal sum \$365,000 and the second stated as its principal sum \$82,000.
- [8] However each mortgage secured also other moneys owing by either mortgagor and, by a Deed of Loan and Mortgage dated 9 March 1998, in which signatures purporting to be those of both respondents and Denice also appear to be witnessed by Mr Cawthorne, but which were, in fact also forged by Denice, all three covenant to pay the total sum of \$422,000. The mortgagees in the mortgage of the rural property were the appellants and they, together with John Walter Skalla, were

¹ However its schedule bears the date 9 March, the date which also appears on the Deed of Loan and Mortgage referred to in the following paragraph.

described as the mortgagees in the Deed of Loan and Mortgage dated 9 March 1998. Mr Skalla was the mortgagee in the mortgage of the residential property.

- [9] Of the total advance of \$422,000, the vast majority (over \$350,000) was used to pay out the mortgages to Park Avenue Nominees which, having been for a year only, were by then overdue for payment. After payment of \$3,400 to a creditor of Denice's, the balance of approximately \$46,000, after payment of costs and outlays associated with the mortgage transactions, was paid by cheque in favour of the two respondents and Denice but fraudulently endorsed by Denice to her own account.
- [10] Throughout this period the first respondent trusted his wife, the second respondent, to handle their financial affairs. He assumed that she was acting honestly in that respect.
- [11] There is no dispute that, as against the first respondent, the subject mortgage was procured by forgery. However it became registered with the consequence that the appellants' title as mortgagees became indefeasible unless "there has been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest".² It is accepted by the appellants that fraud by the registered mortgagee includes fraud by its agent and that Parker was relevantly the appellants' agent. It is also common ground that fraud in this context includes wilful blindness, an abstention from inquiry for fear of learning the truth,³ and possibly reckless indifference in other respects but that, in either case, it must amount to actual dishonesty.⁴
- [12] The learned trial judge appears to have made a finding of fraud against Parker on the basis of wilful blindness and that is the basis on which the respondents seek to sustain that finding. He said:
- "The nature of the whole transaction and his dealings with Denice Hoger must surely have aroused his suspicions. I find that he abstained from making inquiries for fear of learning the truth.
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- I find that he had no factual basis for any honest belief that the mortgage instrument was genuine, in the sense of being executed by the persons purporting to be the mortgagors. His conduct in not ascertaining from Mr Hoger what he, Mr Hoger, knew about the transaction was reckless in the extreme."
- [13] In determining this question, the learned trial judge formed an adverse view of Parker's credit. Parker had sworn that he would not witness a borrower's signature in any circumstances. He was later obliged to concede that he had done so on two identified occasions. His Honour also expressed general dissatisfaction with Parker as a witness, describing him as evasive and disingenuous and rejecting his own explanation that he was naïve. It may be assumed that these last were findings

² *Land Title Act* 1994 s 184(3)(b).

³ *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210.

⁴ See also *Butler v Fairclough* (1917) 23 CLR 78 at 90, 97, *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1988] 1 VR 188 at 192 - 195.

based, in part, on his Honour's observations of Parker when he gave evidence. The appellants conceded that, by reason of these matters, his Honour was entitled to form an adverse view of Parker's credibility. Up to a point that is so, given the advantage which, this Court must concede, his Honour had in observing Parker giving evidence. But it by no means follows, and the appellants dispute, that Parker was involved, by wilful abstention from inquiry, in the fraud perpetrated on the first respondent. There are other equally credible explanations for Parker's poor performance as a witness.

- [14] It is of some relevance to contentions made in this Court about the approach adopted by his Honour in resolving the question of fraud by Parker, to see how it arose in the trial. It was never pleaded by either the first or second respondent⁵ and the second respondent, unsurprisingly, took no further part in the trial or this appeal though she remained at all times a party. Nor was it even pleaded, or at least clearly pleaded⁶ by the third respondent third party. It was raised for the first time during the course of the opening of Mr D J Campbell for the first respondent early on the first day of a trial which ran for six days and involved substantial documentary evidence. Mr Campbell and his Honour appeared to raise the point almost simultaneously. It is fair to say that his Honour was immediately attracted to the point although his attention appeared to be directed to what he saw as "a gross dereliction of duty" by Parker rather than to any dishonesty by him. His Honour concluded his remarks at this point by saying, correctly, that the first respondent was deluded by his wife and daughter; but he went on to say that Parker would be guilty of this conduct and that the law would be an ass if there were not a remedy for such conduct.
- [15] It would also not be unfair to say that his Honour's enthusiasm for the point did not wane during the ensuing six days. A little later on the same day, during cross-examination of the first respondent by Mr Douglas SC for the third respondent, but before Parker gave evidence, his Honour, having remarked that it was "early days", expressed the view that "all of this" came about because of a gross dereliction of duty by Parker and that "the plaintiffs [the appellants] are visited with that conduct". He went on to imply that they, in turn would have a remedy against Parker. And when Parker ultimately came to give evidence his Honour made him aware of his Honour's previous remarks that he might have "adverse findings made against you in respect of your conduct", inquired whether he should be "warned" and intervened during the course of both his examination-in-chief and his cross-examination on a number of occasions in a way which indicated some hostility towards him.
- [16] It was not contended in this Court that the appellants were taken by surprise or were not prepared to meet the allegation of fraud by Parker. But the appellants contended that, because, at an early stage before even hearing the evidence of Parker, his Honour expressed a view that Parker had committed a gross dereliction of duty which should be visited upon the appellants, and because of the other

⁵ Amended defence of the first defendant par 7 to par 14; defence of the second defendant par 8 to par 15.

⁶ Third party's notice to plaintiff par 1; amended defence and counter-claim of the third party State of Queensland par 5 to par 7.

conduct by his Honour referred to above, he was prepared to find fraud by Parker whereas a more objective assessment would not have justified such a finding.

- [17] The appellants submitted that the learned trial judge was wrong in finding that there was fraud by Parker, there being no circumstances which justified that finding on the balance of probabilities, but also having regard to the conventional perception that members of our society do not ordinarily engage in fraudulent conduct and to the consequent judicial approach that a court should not lightly make a finding that a person has been guilty of such conduct.⁷ They conceded that he may have been careless or incompetent in failing to adhere to his own requirement, set out in detail later in these reasons, that, in order to ensure that the person described in specified documents is the person who executes them, he should be provided with certified copies of three identifying documents, and perhaps in other respects also, but submitted that there was no basis for a finding of actual dishonesty.
- [18] The learned trial judge appeared to rely on 11, or possibly 12 "features of the transaction vis-à-vis Mr Parker" which he said were "wholly unsatisfactory" and on which he appears to have based his conclusion that Parker was fraudulent. The first 11 of those, as numbered by his Honour, were as follows:
- "(i) he was acting in a private mortgage transaction with all the attendant desperate actions of a borrower who needed money quickly;
 - (ii) the advance had been sought by Mrs Hoger and Denice, and not Mr Hoger, as borrowers;
 - (iii) notwithstanding that he, unilaterally, made Mr Hoger a party to the borrowing;
 - (iv) this is so even when his dealings were solely with Denice, and not with Mr and Mrs Hoger;
 - (v) he ignored the failure to comply with the requirements of his 13 February 1998 letter, which requirements were imposed with the express purpose of ensuring the mortgagors authentic signatures were obtained on the mortgage instrument;
 - (vi) he did not know, nor did he talk to, Mr Cawthorne (the Justice of the Peace);
 - (vii) he proceeded with settlement when he knew (as is evidenced by his 23 February letter and his conversation with Denice) that he was not satisfied that the executed 1998 mortgage satisfied his own prescribed requirements;
 - (viii) that he knew Denice was under pressure financially and that he had no known income details for her;
 - (ix) I find that he made the request for the \$2,000 advance fee because he began to realise that there might not be substance in the prospective borrowers and that his fees might not be paid;
 - (x) he accepted the copies of Mr and Mrs Hoger's uncertified passports which had been forwarded by Denice without any reference at all to Mr and Mrs Hoger; and
 - (xi) he admitted that 'there are certain things in there that just don't stack up'."

⁷ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

To those his Honour added that Parker made no attempt to speak to the first respondent, Mr Cawthorne the Justice of the Peace or even the second respondent.

- [19] As to (i), it is true that he was acting in a private mortgage transaction with the added urgency of borrowers who needed money quickly in order to repay an existing loan secured over the rural property and the residence property. But the urgency was primarily in order to discharge the mortgages and, in particular, the mortgage over the much larger and more valuable rural property jointly owned and mortgaged by both respondents. The reference in (viii) to the knowledge that Denice was under pressure financially appears to be a reference to a warrant of execution which had been registered against the residential property by a creditor of Denice's for the sum of a little over \$3,000. But that was of minor significance when compared to the imminent liability to repay over \$350,000 to avoid a risk of repossession and sale of a rural property which, to Parker's knowledge, was valued at \$485,000.
- [20] As to (ii), (iii) and (iv) it is true that Parker dealt solely with Denice. But he did so in a context in which, to his knowledge, the loan being sought was to be secured by mortgages which replaced existing mortgages by the same parties over the same properties, most of the loan monies was to be used to pay out those mortgages and the proposed mortgagors were all members of one family.
- [21] Mr Parker agreed in his evidence that the borrowers were shown on his letter of instructions as Denice and Merle Hoger and that he made the decision to include the first respondent. However the contemporaneous documentation does not entirely support this. Parker's letter of instruction described the borrower merely as "Hoger" with the contact being Denice. The letter of offer from the lenders' agent, which was sent and returned before Parker received instructions, was addressed to Denice and Merle. However it was returned apparently accepted by all three, that is, Denice, Merle and Elvin. It is true that letters emanating from Parker shortly after he obtained instructions describe the borrowers as Denice and Merle. Mr Parker explained this, plausibly enough, as probably caused by his secretary taking this from the letter of offer. However all relevant documents were thereafter executed on the basis that all three were borrowers and mortgagors, in particular the Deed of Loan and Mortgage dated 9 March 1998 in which all three are described as the mortgagor, in which all accept liability to repay and which all three appear to have executed as mortgagor in the presence of Mr Cawthorne JP. Moreover, given that the loan was to be used substantially to pay out both mortgages and that by far the more valuable of the mortgaged properties was the rural property (this appears to have been the only one in respect of which a valuation was obtained for the appellants) it is unsurprising that all three of the Hogers would be required to assume primary liability for repayment.
- [22] The circumstance most strongly relied on by the first respondent in this Court as showing fraud by Mr Parker was that he did not insist on compliance with requirements stated in his letter of 13 February 1998 as follows:
- "To ensure that all persons executing documents (whether as Mortgagors, Borrowers, Guarantors, Company Directors or otherwise) are the actual persons described in the documents and where that person is represented by a Solicitor, such Solicitor is to provide confirmation in writing to us that the person who actually

executed the documents is the person described in the documents and that such person is personally known to the Solicitor or that the Solicitor identified the party by examining their Drivers Licence, Passport or Birth Certificate.

Where such person is not represented by a Solicitor such person must provide to us certified copies of not less than three (3) identifying documents, namely:-

- (a) Birth Certificate
- (b) Passport
- (c) Drivers Licence
- (d) Citizenship Certificate
- (e) Rate Notice
- (f) Electricity Account
- (g) Current Credit or ATM Card issued by a Bank, Building Society or Credit Union
- (h) Medicare Card."

It also seems to have been the circumstance most strongly relied on by his Honour for his finding of fraud by Parker because it is stated in different ways in each of par (v), par (vii) and par (x) of the features on which he relied. Moreover his Honour had earlier referred to as important Parker's inability to provide any adequate answer for settling without compliance with these requirements; and, after stating the features which he enumerated, he returned to this once again, saying "He allowed the transaction to go ahead notwithstanding clear non-compliance with his own prescribed verification measures".

- [23] It is undoubtedly the case that this requirement was not insisted on in the present case and was not satisfied. Mr Parker did follow up this requirement in his facsimile to Denice of 23 February 1998 in which, in addition to other matters, he said:

"We also did not receive confirmation of identification of the parties executed [sic] the documentation, as set out in our letter of February 13. Before any further work can be done, we require this confirmation of identification."

In reply to this he received by facsimile on 6 March 1998, photocopies of relevant pages of the passports of each of the respondents. They were not certified in any way; Mr Parker agreed that, by certification, he meant certification by a Justice of the Peace. He also received, at some date he was unable to specify, uncertified photocopies of the first respondent's Commonwealth Bank Visa Card and of the Medicare Card and electricity account of both respondents. He had also by 6 May received all other necessary documents, including some not already referred to, apparently executed by both respondents and in many cases apparently witnessed by Mr Cawthorne, a Justice of the Peace.

- [24] Mr Boyce, another solicitor, when asked whether he would have any reason to think that there was anything wrong with a document returned to him, in circumstances such as this, apparently witnessed by a Justice of the Peace, said that he would not. Mr Boyce had been solicitor for Park Avenue Nominees in the previous mortgage

transactions and had, it seems, been deceived in this way.⁸ Moreover there was no evidence that, either in all other cases in which he acted for a mortgagee, or even generally, Mr Parker insisted on compliance with the requirements stated in the quoted passage of his letter of 13 February. In those circumstances we do not think that his failure to insist on such compliance in this case proved dishonesty on his part. He may simply have thought that what he had was sufficient to satisfy him, in all of the circumstances, that those whose signatures appeared on the documents he had received had in fact executed them.

- [25] That is, in effect, what he said. He saw the transaction as a simple refinancing transaction involving all three; and in that context he relied on the apparent execution by all mortgagors of the mortgages, Deed of Loan and Mortgage and other supporting documents in the presence of a Justice of the Peace. When pressed on this he said that he was naïve, an explanation which his Honour did not accept, notwithstanding that Parker was only about 30 years of age and in a small practice.⁹ But an unacceptable explanation that he was naïve is at least as consistent with a desire to explain away his lack of care or competence as with his being dishonestly involved in the fraud on the first respondent.
- [26] As to (vi) and the unnumbered feature which his Honour added, it is true that Parker did not know or seek to talk to Mr Cawthorne but the only evidence, apart from his Honour's finding with respect to Parker's credibility, which touches on the question whether his failure to do so was evidence of fraud was that of Mr Boyce just referred to. There was no evidence that it was considered to be a prudent or even a common practice among solicitors to verify the authenticity of the signature of a party to a document, or specifically of the signature of a party to an instrument under the *Land Titles Act*, by speaking to the Justice of the Peace or other person who appears to have witnessed that signature. And at least in the specific case of instruments under the *Land Titles Act* it might reasonably be thought that Justices of the Peace would be aware of the provisions of s 162 of that Act. Of course if he had spoken to the second respondent he would, no doubt, have been assured of the genuineness of the transaction. So the only genuine criticism here is that he did not speak to the first respondent.
- [27] As to (ix), it is correct that Parker did request \$2,000 in fees in advance but later resiled from this. But this is as consistent with a wish to have his money sooner rather than later as with any more sinister motive.
- [28] Finally, as to (xi), Parker's admission that there were certain things that did not "stack up" appeared to be a reference to a document headed:
- "STATEMENT OF POSITION
MR & MRS D & E HOGER"
- There were indeed a number of matters in the document which did not "stack up". In the first place, Mr and Mrs Hoger were misdescribed by initials; his is not "D" but "E" and hers is "M"; and the only D Hoger was Denice who was plainly not

⁸ In that transaction, which of course was completed successfully from the mortgagees' point of view, the mortgages and deed of loan also appeared to have the signatures of both respondents and Denice witnessed by Mr Cawthorne JP.

⁹ And notwithstanding that, during the course of Parker's evidence, his Honour had said that Parker struck him as being extremely naïve.

Mr Hoger. Secondly the body of the document included as assets both properties and as liabilities the amounts apparently said to be owing under both mortgages. It was therefore not merely a statement of the financial position of the respondents. And finally it was signed by Denice only, following a statement as follows:

"I DENICE HOGER agree this is a true statement of my financial position."

For the same reason that it was not merely a statement of the financial position of the respondents it was, equally plainly, not merely a statement of Denice's financial position. Parker said in evidence that he did not recall looking at that document. But whether or not his evidence in that respect is accepted it is difficult to infer, from his statement that "there are certain things in there that just don't stack up", anything more than that, as is self-evident, there are a number of inconsistent and inexplicable statements in the document. He was not asked to explain further what he meant by that statement.

- [29] Yet it was on the basis of the combination of these features that his Honour concluded that Parker's suspicions that the first respondent had not executed the mortgage of the rural property must have been aroused and that Mr Parker had no factual basis for any honest belief that the mortgage was genuine. And from those conclusions his Honour found fraud against Parker on the basis we have indicated.
- [30] In our opinion his Honour failed to give sufficient weight to the context in which the acts or omissions he relied on took place. That context included:
1. that it appeared from Parker's search that there were existing mortgages over both properties, registered on the same day in favour of one mortgagee, the respondents being the mortgagors under the mortgage of the rural property and the second respondent and Denice being the mortgagors under the mortgage of the residential property;
 2. that the major part of the loan sought would be used to pay out these mortgages in order to secure their release and replacement by the proposed mortgages;
 3. that the major asset secured by the existing mortgages was, by far, the rural property (for the purpose of obtaining the loan Parker had it valued at \$485,000 and does not seem to have even bothered to have the residential property valued) and consequently the major concern of the borrowers must have been to ensure that the mortgage over this property was either paid out or renewed;
 4. that all mortgagors appeared plainly to be members of one family;
 5. that the Deed of Loan and Mortgage, the mortgage instruments and a number of other ancillary documents appeared to have been executed by all three proposed mortgagors in the presence of Mr Cawthorne, a Justice of the Peace;
 6. and that, in response to his letter of 13 February and his facsimile of 23 February he received a photocopy of the first respondent's passport and, it seems, of his Visa card, his Medicare card and his electricity account.
- [31] In that context the features relied on by his Honour were, in our opinion, more likely in this case to found an honest, if careless belief by Parker that the mortgage instrument in respect of the rural property was in fact executed by the first respondent when it was returned to him than to found a wilful abstention of inquiry by him for fear of learning that the first respondent's signature on the mortgage of

the rural property had been forged. None of these features, either separately or in combination, proved actual dishonesty by Parker.

- [32] It is true that his Honour found Parker to be evasive and disingenuous. But no doubt the possibility that he might be made liable for negligence, or possibly even fraud, given his Honour's earlier expressions of opinion of which his Honour reminded Parker early in the course of his evidence, was sufficient to explain this. That probability and his Honour's early apparent hostility towards him are at least as likely explanations for any evasiveness or disingenuousness by him as a dishonest involvement, even by wilful abstention from inquiry to allay a suspicion, in the fraud which had been perpetrated on the first respondent.
- [33] In our opinion there was nothing in the conduct of Parker which justified a conclusion that he was guilty of actual dishonesty; that he actually had a suspicion that the first respondent's signature on the mortgage had been forged and that, having that suspicion, he abstained from further inquiry. Having reached that conclusion it is unnecessary to consider the appellant's submission, referred to earlier, that his Honour's remarks, earlier set out, led to his drawing inferences from facts adversely to Parker where such inferences were not justified. And it should be said, in fairness to his Honour, that he was then expressing merely provisional views which might have changed as the case developed.
- [34] Having reached that conclusion it is unnecessary to consider the questions of election and estoppel.
- [35] For those reasons we would allow the appeal, set aside the orders made by the learned trial judge and order that the appellants recover possession of the land situate at Lot 2 on Registered Plan 152209 County of Canning Parish of Mooloolah and being the whole of the land contained in Title Reference 15519089. We would order that the respondents pay the appellants' costs of the trial of this action and of this appeal.