SUPREME COURT OF QUEENSLAND

CITATION:	*Young and Ors v Hoger and Ors* [2000] QSC 455
PARTIES:	**WILLIAM IAN YOUNG, DELICE YOUNG, GARY ALAN GRANT, EVELYN JEAN GRANT and LAKE MAPLE PTY LTD** (plaintiffs) **v** **ELVIN JOHN HOGER** (first defendant) **MERLE EDITH HOGER** (second defendant) **STATE OF QUEENSLAND** (third party)
FILE NO/S:	S 8689 of 2000
DIVISION:	Trial
PROCEEDING:	Action for recovery of possession of land
DELIVERED ON:	6 December 2000
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2000 – 27 July 2000
JUDGE:	Douglas J
ORDER:	**a) The plaintiff's action for recovery of possession of land be dismissed;** **b) The Registrar of titles be directed to remove the plaintiff's mortgage from the freehold land registrar and to cancel the mortgage;and** **c) The plaintiff's pay the first defendant damages in the sum of $42,250.**
CATCHWORDS:	CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE – EXCEPTIONS – FRAUD OR FORGERY – husband and wife joint tenants of certain land – wife and daughter complicit in forging security documents and procuring mortgage – whether conduct of the mortgagees' solicitor in registering the mortgage amounted to fraud – whether equitable mortgage survives in relation to complicit joint tenant. *Property Law Act* 1974 *Land Title Act* 1994 *Trade Practices Act* 1974 (Commonwealth)

Assets Co Ltd v Mere Roihi [1905] AC 176
Breskvar v Wall (1971) 126 CLR 376
Frazer v Walker [1967] 1 AC 569
Flourentzou v Commonwealth Bank of Australia (1997) NSWConvR 55-281
Immer (No 45) Pty Ltd v Uniting Church in Australian Property Trust (NSW) (1993) 182 CLR 26
Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd [1998] 3 VR 16
National Commercial Banking Corporation of Australia Ltd v Headley (1984) NSWConvR 55-211
Russo v Bendigo Bank Limited [1999] VSCA 108
Sargent v ASL Developments Ltd (1974) 131 CLR 634.
Schultz v Corwall Properties [1969] 2 NSWR 576

COUNSEL: J A Griffin QC with him B G Cronin for plaintiffs
D J Campbell for first defendant
R J Douglas SC with him B J Clarke for third party

SOLICITORS: Walsh & Partners Litigation Lawyers for plaintiffs
J J Riba & Company Solicitors for first defendant
C W Lohe, Crown Solicitor, for third party

[1] **DOUGLAS J:** The plaintiffs are the registered mortgagees under Mortgage No 702569150 registered on 19 March 1998 over the land described as Lot 2 on RP 152209 in the County of Canning, Parish of Mooloolah.

[2] There is no doubt that the mortgagors on the face of the mortgage, the first and second defendants, are in default.

[3] The Bill of Mortgage entitles the mortgagee to take possession if the mortgagor is in default. Default has occurred through the non payment of interest on the first day of each month pursuant to Clause 2 thereof, and the non payment of the principal at the expiration of 12 months pursuant to Clause 1.

[4] Demand for possession was made, and because some uncertainty arises as to whether the demand was actually received as required by the Mortgage and the Act, one Grant gave evidence that he served the demand at the second defendant's place of abode in accordance with s 347 of the *Property Law Act* 1974 which is the operable provision pursuant to Clause 20.1 of the Bill of Mortgage. Counsel for the first defendant admitted that a similar document had been served on the first defendant.

[5] Therefore on the face of it the plaintiffs are entitled to possession. However, there are considerable obstacles in their path.

[6] It is necessary to set out the history of this matter before dealing with the consequences of what occurred. The first and second defendants are a married

couple. The first defendant is about 52 years of age and his principal occupation is that of a plant operator employed by Energex. He has worked for that company or its statutory predecessors for 26 years. Mrs Hoger (the second defendant) is about one year younger and is presently unemployed, although she did until late October 1998 work as a nurse's assistant.

[7] They were married in 1970 and had four children, including (relevantly) a female child, Denice Hoger (aka Jolly, Wood). Mr and Mrs Hoger separated on 28 October 1998 and see each other occasionally when she travels from Brisbane where she now lives to Wooombye to see their grandchildren.

[8] Mr Hoger has lived on the mortgaged property (the farm) since he was 14 years old when it was purchased by his father. At the age of 17 Mr Hoger purchased the farm from his father and the transfer into his name was ultimately perfected when he reached the age of 21 years. When Mr and Mrs Hoger were married the land was transferred to them, as joint tenants, and so registered. It became the matrimonial home. They, with their joint resources and efforts, effected improvements to the farm buildings and agricultural production. About a quarter acre subdivision was made of the farm to provide for the construction of a residence for Mr Hoger's sister. It was always Mr Hoger's intention to continue indefinitely to reside on the land with his wife. Until 18 October 1998 Mr Hoger relied upon and trusted his wife and Denice. That was his undoing. He was an industrious man and worked on the farm as well as continuing his employment with Energex. He assisted his sons in their businesses. On the other hand he was a naive and commercially injudicious man. For instance he did not insure the farm or any other properties he owned because, he said, he did not believe in insurance. Mrs Hoger attended to all of the family dealings, the books of account, cheque books, and all money matters. Unfortunately for him he took no part in that and relied upon her. She attended, almost routinely, to payment of all accounts and to banking requisites.

[9] The property was unencumbered until 1992 when Mr Hoger agreed to obtain a loan of some $50,000 from the Commonwealth Bank of Australia in order to finance Denice and another daughter, Leane, into a fish and chip shop business at Woombye. He did so because they had no regular employment. He wanted to give them a start in business. The business was purchased in December 1992 and sold in about June 1994 with net proceeds of about $30,000, the balance owing on the mortgaged land then being about $52,000.

[10] At the time of the sale of the business Hoger was told by Mrs Hoger or Denice, or both of them, that:

(a) the business was sold for little less than it was purchased;
(b) the proceeds of the sale paid out the mortgage.

[11] From that time on Hoger believed that there was no money owing on the mortgage but thought that the mortgage remained in place. In about March 1997 he signed an authority to release the 1993 mortgage but without reading it. It was presented to him by Mrs Hoger and Denice whilst he was busy at work. It was submitted that he knew that he was asked to sign the discharge with knowledge that another mortgage was to be given over the land. I reject that submission.

[12] Although the Commonwealth Bank wrote regularly to the defendants before and after the business sale advising of default in payment of principal interest, this correspondence never came to the attention of Mr Hoger. That Bank of course ceased writing when the 1992 mortgage was paid out from part of the advance under the 1997 mortgage with which I will deal. It is fair to say that Mrs Hoger kept the Bank letters from Mr Hoger. It is also clear that Mrs Hoger and Denice used the business sale proceeds for their own purposes.

[13] When the 1992 mortgage was paid out a further mortgage in favour of Park Avenue Nominees Pty Ltd (Park Avenue) was registered on 4 March 1997. That mortgage secured an advance of $350,000 at an interest rate of 17% reducing to 12% upon payment, and with monthly instalments of $4,958.33 reducing to $3,500 for prompt payment. It was for a 12 month term. The signatures on the document purport to be those of Mr and Mrs Hoger, dated 13 February 1997 and witnessed by one Cawthorne who was a JP. The solicitor for Park Avenue, one Boyce, signed as solicitor for the mortgagee. He was and is the principal of a firm of solicitors, Michael Boyce and Associates of the Gold Coast. He is also the principal of Park Avenue. This lending, unlike the 1992 mortgage, was from a private mortgage lender.

[14] The evidence reveals that the signature of Mrs Hoger on the document is genuine. However the signature purporting to be that of Mr Hoger is a forgery. It is probable that Mr Hoger's signature was forged by Mrs Hoger.

[15] The advance under the 1997 mortgage was made, and the mortgage lodged for registration, after Mr Boyce had obtained, through the applicants for the loan being Mrs Hoger and Denice, a certificate by one Lauchland, then a solicitor employed by Messrs Raj Lawyers of Brisbane to the effect that he saw, *inter alia*, Mr Hoger at his office at 5.45 p.m. on 13 February 1997 and that he explained to him the effect of, amongst other things, the mortgage and the particulars of mortgage, which, on the face of the certificate had then already been signed, and that he had "read the document and knew the effect of and approved the terms and conditions".

[16] In fact Mr Hoger never met or spoke with Mr Lauchland. That certificate was false and Mr Hoger knew nothing of that mortgage until some time in the week after 18 October 1998.

[17] The advance under the 1997 mortgage was used by Mrs Hoger and Denice to:

(a) discharge the 1992 mortgage;
(b) purchase a dwelling, registered in the name of Mrs Hoger and Denice, at New Street, Woombye; and
(c) otherwise for their own purposes.

[18] In early 1997 Mr Hoger was told by Mrs Hoger and Denice, that Denice had purchased the New Street property where she was by then residing. Mr Hoger had also been told by Mrs Hoger that she was a joint owner of New Street. He ascertained this after an inquiry of her by him as to the absence of funds from an investment account. He was told, or he believed, that the account funds had been used to purchase New Street. Unfortunately he pursued the matter no further.

[19] By January 1998 the situation had become even more complicated. The 1997 mortgage was due for repayment and there was no money to repay it with. Mrs Hoger and Denice were again desperate. They then made application to PJB Mortgage Management Pty Ltd (PJB) for an advance of $447,000. PJB's business was to field applications from borrowers and to marry them up with lenders who they canvassed through commercial contacts. By 24 January 1998 (although the letter is dated 1997) PJB advised Mrs Hoger and Denice that its client was prepared to make the advance at an interest rate of 15% reducing to 11% for prompt payment, for a term of 12 months, on first mortgage terms, with various establishment and approval fees. On or after 25 January 1998 the letter that contained that advice was returned to PJB bearing, under an acceptance of the terms of a letter endorsed thereon, the purported signatures of Mr Hoger, Mrs Hoger and Denice Hoger. The evidence reveals that the signatures of Mrs Hoger and Denice were genuine, but that Mr Hoger's signature was forged.

[20] In the event Mr and Mrs Hoger were absent from Australia in New Zealand from 31 January to 21 February 1998. It was during this time that further events occurred. By this time another character enters the play. He is one Mark Ashley Parker the principal of Parker Simmonds, solicitors of the Gold Coast. Parker Simmonds shared offices, reception and secretarial services with PJB. There was much interaction between them. It appears that all of PJB's business was referred through Parker Simmonds and that it accounted for approximately 30% of Mr Parker's gross fees. He charged both broking and legal fees which were ordinarily paid out of monies advanced on settlement. At all times Parker knew that the applicant borrowers were Mrs Hoger and Denice. Although he said he did not do third party mortgages he decided, of his own volition, to make Mr Hoger a borrower without ever having met or spoken to him. Again the lenders in this proposal were private mortgage lenders or lenders described as "lenders of last resort". This means, as I understand it, lenders who are prepared to lend when conventional lenders are not so prepared. They normally charge higher interest rates and allowed borrowing's for limited times only. Neither Mr Parker nor his secretary (who were the two people involved at Parker Simmonds) ever had any dealing, either directly or indirectly, with Mr Hoger. All of that firm's correspondence was addressed to Mrs Hoger and Denice or solely to Denice. Letters or facsimiles received by that firm were solely from Denice. There is no record that Mr Parker or any member of his staff at any time had any personal attendance with Mrs Hoger or Denice. The recorded attendances, by Mr Parker and his secretary, consisted of telephone calls with Denice, though it is open to infer that Denice did attend at the offices to deliver certain documents.

[21] By a letter dated 13 February 1998 from Parker Simmonds addressed to Mrs Hoger and Denice, the security documents for the advance, including an instrument of mortgage and a solicitor's certificate, were forwarded by mail or courier for execution. A similar letter was also forwarded containing securities for the advance to Mrs Hoger and Denice upon the security of New Street. The forwarded mortgage instrument in respect of the farm was returned by Denice to Parker Simmonds, apparently executed, after 16 February and before 23 February 1998. The executed mortgage was dated 16 February 1998 and bore the purported signatures of Mr and Mrs Hoger and signatures of Mr Cawthorne, again, as witness to their signatures. It must be borne in mind though that at this time (namely 16

February 1998) Mr and Mrs Hoger were in New Zealand. The evidence reveals that the signature of Mr and Mrs Hoger were forgeries, that the signature of Denice was probably genuine, and that each of the forgeries were made by Denice.

[22] Mr Cawthorne was a Justice of the Peace but is deceased and there is no evidence from him as to the circumstances of execution.

[23] Parker knew that at no time was any solicitor engaged to act for any of the Hogers, particularly Mr Hoger. Cawthorne was unknown to Parker, and Parker knew nothing of the circumstances of execution before Cawthorne as witness. Parker did not speak with and made no attempt to contact Cawthorne.

[24] In the 13 February letter Mr Parker laid down requirements for execution which were specifically directed by him to the risk of forgery which he agreed, was a matter to which mortgage transactions were particularly prone. The first alternative nominated on the second page of that letter, namely a certificate from the solicitor who had identified the mortgagor's signature, could not be satisfied.

[25] This left the second alternative for identification of the mortgagor, being that, as intended by Mr Parker, the witnessing Justice of the Peace with a passport/driver's licence, or other identifying document. Mr Parker accepted at trial, though grudgingly, that this was never satisfied.

[26] Mr Parker sent a facsimile to Denice on 23 February 1988. It contained, *inter alia*, the following:

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

[27] The letter also requested the sum of $2,000 in advance for his legal fees. This was new because in the 13 February letter he had indicated that such fees would be paid from the advance. In fact the $2,000 was not paid and Parker's fees were paid in whole from the advance on settlement. Parker spoke to Denice on 23 February requesting the "identity" document and also required a further valuation from her. He knew that Denice and Mrs Hoger were under financial pressure. He knew that the 1997 mortgage advance was overdue for repayment and that the Bank of Queensland had advised of a warrant of execution which had been lodged on 22 December 1997 and which was to be discharged from the 1998 mortgage advance.

[28] Then Mr Parker adopted the role of broker. He began to confuse his position as solicitor and broker. He wrote to one Arnold, of Australian Business Brokers, to canvass funds. He facsimiled on 26 February and again on 2 March. The facsimile on 2 March was in fact a letter dated 27 February. It contained an annexure which purported to be a true and correct statement of the assets and liabilities of Denice but is in fact headed "Statement of Position of Mr and Mrs N and E Hoger". That alone should have been a red light warning to Mr Parker. In fact he agreed at the trial that the content of the statement bore a character that "certain things in there just don't stack up".

[29] The valuation which was sought probably came from a request by Arnold. Parker then instructed Williams Gardner of Gardner Valuers Propriety Limited. He valued the property by valuation dated 3 March 1998 at $485,000.

[30] On 6 March Mr Parker received, by facsimile, a copy of the operative page of the passport of each of Mr and Mrs Hoger. Each was not certified as required by the 13 February letter. At some later time, and possibly after settlement, he received copies of other personal documents pertaining to Mr and Mrs Hoger. Again, these were not cerified. He, emboldenly, did not conclude verification or the authenticity of the signatures on the 1998 mortgage was serviced by the apparent execution before a Justice of the Peace. He decided to dispense with his 13 February letter standard verification procedures and made the decision to proceed with the mortgage. I find that he had no factual basis for belief, before settlement, that the mortgage signatures of Mr and Mrs Hoger were in fact genuine. Settlement ensued and the advance was made on 9 March 1998. The advance made in respect of the farm was $340,000 of which $258,000 was paid in discharge of the 1997 mortgage over the farm property.

[31] The 1998 mortgage fell into default almost immediately, probably shortly before 16 April 1998, and continued.

[32] The plaintiffs are the persons and entity (Lake Maple Pty Ltd) who together advanced the monies paid on settlement on 9 March 1998. They were the "investors" gathered together by Arnold to make up the sum borrowed.

[33] In acting as solicitors for the plaintiffs Parker Simmonds acted within the scope of their authority as agents for the plaintiffs. What then is the position of Parker and what was the nature of his conduct? Was his conduct merely negligence, or did it amount to fraud in the sense required by the *Land Title Act* 1994? I must decide whether his conduct as agent for the plaintiffs was fraudulent in that sense.

[34] He was an experienced solicitor involved in mortgage lending. Parker knew all of the relevant facts at settlement and on mortgage lodgement. He was the eyes and ears of the plaintiffs. I was not impressed by Parker in the witness box. He was evasive and disingenuous. When faced with propositions (particularly in writing) which were against his position he denied having read them. He was evasive about his involvement in canvassing funds for this advance, both in early and later in 1998, and also as to not witnessing mortgagor's execution when acting for mortgagees. More importantly though, he was unable to provide any adequate answer for settling without compliance with his 13 February 1998 verification requirements. He said that he was naive but I do not accept this. His decision to disregard the unsatisfactory features of the transaction which ought to have put him on notice that there was a real danger that the signatures of Mr and Mrs Hoger, but particularly Mr Hoger, may not have been true was dangerous. He made a conscious act to disregard these features. Particularly he proceeded to settlement without having obtained a solicitor's certificate, a thing which Mr Boyce would not ever do in such a transaction. Mr Boyce was also an experienced solicitor in this field.

[35] In my view the following features of the transaction *vis a vis* Mr Parker were wholly unsatisfactory:

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".

[36] Additionally Parker made no attempt to speak with Mr Hoger, Mr Cawthorne or even Mrs Hoger. This could have been done at any time after 20 February when Mr and Mrs Hoger returned from New Zealand, bearing in mind the advance did not settle until 9 March. 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. All that he was concerned about was obtaining his fee and having the mortgage registered, he believing that once it was registered the position of his clients was safe and unassailable. He allowed the transaction to go ahead notwithstanding clear non compliance with his own prescribed verification measures and disregarded the suspicions he enjoyed in relation to verification. 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. A simple inquiry of Mr Hoger would have brought all of this to an end.

[37] Mrs Hoger, though delivering a defence in the action, did not appear at the trial either in person or by counsel. On the first day of the trial I made an order that she

be informed of the fact that the trial had commenced, and that if she wished to appear she should do so. That was done but she failed to appear. I find that she forged the signature of Mr Hoger on the 1997 mortgage. I find that she signed, as applicant for the 1998 advance, the letter dated 24 January 1998 which was forwarded to her at the farm address. I further find as follows:

(a) that she was present at the farm and spoke with Mr Gardner on the occasion of his attendance to value the land for the purpose of the 1998 mortgage advance;
(b) that the $46,360.85 excess advance paid on settlement of the 1998 mortgage was paid into Mr and Mrs Hoger's account which Mrs Hoger controlled;
(c) that Mrs Hoger received the letter of demand of 5 June 1998 (the mortgage being in default) forwarded to the farm address;
(d) that she had dealings with a Mr Gay in July 1998 with a view to refinancing the farm; and
(e) that she admitted knowledge of and complicity in the 1998 mortgage in a police interview, albeit falsely denying that she forged Mr Hoger's signature on that mortgage.

[38] I find that Mrs Hoger was complicit with Denice in procuring the 1998 mortgage at least. I find this on the basis that she either knew of what Denice intended to do and agreed with it, or that she actively, with Denice as the front, procured that mortgage. I further find that she assisted and authorised Denice to not only forge her signature but also Mr Hoger's signature on the 1998 mortgagee whilst she was absent in New Zealand.

[39] Mr Hoger was oblivious to all of these things until 18 October 1998 however, nonetheless, the plaintiffs allege, that Mr Hoger has either affirmed the mortgage or waived his rights. It is submitted that as matters stood on 18 October 1998, the plaintiffs had the right to possession of the farm property. It is further submitted that the first defendant knowing that the mortgage was a forgery, was confronted with two inconsistent rights. He could challenge the plaintiff's right to possession by relying on the forgery, or he could seek to have the plaintiffs stay their hand by paying interest and costs. It is further submitted that he could not do both, since the latter entailed "buying off" the right the plaintiffs otherwise had to possession by having them act to their detriment by forbearing from proceeding to take possession. I was referred to *Immer (No 45) Pty Ltd v Uniting Church in Australian Property Trusts (NSW)* (1993) 182 CLR 26 and to *Sargent v ASL Developments Ltd* (1974) 131 CLR 634. It was submitted correctly that it is not a necessary requirement of waiver or estoppel by conduct that there be full knowledge of the facts. However, what did happen here? In my view Mr Hoger went into a panic. He frankly could not believe that his wife of so many years and his own daughter could have done these things to him. He immediately gave instructions to one Clark, a solicitor in Nambour. The evidence of Clark reveals that when Mr Hoger first contacted him on or about 19 October 1998 he was panicking and worried. He spoke to his solicitor on six occasions on the first day of conduct. I accept what he says when he says that he had not been served with any documents which gave him any inkling of knowledge of what had happened prior to 18 October 1998. I am of the view that Mr Hoger when confronted with the true situation did not, in reality,

know what to do. His immediate and instinctive act was to endeavour to save the position in the best way he could. I find that his instructions to Mr Clark were confusing and panicky. I do not think that at any time he understood in any stark way at all that he had a choice between challenging the mortgage or paying it out in some way. Without being critical of Mr Clark I find that he did not consider the prospect that the indefeasibility of title with respect to the mortgage could be attacked. I am not sure that he conveyed to Mr Hoger clearly that such was an option. I am not prepared to find that Mr Hoger either affirmed the mortgage or waived his rights in respect of what had happened. In fact he paid out $42,250 to the plaintiffs in an effort to preserve his position.

[40] As I said at the beginning of this judgment, the plaintiffs have established a *prima facie* case to judgment to recover possession, even if, as the defendants plead, the mortgage was a forgery and, prior to registration, a void instrument. This is because of the quality of a registered interest conferred by s 184 of the *Land Titles Act* 1994 (the Act) as construed in relation to its predecessor section in *Breskvar v Wall* (1971) 126 CLR 376.

[41] Section 184 is of no force if there has been fraud by the registered proprietor of the interest in question: s 184(3)(b). The section also does not give paramountcy to a registered interest over any interests of a kind mentioned in s 185: s 184(3)(a). The interest enumerated in s 185 (commonly called "Exceptions to Indefeasibility") include "an equity arising from the act of the registered proprietor" of the interest in question: s 185(1)(a). If fraud is established I have power to make such orders as I consider just including the power to correct the register or cancel the registration of an instrument.

[42] I have already found that the 1998 mortgage is a forgery. What then is meant by 'fraud by or on behalf of the person obtaining registration'? Assistance is gained from the speech of Lord Lindley in *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210 where his Lordship said: "Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value … must be brought home to the person whose registered title is impeached or to his agents. (My underlining).". That passage is cited with approval by the Privy Council in *Frazer v Walker* [1967] 1 AC 569 at 580 where the Board spoke of "actual fraud by the registered proprietor or his agent". A relevant example where a registered interest has been set aside for fraud of a solicitor or other agent imputed to the registered proprietor, is *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 where an employee of a bank wilfully refrained from further inquiry into a possible breach of trust for fear of learning the truth.

[43] In *Schultz v Corwall Properties* [1969] 2 NSWR 576 Street J (as he then was) at 582-3 said:

> "In this extract from their judgment their Lordships encompass two alternative situations. The first is one in which the fraud is actually committed by ('brought home to') the person whose title is impeached or his agent. And the second is one in which he or his agents have knowledge that a fraud has been committed whereby the

previous registered proprietor is being deprived of some or all of his interest,

Each of these two concepts is capable of begin applied in accordance with settled principles of law. The first, namely, fraud on the part of the person whose title is impeached or his agents, involves the application of the ordinary principles governing the responsibility of principal for the fraud of his agent. If the fraud in question is the immediate act of the person who title is impeached, then the position is not open to doubt. If, however, the fraud is that of an agent for the person whose title is impeached, the principle of respondent superior, with all its limitations and qualifications, is applicable. The matter is to be tested by investigating whether or not the principal is, in the particular circumstances under consideration, liable to the person who has been defrauded for their acts of the agent. On this topic one need not delve more deeply than the general statement in *Bowstead on Agency*, 13th ed., p.242:-

> 'An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest.
>
> This principle is general, applicable to cases of actual and apparent authority; in tort; in the disposition of property; a similar result even appears in criminal cases. But the mere fact that the principal, by appointing an agent, gives that agent the opportunity to steal or otherwise to behave fraudulently does not without more make him liable: the agent must normally be acting within the scope of his actual or apparent authority for the principal to be responsible.'"

[44] In my view Parker of Parker Simmonds was clearly acting within the scope of his actual and ostensible authority.

[45] What then amounts to fraud? In *Assets Co Ltd v Mere Roihi* (*supra*) Lord Lindley again said:

> "… by fraud … is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transaction having consequences in equity similar to those which flow from fraud." (at 210)

His Lordship continued:

> "… the fraud which must be provided in order to invalidate the title of a registered purchaser for value … must be brought home to the person whose registered title is impeached or to his agents. Fraud by

> persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents." (at 210)

[46] So it was said that it was not merely a matter of showing that the transferee might have been more vigilant and had failed to make further inquiries, for that would not in itself prove fraud. As Lord Lindley said "… but if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him.". (at 210)

[47] Finally, the important distinction between persons acting honestly and dishonestly was emphasised by his Lordship's description of the consequences of presenting a forgery of registration, as occurred in the present case. Again per Lord Lindley: "A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon." (at 210)

[48] In my view Parker failed to make further inquiry, when he should have, for fear of learning the truth. In the circumstances he could not have honestly believed that the mortgage was a genuine document which could be properly acted upon.

[49] It was clearly part of Parker's retainer that he was retained for the purpose of lodging the relevant mortgage for registration. At the time he lodged the document I find that he had no factual basis for believing that the document was genuine in circumstances where he had wilfully turned a blind eye to the lines of inquiry (set up by himself) which would have revealed the forgery, he having done so, as I have found, for fear of learning the truth. It is so unfortunate that a simple telephone call to Mr Hoger would have brought the whole scheme of Mrs Hoger and Denice tumbling down.

[50] A mortgage intended to be executed by joint tenants where the signature of one of the joint tenants is a forgery is wholly void and, providing forgery is established, ought to be wholly set aside, leaving the "mortgagee" to establish an equitable mortgage against the joint tenant whose signature is valid (or whose validity that joint tenant is estopped from denying). This course was adopted in *National Commercial Banking Corporation of Australia Ltd v Headley* (1984) NSWConvR 55-211. See also *Flourentzou v Commonwealth Bank of Australia* (1997) NSWConvR 55-281.

[51] It is not then necessary to deal with the first defendant's claim against the third party for compensation. Nor is it necessary to deal with whether, in such circumstances, the third party is entitled to an indemnity against the second defendant.

[52] The first defendant also made by way of counterclaim claims against the plaintiffs under the *Trade Practices Act* 1974 (Commonwealth) and also in respect of unconscionable conduct (the in *personam* claim*)*. It is not necessary in view of my findings in the main action to proceed to this. However, in order to mount a successful action based upon the *Trade Practices Act* it would be necessary to show (as the plaintiffs submitted):

(a) misleading or deceptive conduct by the plaintiffs;
(b) that the conduct occurred in trade or commerce;
(c) that the plaintiffs were more than just intermediaries of the information on the documents; and
(d) reliance upon the conduct.

I agree with the submission of counsel for the plaintiffs that if the *Trade Practices Act* provided some basis for relief in the present circumstances one would have thought that a claim under the *Trade Practices Act* would have been ventilated in *Russo v Bendigo Bank Limited* (1999) VSCA 108 (30 July 1999) unreported. It is my view, and without having to decide the matter, that the discretionary provisions of the *Trade Practices Act* should not be able to be used in order to circumvent the indefeasibility of title provided by the *Land Title Act*.

[53] The first defendant is entitled to repayment of the sum of $42,250 either as damages or as money had and received.

[54] In the event I order that:

(a) The plaintiff's action for recovery of possession of land be dismissed;
(b) The Registrar of titles be directed to remove the plaintiff's mortgage from the freehold land registrar and to cancel the mortgage;
(c) The plaintiff's pay the first defendant damages in the sum of $42,250.

[55] I shall hear submissions as to costs and to what, if any, consequential orders the plaintiff's may seek particularly with respect to the appointment of a trustee for sale of the farm property based upon their entitlement to an equitable mortgage with respect to the second defendant's interest as joint tenant.

[56] Finally, I should make some comment on the paperless system of registration set up by the *Land Title Act*. In this system original documents are destroyed once they have been recorded electronically. In this case it was necessary for expert evidence to be called from an expert in handwriting to give opinion evidence as to the genuineness or otherwise of some of the signatures involved on a number of documents. In relation to the crucial document, namely the 1998 mortgage, only a copy could be obtained. Although an expert was able to be come to a conclusion (with difficulty) in this case based upon the perusal of that document, it is plain that the best document for such purposes must always be the original. I do not understand why the originals of documents such as Memoranda of Transfer cannot be kept for some appropriate time. There will surely come a case one day where handwriting experts will not be able to determine, from a copy, the legitimacy or otherwise of a signature solely by viewing an electronic copy of an original document.

[57] In time the legislature will rue the day it introduced this paperless scheme and look back in wonder and ask why it was so mad.