SUPREME COURT OF QUEENSLAND

CITATION:	*Unic v Quartermain Holdings P/L* [2001] QSC 403
PARTIES:	**UNIC S.A. RCS GRASSE B 958 806 408 – SIRET 958 806 408 00034 APE 295 E** (applicant) **v** **QUARTERMAIN HOLDINGS PTY LTD** (respondent)
FILE NO:	S 7244/01
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	31 October 2001
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2001
JUDGE:	Wilson J
ORDER:	**The application is dismissed**
CATCHWORDS:	CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – MORTGAGES, CHARGES AND ENCUMBRANCES – where applicant creditor alleged that debtor mortgaged properties to respondent to defeat creditors – where applicant alleged that respondent company was controlled by debtor – whether there was fraud by the registered proprietor - whether court could grant relief setting aside mortgage in favour of respondent pursuant to s 187 *Land Title Act* 1994 (Qld) where the applicant was not deprived of an interest in the land *Land Title Act* 1994 (Qld), s 117(b), s 126, s 184, s 187. *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210, applied. *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, applied. *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 at 255, applied. *Breskvar v Wall* (1971) 126 CLR 376 at 385, referred to. *Briginshaw v Briginshaw* (1938) 60 CLR 336, applied. *Bond v McClay* [1903] St R Qd 1, applied. *Butler v Fairclough* (1917) 23 CLR 78 at 90, 97, referred to.

Friedman v Barrett [1962] Qd R 498, applied.
In re Shears & Adler (1891) 7 VLR 316 at 320, applied.
Latec Investments Limited v Hotel Terrigal Pty Ltd (in liq) (1964-65) 113 CLR 265, considered.
Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd [1998] 1 VR 188 at 192-195, referred to.
Young v Hoger [2001] QCA 453, 23 October 2001, Appeal No 175 of 2001, referred to.

COUNSEL: Mr R J Oliver for the applicant
No appearance for the respondent

SOLICITORS: McInnes Wilson Lawyers for the applicant
No appearance for the respondent

[1] **WILSON J:** This is an application -

> "that pursuant to section 187 of the *Land Title Act* 1994 the Court make a declaration that the Quartermain Holding Limited Mortgage no 703199838 be removed from the Certificate of Title of Lot 633 on CP SL 813284 and Lot 23 on RP 205092."

[2] The respondent is a company incorporated in the Bahamas. The application and the first of the supporting affidavits were served on it at its registered office in Nassau, the Bahamas, on 31 August 2001. The registered office is that of a firm of counsel and attorneys, Callenders & Co. That firm communicated with Brisbane solicitors (O'Shea Corser & Wadley), who appeared when the application was mentioned before the Court on 24 September 2001. However, the Brisbane solicitors received no further communications from Callenders & Co and no instructions from the respondent, and Atkinson J gave them leave to withdraw on 28 September 2001. Thus the application was heard without any appearance by the respondent.

[3] The registered owner of both lots is Penelope Jayne Connor ("Mrs Connor"). The properties consist of a house property at Raby Bay (lot 633) and some vacant land at Slacks Creek (lot 23). The respondent's mortgage over both parcels, which was registered on 2 March 1999, is a third mortgage, the first and second registered mortgages being held by the State Bank of New South Wales Pty Ltd. There are also enforcement warrants registered against the properties in favour of Drakos and Castrisos (registered on 22 February 1999 in the case of lot 633 and on 3 March 1999 in the case of lot 23) and the applicant (registered on 17 September 1999 in respect of Lot 23 and 23 February 2001 in respect of Lot 633), but these ceased to bind the lands six months after they were lodged[1]. Further, on 3 February 2000 Wood Parsons Pty Limited lodged a caveat against dealings with lot 23, claiming an estate in fee simple pursuant to an agreement dated 18 November 1999 between Mrs Connor as registered proprietor and it as purchaser. Presumably that caveat has lapsed, for want of court proceedings to establish the interest claimed[2]. The

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1 *Land Title Act* s 117(b)
2 *Land Title Act* s 126

applicant lodged a caveat against dealing with both parcels on 12 October 2000; presumably that caveat has lapsed, too. On 23 August 2001, the applicant lodged another writ of execution against both parcels.

[4] In 1997 the applicant commenced a proceeding in this Court against Mrs Connor claiming 1,212,425.93 French Francs for goods sold and delivered to her in the first half of 1994. Ultimately the matter was tried by Atkinson J in October 2000, and on 22 December 2000 Her Honour ordered Mrs Connor to pay the applicant the amount claimed. The judgment debt has not been paid. (As at 6 February 2001, it was equivalent to AUD $464,894-83.)

[5] Counsel for the applicant submitted that the mortgage from Mrs Connor to the respondent was a fraudulent transaction to defeat her creditors, and that pursuant to s 187 of the *Land Title Act* the Court should direct the Registrar of Titles to "cancel the mortgage".

[6] In evidence before Atkinson J, Mrs Connor denied having any interest in the respondent. (Transcript of trial page 109.) Counsel for the applicant asked me to infer from the evidence adduced in support of the present application that she so controls the respondent that they "are in loose terms, one and the same entity". (Transcript page 7.) He adduced evidence of a series of transactions in January and February 1999, culminating in the mortgage, which he submitted led to this conclusion. I shall return to these shortly.

[7] I consider that I should not be influenced by the adverse findings of credit against Mrs Connor and her husband made by Atkinson J, since they were findings on the evidence presented to Her Honour in relation to the (quite different) issues which were before her. The respondent was not a party to that proceeding. I cannot transpose Her Honour's findings to the present case and use them against the respondent.

[8] Mrs Connor and her sister Suzanne Mary Lynn were beneficiaries of the Lynn Trust, which had been established by their grandfather, who died in August 1996. There was litigation arising out of his estate in New South Wales and in the Bahamas. It was settled, and in about November 1998 Mrs Connor and her two children left Australia for the Bahamas, and Mr Connor followed shortly after. According to an affidavit of their former solicitor, David Ritchie Alexander, this was to avoid tax liabilities. Mrs Connor, Mr Connor and her sister entered into a deed with the trustee (MacGregor Morgan & Company Limited) and others dated 10 December 1998. It provided (inter alia) that the trustee transfer two-thirds of the shares in two companies, Wood Parsons Pty Limited and Ingleburn Holdings Pty Ltd, to Mrs Connor and the other one-third to her sister, or in each case to her nominee. The shares intended for Mrs Connor were subsequently transferred to the respondent as her nominee.

[9] On 15 January 1999 Mrs Connor's former solicitor, David Ritchie Alexander, obtained an injunction restraining her from transferring, selling, charging or mortgaging any of her assets in Queensland. He claimed to be owed more than $0.5

million for professional fees and disbursements. The injunction was dissolved on 3 February 1999.

[10] The respondent was incorporated on 29 January 1999. It has not been possible to obtain any information about it by search in the Bahamas. On the day of its incorporation, it gave a joint and several power of attorney to Mr Connor, Robert John Herd (a Brisbane solicitor) and William Haddock (a Brisbane accountant). Mrs Connor also gave a joint and several power of attorney to those three men on that day.

[11] By a loan agreement dated 17 February 1999 the respondent agreed to lend Mrs Connor US $500,000 by way of an interest only loan payable on demand. It was to be secured by a guarantee and a mortgage debenture from Couch Pty Ltd (a Queensland company in which Mr Connor and later Wood Parsons Pty Limited held the only issued share) and a registered mortgage over Mrs Connor's interest in the Raby Bay and Slacks Creek properties. Mr Herd signed the mortgage debenture as attorney for Mr Connor, the mortgagor company's authorised officer. On 1 March 1999 Mr Herd executed the mortgage as attorney for Mrs Connor. He signed the document a second time - as solicitor for the mortgagee (the respondent). It was lodged for registration the next day.

[12] On 18 February 1999 two-thirds of the shares in Wood Parsons Pty Limited were transferred to the respondent as nominee for Mrs Connor. The next day Messrs Herd and Haddock were appointed as directors of Wood Parsons Pty Limited. Similar dealings took place in relation to Ingleburn Holdings Pty Ltd.

[13] Wood Parsons Pty Limited went into liquidation in January 2001. Ingleburn Holdings Pty Ltd has lodged a proof of debt in the sum of $1,351,574-00.

[14] Wood Parsons Pty Limited was the majority shareholder in another company, Guide Rails Pty Ltd. It purported to sell its shares to two offshore companies in August 2000. It went into liquidation in November 2000. There may be a surplus of approximately $2m available to shareholders, but for a loan to Wood Parsons Pty Limited of approximately $1m.

[15] The circumstances surrounding the registration of the mortgage in favour of the respondent arouse suspicion that there may have been a pre-existing relationship between Mrs Connor and the respondent, and that it may have been their mutual intention to put the property beyond the reach of her creditors, including the applicant, who had brought the proceedings in this Court against her for the recovery of a large sum. On the other hand, there remains the possibility that the respondent was an arm's length financier, who just happened to be incorporated in the Bahamas. Although the applicable standard of proof is the civil standard, the seriousness of a charge of fraud must be borne in mind and the evidence must be scrutinised very carefully[3].

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3 *Briginshaw v Briginshaw* (1938) 60 CLR 336

[16] In supplementary submissions, counsel for the applicant focussed on the conduct of the solicitor Mr Herd, who, it was submitted, "failed to make adequate enquiries in circumstances where he could not honestly believe the mortgage transaction to be genuine or at arms [sic] length". Certainly "fraud" within the meaning of the *Land Title Act* includes fraud by an agent, and it can include wilful blindness, an abstention from inquiry for fear of learning the truth, and possibly reckless indifference in other respects, although in any case it must amount to actual dishonesty.[4]

[17] Although I would be disinclined to infer from the material before me that Mrs Connor and the respondent set out to defeat her creditors, it is not necessary for me to come to a final conclusion on the facts because I consider that, as a matter of law, the applicant is not entitled to the relief sought in the application.

[18] "Fraud" is not defined for the purpose of s 187, or indeed anywhere in the *Land Title Act*. Section 187 is within Subdivision B of Division 2 of Part 9 of the Act. That subdivision is headed "Indefeasibility" and s 187 is headed "Orders by Supreme Court about fraud and competing interests".

[19] Section 184 subsection (1) provides for the indefeasibility of title which is at the heart of the Torrens system. Then subsection (3) provides for exceptions to that principle, including fraud by the registered proprietor. They are in these terms -

> "**Quality of registered interests**
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> **184. (1)** A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.
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> **(2)**.....
>
> **(3)** However, subsections (1) and (2) do not apply -
>
> (a) .....
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> (b) if 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."

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4 *Young v Hoger* [2001] QCA 453; *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210; *Butler v Fairclough* (1917) 23 CLR 78 at 90, 97; *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 at 192 -195

[20] Section 187 provides –

> **"Orders by Supreme Court about fraud and competing interest**
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> **187.(1)** If there has been fraud by the registered proprietor or section 185(1)(c) to (g) (Exceptions to s 184) 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 –
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> (a) to cancel or correct the indefeasible title or other particulars in the freehold land registry; or
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> (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."

[21] "Fraud by the registered proprietor" should bear the same meaning in s 187 as it does in s 184. "Fraud" in s 184 means actual dishonesty or moral turpitude[5], which can be brought home to the registered proprietor whose title is under attack - in the present case the respondent, which is a registered mortgagee.

[22] In *Bank of South Australia Limited v Ferguson*[6] the High Court said of cognate South Australian legislation:-

> "Not all species of fraud which attract equitable remedies will amount to fraud in the statutory sense. .....
>
> The points of significance for the present litigation are that (i) statutory fraud embraces less, not more, than the species of fraud which, at general law, founds the rescission of a conveyance; and (ii) statutory fraud is not itself generative of legal rights and obligations, its role being to qualify the operation of the doctrine of indefeasibility upon what would have been the rights and remedies of the complainant if the land in question were held under unregistered title."

[23] In *Ferguson* a mortgagor sought to have a registered mortgage set aside on the basis of fraud by the mortgagee. A bank manager employed by the mortgagee had forged the mortgagor's signature on a "statement of position" form used in connection with

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5 *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210; *Friedman v Barrett* [1962] Qd R 498; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604

6 (1998) 192 CLR 248 at 255

a loan application. The form and certain cash flow documents were forwarded to a more senior bank officer for consideration. Subsequently a new manager was appointed who was unaware of the forgery. The new manager made some pencil notes on the cash flow documents and resubmitted them to superior officers supported by a valuation higher than that provided by the registered proprietor. The loan was approved and the registered proprietor (who was unaware of the forgery, the pencil notes or the valuation) executed a mortgage. The High Court held that the fraud constituted by the forgery of the mortgagor's signature on the statement of position was not operative because it did not operate on the mind of the person said to have been defrauded (the mortgagor) and induce detrimental action by him.

[24] The fraud alleged in the present case is fraud to defeat Mrs Connor's creditors. Her creditors (other than the prior registered mortgagees) had no interest in the land. The applicant has caused a writ of execution to be registered, but that has not given the applicant any interest in the land. While its registration remains current (see s 117), the writ "binds" the land in the sense that Mrs Connor (the registered proprietor of the fee simple and the judgment debtor) cannot deal with her interest to the prejudice of the applicant (the execution creditor), but her interest is not otherwise altered or divested[7].

[25] The Torrens system has been described as a system of "title by registration".[8] Fraud affords an exception to the conclusiveness of the register. It is not surprising, therefore, that counsel was unable to cite any cases of fraud (in the sense it is used in Torrens legislation) which did not have the effect of depriving someone else of an interest in the land. He cited *Latec Investments Limited v Hotel Terrigal Pty Limited (in liquidation)*[9], where it was held that fraud is not limited to fraudulent misrepresentation, but may extend to other forms of dishonesty including dishonest collusion between parties to a transaction to defeat the rights of a third party. But that was also a case of fraud depriving someone of an interest in land - the fraud of a mortgagee which colluded with a subsidiary which purchased the land, so depriving the mortgagor of its interest. Counsel for the applicant described the effect of the fraud in the present case as cheating the applicant by depleting the value of the assets against which it could prima facie enforce its judgment. In my view that is not sufficient for it to amount to fraud in the statutory sense.

[26] In *Ferguson* the High Court said[10]:-

> "With respect to the findings of fraud in relation to Ex D3, [the statement of position] Matheson J [in the South Australian Full Court] correctly observed that, for fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person."

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7 *Re: Shears and Alder* (1891) 7 VLR 316 at 320; *Bond v McClay* [1903] St R Qd 1.
8 *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ.
9 (1964-65) 113 CLR 265.
10 At page 258.

Counsel for the applicant submitted that that passage from the High Court's judgment in *Ferguson* is not applicable to all cases of fraud. He gave as an example one of two mortgagors forging the signature of the other mortgagor on the mortgage and thereby obtaining an advance from the mortgagee. That would amount to fraud against the second mortgagor even though it did not operate on his mind or induce detrimental action by him. The essential point is that there must be a causal link between the fraud and the defrauded party's loss of an interest in the land. That link is missing in the present case.

[27] Section 187 gives the Court certain powers in the event that fraud, in the sense I have been discussing, is established. It does not expand the concept of fraud or the persons who may seek redress in consequence of it. Accordingly, the relief sought in the application should be refused.

[28] Counsel for the applicant included in his submissions a draft order, which provided for two further forms of relief, viz –

(a) a declaration that the respondent hold all of the shares in its name in Wood Parsons Pty Ltd and Ingleburn Pty Ltd on trust for and on behalf of Penelope Jayne Connor the judgment debtor in Supreme Court No 2381 of 1997; and

(b) an order that the respondent, by itself, its servants and agents and everyone of them, be restrained, and an injunction be granted restraining it from selling or otherwise disposing of any of its assets or undertaking or removing such assets from Australia until further order.

[29] The respondent had no notice that such relief would be sought, and I am not prepared to make either order on the present application. I am not satisfied that there is sufficient urgency surrounding the application for an injunction, which seems to be based on speculation, to entertain it at this stage.

Order

1. The application is dismissed.