

SUPREME COURT OF QUEENSLAND

CITATION: *Cantrick & Ors v Thompson & Anor* [2004] QSC 341
State of Queensland v Thompson [2004] QSC 341

PARTIES: **GAVIN EARLE CANTRICK**
(applicant/defendant/defendant)
CHERYL ANNE CANTRICK
(applicant/defendant/defendant)
DONALD RALPH BAILLIE
(applicant/defendant/defendant)
JOAN VIOLET BAILLIE
(applicant/defendant/defendant)
v
HELEN THOMPSON
(first respondent/defendant/plaintiff)
MAX LOCKE, REGISTRAR OF TITLES
(second respondent/plaintiff/defendant)

STATE OF QUEENSLAND
(plaintiff)
v
HELEN THOMPSON
(defendant)

FILE NO/S: SC No 1953 of 2002
SC No 5363 of 2002

DIVISION: Trial Division

PROCEEDING: Application
Civil Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 September 2004

DELIVERED AT: Cairns

HEARING DATE: 16, 17, 18, 19, 20, 23, 24 and 25 August 2004

JUDGE: Mackenzie J

ORDER: **Orders in 1953 of 2002**
On the applicants' application:
1. That Caveat No 704978266 lodged by the first respondent be removed pursuant to s 127 of the *Land Title Act 1994*.
2. That Caveat No 705140141 lodged by the second respondent be removed pursuant to s 127 of the *Land Title Act 1994*.
3. That the first respondent deliver up to the applicants

possession of the house and land situated at 23 Edinburgh Road, Benowa in the State of Queensland described as Lot 15 on RP 854402 in the County of Ward, Parish of Nerang contained in Title Reference 18531007.

4. That the first respondent pay the applicants' and the second respondent's costs of and incidental to the application to be assessed.

On the first respondent's counterclaim:

5. That the first respondent's counterclaim be dismissed, with costs to be assessed.

On the second respondent's counterclaim:

6. That the second respondent be directed that, upon being satisfied as to the contents of a mortgage, the registered proprietors of which were Arthur William Sibley, Una May Sibley, Geoffrey William Grigg and Ellen Patricia Grigg, which was recorded under the reference 701701769 on 13 December 1996 and in respect of which release 7044263083 was fraudulently produced by or on behalf of a registered proprietor of the lot, Peter Jensen, and recorded on 16 November 2000, and upon being satisfied that the mortgagor Helen Thompson has not performed her obligations under the mortgage, he re-register the mortgage, with its priority to date from the time of re-registration.
7. That the first respondent pay the costs of the second respondent and the applicants to be assessed.

Orders in 5363 of 2002

1. It is declared that mortgage 701701769 between Helen Thompson as mortgagor and Arthur William Sibley, Una May Sibley, Geoffrey William Grigg and Ellen Patricia Grigg as mortgagees was signed by Helen Thompson and is a valid instrument.
2. It is declared that a mortgage 704386698 between Helen Thompson as mortgagor and Peter Jensen as mortgagee was signed by Helen Thompson and is a valid instrument.
3. The defendant pay the plaintiff's costs of and incidental to the claim to be assessed.

CATCHWORDS: CONVEYENCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE: CERTIFICATE AS EVIDENCE – EXCEPTIONS – FRAUD OR FORGERY – where applicants obtained indefeasible title – where applicants bona fide purchasers for value without notice – whether forgery or fraud involved in release of prior

mortgage

CONVEYENCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE: CERTIFICATE AS EVIDENCE – EXCEPTIONS – FRAUD OR FORGERY – whether respondent/defendant/plaintiff executed a mortgage – where pre-marriage name used in transaction – where details of parties show apparent arms length transaction – whether forgery or fraud involved in subsequent dealings

CONVEYENCING – LAND TITLES UNDER THE TORRENS SYSTEM – TRUSTS, EQUITIES AND UNREGISTERED INSTRUMENTS AND INTERESTS – POWERS AND DUTIES OF REGISTRAR – where declaration sought per s 15 *Land Title Act* – whether s 15 applied

CONVEYENCING – LAND TITLES UNDER THE TORRENS SYSTEM – TRUSTS, EQUITIES AND UNREGISTERED INSTRUMENTS AND INTERESTS – POWERS AND DUTIES OF REGISTRAR – where direction sought per s 26 *Land Title Act* that Registrar entitled to register third party mortgage

CONVEYENCING – LAND TITLES UNDER THE TORRENS SYSTEM – TRUSTS, EQUITIES AND UNREGISTERED INSTRUMENTS AND INTERESTS – POWERS AND DUTIES OF REGISTRAR – whether s 187 ought to be exercised – where exercise of discretion – where competing claims

CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – INSTRUMENTS GENERALLY – EFFECT OF REGISTRATION – OPERATION AS A DEED – whether lack of consideration relevant

CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – TRANSFERS – CONSTRUCTION, COVENANTS AND EFFECT OF TRANSFER – where respondent/defendant/plaintiff relied on absence of written notice of transfer – where notice under s 199 *Property Law Act* not necessary – whether registration perfected title and rights

Evidence Act (Qld) 1977: s 59, s 92, s 98

Land Title Act (Qld) 1994: s 15, s 62, s 126, s 127, s 176, s 180, s 185, s 187

Property Law Act (Qld) 1974: s 199

Field v Commissioner for Railways (NSW) (1957) 99 CLR

285, applied
R v Devenish [1969] VR 737, cited
Grayden v The Queen [1989] WAR 208, cited
Lockheed-Arabia Corp v Owen [1993] QB 806, cited
R v Mazzone (1985) 43 SASR 330, cited
Rush & Tomkins Ltd v Greater London Council [1988] 3
 WLR 939, applied
Re Sampson and the Fugitive Offenders' Act (1966) 66 SR
 (NSW) 501, cited
Tessman v Costello [1987] 1 Qd R 283, cited
Trade Practices Commission v Arnotts Ltd (1989) 88 ALR
 69, applied

COUNSEL: G J Radcliff for the applicants
 D Laws for the first respondent
 B J Clarke for the second respondent

B J Clarke for the plaintiff
 D Laws for the defendant

SOLICITORS: Davies-Graham & Associates for the applicants
 Worcester & Co for the first respondent
 Crown Law for the second respondent

Crown Law for the plaintiff
 Worcester & Co for the defendant

[1] **MACKENZIE J:**

The Actions

- [2] These are two actions arising out of a series of events, which were heard together because of the convenience in doing so. The first (No 1953 of 2002) is by applicants who, for monetary consideration, obtained transfers of an interest in a mortgage over real property which, on the face of it, was given by Ms Thompson in favour of Peter Jensen, a solicitor currently serving a sentence for numerous offences of dishonesty. The application seeks delivery of possession of the property and removal of caveats by the registered proprietor and the Registrar of Titles. The second (No 5363 of 2002) is by the State of Queensland against the registered proprietor of the property, seeking declarations that each of the mortgages involved in the matter and her signature on them are valid. There are counterclaims by Ms Thompson and the Registrar, of which more will be said later.
- [3] The account that follows in paras [6] to [9] is a description of how the course of events would appear to someone reading the relevant documents and the Land Title Register alone, without knowledge of the claims made in the proceedings. It should also be recorded, to avoid confusion, that Ms Thompson is and was at all material times married to one John Cornwell. It is common ground that in all other respects than the transactions involved in these proceedings, she adopted the surname "Cornwell". However, I will use the name "Thompson" to refer to her, to conform to the name used in the actions.

- [4] The Cantricks originally advanced money to Jensen in early 1996. According to the mortgage with which these proceedings are concerned, it was in substitution of other securities. It was registered on 14 March 2001. The Baillies entered into their transaction on about 9 May 2001 with registration occurring on 9 July 2001. It was conceded, at trial, that both took their assignments as bona fide purchasers for value without notice.
- [5] The respondents to their action are the registered proprietor Ms Thompson and the Registrar of Titles, both of whom are caveators. Ms Thompson caveated on the basis that Mr Jensen fraudulently executed a mortgage in his favour without her knowledge or consent. The Registrar of Titles' caveat is based on information received by him that a prior mortgage in favour of persons named Sibley and Grigg had been fraudulently released.
- [6] Relevant events concerning the real property commenced with its transfer to Mr Cornwell on 9 January 1995. A standard REIQ contract dated 21 September 1995, showing Mr Cornwell as vendor and giving his business address as his address, and Ms Thompson as purchaser and giving their residential address as her address, was entered into. It showed a purchase price of \$330,000, zero deposit, and 17 October 1996 as the date for completion. It also showed that the contract was subject to finance in the sum of \$330,000 and that Peter Jensen was to be the lender. On 16 October 1996, Mr Cornwell executed a transfer of the property to Ms Thompson. On the same day Ms Thompson executed a mortgage in favour of the Sibleys and the Griggs.
- [7] Then a series of transactions occurred on 10 December 1996. The original transfer, to Mr Cornwell, was registered, the transfer from Mr Cornwell to Ms Thompson was registered and the mortgage by Ms Thompson in favour of the Sibleys and the Griggs was registered.
- [8] On 20 October 2000 Ms Thompson gave a mortgage in favour of Mr Jensen which was registered the same day. On 15 November 2000 a release of the mortgage by Ms Thomson in favour of the Sibleys and the Griggs was executed, and registered the following day.
- [9] On 23 February 2001 Mr Jensen transferred to the Cantricks a 152/210th interest in the mortgage given in his favour by Ms Thompson. That transfer was registered on 14 March 2001. On 9 May 2001 Jensen transferred a 29/105th interest in the mortgage given in his favour by Ms Thompson to the Baillies. This transfer was registered on 9 July 2001.
- [10] The factual complications arise in one respect from an allegation on the part of Ms Thompson that she did not execute the mortgage in favour of Mr Jensen and that her signature was forged. Her caveat is based on registration of a fraudulent mortgage which, it is alleged, has the consequence that the mortgage purporting to be in favour of Mr Jensen was defeasible, did not bind her and was unenforceable against her, and that the applicants are not entitled to possession. There is also an allegation that the earlier mortgage in favour of the Sibleys and the Griggs was not executed by her and is a forgery.
- [11] The State of Queensland, on the other hand, contends that both mortgages were signed by her and are valid instruments. This claim mirrors the Registrar of Titles' counterclaim in the first action where he admitted the applicants' allegations

concerning the transactions reflected in the documents registered by him in his defence but revealed that he proposed to seek an order which had the effect of allowing priority to be given to the applicants' registered interest under the Jensen mortgage. The Cantricks and the Baillies, not being concerned about the validity or otherwise of the mortgage to the Sibleys and the Griggs because of the Registrar's disclosed intention to seek orders to that effect, replied that their interests were not affected if the mortgage in favour of the Sibleys and the Griggs was reregistered subject to their prior registered interest.

- [12] The framework of Ms Thompson's counterclaim for declarations and orders in 1953 of 2002 was that she was unaware of Mr Jensen's fraudulent activities and that the Sibley/Grigg and Jensen mortgages were fraudulent. She had not received the consideration recited in them. With regard to the Sibley/Grigg mortgage, any rights that the Sibleys and the Griggs had were extinguished upon registration of the applicants' interests and they therefore had no right to be restored to the register or to caveat. With respect to the Jensen mortgage, she had no notice of any kind of the applicants' interest in it. The mortgage was a sham and the applicants' derivative interests under it should be removed from the register. The applicants held no contractual security enforceable against her. Accordingly she held an unencumbered estate in fee simple over the property.

The Course of the Trial

- [13] The trial was beset with difficulties which the legal representatives of the parties should not have allowed to develop, especially since the case was a supervised case. Complaints about, for example, the difficulty in pleading by way of defence in the absence of a statement of claim (since the proceedings 1953 of 2002 were commenced by application) and the lack of particularity should have been addressed by legal representatives during the management phase of the case which extended over quite a lengthy period. At trial there was a request for particularisation of some allegations which would ordinarily have been expected to have been given, especially if a request had been made. Counsel for the applicants in 1953 of 2002 was not counsel during the management phase and only became involved within a short time of trial. It was suggested that his request for the particulars, for the first time, and, perhaps, where there was a belief that particulars were not being sought, had contributed to the problem. However, provision of particulars, given the stage preparation should have reached, should not have been difficult.
- [14] A direction that handwriting experts confer was not complied with. It was said that this had occurred because the expert who gave a report on Ms Thompson's behalf had been ill for an extended period. His report was dated 13 March 2002. However, nothing was done to remedy the default or, more importantly, avoid the potential problem if he became unavailable to give evidence. That turned out to be the case. There was a belated attempt to find another expert to give an opinion as to the genuineness of critical signatures on relevant documents, which is the very antithesis of the intent of the rules. In the end the original expert's report was admitted under s 92 of the *Evidence Act*, largely because I had expressed the view that, given the fact that the signatures were on electronic copies of documents in the office of the Registrar of Titles, the evidence, given in the form of qualified opinions, was unlikely to be decisive. (The expert called by Mr Clarke, who gave oral evidence, contended that the relevant signatures were genuine; the other expert, who did not, contended to the contrary.)

- [15] It also seemed to be the case that evidence of some potential importance, especially in Ms Thompson's cases, had not been obtained in a timely way, with the result that in more than one instance, the issue of disclosure only arose during the course of the trial and an opening in appropriate detail could not be made. Some issues that emerged in evidence in support of her case, including important parts of evidence concerning Mr Jensen, were not put to opposing witnesses, depriving them of the chance to give an alternative version. Particulars given in a chronology about Mr Jensen supplying or procuring finance were abandoned while the trial was under way. A number of allegations made in Ms Thompson's pleadings, particularly relating to the effect of particular statutory provisions, were abandoned at the trial on the basis that they were not likely to be sustainable.
- [16] Those complications are illustrative rather than exhaustive, as the transcript shows. In the end the common consensus was that as, by the time some of the difficulties arose, considerable expense had been expended on the trial, an attempt ought to be made to proceed in the face of the complications.

Jensen's Evidence

- [17] Mr Jensen gave evidence that Ms Thompson signed the Sibley and Grigg mortgage which was a genuine transaction based on an advance of money. He admitted that he had forged the release of that mortgage. He said that subsequently Ms Thompson executed the mortgage in his favour.
- [18] The background to this, he said, was that (as his statement to the police records) he had had a lengthy business association with Mr Cornwell and had advanced to him, and, to a lesser extent, Ms Thompson, a considerable sum of money which he estimated at about \$500,000, over a period of years. The money included a large proportion of the purchase price of the real property which is the subject of these proceedings. He said that he had delayed registering the transfer from the developer to Mr Cornwell to hide the fact that Mr Cornwell owned it from creditors. Eventually, because of pressure from the developer, who was still receiving rates and land tax notices in respect of the land, it became necessary to regularise the position. The transfer to Ms Thompson occurred for those reasons.
- [19] By the time of the Jensen mortgage, Mr Jensen's fraudulent activities had reached a point where he needed an injection of funds to continue. He said he discussed the position with Mr Cornwell and it was agreed that the mortgage to Mr Jensen would be executed. Mr Jensen did not suggest that Ms Thompson was involved directly in that discussion. She was told that the mortgage was for the purpose of refinancing and replacing the existing mortgage. She agreed to execute the mortgage on that basis. After that, he said, he "hawked it around trying to find people to buy it" and that the applicants were "the people who ended up with it".

Similar Fact Evidence

- [20] As the pleadings show (paragraph 13(d)(ii) of the further amended defence and counterclaim of Ms Thompson) there was an allegation that it was to be inferred that the Sibley/Grigg mortgage involved forgery of Ms Thompson's signature by or with the knowledge of Mr Jensen because of Mr Jensen's dishonest procurement of advances from various other persons by means of forged documents. As the transcript shows, a request for particulars, in the interest of confining the issues, proved difficult to satisfy. In any event Mr Jensen admitted a number of fraudulent

transactions concerning the same property in response to questioning by Mr Clarke. There was ample other evidence of Mr Jensen's extensive fraudulent conduct. The eventual focus on the relationship between Mr Jensen and Mr Cornwell meant that the issue of the effect of Mr Jensen's fraudulent disposition on the conclusion to be drawn about the genuineness or otherwise of transactions involving Mr Jensen, Mr Cornwell and Ms Thompson became somewhat peripheral. This was especially so in view of the approach taken to assessing their evidence, which is discussed later.

Mrs Pope's Evidence

- [21] Mr Jensen's legal secretary, Mrs Pope, who worked for him until about 6 months before his frauds were discovered, gave evidence that she was present when Ms Thompson executed the mortgage in favour of Mr Jensen. She could not specifically recall the time of day but remembered that she was not accompanied by Mr Cornwell. Ms Thompson was well known to her since she had seen her on a number of previous occasions in connection with legal transactions. (Ms Thompson said that there was a limited number of legal transactions, but accepted she would have been at the premises on other occasions.) She denied that the mortgagor's signature had been applied out of her presence and that she had signed as a witness notwithstanding that the signatory was not present. She admitted that she signed as witness to Mr Cornwell's signature on a limited number of occasions when he was not in her presence but she had reason to believe that he was the person who had executed the document at another location.

Ms Thompson's Evidence

- [22] Ms Thompson impressed me as an intelligent woman who was by no means overwhelmed by the experience of giving evidence. She gave evidence that she had finished high school and gone to university briefly but had left to join the workforce in New Zealand. She worked in an insurance underwriting business in the medical insurance field. Her evidence contained elements of non-inquisitive acquiescence in what she was asked to do in regard to the admitted transfer from her husband to her, a denial of any knowledge of the state of her husband's finances and a determined, and at times, in the atmosphere of the trial, an almost combative maintenance of her position that she had not signed any relevant documents except the transfer from her husband to her.
- [23] In the early part of her evidence, despite the state of the pleadings, she denied even that, giving an explanation, after the weekend had elapsed during the course of her evidence, that she had panicked when she saw a reference to \$330,000 consideration endorsed on the contract and had denied that it was her document. Her explanation why she panicked is as follows:
- “On Friday when I was looking at this document, the \$330,000 figure on it stood out to me as a mortgage and in a moment of panic I actually thought that I was looking at a transfer of the mortgage. On reflection I know that this is the transfer that I signed and I would like to correct myself on that, if I may.”
- [24] In addition, although the transfer to her was in her pre-marriage name, she did not ask why. She accepted, she said, advice from Mr Jensen that putting the family home in her name was a means of protecting it against the failure of her husband's business enterprises. That notion may not be unusual in itself, but this particular

transaction occurred without any question by her as to why, for this transaction alone, her pre-marriage name was to be used. Despite the shifting of ground in her evidence with regard to the transfer, her final position was that she accepted that the transfer was the one she had signed, although she did not clearly concede that the reference to \$330,000 consideration was in it at the time.

- [25] There was also some ambivalence in the evidence as to when Ms Thompson was told about the proposal to transfer the property to her. In her evidence-in-chief she was asked a question whether she had been told at Mr Jensen's office about it. It may be accepted that this did not exclude the possibility that she had been told the day before when, she said, Mr Jensen had come to her home and told her, in her husband's presence, of the proposal. The subject was canvassed again in cross-examination. The following passage illustrates my concern about the nature of the evidence:

"I asked you some questions about that. When Mr Laws was examining you, he took you back to this and said, "I take you back to this Mr Jensen's office. Were you – was anything said to you on the subject of money being owed on 23 Edinburgh Road before you signed the transfer?" You said, "No, not at all."?-- But the day before he visited my home and explained the reasoning for the transfer and yet there were no moneys owing on the property. That was the day before I went to his office to sign the transfer.

I see. So, you're saying now that nothing was said to you on the morning in Mr Jensen's office, something had been said to you the previous day at your home?-- Yes, because it had been explained the previous day and all I did on the following day was sign the transfer.

You're quite sure about that now?-- Yes.

Because Mr Laws then asked you this question, "Do you recall what was said to you immediately prior to signing the transfer at the offices of Mr Jensen?" Your answer was, "It was only a transfer of ownership. There were no moneys owing on the property when I signed."?-- That's true.

But you have just said he didn't say that to you immediately prior to signing the transfer in his office. You said he said that to you a previous day at your home?-- He did.

Which is the right story, Mrs Cornwell?-- Well, he told me the previous day at my home of the reasoning for the transfer and that there were no moneys owing. The day I signed the transfer in the office, he probably said something to that effect again, but I can't remember for sure.

So, you are withdrawing the statement that you made to me a couple of minutes ago that he didn't say that on the morning in his office immediately before signing the transfer?-- All I can remember is signing the transfer and there were no moneys owing. Whether it was on the day before or the same day, I know that he said that to

me, so I'm sorry if it was the day before or the day after and I can't remember.

If you couldn't remember, why were you so categorical in answering Mr Laws' questions?-- Well, I don't know that I was.

The record speaks for itself?-- I am telling you my knowledge.

You are tailoring your evidence, aren't you, Mrs Cornwell today?-- No, that's totally incorrect."

- [26] One other unusual circumstance that emerged for the first time in her evidence was a claim that her signature on the contract of sale from her husband to her was not genuine, notwithstanding that the document had been disclosed, without any suggestion of such a claim, by her legal advisors. The contract, the transfer from Mr Cornwell to her and the Sibley/Grigg mortgage were all stamped on 5 December 1996. The contract and the mortgage were stamped at the concessional rate for the principal place of residence of the transferee and mortgagee. It was agreed fact that this concession would only be granted if the contract and the mortgage were accompanied by a declaration, signed personally by the transferee and the mortgagee, that the property was her principal place of residence. The consequence of this is that either Ms Thompson signed each of the declarations or both were forgeries. Since the original documents were only retained by the Office of State Revenue for 5 years they could not be produced.

Impossibility to sign Jensen Mortgage?

- [27] On 20 October 2000 Ms Thompson worked as a part time teachers' aide at Benowa State Primary School. She usually arrived at about 8.30am. Her official hours of duty were 9.00am to 11.30am. Attendance sheet records show that she was at work for those hours that day. However she was accustomed to doing unpaid voluntary work until about 3.00pm, as many of the part time teachers' aides did, in the hope of gaining a permanent position. On Fridays, work for the following week was prepared. Ms Thompson gave evidence, supported by a photograph of a birthday cake and a birth extract for her son, that she went shopping after finishing that day until about 5.00pm primarily to prepare for her son's birthday the next day. She said that it was impossible for her to have been at Mr Jensen's office to sign the mortgage to him since she had been at school and shopping for the whole day. She accepted in cross examination that there was no obligation to stay after 11.30am and that she did not necessarily remain in the company of other staff during the optional period.
- [28] Ms Thompson said that on 20 October 2000 she was working with Ms Rennix in the morning. Ms Rennix, who was called to give evidence, had no specific recollection of the relevant day and no particular recollection of Ms Thompson being there. She spoke of the practice of part time teachers' aides volunteering time to the school in the hope of getting a permanent position but agreed that attendance was voluntary after 11.30am.
- [29] Ms King, another teachers' aide, did not work directly with Ms Thompson at the relevant time. She had no knowledge of what Ms Thompson did on 20 October 2000. She too said that she volunteered a lot of hours after finishing her standard

hours. On the basis of all of this evidence it was not impossible or even improbable that, had Ms Thompson wished to visit Jensen's office on that day, there would have been opportunity to do so.

The Handwriting Evidence

- [30] This has been previously touched upon in paragraph [13]. Mr Clarke drew my attention to the controversy whether s 59 of the *Evidence Act 1977* and its equivalents require the original disputed document to be produced or whether a copy may be used for comparison purposes if s 59 is relied on (see, eg, *Re Sampson and the Fugitive Offenders' Act* (1966) 66 SR (NSW) 501 at 513, 517; *Grayden v The Queen* [1989] WAR 208 at 211-213 on the one hand; *R v Devenish* [1969] VR 737 at 740; *Grayden v The Queen* at 217-218; *R v Mazzone* (1985) 43 SASR 330; *Lockheed-Arabia Corp v Owen* [1993] QB 806, on the other.).
- [31] It is not necessary to enter into that controversy in this case. All parties were agreeable to the evidence of the experts being admitted. Each expert, as the discussion below shows, believed that it was within their field of expertise to express an opinion as to the genuineness or otherwise of the disputed signatures. In any event, the *Evidence Act* does not generally purport to be a code with regard to evidentiary matters. (Mazzone at 339) Finally for the reasons given below, the weight of the evidence was not decisive.
- [32] Mr Heath whose report was tendered by Mr Clarke examined a copy of the Sibley/Grigg mortgage and the Thompson to Jensen mortgage, both of which were purportedly signed by Ms Thompson as mortgagee. The originals of both documents had been scanned into the Registrar of Titles' records. The evidence was that original documents are destroyed after being imaged. The fact that only copies were available led Mr Heath to qualify his opinion. Some of the problems inherent in examining copies were elaborated on in evidence.
- [33] In cross-examination he was taken through particular features of the disputed signatures but was not persuaded to vary his opinion which, as expressed in the written report, was that there was strong support for the proposition that the writer of the signatures on the disputed mortgages was the person who wrote the specimens, and strong positive evidence to conclude that the questioned signatures and the specimens were written by the same writer. Mr Heath's demonstration charts were also tendered.
- [34] Mr Marheine, who was too ill to give evidence, reported in writing that he had examined digital images of the same two mortgages and the Cornwell to Thompson transfer. He considered the documents to be of sufficient quality in their reproduction and detail to enable proper examinations of the signatures to be conducted, save for the colour and type of the writing instrument used or determination of the pressure of writing. He also examined other undisputed signatures of Ms Thompson. He concluded that the disputed signatures, whilst bearing some pictorial and structural likeness to the specimen signatures, exhibited "an internal consistency in handwriting characteristics, inconsistent with those exhibited in the specimens". He also said that the disputed signatures exhibited characteristics or hallmarks of forgery by simulation, such as poor line quality, retouching and pen lifts in unusual places, superior fluency, and fundamental differences in letter design elements "to name a few". He concluded that the

disputed signatures on the two mortgages were forged signatures produced by simulated methods, in that a model genuine signature had been used in the simulation process.

- [35] Mr Marheine did not prepare a demonstration chart. His report did not purport to be one which explained in detail his method and the full basis of his opinions. Unfortunately, the fact that the conference between experts which should have been held according to a directions order was not held, means that issues between the experts were never focused in a useful way. Because of this, and the essentially qualified nature of Mr Heath's opinion, because only electronic copies of the Titles Office documents are available, I have come to the conclusion that I cannot derive any decisive advantage to one side or the other from the handwriting evidence.

Admissibility Issues

- [36] Exhibits 7 to 11 were admitted provisionally, in recognition of a claim of legal professional privilege made by Mr Laws. As I understood the basis upon which it was alleged that the documents were probative, it is that Ms Thompson and her husband were prepared to negotiate settlement and were actively seeking finance to pay out the mortgagee. This, as I understood the argument, was relied on as what might be described as "consciousness of liability" with an inference to be drawn that the defence relied on was false. When this kind of inference is sought to be drawn it must be recognised that people negotiate for all sorts of reasons, ranging from an attempt to avoid the full consequences of inevitable loss to making a commercial decision that resolves a case where victory is almost certainly assured in any event, but the victory may be pyrrhic if the matter goes to trial. Essentially the applicant's explanation of the attempts to get finance was that they were made for the purpose of refinancing to avoid the consequence of losing the home, even though critical documents had been forged.
- [37] In a case where it is alleged that admissions have been made but they have been made in circumstances truly concerned with the negotiation of settlement of a dispute, they will ordinarily be privileged. (*Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285; *Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 69; *Rush & Tomkins Ltd v Greater London Council* [1988] 3 WLR 939) Having regard to the nature and contents of the documents, I do not consider that any of them would be subject to legal professional privilege. However, I am not persuaded that any of them should be treated as containing unequivocal admissions either directly or by drawing a "consciousness of liability" inference.
- [38] The only exhibit upon which I wish to specifically comment is Exhibit 7 which is correspondence from Ms Thompson's former solicitor to the Supervised Case List Manager. Essentially, it was sent as part of the management of the trial and maintains the allegations of fraud with respect to the Sibley/Grigg mortgage and the Jensen mortgage but advises that a proposal for payment of the only registered mortgage interest has been made by the applicant. The document is essentially a factual statement of the issues and the present situation as was required for the purposes of management of the supervised case.
- [39] The supervised case regime depends on frank provision of information. It would therefore be of some concern if the parties to a supervised case became apprehensive that information given by them to the Supervised Case List Manager

about the status of the case and, in particular, that negotiations were being conducted with a view to settlement, might be used as evidence of an admission of liability. The concern would be that the court might be asked to draw such an inference from the mere conducting of negotiations or from some aspect of information given as to the nature of the negotiations which was effectively inconsistent with the defence. I was not asked to consider whether there was any basis for exclusion. Every case would depend on its own circumstances, but in such a case the question might genuinely arise under s 98 of the *Evidence Act* as to whether the evidence ought to be excluded.

Mr Cornwell's Evidence

- [40] The evidence of Mr Cornwell, the husband of the applicant, presented a number of problems with regard to the important issues of credibility and weight. He expressly denied a number of crucial elements of the opposing cases, including the signature of critical documents and participation in some of the transactions central to the case.
- [41] He gave evidence that he had worked as a mortgage broker in conjunction with the mortgage lending aspect of Mr Jensen's practice. He said that he also engaged in a limited number of brokering transactions for other lenders. He claimed that during the relevant period for the purposes of the transaction upon which this action focuses, the brokerage business was lucrative. The word "claimed" is used because there are no records available to support that evidence. According to Mr Cornwell all of his records passed into the possession of a credit organisation in 1998 when he ceased to occupy premises adjacent to Mr Jensen's. Although this trial has been imminent for a considerable time he had taken no steps to try to locate them.
- [42] For reasons that were never explained plausibly by him, instead of personally dealing with the monies he was owed for brokerage, the monies were left under the control of Mr Jensen. According to Mr Cornwell he was paid \$750 per week from which he paid his assistant and gave \$400 to his wife for household expenses. Sometimes he got additional money to pay outgoings and other expenses. He also gave evidence that he received \$750 per week for providing security services for Mr Jensen. In the absence of evidence to the contrary, this is taken to be additional to the other \$750. He said that Mr Jensen had installed a closed circuit television in his reception area and the monitor was actually in Mr Cornwell's office. The traffic through the day was recorded and the tapes catalogued. He also said that if Mr Jensen left the office, on most occasions he would be asked to go with him. He said that the money was a wage equivalent to that Mr Jensen said he paid to an employed solicitor. Mr Jensen denied any such arrangement actually existed, although he conceded that he had signed a document saying it did for the purpose of facilitating Mr Cornwell's application for a weapons licence. He denied any payments were made.
- [43] Mr Cornwell gave evidence that all of those transactions were recorded in a red ledger which Mr Jensen kept and showed him from time to time. Sometimes, payments of monies to him or on his account were debited by Mr Jensen against the amount standing to Mr Cornwell's credit in the ledger in Mr Cornwell's presence. On other occasions, when it was inconvenient to do so, Mr Cornwell signed a business card as a record of the transaction. However he cast doubt in his evidence

on the genuineness of the cards found in Mr Jensen's possession because of the way they were signed, without actually denying that they were genuine.

- [44] On 5 April 1994 Mr Cornwell had entered into a deed of arrangement under Part 10 of the *Bankruptcy Act*, declaring assets of \$500 and liabilities of about \$192,000. \$10,000 was to be advanced as consideration, according to the Deed of Arrangement, by one of Mr Cornwell's companies, Columbus Max Corporation Pty Ltd. It was an integral part of his case that by means of his business activities and other remuneration he had accumulated a balance of \$60,000 in the period June/July to October/November 1994 in Mr Jensen's register. He said that at that time Mr Jensen told him he had enough for a deposit on a house. The contract was entered into and a deposit paid by drawing from money held by Mr Jensen for him.
- [45] Mr Clarke worked through Mr Cornwell's assets and liabilities with a view to demonstrating what level of earnings would have been necessary for Mr Cornwell to achieve what he said he had accumulated from the time of the Part 10 Deed until October 1996. Mr Cornwell's evidence was that by about October 1994 his net balance in the ledger (after taking into account the weekly and other amounts paid to him by Jensen) was \$60,000. He could not recall the amount of the deposit but it was either 5% or 10% of the purchase price of \$275,000. He said there were extra costs for a pool, a fence and an entrance, blinds and some electrical goods, amounting to about \$30,000.
- [46] He said that in January 1995 he had obtained a loan from an investor, Mr Remmele, for \$40,000. In April 1995, Mr Remmele advanced another \$50,000. Both of these sums, and interest, were repaid during the relevant period.
- [47] Mr Cornwell said he gave a mortgage dated 25 January 1995 over the relevant property in the sum of \$215,000 to Petsai Investments Pty Ltd, Ostasia Property Sales Pty Ltd and Colin and Betty Clifford. He said that this was repaid before the transfer of the property to his wife. Over the 21 months of its life it incurred interest of about \$49,000. (On his evidence, during this period there would have been debited, against sums due to him, living and other expenses of about \$70,000. On the other side of the balance, income from the security services he said he provided would have been of a similar amount). Mr Cornwell also gave evidence that Mr Jensen showed in September 1996 that he had a credit balance of \$240,000 in the ledger.
- [48] Mr Clarke's proposition was that to discharge the Remmele and Petsai loans \$367,000 was needed. Mr Cornwell said that times were good and the money had come from his broking business and his security services. (This was contradicted by Mr Jensen whose assessment was that Mr Cornwell's business did not prosper). However notwithstanding the claimed success, judgment for about \$27,000 was given against him on 31 July 1995 in favour of the National Australia Bank. The judgment, he believed, remained unpaid until at least 1997 or 1998 when, according to Mr Cornwell, he had instructed Mr Jensen to settle for a lesser sum. He also agreed that he had, during the relevant period, incurred a liability for \$30,000 under a guarantee he gave for a friend who defaulted on a loan. That sum was not paid either.
- [49] Nevertheless, he maintained that he had not had financial problems in the relevant period. There was also evidence that a motor vehicle was repossessed because

payments were not made, although the evidence is not clear whether that occurred in the relevant period or later.

- [50] Mr Radcliff also took Mr Cornwell through expenditures he had made over the 21 month period which implied that he had generated income in excess of \$500,000 in it. When pressed about the number of transactions from which he earned brokerage he responded vaguely, on the basis that he had not given a lot of thought to the question until he was asked about it in the witness box.
- [51] The debt to the National Australia Bank also had a curious consequence that is not adequately accounted for, except in the obvious way, that Mr Cornwell played a part in it. A bankruptcy notice was issued in August 1998 in respect of it and, according to Mr Jensen, delivered to his office under cover of a letter from Carne & Herd, Solicitors. This accords with one of the requirements of an order for substituted service made by the Deputy District Registrar of the Federal Court on 20 November 1998. By reference to Mr Cornwell's passport, it was established that he had left Brisbane on 30 January 1999 and returned to Sydney on 5 February 1999. He said he had been to New Zealand, although he could not remember whether he arrived at Auckland or Wellington.
- [52] In evidence in chief he was questioned about a letter which, on its face, is a letter marked "copy" dated 1 February 1999 addressed to Carne & Herd apparently with an original signature of Mr Cornwell. The letter referred to a post office box in Wellington as a contact point. The letter contained almost entirely false information about the writer's financial and personal situation. It concluded:
"A copy of this letter will be sent to Jensens Solicitors. Hopefully, this is the last they will hear from either of us".
- [53] He admitted that the post office box was that of a friend of his but he maintained that the letter was not signed by him; he had never seen it before it was shown to him the day before he gave evidence. He said that he had nominated the post office box to Mr Jensen as one where he could send correspondence while he was in New Zealand.
- [54] In cross examination, Mr Clarke questioned him further about it and then produced another letter seized by the Queensland Law Society from Mr Jensen's office. On the face of it, it is a covering letter dated 1 February 1999 signed as an original by Mr Cornwell, addressed to Mr Jensen. It asserts that Mr Cornwell had returned to New Zealand, that he would be an infrequent visitor to Australia and that he was glad to hear that there had been no trouble in reletting the office space he had occupied. Also found in the seized documents is an apparently genuine stamped envelope, postmarked Wellington at 5pm on 1 February 1999. Mr Cornwell's response to the suggestion that he had signed the letters and sent them from New Zealand was a vehement denial. He denied having sent the original of the longer letter to Carne & Herd. Despite Mr Cornwell's firm assertion to the contrary, the crease marks on the two letters bear a striking correspondence and together they fit appropriately into the envelope. Indeed his refusal to admit the obvious in that regard, without any attempt at explanation of why he said the folding was different, is, in my view, indicative of a lie rather than a genuinely held difference of opinion.
- [55] In other respects his evidence was unsatisfactory. Given his description of various phases of his career as a financial planner, mortgage broker and real estate agent, it

would require a degree of obtuseness far beyond what was apparent in his presentation in the witness box to have the professed degree of naivety about the conduct of his affairs, in respect of preparing for this litigation and in the way his relationship with Jensen was conducted, and the professed absence of knowledge of basic aspects of stamp duty and conveyancing practices. There are examples in his evidence of an ability to detect minor and subtle imprecisions in questions and answer accordingly, which were consistent with mental agility not obtuseness.

Mr Remmele's Evidence

- [56] Mr Remmele is a retired businessman who kept bank statements which he annotated, at the time they arrived, with a description of the transaction to which individual entries related. A number were annotated "Cornwell". He also had kept a file relating to the relevant transaction but it had disappeared.
- [57] Mr Remmele said that he had responded in 1994 to an advertisement by Mr Jensen soliciting funds to be placed on first mortgage and subsequently made several investments through him. He had ultimately lost about \$250,000 in capital and interest as a result of Mr Jensen's activities. In January 1995 he advanced \$40,000 to Mr Jensen either to assist in building Mr Cornwell's house or to assist with the first mortgage. He believed from what Mr Jensen had told him that Mr Jensen had a mortgage over the property. He did not see such a mortgage. He said that Mr Jensen had signed a loan agreement with him. However, because his file had disappeared, he could not produce it.
- [58] In April 1995 Mr Remmele invested another \$50,000. His records showed regular payments of interest and repayments of \$10,000 and a sum consisting of \$30,000 and some interest in January and February 1996 in respect of the first sum lent. In May 1996 he received a sum equivalent to \$50,000 and interest in respect of the second sum lent. He believed that Mr Jensen had made the repayments credited to his bank account. There was no reason to have any doubts about the accuracy of Mr Remmele's evidence, insofar as it was based on his records. The only uncertainty lies in Mr Jensen's statement that he was unaware of these transactions with Mr Cornwell, and Mr Cornwell's evidence that he thought he may have approached Mr Remmele in the first instance about a loan.
- [59] The effect of the Remmele transactions was that the repayments of capital totalling \$90,000 were made in January, February and May 1996 and interest had been periodically paid in a sum amounting to about \$13,000. These payments were not in relation to a mortgage; the probability is that they were made in relation to some kind of a loan arrangement, and paid by Mr Jensen from funds available to him.

Assessment of Credibility – Mr Jensen

- [60] There is no doubt that because of his self confessed criminal activities Mr Jensen's evidence must be approached with considerable caution. It is stating the obvious to say that because accomplished fraudsters have a highly developed capacity to relate a convincing but false story, the need to avoid suspension of disbelief because the story is well told must be kept in mind. So must the fact that, just because a person confesses to instances of fraudulent conduct, he is not necessarily being truthful when he says that his conduct in other respects represents a true state of fact. I am not prepared to act on any assumption of the truth or reliability of Mr Jensen's evidence. I will only act on it where there is independent evidence supporting it or

where it is a reasonable inference from sufficiently proved circumstances that his evidence may be safely acted upon having regard to the civil onus of proof.

Assessment of Credibility – Mr Cornwell

- [61] Because of the multiple issues concerning the credibility and reliability of Mr Cornwell's evidence, it will be assessed on the same basis as Mr Jensen's.

Assessment of Credibility – Ms Thompson

- [62] Issues arising from her evidence have been discussed earlier. She was by no means an unintelligent person but it is possible, given my assessment of Mr Jensen and Mr Cornwell, that she was not made fully aware of all of the underlying and background circumstances of relevant events. It must be said, however, that she seemed to be disposed to distance herself from any concessions that may have suggested that there was any reference to money during the transaction in which, she eventually admitted, she signed the transfer in her pre-marriage name. Her preparedness to deny signing the document that was, on its face, a transfer from her husband to her because she mistakenly thought, as she said, it was a transfer of a mortgage supports this observation. For those reasons, her denials of involvement in executing the associated mortgage to the Sibleys and the Griggs require careful consideration. I am satisfied that she knew that the purpose of the exercise on the day in question was to protect the home from creditors in the event of failure of her husband's business.
- [63] Her initial balking at the notion that she had signed the transfer because it referred to \$330,000 consideration when she believed "the only transfer (she) signed was for (her) to own the property with no consideration" suggests, as one possibility, that she subscribed her name to it at the time of signing it without particular attention to its contents. If that were so, her denial of signing another document in the form of a mortgage, if it was presented to her on the day, is lessened in force. When that is taken into account with her concession that insurance was discussed, the requirements under Suncorp's practices with regard to insurance policies, and the absence of any complaint that mortgagees were shown in insurance documents addressed at a later time to her at her residential address, it suggests that she was not surprised by the reference to them. If that were the case, the probability that she signed the mortgage is substantially increased.

Conclusions

- [64] Because of the quality of the evidence of key witnesses, there is a need to be cautious about reaching a conclusion based on their evidence. Nevertheless in respect of some critical issues, there is evidence other than that of those witnesses.
- [65] With respect to the Jensen mortgage, it was plainly not impossible for Ms Thompson to have signed it on 20 October 2000 in the period from 11.30am to 3.00pm. The evidence of Mrs Pope supports the conclusion that she signed it. Her evidence, which she maintained without qualification, was that Ms Thompson had signed it in her presence. The fact that she was the witness to the signature was not attacked. What was explored was whether she witnessed the document when Ms Thompson was not in her presence with a view to leaving open the possibility that Ms Thompson's evidence that she did not sign may be true. There was no other

attack on her evidence. I am prepared to act on her evidence and find that the mortgage was executed by Ms Thompson, on the balance of probabilities.

- [66] I am satisfied that she executed the mortgage to Mr Jensen after being told that it was to replace the existing mortgage. That mortgage was the Sibley/Grigg mortgage, release of which was, according to Mr Jensen, forged by him. That evidence is supported by the fact that, even to an unpractised eye, inspection of the signatures purporting to be those of the Sibleys and the Griggs shows that they bear little resemblance to the signatures on the mortgage itself.
- [67] With respect to the fundamental issue of why the transaction with respect to the transfer of the home would be carried out in the way the documents apparently show, the underlying theme in Mr Jensen's evidence is that the relationship between him and Mr Cornwell was different from the relationship with other people who were attracted to his schemes. It was common ground that Mr Cornwell worked as a mortgage broker finding borrowers, in tandem with Mr Jensen who found investors. That is one point of distinction between Mr Cornwell and the others. The curious financial relationship which Mr Cornwell says existed between him and Mr Jensen differs from Mr Jensen's version of it. It was common ground between them that there was a practice of using business cards to evidence financial transactions between them although the detail was not identical. The major point of difference was whether a ledger existed as well. Mr Cornwell said it did; Mr Jensen denied it.
- [68] It is not essential in my view to resolve where the truth lies with regard to the ledger or whether the relationship was parasitic or symbiotic. The important fact is that there is evidence of an unorthodox kind of relationship between them. From Mr Cornwell's viewpoint, he allowed Mr Jensen to dole out to him a part of what were his own earnings and took money for security duties of an unusual kind. From Jensen's viewpoint, he paid monies which came into his possession (often illegally obtained, whether Mr Cornwell knew that or not) to Mr Cornwell for reasons he explained in a statement he gave to the police on 25 November 2002 which is in evidence.
- [69] Despite Mr Cornwell's evidence that his mortgage broking business was prosperous, the evidence of the debt to the National Australia Bank and the liability on the guarantee, which both remained unpaid, suggest otherwise. When the critical transactions are viewed in this setting, in my view certain inferences suggest themselves. Uniquely in the Cornwells' affairs, Mrs Cornwell's pre-marriage name of Thompson was used in the transaction. The contract shows Mr Cornwell's address as his business address and Ms Thompson's address as the family residence. In the broad sense, the understanding was that the transfer of the property to her was a strategy to protect it from Mr Cornwell's creditors in case his business failed.
- [70] In my view, the more reasonable inference, in all the circumstances, is that use of the different addresses for parties who were husband and wife and the use of a name she no longer used (which might suggest to a casual observer an arms' length transaction) were intended to minimise the risk that the divestment of the property from him to his wife would be immediately apparent to someone with an interest in ascertaining whether there was property to which recourse might be had to satisfy debts. It is also not an unreasonable inference that, if there was, in fact, financial stress, the possibility of raising money upon mortgage from investors may have

seemed attractive. On the balance of probabilities I am satisfied that the crucial transactions evidenced by the documents occurred and that the parties to them are those whom they purport to be.

Was notice of transfer of Jensen mortgage necessary?

- [71] Section 62(1) of the *Land Title Act* 1994 provides relevantly that on registration of an instrument of transfer for an interest in a lot, all rights powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee. Section 62(4) defines “rights”, in relation to a mortgage, as including the right to sue on the terms of the mortgage and to recover a debt or enforce liability under it. Where the rights of a mortgagee are concerned, s 62 appears to provide a self-contained method of transfer of the right to recover the debt and enforce liabilities under the mortgage against the mortgagor. It is complete upon transfer. On the face of it, the act of registration is sufficient to achieve transfer of the rights. *Tessman v Costello* [1987] 1 Qd R 283 provides a succinct summary of authoritative discussion of the relevant concepts.
- [72] Section 199 of the *Property Law Act* provides the requirements for an effectual assignment of a debt or other legal thing in action. Section 199 focuses on the principle that the assignment is effectual if express notice in writing is given to the debtor. It operates from the date of such notice. Ms Thompson relied on the absence of written notice of the transfer of Mr Jensen’s interest in the mortgage to the Cantricks and the Baillies.
- [73] In my view the specific provision, consistent with the philosophy of the Torrens System, in s 62(1) of the *Land Title Act* is the source of the rights of the transferees of the mortgage. Upon registration those rights were perfected. While there may be practical reasons which make it sensible for the mortgagee to be given notice rather than merely relying on the fact of registration, notice conforming to s 199 of the *Property Law Act* was not necessary.

No consideration

- [74] This issue becomes academic because of the finding of fact that the relevant mortgages were executed by Ms Thompson. However I will observe that, to the extent that the fact that no monies were actually received by her from the Sibleys and the Griggs or the Cantricks and the Baillies because Mr Jensen used it to keep the snowball he had created rolling or because, as he put it, the money went straight “into the black hole” was relied on, the principal difficulty is s 176 of the *Land Title Act*. It provides that a registered instrument operates as a deed. The consequence is that an obligation under it is enforceable even without consideration. (See s 180).

Rectification of the register

- [75] Section 15 of the *Land Title Act* gives the Registrar power to correct any register kept by him if satisfied that the register is incorrect and the correction will not prejudice the rights of the holder of an interest recorded in the register. In support of the relief on the counterclaim in 1953 of 2002, in the form of restoration of the Sibley/Grigg mortgage to the register, Mr Clarke pointed out that although the Cantricks and the Baillies were defendants to the Registrar’s counterclaim, there was no issue between them and the Registrar. They were content for the relief sought, which involved retaining their priority position as mortgagee. Restoration

of the Sibley/Grigg mortgage would not in those circumstances prejudice them since it would rank behind them in priority. The live issue was between Ms Thompson and the Registrar.

- [76] Because of the findings of fact, the framework within which this aspect of the matter must be resolved is that there was a valid mortgage executed and registered but released as the result of an instrument forged by Mr Jensen. The Cantricks' and the Baillies' interests were registered after the Sibley/Grigg mortgage had been released and acquired priority over it by registration at the time when the mortgage itself had ceased to have effect as a result of the release which had been registered. The Sibleys and the Griggs are not parties to either of the present proceedings. Nor have they begun any proceedings with a view to reinstating their interest on the register. As Mr Clarke pointed out, had the instrument evidencing the interest fraudulently released by Mr Jensen not been destroyed it would have been able to be registered again by re-lodging it. Until then, it would have remained an equitable mortgage. It was submitted by Mr Clarke that, firstly, destruction of the original of the document and creation of an electronic copy of it should not diminish the right of a person in whose favour the interest had been created. The electronic copy was a reliable source of secondary evidence of its terms.
- [77] The relief claimed in the counterclaim was a declaration that the correction proposed by the Registrar pursuant to s 15 of the *Land Title Act* would not prejudice the rights of the holder of any interest registered in the register. Further, a direction was sought, pursuant to s 26 of the *Land Title Act*, that the Registrar was entitled to register the Sibley/Grigg mortgage in accordance with s 15 of the *Land Title Act*. Section 26 permits the Registrar to apply to the Supreme Court for directions.
- [78] In Mr Clarke's submissions, he took the stance that, even assuming it was correct to say that, by reason of inclusion in the register of the forged release, the register is incorrect within the meaning of s 15(1)(a), it was nevertheless still not possible for the Registrar to correct the register under that section. Because of the operation of s 15(4), which provides that a correction under s 15 takes effect as if the "error" had not been made, the effect would be to give priority to the Sibley/Grigg mortgage in priority to the mortgages of the Cantricks and the Baillies. In my view, it is not a case to which s 15 applies.
- [79] Mr Clarke submitted that the power to rectify the register under s 187 ought to be exercised. Section 187(1) provides that if there has been fraud by the registered proprietor or s 185(1)(c) to (g) apply, the Supreme Court may make the order it considers just. The argument ran that Mr Jensen, while he was the registered proprietor of the Jensen mortgage, fraudulently released the Sibley/Grigg mortgage, with the consequence that the Jensen mortgage became the first ranking registered mortgage. It was submitted that Ms Thompson, as holder of the fee simple, ought not be permitted to take advantage of Mr Jensen's fraud against the Sibley/Grigg mortgage by reason of the forged release. It was submitted that, as a genuine mortgage, it ought to continue to bind the land and Ms Thompson, at least in equity.
- [80] These submissions raise issues of some complexity. A "registered proprietor" means a person recorded in the freehold land register as a proprietor of the lot. A "proprietor" of a lot is a person entitled to an interest the lot whether or not the person is in possession. An example appended to the definition shows that a mortgagee of a lot is a proprietor of the lot.

- [81] Mr Jensen became a registered proprietor of the lot by reason of registration, on 20 October 2000, of a mortgage given by Ms Thompson in his favour. According to the findings of fact, that is a genuine mortgage. While Mr Jensen was a registered proprietor, he executed a fraudulent release of the Sibley/Grigg mortgage, which mortgage had priority over his by reason of registration on 10 December 1996. The release was registered on 16 November 2000. The mortgage given to him by Ms Thompson was represented to her as a transaction to effect refinancing of the relevant lot. The fraudulent release was executed by Mr Jensen independently of any positive act of Ms Thompson. Any default on her part resulted from her acceptance of what she was told about the transactions and not attempting to understand their implications. When Mr Jensen used his mortgage from Ms Thompson to raise funds from the Cantricks and the Baillies, they took bona fide without notice after the Sibley/Grigg release. They received an indefeasible interest by virtue of registration of the transfers of the mortgage from Mr Jensen to them on 14 March 2001 and 9 July 2001 respectively.
- [82] The Registrar's stance of preserving the Cantricks' and the Baillies' priority, but reinstating the Sibley/Grigg mortgage to the register with priority behind the Cantrick/Baillie mortgage is intended to recognise the current indefeasibility of the Cantrick/Baillie interests and the effects of Mr Jensen's fraudulent release on the Sibleys and Griggs. Since there was fraud by Mr Jensen when he was a registered proprietor of a lot, the submission is that it is just to make orders achieving the outcome the Registrar seeks, even in the absence of an existing application by the Sibleys or the Griggs.
- [83] As in many situations where there are competing claims to the benefit of an exercise of discretion, the exercise is one of attempting to assess the relative merits of the competing claims. When that exercise is performed, the Sibleys and the Griggs are in a more meritorious position than Ms Thompson. I will therefore give a direction to the Registrar to facilitate his proposed course of action.
- [84] Having regard to the findings, the following orders are made:

Orders in 1953 of 2002

On the applicants' application:

1. That Caveat No 704978266 lodged by the first respondent be removed pursuant to s 127 of the *Land Title Act 1994*.
2. That Caveat No 705140141 lodged by the second respondent be removed pursuant to s 127 of the *Land Title Act 1994*.
3. That the first respondent deliver up to the applicants possession of the house and land situated at 23 Edinburgh Road, Benowa in the State of Queensland described as Lot 15 on RP 854402 in the County of Ward, Parish of Nerang contained in Title Reference 18531007.
4. That the first respondent pay the applicants' and the second respondent's costs of and incidental to the application to be assessed.

On the first respondent's counterclaim:

5. That the first respondent's counterclaim be dismissed, with costs to be assessed.

On the second respondent's counterclaim:

6. That the second respondent be directed that, upon being satisfied as to the contents of a mortgage, the registered proprietors of which were Arthur William Sibley, Una May Sibley, Geoffrey William Grigg and Ellen Patricia Grigg, which was recorded under the reference 701701769 on 13 December 1996 and in respect of which release 7044263083 was fraudulently produced by or on behalf of a registered proprietor of the lot, Peter Jensen, and recorded on 16 November 2000, and upon being satisfied that the mortgagor Helen Thompson has not performed her obligations under the mortgage, he re-register the mortgage, with its priority to date from the time of re-registration.
7. That the first respondent pay the costs of the second respondent and the applicants to be assessed.

Orders in 5363 of 2002

1. It is declared that mortgage 701701769 between Helen Thompson as mortgagor and Arthur William Sibley, Una May Sibley, Geoffrey William Grigg and Ellen Patricia Grigg as mortgagees was signed by Helen Thompson and is a valid instrument.
2. It is declared that a mortgage 704386698 between Helen Thompson as mortgagor and Peter Jensen as mortgagee was signed by Helen Thompson and is a valid instrument.
3. The defendant pay the plaintiff's costs of and incidental to the claim to be assessed.