SUPREME COURT OF QUEENSLAND

CITATION:	*J Wright Enterprises Pty Ltd (In Liquidation) v Port Ballidu Pty Ltd* [2010] QSC 213
PARTIES:	**J WRIGHT ENTERPRISES PTY LTD (IN LIQUIDATION) ACN 116 328 170** Plaintiff **v** **PORT BALLIDU PTY LTD ACN 010 820 185** Defendant
FILE NO/S:	BS 11916 of 2007
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16, 17, 18, 19, 20 November 2009 and 23 March 2010
JUDGE:	White J
ORDER:	
CATCHWORDS:	COMPANIES – DIRECTORS – POWER OF ATTORNEY – AUTHORITY – Whether actual authority to bind company – Whether implied actual authority to bind company – 'Indoor management rule' – s 126 to 129 of the *Corporations Act* 2001 (Cth) – Whether ostensible authority to bind company EXECUTION UNDER POWER OF ATTORNEY – Whether execution in accordance with statutory requirements REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – Whether fraud exception to indefeasibility applies *Corporations Act* 2001 (Cth), s 9, s 129(1) and (2), s 126, s 127, s 128, s 129 *Land Title Act* 1994, s 132, s 134, s 184(3)(b) , s 182, s 184(i), s 187 *Powers of Attorney Act* 1988, s 69, s 99(2), s 163

Property Law Act 1974, s 46(3)

Australian Guarantee Corporation Ltd v De Jager [1984] VR 483, cited

Breskvar v Wall (1971) 126 CLR 376, cited

Chandra v Perpetual Trustees Victoria Limited (2007) 13 BPR 24,675, cited

Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72, cited

Davis v Williams [2003] NSWCA 371, considered

Elrowa Nominees Pty Ltd v Registrar of Titles [2003] QCA 165, cited

English, Scottish & Australian Bank Ltd v Phillips (1937) 57 CLR 302 at 308-9, cited

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, cited

Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146, cited

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451, cited

Parker v Mortgage Advance Securities Pty Ltd [2003] QCA 275, cited

Perpetual Trustees Victoria Ltd v Cipri [2008] NSWSC 1128, cited

Perpetual Trustees Victoria Ltd v Tsai (2004) 12 BPR 22,281, cited

Provident Capital Ltd v Printy [2008] NSWCA 131, cited

PT Ltd v Maradona Pty Ltd (1991) 25 NSWLR 643

Pyramid Building Society (In liq) v Scorpion Hotels Pty Ltd [1998] 1 VR 188, cited

Queensland Premier Mines Pty Ltd v French [2007] HCA 53, cited

Royal British Bank v Turquand (1856) 6 EL & BL 327; 18 ER 886, cited

Royalene Pty Ltd v Registrar of Titles [2008] QSC 64, cited

Russo v Bendigo Bank Limited [1999] 3 VR 376, considered

Small v Tomassetti (2001) 12 BPR 22,253, cited

Sweeney v Howard [2007] NSWSC 842, cited

Tobin v Broadbent (1947) 75 CLR 378, cited

Wright Enterprises Pty Ltd v Port Ballidu Pty Ltd [2008] QSC 78

Young v Hoger [2001] QCA 453, considered

COUNSEL: J Peden for the plaintiff

DJS Jackson QC and G Sheahan for the defendant

SOLICITORS: Frews Solicitors for the plaintiff

Mullins Lawyers for the defendant

[1] The plaintiff, a company now in liquidation, claims $539,448 for moneys due and owing plus interest under a loan and variation of loan agreement, allegedly with the defendant, and possession of land at 17 Manning Street, South Brisbane pursuant to a bill of mortgage registered no. 709818322. Alternatively to the claim for possession the plaintiff seeks a declaration that it is entitled to an interest in the land as equitable mortgagee or chargee, specific performance of an agreement to grant a registered mortgage over the land, and an order for the sale of the land.

[2] By its counterclaim the defendant seeks a declaration that it is not a party to, nor bound by the loan agreement, the bill of mortgage and the variation of loan agreement, and an order pursuant to s 187 of the *Land Titles Act* 1994 cancelling the registration of the mortgage and removing the current particulars. The defendant also seeks an order that the plaintiff refund to it $229,454 and interest being the amount of part of the repayment of the loan to the plaintiff brought about by the variation to the loan agreement.

Overview

[3] The defendant ("Port Ballidu") was incorporated on 6 June 1988. Mr Trevor O'Rourke and his wife, Mary O'Rourke, were original directors. Mr O'Rourke was involved in the travel industry, especially sports travel, and in property development, particularly at The Gap, a western suburb of Brisbane. His travel business was Global Sports Travel. Mr O'Rourke operated his businesses out of premises at 17 Manning Street, South Brisbane which Port Ballidu had purchased in February 1999, with the benefit of a loan secured against the land, and was the registered proprietor.

[4] Mr Paul Burns and his younger brother, Mr Rory Burns, both residents of the United Kingdom, operate a worldwide group of companies known as the Seatem Group of Companies[1] which were and are involved in the ticketing of sporting and other entertainment events. They were, for example, amongst the original promoters of the Rugby World Cup in 1987. Mr Paul Burns is the Chief Executive Officer of the Group and resides in London. Mr Rory Burns is the Chief Financial Officer of the Group and a director of each of the companies in the Group. He resides in Belfast.

[5] In August 2001, Seatem Australasia Pty Ltd acquired two of the three issued shares in Port Ballidu; the other was held by Mr O'Rourke. Mr Paul Burns and

[1] Exhibit 63. The Group operates in about 20 countries.

Mr Rory Burns were each appointed directors on 23 August 2001. Mr O'Rourke remained a director.[2] The other directors and shareholders, Mr Terrence Doyle and Mr Thomas Anthony Handy, ceased to be directors and have any interest in the company on 17 August 2001. The two businesses had earlier merged in 1999. Seatem Australasia moved its ticketing and travel business from Sydney to Brisbane, operating out of 17 Manning Street, although the Sydney travel business continued. Port Ballidu did not trade and merely rented its premises (which contained some other small non-related commercial tenancies) for the operation of the business, although it provided its land as security for loans for working capital for the Australian Seatem companies from time to time.

[6] Seatem Australasia Pty Ltd is the parent company in Australia[3] of three subsidiaries, Seatem Entertainment Services Pty Ltd which provides tickets to theatre, sport and concert events (operating out of 17 Manning Street), Seatem Travel Pty Ltd which offers travel packages, and Port Ballidu. Mr O'Rourke was a director of each of these Australian Seatem companies, in addition to Port Ballidu, as were Mr Paul Burns and Mr Rory Burns.

[7] The local companies in most of the countries in which the Seatem Group had a presence were left to operate the ticketing and travel businesses with a fair degree of independence but with regular visits by Mr Paul Burns and Mr Rory Burns. Mr Paul Burns came to Australia several times a year, usually accompanied by his brother. The day to day running of the Australian companies was left to Mr O'Rourke.

[8] The Australian Seatem Group companies changed financiers in respect of working capital secured against 17 Manning Street on several occasions between 2001 to 2006. This change seems to have been due to Mr O'Rourke's borrowing for his other businesses, especially for the development at The Gap.

[9] In July 2006, Mr O'Rourke urgently needed funds and sought to use 17 Manning Street as security. The content of communications about this between Mr Rory Burns and Mr O'Rourke is in contention. If the communication was as the plaintiff contends, Mr O Rourke was authorised to borrow against the security of the land. By 26 July 2006, Mr O'Rourke, through a finance broker, had obtained an agreement for an advance from the plaintiff. Frews Solicitors were engaged by Mr Jeff Wright of the plaintiff to prepare the documentation for a loan of $445,000 jointly to Port Ballidu and to Mr and Mrs O'Rourke.

[10] Frews raised concern about Mr O'Rourke's authority to bind Port Ballidu. A number of documents of alleged authority were produced by Mr O'Rourke but were unsatisfactory to Frews. Eventually, on 27 July 2006, Mr O'Rourke revealed the existence of an unregistered power of attorney from Port Ballidu to himself granted in 1997, prior to the Burns' involvement in the company. The solicitor at Frews then gave Mr O'Rourke a set of security documents to take away and execute as required with a witness and to receive independent legal advice prior to doing so. Neither Mr O'Rourke nor Port Ballidu were represented by lawyers on this

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[2] Until 21 January 2008. He was made bankrupt on 11 February 2008. Mr O'Rourke's share in Port Ballidu was acquired by a Seatem Group company, Galathea STS Limited, in September 2008. Mr John Goodwin is currently the third director of Port Ballidu.

[3] Seatem Group Holdings Limited, registered in the British Virgin Islands, is the ultimate parent company.

transaction. Mr Adrian Gundelach, a longstanding friend of Mr O'Rourke and an experienced practitioner in criminal law but not commercial or company law, witnessed Mr O'Rourke's signature and the independent advice documents. Mr O'Rourke did not execute the documents as attorney for Port Ballidu as required by s 46(3) of the *Property Law Act* 1974 and s 69 of the *Powers of Attorney Act* 1988 but merely in his own name. The mortgage did not contain the words near Mr O'Rourke's signature "by its duly constituted Attorney under Power of Attorney No. 709812208" which were inserted subsequently into the bill of mortgage by Frews' Nathaniel Grant after the power of attorney was registered by Frews on 1 August 2006.

[11] A few months later, Port Ballidu's and Seatem's financier, Westpac, requested those entities to refinance elsewhere. Mr O'Rourke arranged for Challenger Finance to do so with a first ranking bill of mortgage to be offered to Perpetual Trustee Company Limited, as trustee for Challenger, as agreed to by the plaintiff. These documents were executed by Mr O'Rourke for himself and Port Ballidu. The other directors were not informed of this refinancing. As a consequence of those arrangements, $229,454 was repaid from the refinancing to the plaintiff, leaving an amount of $259,350 owing to the plaintiff.

[12] Default was made in the repayment of the outstanding monies to the plaintiff. Notices were served on Port Ballidu in September and October 2007 demanding payment, asserting rights under the *Property Law Act*, and, finally, requiring vacant possession. By the end of 2007 Mr Paul Burns and Mr Rory Burns became aware of the state of affairs.

[13] The plaintiff went into administration and then liquidation. The liquidator seeks to recover the amount outstanding on the loan plus interest and possession of the land. It sought unsuccessfully to obtain summary judgment against Port Ballidu.[4] The plaintiff has maintained a caveat over 17 Manning Street.

[14] Evidence was given at the trial for the plaintiff, amongst others, by Mr Handy about the granting of the power of attorney to Mr O'Rourke in 1997, and by Ms Serrano (formerly of Frews) and Mr Grant about the loan documentation, but not by Mr Crowley of the finance broker Corke Financial Pty Ltd or by Mr Jeff Wright with whom the liquidator had had no contact for some years. Evidence was given in the defence case by Mr Paul Burns and Mr Rory Burns and Mr Gundelach but not Mr O'Rourke. Although inferences were asked to be drawn about the non-production of at least, Mr O'Rourke, the break-down of the relationship between Mr O'Rourke and his former business partners was such that I was not prepared to drawn any inference adverse to Port Ballidu.

[15] There were a number of skirmishes between counsel throughout the trial particularly about disclosure – particularly complaints by Mr Peden for the plaintiff. They were dealt with in the course of the trial and it is unnecessary to add anything further.

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[4] *Wright Enterprises Pty Ltd v Port Ballidu Pty Ltd* [2008] QSC 78.

The issues

[16] The important issues which arise for resolution concern:

- whether Mr O'Rourke held a valid power of attorney on behalf of Port Ballidu;
- whether the directors of Port Ballidu actually authorised Port Ballidu to enter into the security and loan agreement;
- whether Mr O'Rourke had implied actual authority to do so or ostensible authority;
- whether Port Ballidu acquiesced in the security and loan agreement by authorising the variation of the bill of mortgage and executing the variation of loan agreement in November 2006;
- the indefeasibility of the bill of mortgage, the fraud exception and whether the mortgage secured the loan (and variation) if the loan was not authorised.

The factual issues

[17] There is benefit and logic in considering events chronologically. To do so requires starting in 1997 with the granting of a general power of attorney by Port Ballidu to Mr O'Rourke.

(i) Power of Attorney in 1997

[18] The evidence of Mr Rory Burns is that, notwithstanding due diligence being carried out by Seatem's lawyers prior to the acquisition of Seatem's interest in Port Ballidu, the power of attorney to Mr O'Rourke was not drawn to their attention by those who conducted that due diligence nor, at any relevant time, by Mr O'Rourke. It is not challenged that the first Mr Paul Burns and Mr Rory Burns knew of the power of attorney was after the proceedings had commenced.

[19] Port Ballidu contends that the power of attorney granted to Mr O'Rourke was invalid because Mr Handy, who signed it on behalf of Port Ballidu, was not, at the time, a director. Counsel for Port Ballidu accepted that s 99(2) of the *Powers of Attorney Act* 1988 validates a transaction with an unknowing third party by an attorney purporting to use a power that is invalid. However, Port Ballidu relies specifically on the requirements of s 46(3) of the *Property Law Act* and s 69 of the *Powers of Attorney Act* to impugn the execution of the bill of mortgage, matters which will be discussed subsequently. This section will merely set out the evidence about the alleged granting of the power of attorney to Mr O'Rourke.

[20] There was some controversy about when Mr Handy became a director of Port Ballidu. On 1 October 1997, Mr Handy acquired Mrs O'Rourke's share in Port Ballidu[5] but the annual return and minutes show that transfer to be effective from 28 November 1997.[6] On the other hand, the Register of Director's Shareholdings shows Mr Handy's acquisition of Mrs O'Rourke's share as on

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5 Exhibit 23.
6 Exhibits 25 and 26.

1 October 1997.[7] That seems to have been the basis for an understanding by Mr Handy that he was a director when he executed the power of attorney on behalf of Port Ballidu.

[21] On 20 November 1997, a power of attorney in favour of Mr O'Rourke was granted by Port Ballidu, signed by Mr O'Rourke and Mr Handy as director of Port Ballidu. That grant was entered in the seal register[8] with the date 20 November 1997, initialled in the column for signatories not by Mr Handy but possibly the then company secretary and another unidentified set of initials. The Annual Return[9] of the company shows Mr Handy's appointment as 28 November 1997 (there is over-writing on the month changing October to November in numerals). The minutes of the meeting of members of Port Ballidu of 28 November 1997[10] record a resolution by the company appointing Thomas Anthony Handy and Terrence Patrick Andrew Doyle as directors of Port Ballidu effective from 28 November 1997. Mary O'Rourke's resignation as director was effective from 29 November 1997. Mr Handy's consent to act as director of Port Ballidu is dated 28 November 1997.[11]

[22] Mr Handy had no, or very little, independent recollection of these events. He now says that he would not have signed as director if he did not believe he was a director but it is plain from the contemporary documentary evidence that he was not and he must have known he was not a director, because a week after he signed the power of attorney for Port Ballidu, he signed his consent to act as a director. It is not useful to speculate about these matters except to observe that individuals are often surprisingly careless about executing documents, the capacity in which they do so and dating them accurately. Nonetheless, Article 54 of Port Ballidu's Articles of Association[12] provides for the assumed validity of anything done by any person acting as a director, notwithstanding some defect in the appointment.

[23] The contemporary documentary evidence supports the conclusion that when Mr O'Rourke was purportedly granted the power of attorney by Port Ballidu, Mr Handy was not a director but acted as a director in doing so. Port Ballidu's seal register has the document entered as a power of attorney recognised by the company on 20 November 1997. The conclusion must be that a power of attorney was granted to Mr O'Rourke in 1997, recognised by the company and never revoked.

(ii) The Seatem interest in Port Ballidu

[24] Seatem Travel Pty Ltd and Seatem Entertainment Services Pty Ltd had operated in Australia out of Sydney for many years prior to 2001 under the Keith Prowse name.[13] Mr O'Rourke's business of travel and ticketing sporting events and the Seatem ticketing and travel businesses were merged, as mentioned,[14] in 1999. The ticketing business came to Brisbane to operate out of 17 Manning Street, leaving the

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7 Exhibit 28.
8 Exhibit 24.
9 Exhibit 25.
10 Exhibit 26.
11 Exhibit 29.
12 Exhibit 1 Doc 1. See also *Corporations Act* s 9 and s 129(1) and (2).
13 The first theatre ticketing business in the United Kingdom commencing in the nineteenth century. The business operating out of 17 Manning Street was "Keith Prowse Sport and Entertainment Travel".
14 At paras [5] and [6].

Seatem travel business in Sydney.[15] Mr O'Rourke became a director of each Seatem company in Australia and Mr Paul Burns and Mr Rory Burns became directors of Port Ballidu, as well as continuing as directors of the Seatem companies.

(iii) The way the Seatem companies (including Port Ballidu) operated in Australia

[25] Mr Rory Burns' evidence was that there was a certain "interconnectedness" between the Seatem "countries" in as much as ticketing for an event in one country would be contracted by the local Seatem company and made available to other Seatem companies worldwide for sale. Events in Australia which were contracted in this way included, for example, the Melbourne Cup and the Australian Open Tennis Championships. Mr O'Rourke would negotiate contracts for tickets to events such as these which were within the local company's financial resources.

[26] Mr O'Rourke was responsible for the day to day conduct of the operation and office in Brisbane. The Sydney office had a manager. Mr O'Rourke had authority to sign cheques on all Seatem Australian company accounts. Mr Paul Burns visited at least twice yearly to see staff, to review progress, to meet with management and would arrange his visits to Australia to coincide with the renegotiations for ticketing rights to large events. Mr Rory Burns came a little more often, about three times a year.

[27] As Chief Executive Officer, Mr Paul Burns was in daily contact with his brother as Chief Financial Officer and spoke about once a week with Mr O'Rourke or communicated via email. No formal directors' meetings were held for Port Ballidu (nor, for that matter, with the other Australian Seatem companies) as its only function was to the rent premises at 17 Manning Street to the Seatem companies in Brisbane (and other unrelated tenants) and to provide its real estate as security for working capital for the Australian companies. Important decisions were conducted by telephone, not conference calls but rather by conveying information one on one. Sometimes important decisions were made in face to face meetings in Australia during either of the Mr Burns' visits. The role of Mr O'Rourke was not formally structured but evolved in discussions. He was, effectively, the managing director of the business in Australia.

[28] The defence contends that Mr O'Rourke's management of the day to day decisions of the ticketing and travel businesses plainly did not extend to borrowing against the asset of Port Ballidu and a consideration of the way in which loan facilities were executed demonstrates the involvement of at least another director.

(iv) Loan facilities

[29] Initially Port Ballidu's bankers were the National Australia Bank ("NAB") but, at the request of NAB in 2003, Port Ballidu arranged for the Bank of Queensland to be its financier. Mr Paul Burns met with the NAB representatives and Mr O'Rourke in Australia for that discussion.

[30] Mr Paul Burns and Mr O'Rourke negotiated with the Bank of Queensland for it to take over the banking relationship. To that end, Port Ballidu entered into a facility

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[15] It seems that ticketing and travel packages operated out of 17 Manning Street, see Agreement relating to Official Travel Agents, p2 (Exhibit 76).

with an $800,000 limit on the security of a mortgage over 17 Manning Street.[16] The facility, the mortgage and a fixed and floating charge over the undertakings of Port Ballidu were executed by Mr Paul Burns and Mr O'Rourke for Port Ballidu on 17 June 2003.[17]

[31] In 2005, the Bank of Queensland asked that the banking relationship end. Mr Paul Burns explained that he understood that this was because Mr O'Rourke's personal interests were complicated in the Seatem business arrangements.[18]

[32] Mr Paul Burns, from London, was involved in the process of moving the banking relationship to Westpac. He executed the business finance agreement, the mortgage over 17 Manning Street, a fixed and floating charge in respect of Port Ballidu and Seatem Entertainment Services Pty Ltd[19] and a guarantee by Seatem Australasia Pty Ltd in respect of money owed by Seatem Travel Pty Ltd.[20] The documents were faxed to Mr Burns in London. He executed them, faxed the documents back to Westpac and then posted the originals to the bank. The total amount was for $740,000 which included the continuation of the loan to Port Ballidu relating to the purchase of 17 Manning Street and $50,000 working capital for Seatem Travel Pty Ltd.[21] These documents were executed over several months in early 2005. Mr O'Rourke also executed them as director.

[33] Tickets had to be paid for when purchased from the event originator and the notations on bank documents indicate that cash flow was a problem for the Seatem companies in Australia at that time because people were not travelling due to terrorists attacks post 11 September 2001 in New York, wars in the Middle East and health scares, and working capital was thus needed. The notations are clear about the boundary between the travel/ticketing business and the private land development business of Mr O'Rourke.

[34] Mr O'Rourke committed to a loan of $2.5 million to himself, his wife and two of his own companies in December 2005 for the marketing, sale and distribution of tickets and travel and accommodation packages to the Rugby World Club in 2007. Although Seatem Travel Pty Ltd was appointed an official travel agent to the Rugby World Club in November 2005, the commitment was to almost €2,000,000 in tickets, well beyond the resources of the Australian Seatem companies according to Mr Rory Burns. He and Mr Paul Burns were unaware of this arrangement until much later.

[35] Mr Peden, for the plaintiff, submitted that despite knowing that two banks had wished to sever the banking relationship with Port Ballidu and the Seatem companies because of issues with Mr O'Rourke's personal businesses, Mr Paul Burns and Mr Rory Burns permitted Mr O'Rourke to continue as managing

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16 Exhibit 69.

17 Exhibits 68, 69 and 70.

18 This can be seen in the Bank of Queensland documents dated 12 May 2004, Exhibit 61. The loan submission for Port Ballidu to continue its facility (the loan to purchase 17 Manning Street in 1998) and for working capital of $50,000 for Seatem Travel Pty Limited noted a concern that no funds were to be made available "to prop up Payne Road subdivision" and included "there have, however, been a large number of XSS [excesses] since then [24 April 2003] for Seatem Travel hopefully not directed to a development?"

19 Exhibit 72 and 74.

20 Exhibit 75.

21 See Exhibits 71, 72 and 73.

director of the travel and ticketing businesses in Australia and should bear the consequences of doing so. Mr Jackson QC for Port Ballidu, on the other hand, submitted that this body of evidence served to demonstrate that on each occasion when Port Ballidu entered into a financing arrangement involving security over 17 Manning Street, Mr Paul Burns and Mr Rory Burns were made aware and were involved in the transaction. On each occasion the security documents were executed by two of the company directors in accordance with the company's constitution and the relevant legislation. It thus required, on Mr Peden's argument, for Mr Paul Burns and Mr Rory Burns to have anticipated dishonesty and a breach of his fiduciary obligations to Port Ballidu by Mr O'Rourke, if not complicity, at least extreme carelessness, by a lender.

(v) The July/August 2006 transactions

[36] That Mr O'Rourke was seeking funds in July 2006 is evidenced in an indicative letter of offer[22] to Mr and Mrs O'Rourke and Port Ballidu from Corke Financial Pty Ltd on behalf of its client, Flinders Property Investments Pty Ltd, for $445,000 for two months at four per cent interest per month, with default interest at six per cent per month with interest with security over the O'Rourke properties at The Gap and over 17 Manning Street. A general condition of the loan required a "copy of a resolution in accordance with the companies [sic] constitution that the loan and security is authorised". The letter of offer was signed on 19 July 2006 by "D O'Rourke" and Mrs O'Rourke and "D O'Rourke" for Port Ballidu. Alongside each of D O'Rourke's signatures is hand printed "As Power of Attorney". There is no evidence of any power of attorney held by "D O'Rourke" in respect of Port Ballidu. Damien O'Rourke was said to be Mr Trevor O'Rourke's brother. This offer was not proceeded with, but Mr Jeff Wright had possession of the letter and faxed it to Frews with other company searches on 27 July 2006.[23]

[37] On 26 July 2006, Mr Jeff Wright telephoned Frews and spoke to Caroline Serrano. Ms Serrano was unable to recall if this was her first dealing with Mr Wright. Her diary note has a file number on it so it probably was not. She could recall that this was not a "one-off" loan by Mr Wright's company. Her note states that Mr Wright wanted a loan of $400,000, to be secured against a commercial building at South Brisbane, to be documented. Mr Wright told Ms Serrano that "company directors are off shore".[24] The next line in Ms Serrano's diary records "worried about" but she was unable to recall to what that referred. In a further call by Mr Wright, after noting matters relating to valuation and security, Ms Serrano recorded "Worried about 1 director's authority to sign".[25]

[38] Ms Serrano telephoned Paul Crowley of Corke Financial Pty Ltd about title searches and mortgage priorities. Corke Financial, it may be inferred, was a finance broker approached by Mr O'Rourke to find a lender. Mr Wright faxed the company searches, which Ms Serrano was having difficulty accessing, to Frews on 27 July 2006 together with the letter of offer from Flinders Property Investments Pty Ltd.[26] The company searches sent by Mr Wright were for Port Ballidu,

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22 Exhibit 32.

23 Frews seems to have thought "D O'Rourke" was Trevor O'Rourke although the signatures are different.

24 Exhibit 2.

25 Exhibit 3.

26 See para [36] herein.

Seatem Australasia Pty Ltd and Menhadden Pty Ltd (Mr and Mrs O'Rourke's company) and a valuation for 17 Manning Street. Mr Wright was, therefore, aware that two of the three directors were off-shore.

[39] Mr Crowley telephoned Ms Serrano on 27 July and asked her, on behalf of Mr O'Rourke, after mentioning an investment in Singapore, to fax a letter to Singapore confirming that the mortgage documents were currently being prepared and that settlement was scheduled for "tomorrow subject to the client's satisfaction that requirements are met and documents signed".[27]

[40] Frews received $409,400 from the plaintiff on 27 July 2006 as "loan funds" "to Port Ballidu."[28] It is likely that by the Friday morning of 28 July 2006, Nathaniel Grant, a very junior solicitor,[29] took over the file from Ms Serrano to prepare the security documents. He said he had no independent recollection of any of these events.

[41] At 9.18am on 28 July, Mr Crowley on Corke Financial's letterhead faxed to Mr Grant, under cover of a letter, a purported authority to Mr O'Rourke to enter into the loan transaction on behalf of Port Ballidu. The letter stated:

> "Nathaniel,
>
> Enclosed is the resolution that Trevor O'Rourke can sign on behalf of the company.
>
> Would you please advise when the documents will be ready. We must settle this today."

The attached document was headed:

> "Copy of resolution passed at a duly convened meeting of the directors of Port Ballidu Pty Ltd."

The meeting was held on 24 December 2001 and those present were the three directors of Port Ballidu. The minutes recorded that:

> "It was resolved that:
>
> Port Ballidu Pty Ltd accept the Terms & Conditions set out in the Bill Facility letter of offer dated 21/12/01.
>
> We pledge the assets of Port Ballidu Pty Ltd."[30]

The minutes record the various security documents and conclude:

> "It was further resolved that all security documents are to be executed under the seal of the Company, and the director signing hereunder has the necessary power to sign on behalf of the [sic] in accordance with the Memorandum and Articles/Constitution of the Company."

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27 Exhibit 33.
28 Exhibit 1, Doc 8.
29 He said he had been a solicitor for less than a year – T/S 1-38.
30 Exhibit 10.

The minutes were signed by Mr O'Rourke as director. There was no reference to Mr O'Rourke holding a general power of attorney to bind Port Ballidu nor that the resolution that Mr O'Rourke could sign the security documents with the company seal extended to any other future transactions.

[42] Frews conducted an ASIC company search for Port Ballidu at 10.05am.

[43] In a composite diary note prepared by Mr Grant on Monday 31 July 2006 relating to the events on the previous Friday, Mr Grant recorded that he told Mr Crowley that the minutes of the company meeting which he had faxed were "not good enough as it was signed by Trevor only and it seemed to only refer to the loan mentioned in the minutes".[31] Mr Crowley's response was that the loan would not go through to which Mr Grant recorded his response as:

> "I said all we need is a flying minute or a power of attorney. He said there was no POA and the other directors were not contactable."

Mr Grant records that Mr Crowley telephoned:

> "… a bit later on and said that the other director had just sent through an e-mail authorising the loan. It had said it was for some $300,000."

[44] That email, which Mr Rory Burns denied sending in its terms, was sent to Mr Grant by Mr Crowley by email attachment at 12.19pm on Friday 28 July 2006.[32] It was purportedly sent from "Rory Burns" to "Trevor O'Rourke" with the subject "Temporary facility against the building". The email stated:

> "Dear Trevor,
>
> I refer to our conversations in respect of raising, for a maximum period of six weeks, a temporary facility of some $300,000 to pay an urgent Rugby World Cup liability.
>
> As I explained to you, I discussed this with Paul and he is firmly of the view that raising money against the building for the business is not a good plan in the absence of implementation of the changes to the business as discussed and agreed during our last visit. You and I have agreed to discuss the business plan on Monday.
>
> In our conversation, you emphasised your confidence in the progress of the sale of the RWC product and that any facility would be purely temporary and that you are prepared to put your interest on the table. Accordingly, I agree that the building may be accessed for a limited six week period, on the above conditions, to raise the money referred to and that any such facility will be repaid at the end of that period. Please keep me advised of the progress of the repayment and we will talk at the start of the next week in any event.
>
> Regards,
> Rory."[33]

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31 Exhibit 8.

32 Exhibit 12. The time on the "original" email was 6.20pm in Ireland the previous evening.

33 Exhibit 12.

Mr Grant's note records him as telling Mr Crowley that the email was too vague and that "we could not confirm that he had actually sent it".[34] Mr Crowley responded that he wanted to change the loan amount to $300,000 plus costs.

[45] At 12.50pm Mr Grant faxed a letter to Harding Richards Lawyers[35] stating that Frews understood that that firm acted for Port Ballidu Pty Ltd and Mr and Mrs O'Rourke. He referred to the indicative letter of offer for $445,000 and noted that there were three directors of Port Ballidu and that only Mr O'Rourke was capable of signing mortgage documents as the other two directors were currently overseas. He asked:

> "Can you please confirm whether Trevor O'Rourke has authority to sign on behalf of the company and provide evidence of such authority."

Mr Grant noted that the indicative letter of offer "seems to be signed as power of attorney for Port Ballidu" and asks again if Mr Trevor O'Rourke had a power of attorney for the company. This is apparently a reference to "D O'Rourke", mistakenly thought to be T O'Rourke, but since Mr Grant remembers nothing he could not sensibly be asked in cross-examination. There is no evidence that Harding Richards acted for Port Ballidu at the time and no response was received from the firm that was introduced into evidence. Mr Grant had no recollection independently of the document.

[46] Mr Grant recorded that Mr O'Rourke came into the office at lunchtime and was told that there was a problem as there was no authority giving him the power to sign the mortgage documents on behalf of the company.[36] He told Mr O'Rourke that what was needed was a power of attorney or a minute of meeting of the directors giving him that power. Mr O'Rourke responded that he had seen a power of attorney in the company folder. Mr Grant asked Mr O'Rourke to send it to him.

[47] The power of attorney was faxed to Mr Grant between 2.08 and 2.14pm.[37] It is a general power of attorney and noted on its back that the power was subject to s 46 of the *Property Law Act* 1974. Mr O'Rourke was told that the original needed to be sighted by Frews.

[48] On 28 July 2006 at some unspecified time, but thought by Ms Serrano to be in the afternoon (which is consistent with Mr Grant's note), Ms Serrano made a file note that Jeff Wright had telephoned to see if the loan had settled. She told him it had not and that Mr O'Rourke had picked up the mortgage documents. She noted "gave us a copy of POA" meaning power of attorney.[38] Ms Serrano had little independent recollection and was unable to assist further with that note.

[49] A national personal insolvency search was conducted on Mr O'Rourke and Mrs O'Rourke in the afternoon.[39] Mr O'Rourke asked Mr Grant if he could send an email "to the person he owes money in Singapore just stating that a loan has been approved".[40] Mr Grant agreed and did so to Jessica Neo in the terms earlier

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34 Exhibit 8.
35 Exhibit 13.
36 Exhibit 8.
37 Exhibits 14 and 15.
38 Exhibit 6.
39 Exhibit 16.
40 Exhibit 8.

suggested by Mr Crowley.[41] There is some doubt about the effectiveness of its transmission.

[50] Mr O'Rourke took the security documents to be executed and witnessed by Mr Gundelach. Mr Gundelach had very little recollection about the execution of the security documents brought to him, presumably on 28 July but perhaps over the weekend, by Mr O'Rourke, an old friend. Mr Gundelach gave evidence by video link from Rockhampton and to assist he had been provided with a bundle of documents which, for ease of following his evidence, was made a separate exhibit.[42] Mr Gundelach could not recall clearly but thought the meeting had occurred in his chambers in Brisbane, but stated that he had visited the O'Rourke home in the past. He could not say if it was in the morning or the afternoon. If it were on 28 July, other evidence suggests the afternoon. He identified his signature and that of Mr and Mrs O'Rourke on the documents. He was not asked if Mrs O'Rourke had personally attended. The hand printed writing of his name associated with his signature was not his handwriting and was not on the documents when he signed. That led him to conclude that the words under Mr O'Rourke's signature, apparently by the same hand, "by Trevor O'Rourke – Director its duly constituted Attorney under Power of Attorney No. 70981228" were inserted subsequently. In fact, Mr Grant's evidence was that he had inserted the hand printed words subsequent to the registration of the power of attorney on 1 August 2006 and before lodging the mortgage for registration, because he understood that that was the capacity in which Mr O'Rourke had signed the bill of mortgage and that if he did not, it would be requisitioned by the Registrar.

[51] Mr Gundelach did not discuss with Mr O'Rourke the capacity in which he signed, he cannot recall if a power of attorney was mentioned but if it were, he would not have asked to see it and he provided no legal advice to Mr O'Rourke about the nature of the documents and obligations under them.

[52] Mr Grant noted that on Monday morning, 31 July 2006, Mr O'Rourke brought all of the executed loan documents, together with the power of attorney, into Frews' office. Mr Grant was concerned that the original power of attorney produced by Mr O'Rourke had holes punched into the margin. He attended at the Department of Natural Resources where officers confirmed that it was satisfactory in that form. Mr Grant telephoned Mr O'Rourke from the titles office to explain that the power of attorney required registration. Mr Grant had printed out a Form 16 Request to Register a Power of Attorney which Mr O'Rourke executed, presumably when he arrived at the titles office, and sought to have registered. That request was lodged at 10.26am.[43]

[53] Mr Grant arranged for settlement notices in respect of the loan transaction and security documents to be lodged in the titles office. The Lodgement Summary Report Client Copy records the time as between 11.37am and 11.38am on 31 July 2006.[44] Mr Grant then faxed to Mr O'Rourke an authority to disburse and non-revocation declaration of the power of attorney at 11.38am.[45] Mr O'Rourke

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41 Exhibit 34.
42 Exhibit 62 comprising some of the documents in Exhibit 1 Docs 9-17.
43 Exhibit 17.
44 Exhibit 18.
45 Exhibit 19.

returned by facsimile those documents duly completed at 11.59am with the handwritten note "Nathaniel with thanks. Trevor".[46]

[54] Frews lodged a Form 23 Settlement Notice dated 31 July 2006 over 17 Manning Street in favour of the plaintiff. At some time around noon, Mr Grant arranged two telegraphic transfers – one into Seatem Travel Pty Ltd's account for $90,000 and the other to Neo Kim Hong (aka Jessica Hong) in Singapore in the sum of $302,251.32. Mr and Mrs O'Rourke's signatures on the authority to disburse had been witnessed by Mr Gundelach dated 28 July 2006. Prior to 3.06pm on 31 July, Mr Grant disbursed the loan from the plaintiff in the following manner:

- PJ Crowley - $11,125;
- Office of State Revenue Stamp Duty - $1,780;
- ASIC fee - $135;
- Seatem Travel Pty Ltd - $90,000;
- Frews Solicitors Account - $4,008.68;
- Neo Kim Hong - $302,351.32.[47]

[55] By facsimile transmission at 3.06pm, Mr Grant sent the telegraphic transfer receipts "as requested" in respect of the monies to Seatem Travel and to Neo Kim Hong to Damien O'Rourke whom, as mentioned, the evidence suggested was Mr O'Rourke's brother,[48] but was not said to have any interest in Port Ballidu or the other Seatem companies.

[56] On Tuesday 1 August 2006, Frews received confirmation that the power of attorney no. 709812208 had been registered at 12.03pm.[49] The original power of attorney was left in Frews' box at the Land Titles Office. Mr Grant admitted writing on the mortgage the capacity in which Mr O'Rourke executed that instrument. It is very probable that after receipt of the registration confirmation statement he inserted the words "Trevor James O'Rourke – Director, by its duly constituted attorney under Power of Attorney no. 709812208" into the mortgage.

[57] Mr Grant then arranged for the lodgement of the two mortgages.[50] A lodgement summary report lists the time at 3.33pm and 3.34pm respectively.[51] The registration confirmation statement was dated 4 August 2006 at 4.09pm.[52] Mr Grant returned Mr O'Rourke's original power of attorney.[53]

(vi) Refinancing the J Wright Enterprises Pty Ltd and Westpac facilities loan

[58] Mr O'Rourke had not discharged the loan to the plaintiff by the due date and Westpac wished to exit the banking relationship. By September Mr O'Rourke had sought and obtained financing[54] from Challenger Financial Services for $1.12 million with Port Ballidu being the only borrower for a period of three years, interest only. The other directors knew nothing of it. On 17 October 2006,

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46 Exhibit 20.
47 Exhibit 1 Docs 19 and 20.
48 Exhibit 39.
49 Exhibit 22.
50 Over 17 Manning Street and over Mr and Mrs O'Rourke's property.
51 Exhibit 40.
52 Exhibit 41.
53 Exhibit 51.
54 Exhibit 52 (formerly Exhibit D for identification).

Mr O'Rourke executed a mortgage in favour of Perpetual Trustee Company Limited as trustee for Challenger in respect of 17 Manning Street. He signed above the printed name "Port Ballidu Pty Ltd ACN 010 820 185". Underneath that was written in block letters in hand by Mr Michael Drummond, solicitor, "DIRECTOR/SECRETARY".[55]

[59] Settlement occurred on 16 November 2006. In a facsimile letter from Frews by Mr Grant to Mr Drummond, Mr Grant wrote that settlement was on terms that a cheque in the amount of $230,186 was paid to the plaintiff ($731.50 for an extra day's interest) and the amount of $2,369.77 to Frews.[56] In fact, the amount available on settlement was $229,454.50, with the balance claimed being payable within 30 days.[57] The plaintiff gave priority to Challenger (Perpetual Trustee) with respect to the mortgage registration.

[60] A "Variation of Loan Agreement" was purportedly entered into between the plaintiff, Port Ballidu, Mr and Mrs O'Rourke and Gospa Pty Ltd concerning the arrangements about priority of mortgages. The copy admitted into evidence[58] is executed only by Mr O'Rourke in his own capacity, for Port Ballidu and for Gospa Pty Ltd. The outstanding amount is expressed as $247,000 "including all principle advances and interest". The repayment date was 15 December 2006 after which interest (specified) would be incurred.

[61] Mr Drummond purportedly acted for Port Ballidu in the refinancing transaction on instructions from Mr O'Rourke who was known to him previously. He had acted for him in his property development business and in relation to ticketing events. Mr Drummond was told by Mr O'Rourke that he ran the Australian side of the "business" although Mr Drummond had done a company search and was aware of other directors. Mr Rory Burns was in Brisbane in October 2006 and was not informed of these significant financial arrangements by Mr O'Rourke.

[62] Mr Rory Burns came to Brisbane in January 2008 after he became aware of a demand to vacate 17 Manning Street. He met with Mr O'Rourke and Mr Drummond at the latter's office on 25 January 2008, where a conversation (rather heated) was held about the plaintiff's loan. Mr Drummond recalled and Mr Burns' note recorded[59] that Mr Burns accused Mr O'Rourke of committing fraud and that all of the parties associated with the "J Wright transactions" had a case to answer.

Actual authority - status of the 27 July 2006 email

[63] The status of the email dated 27 July 2006 purportedly from Mr Rory Burns authorising the use of "the building" to raise $300,000 for six weeks was strongly contested at trial. Its evidentiary effect is as one of a number of facts making up the inference that Mr O'Rourke had actual authority to commit Port Ballidu to the loan.[60]

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55 Exhibit 59.
56 Exhibit 48.
57 Exhibit 49.
58 Exhibit 1, Doc 23.
59 Exhibit 82.
60 Para 2(c)(4)(f) of the Third Amended Reply and Answer.

[64] Mr Rory Burns said he had spoken by telephone to Mr O'Rourke earlier in July when Mr O'Rourke sought to use 17 Manning Street as security to raise $300,000 temporarily and refused his request. Mr Burns told Mr O'Rourke that he could attempt to do so against his shareholding in Port Ballidu, but thought a bank unlikely to be interested. Mr Burns thought that he had sent an email on that topic but denied it was the email produced and tended as Exhibit 12. Mr Burns explained that the email address could only be operated from his office in Belfast and that he was in London on 27 July on business. Searches have not produced the original email at the sender or receiver end. Mr Peden submitted that I should find that Mr Rory Burns was not truthful about the email. I found Mr Rory Burns to be a witness whose evidence was both reliable and honest. The document itself is internally inconsistent, being against raising money using the building in the second paragraph yet authorising it in the third. Even if the email which was tendered as Exhibit 12 was sent by Mr Rory Burns, it authorised borrowings of $300,000 only and for six weeks, not the agreement which was entered into for $445,000 for two months at a very high rate of interest, not the "bank" interest which might be assumed was understood in the email.

[65] In any event, notwithstanding the plaintiff's pleading, Mr Grant, the plaintiff's solicitor, clearly did not regard the email as any kind of authority from the other directors to Mr O'Rourke to borrow against 17 Manning Street. He noted in his memorandum that there was no way of knowing if the director had actually sent the email and that it was too vague.[61] I am not prepared to regard that email as evidence of authority from Mr Rory Burns and, to the extent that the email writer referred to Mr Paul Burns from him, to Mr O'Rourke to borrow against 17 Manning Street in the transaction with the plaintiff. I consider the power of attorney as conferring actual authority below.

Mr O'Rourke's implied actual authority to bind Port Ballidu

[66] The plaintiff bases its case on Mr O'Rourke's implied actual authority to bind Port Ballidu on the "indoor management rule"[62] reflected in sections 126 to 129 of the *Corporations Act* 2001 (Cth). The plaintiff relies on s 126(1) and the assumptions in s 129(1)-(4). Relevantly, those provisions are:

> "**126 Agent exercising a company's power to make contracts**
>
> **(1)** A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal.
>
> **(2)** This section does not affect the operation of a law that requires a particular procedure to be complied with in relation to the contract."

Section 128 sets out the circumstances in which the assumptions may be made.

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61 Exhibit 8.

62 *Royal British Bank v Turquand* (1856) 6 EL & BL 327; 18 ER 886. See generally, the discussion in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 171 and following.

> **128** **(1)** A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
>
> …
>
> **(3)** The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.
>
> **(4)** A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect."

[67] The relevant assumptions are:[63]

> **(1)** A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.
>
> **(2)** A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
> (a) has been duly appointed; and
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
>
> **(3)** A person may assume that anyone who is held out by the company to be an officer or agent of the company:
> (a) has been duly appointed; and
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.
>
> **(4)** A person may assume that the officers and agents of the company properly perform their duties to the company."

[68] The relevant contractual documents which the plaintiff contends bind Port Ballidu are the loan agreement, the mortgage, the authority to complete, the authority to disburse and the loan variation agreement.

[69] Port Ballidu will only be bound by the agreement(s) with the plaintiff if Mr O'Rourke was authorised by Port Ballidu to enter into those agreements on

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63 *Corporations Act* 2001 (Cth), s129.

behalf of Port Ballidu.[64] It is to the company that the enquirer must look for this authorisation and not to the donee of the authority.[65]

[70] The plaintiff contends that the way in which Port Ballidu conducted its business in Australia through Mr O'Rourke supports a finding that he acted with Port Ballidu's implied actual authority. This submission is founded on the additional facts to the general management of the business in Australia that he entered into contracts on behalf of the Seatem business generally and that Port Ballidu had, in the past, used the equity in 17 Manning Street to provide working capital for the business of Seatem Travel. It also relies on the power of attorney to Mr O'Rourke entered in the seal register.

[71] The relationship between Corke Financial Pty Ltd and the plaintiff was not clearly established. As a broker it, no doubt, brought lenders and borrowers together but Mr Wright appears to have been Corke Financial's client.

[72] It is uncontroversial that Mr O'Rourke was left to run the Australian Seatem business on a day to day basis. He had the authority to "contract the product in the jurisdiction for the operational purposes of the Group".[66] He was a director who carried on managerial functions. He could enter into contracts and lease space at 17 Manning Street. The authority to enter into contracts, however, was within the parameters of the working capital of the Seatem companies in Australia. There was no course of conduct in the past which suggested that Mr O'Rourke, as sole resident director, had any authority to use 17 Manning Street to secure fresh financial accommodation for a short-term, high interest loan; certainly none for securing borrowings for his own interests. Mr Paul Burns and Mr Rory Burns had not abandoned the Australian part of the business to Mr O'Rourke to run. Rather, their involvement appeared orderly. They visited two to three times a year to renegotiate the big contracts and one or the other or both were involved in ultimate decisions about banking arrangements and the execution of security documents.

[73] The most significant fact in terms of Port Ballidu holding out Mr O'Rourke as clothed with authority to bind the company generally is the power of attorney. On its own it would have been sufficient, but in the circumstances of its eventual production Port Ballidu argues that it could not amount to a representation by Port Ballidu that Mr O'Rourke was authorised to enter into these transactions. It was nine years old and, although it pre-dated the directors resident overseas, that fact alone would not require a third party to engage in further enquiry. What should have caused, and indeed did cause, concern was that the loan was to Mr and Mrs O'Rourke personally, jointly with Port Ballidu, to be secured against the property of Port Ballidu, while two of the three directors were overseas and not involved in the transaction. Ms Serrano had adverted to the problem in her first note, so Mr Wright at that early stage must have alerted her because she had not then the benefit of the company searches. Mr Grant pursued the concerns about authority. When he was given a company resolution from 2001, so clearly not

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64 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 174; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 466 [36]; [2004] HCA 35.

65 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503 per Diplock LJ; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 187 per Brennan J.

66 T/S 3-52 by Mr Rory Burns.

relating to this transaction, and which must have come from Mr O'Rourke, that further anxiety about authority should have been, and was, raised. Mr Grant was given an email sent from an overseas director the evening before and put forward as authorising borrowings, yet those directors were said to be uncontactable.

[74] Furthermore, Mr Crowley had by then mentioned a lender in Singapore involving Mr O'Rourke. While the mention of Singapore was not on its face completely inconsistent with Seatem's business, it was not obviously part of the Seatem business.

[75] By this stage, the lender, from the knowledge of Mr Jeff Wright about the overseas directors, and through both Mr Grant and possibly Ms Serrano at Frews and possibly Mr Crowley at Corke Financial, knew that the issue of authority was a real one. Overlaying these facts was the urgency to complete the deal, signified by Mr O'Rourke's request and Mr Crowley's earlier request to reassure someone in Singapore to whom money was plainly due and owing, if not overdue. Mr Wright's enquiries of Frews as to whether the loan had been completed served only to underscore the need to complete quickly. When all seemed to have failed in persuading Frews that Mr O'Rourke was authorised by Port Ballidu to enter into this transaction, on the mention of a power of attorney by Mr Grant, Mr O'Rourke remembered that there was one. It was a power of attorney which had been granted nine years previously and had never been registered. That immediately would convey the understanding that it had not been used by Mr O'Rourke in relation to a transaction involving Port Ballidu and interests in land which required registration. It is in all of these circumstances that the power of attorney should have given the plaintiff no comfort without further enquiry of the directors overseas, for one of whom Frews had an apparently active email address.

[76] No doubt Mr Grant was very inexperienced, was under pressure and apparently did not take his concern to a more senior solicitor in the firm for guidance. Nonetheless, he was aware of the need for authority, was put on notice, was aware that Mr O'Rourke could not clothe himself as the agent with the requisite authority and could, without any or little delay, have contacted Mr Rory Burns at least at his email address.

[77] It is next necessary to consider if the loan and mortgage were executed "as attorney" for Port Ballidu. When Mr Grant received the documents back from Mr O'Rourke on 31 July, they had not been executed under the power of attorney as required by law. The relevant provisions are s 46(3) of the *Property Law Act* 1974 and s 69 of the *Powers of Attorney Act* 1989. Mr O'Rourke was appointed Port Ballidu's attorney in accordance with s 170(1) of the *Property Law Act*. That provision was repealed and by s 163 of the *Powers of Attorney Act*, a general power of attorney under the *Property Law Act* is to be taken to be a general power of attorney under the *Powers of Attorney Act*. Section 46 of the *Property Law Act* provides for the execution of instruments by or on behalf of corporations. It provides, relevantly:

> "(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name of or on behalf of a corporation … the person may as attorney execute the conveyance by signing the person's name in such a way as to show that the person does so as attorney of the corporation in the presence of at least 1 witness … and such execution shall take effect and

be valid in like manner as if the corporation had executed the conveyance.

…

(6) Despite anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting a corporation or regulating the affairs of the corporation, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

(7) This section does not affect how instruments are validly executed under the *Land Title Act* 1994."

[78] The *Land Title Act* provides for registration of instruments executed under a power of attorney. Section 132 provides:

"An instrument executed under the authority of a power of attorney may be registered only if the power of attorney is registered under this division."

Section 134 provides:

"(1) An act done by the donee under and in accordance with the terms of a registered power of attorney has the same effect as if the act were done by the donor.

(2) A registered power of attorney is evidence that the donee is authorised to do anything within the terms of the power of attorney.

(3) The registrar may register an instrument executed under a registered power of attorney without being satisfied that the power of attorney has not been revoked."

[79] Section 69 of the *Powers of Attorney Act* provides:

"(1) If necessary or convenient for the exercise of power given to an attorney, the attorney may –

(a) execute an instrument with the attorney's own signature and, despite the fact that the power of attorney was given under hand, if sealing is required or used, with the attorney's own seal; and

(b) do any other thing in the attorney's own name.

(2) An instrument executed by an attorney must be executed in a way showing that the attorney executes it as attorney for the principal.

> (3) An instrument executed, or thing done, in the way specified in this section is as effective as if executed or done by the principal -
>
> (a) with the principal's signature; or
>
> (b) with the principal's signature and seal; or
>
> (c) in the principal's name.
>
> (4) This section applies subject to the *Property Law Act* 1974, section 46."

[80] By virtue of s 46(3) of the *Property Law Act*, a person authorised by a power of attorney to convey any interest in property in the name of a corporation may, as attorney, "sign the person's name in such a way as to show that the person does so as attorney of the corporation" in the presence of at least one witness. Plainly, Mr O'Rourke did not execute the instrument of mortgage in a way showing that he did so as attorney for Port Ballidu in the presence of Mr Gundelach. The words "Director" under his name gave him no authority to bind the company. Printed next to his signature on the loan agreement are the words "Executed by Port Ballidu Pty Ltd ACN 010 820 185 in accordance with its Constitution".

[81] Port Ballidu contends, correctly, that the power must be construed strictly for the purpose for which it was granted. The power was general but, necessarily, for the purposes of Port Ballidu. As already mentioned, the loan was to Mr and Mrs O'Rourke and to Port Ballidu, whose property was to secure the loan. Very early on 27 July, the urgency of the loan and the need to settle a debt in Singapore was adverted to. It must be accepted that Mr Grant did not know how the funds were to be disbursed prior to the execution of the documents but he was aware of a Singapore lender who had to be reassured. What Mr Wright was told when the loan was negotiated is unknown. But Mr Grant did know enough to be put on enquiry as to whether these funds were for Port Ballidu's business purposes. It is fundamental that a power of attorney may not be used to benefit an attorney at the expense of his principal.[67] The request for this loan must have presented to a reasonably sophisticated lender as a loan to Mr and Mrs O'Rourke and called for enquiry about its value to Port Ballidu. There was sufficient evidence led at trial given by the plaintiff's liquidator, Mr McLeod, that Mr Wright was in the business of lending money.[68]

[82] In those circumstances and by reference to the other matters which have been discussed, the plaintiff was not entitled to rely on the power of attorney as establishing Mr O'Rourke's power to bind Port Balidu.[69]

Waiver or acquiescence

[83] The plaintiff contends that Port Ballidu, not having protested to Challenger about the November refinancing and having continued to pay the interest owing, accepts that, so far as those who deal with it outside the company are concerned,

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67 *Tobin v Broadbent* (1947) 75 CLR 378 at 401 per Dixon J.

68 T/S 1-30 and 31.

69 See the detailed discussion by Windeyer J in *Sweeney v Howard* [2007] NSWSC 842 at [47]-[58].

Mr O'Rourke had the capacity to sign bills of mortgage and loans on behalf of the company. Mr O'Rourke signed the variation of loan agreement whereby the plaintiff agreed to postpone its priority in favour of Perpetual Trustee Company Limited and signed in his own name over the printed "Director/Secretary" and opposite the printed words "Signed, Sealed and Delivered by Port Ballidue [sic] Pty Ltd ACN 116 329 170 [sic] in accordance with section 127 of the *Corporations Act*". It was not sealed. It appears that Michael Drummond held himself out (and understood that he was authorised) as being the solicitor for Port Ballidu. Mr O'Rourke signed the mortgage to Perpetual Trustee Company Limited over the name "Port Ballidu Pty Ltd ACN 010 820 185" and written under by hand "Director/Secretary". His signature was witnessed by Mr Drummond. Mr O'Rourke did not purport to bind the company under a power of attorney. The words "Director/Secretary" underneath Mr O'Rourke's signature on the mortgage were inserted by Mr Drummond.

[84] That Port Ballidu continues to make the interest payments to Challenger is not an acceptance or waiver of the indebtedness to the plaintiff as was suggested by Mr Peden. The indebtedness to Westpac was taken over by Challenger and the indebtedness to the plaintiff was included with the amount of $229,554.50 paid out to the plaintiff from the settlement proceeds, the balance $260,000 remaining in the loan to enable settlement to occur. Even though the Challenger transaction was not authorised by Port Ballidu, the company has taken the benefit of it and does not, as at the trial, seek to resile from it.

Indefeasibility

[85] By virtue of s 182 of the *Land Title Act* 1994:

> "On registration of an instrument that is expressed to … create an interest in a lot, the interest –
>
> (a) is … created in accordance with the instrument; and
> (b) is registered; and
> (c) vests in the person identified in the instrument as the person entitled to the interest."

The plaintiff's interest is thus indefeasible.[70] The issue is whether the fraud exception in s 184(3)(b) applies. It provides:

> "… subsections (1) and (2) [indefeasibility] do not apply –
>
> (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."

[86] The fraud relied upon by Port Ballidu is that the plaintiff's solicitor knowingly altered the mortgage instrument so as to make it appear that it had been signed by Mr O'Rourke consistently with the requirements of s 46 of the *Property Law Act* "in such a way as to show that the person does so as attorney of the corporation in the presence of at least 1 witness". He did this three days after it had been executed by Mr O'Rourke and witnessed by Mr Gundelach, presumably without production of the power of attorney or mention of it. It is Port Ballidu's case that Mr Grant did so

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[70] *Land Title Act* 1994 Section 184(1); *Breskvar v Wall* (1971) 126 CLR 376 at 385; *Elrowa Nominees Pty Ltd v Registrar of Titles* [2003] QCA 165 at [40]-[41] per Muir J (as his Honour then was).

for the sole purpose of being able to obtain registration of the mortgage. Mr Grant gave evidence that he believed, which was correct, it was necessary for him to show on the face of the mortgage instrument that it had been executed under the power of attorney otherwise it could not be registered.

[87] The plaintiff, however, contends that the critical element of the fraud here is to consider what the intended outcome was. If the unauthorised alteration to be registered was such that it would have a different effect than that intended by the mortgagor, then that may constitute fraud. Here, the intention was to grant a registerable mortgage to the plaintiff. Mr Peden referred to three examples to support this analysis. In *Davis v Williams*,[71] a registration clerk was given two instruments of transfer to lodge in respect of one parcel of land, the first transfer providing for land to be transferred to two individuals as joint tenants and the second providing for the transfer by one of those individuals alone for his interest to himself and thus severing the joint tenancy. The clerk amended the words of the first transfer by crossing out the words "joint tenancy" and replaced them with the words "tenants in common". Although the alternation was significant, the ultimate affect of the transaction was the same because if the two transfers had been lodged together the individuals would have been registered as tenants in common.

[88] Hodgson JA and Young CJ in Eq analysed the facts on the basis that the registration clerk knew that the transfer was being submitted for registration, that the alteration would cause the Registrar-General to make entries in the register that reflected the altered form of the transfer and not its original form but this did not constitute statutory fraud within the meaning of the New South Wales equivalent to s 184(3). Even if it did it could not be characterised as the fraud of the registered proprietor. Young CJ in Eq discussed the parameters of statutory fraud:[72]

> "Even though anyone who attests a dealing under the Torrens system falsely is in one sense committing fraud against the Registrar-General, the cases show that that is not enough. It will be enough if the officer of the interested party which has become registered knowingly or recklessly certifies so that the registration is effected (*De Jager*, *Hedley*, *Sansom*). It will not be enough if some officer of the person who obtains registration without any moral turpitude or intention of depriving a person of an interest in land makes a false attestation (*Russo*). In all cases it must be shown that there was fraud by the person becoming registered or its agent in obtaining registration so that an interest which would otherwise take priority over that interest has been defeated."

[89] In dissent, Gzell J approved the reasoning of Tadgell J in *Australian Guarantee Corporation Ltd v De Jager*,[73] pointing out the need for the public to be able to rely upon entries on the register in the Torrens system and that one of the safeguards to its integrity is the requirement that instruments be signed by the parties to the transaction and their signatures be the subject of attestation. His Honour would have sheeted home the fraud to the client.

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71 [2003] NSWCA 371.
72 Ibid at [110].
73 [1984] VR 483.

[90] A case heavily relied upon by Mr Peden is *Russo v Bendigo Bank Limited*.[74] A law clerk falsely attested to a signature which had been forged purporting to be the mortgagor's signature without the mortgagor being present. The clerk was unaware of the forgery. She signed the attestation clause contrary to the standing instruction of the solicitor not to attest a signature unless the person had signed in her presence. Ormiston JA, with whose reasons Winneke P and Batt JA agreed, traced the history of what constitutes "fraud" for the purpose of the Torrens system of registration.[75] His Honour concluded:[76]

> "Consequently, having regard to the manner in which the interpretation of the concept of fraud has changed over the years both in New Zealand and in Australia, I would respectfully suggest that the most satisfactory definition of the concept of fraud was given in 1923 by Salmond J in the *Waimiha Saw Milling* case when heard by the New Zealand Court of Appeal: [1923] NZLR 1137 at 1173:
>
> > 'The term "fraud" is not here used in its most restricted sense as including merely deceit, nor in its wider sense as including the constructive or equitable fraud of the Court of Chancery. It means dishonesty – a wilful and conscious disregard and violation of the rights of other persons.'"

The court concluded that the clerk was not party to a false representation against the mortgagor and she did not participate in the lodgement of the false document with the Registrar of Titles. The solicitor who did so was quite unaware of the falsity of the attestation clause. It was on that basis that Mr Jackson QC sought to distinguish *Russo*.

[91] Another example is *Young v Hoger*.[77] Here, the mortgage documents were sent to the mortgagor for execution and return. The solicitor sought certified documentation to verify the identity of the mortgagor but received uncertified photocopies of passport pages and other documents. The solicitor nonetheless settled without compliance with his own requirements of certified copies of three identifying documents. At trial the combination of other features together with the failure to test the bona fides of the mortgagor's signature was held to constitute wilful blindness by the solicitor. The Court of Appeal concluded[78] that there was nothing in the conduct of the solicitor which justified a conclusion that he was guilty of actual dishonesty or that he actually had a suspicion that the mortgagor's signature on the mortgage had been forged and abstained from further enquiry.[79]

[92] It is clear that Mr Grant knew that the Titles Office would not register the bill of mortgage in the form in which Mr O'Rourke had executed it. It would have been a relatively simply matter to have it re-executed correctly even though he was under pressure from Mr Wright, Mr Crowley and Mr O'Rourke to conclude the transaction. By adding the words that he did, he conveyed a false impression to the Registrar of Titles but by the time he added those words of capacity he had seen the original power of attorney and he did not act in violation of any other person's rights. Even so, in a solicitor I would regard this as sufficient to constitute statutory

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74 [1999] 3 VR 376.
75 Ibid at [23] to [34].
76 Ibid at [33].
77 [2001] QCA 453.
78 Ibid at [33].
79 See also *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64.

fraud. It is not, however, a fraud which can be sheeted home to the plaintiff. I agree, with respect, with Gzell J's observations that the integrity of the register is paramount in a system of title based on registration. However, the authorities do not support such exacting standards upon agents of mortgagees with respect to registration,[80] and, it must be emphasised, there were no other rights, for example, of priority which were disregarded. The conclusion must be that Mr Grant's alteration of the mortgage instrument did not fall within the exception to indefeasibility so as to bind the plaintiff.

[93] Port Ballidu contends that even if Mr Grant's conduct is not characterised as fraud within the meaning of s 184(3)(b) so as to bind the plaintiff, the question remains whether the mortgage secures any debt. This, it is argued, is because a personal covenant to pay a debt given by a mortgagor is conceptually and contractually independent of the charge over the land created by the mortgage.[81] The registration of the mortgage does not achieve indefeasibility for the personal covenant to pay but only secures the mortgagee's title to an estate or interest in the mortgaged land.[82]

[94] In *Small v Tomassetti*,[83] Campbell J observed:[84]

> "Notwithstanding that registration confers indefeasibility on a mortgagee, there is still a question of 'indefeasibility for what?'"

In making that observation, Campbell J noted that it was consistent with remarks of Hayne JA in *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [85] that:

> "It has not been contended that indefeasibility of a mortgage does not extend to the covenant for payment and it is plain that it does so extend."

[95] In *Provident Capital Ltd v Printy*,[86] Basten JA with whom Tobias and McColl JJA agreed said of this proposition:[87]

> "Nevertheless, there remains a question, where the covenant in the mortgage reflects a covenant in a separate agreement, as to whether indefeasibility extends to the latter covenant or is limited to the former, so that, if the separate agreement is void, there is no debt secured."

Whether the mortgagee may enforce the mortgage for any amount depends on the terms of the mortgage instrument.[88]

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80 *Forgeries, False Attestations and Imposters: Torrens System Mortgages and the Faud Exception to Indefeasibility* by S Rodrick (2002) Volume 7 No 1 Deakin Law Review 97 at 128.

81 *English, Scottish & Australian Bank Ltd v Phillips* (1937) 57 CLR 302 at 308-9. See a recent discussion of *Phillips* by Kiefel J in *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53 at [49].

82 *PT Limited v Maradone Pty Ltd* (1992) 25 NSWLR 643 per Giles J; *Perpetual Trustees Victoira Ltd v* Tsai (2004) NSWSC 745 per Young CJ in Eq; *Stoljar J Mortgages Indefeasibility and Personal Covenants to Pay* (2008) 82 ALJ 28 at 29.

83 (2001) 12 BPR 22,253.

84 Ibid at [9].

85 [1998] 1 VR 188 at 196.

86 [2008] NSWCA 131.

87 Ibid at [42].

88 *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22,281 per Young CJ in Eq; *Parker v Mortgage Advance Securities Pty Ltd* [2003] QCA 275 states in terms that the indefeasibility

[96] In the Port Ballidu mortgage, the expression "Secured Money" means:

> "…
>
> (a) all amounts which at any time the Mortgagee has advanced or paid, or has become liable to advance or pay, for any reason:
>
> (i) to or on behalf of the Mortgagor; or
>
> (ii) at the express or implied request of the Mortgagor; or
>
> (iii) because of any act or omission of the Mortgagor; or
>
> (iv) because of any act or omission of the Mortgagee made at the express or implied request of the Mortgagor; and
>
> (b) all amounts for which at that time the Mortgagor is or may become actually or contingently liable to the Mortgagee for any reason, including all amounts for which the Mortgagor is or may become liable to the Mortgagee in respect of any orders, drafts, cheques, promissory notes, bills of exchange, letters of credit, Guarantees, bonds and other instruments or engagements (whether negotiable or not) which:
>
> (i) have been drawn, issued, accepted, endorsed, discounted or paid by the Mortgagee; or
>
> (ii) are held by the Mortgagee as a result of any transaction entered into by the Mortgagee for, or on behalf of, or at the express or implied request of the Mortgagor; and
>
> (c) all amounts which at that time are owing and unpaid, or owing but not presently payable, or owing upon a contingency, by the Mortgagor to the Mortgagee for any reason; and
>
> (d) all amounts which at that time the Mortgagee is entitled to recover or claim from the Mortgagor for any reason (including any assignment, transfer or disposition by any person to the Mortgage of any property); and
>
> (e) all amounts which at that time it is reasonably foreseeable or at some future time falls into any of the descriptions in (a), (b), (c) or (d) above applied as at that future time; and

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extending to the covenant to pay will only be defeated by some equity against the mortgagee. That was a summary judgment appeal and the issues raised here were not engaged.

(f) all amounts which at that time the Mortgagor owes or is liable for, to any assignee of the Mortgagee because the assignee performs an agreement or exercises a right the Mortgagee had before the time of the assignment; and

(g) all amounts which are payable to the Mortgagee under this mortgage or under any Collateral Security."

[97] The amount of the loan is not mentioned in the mortgage instrument but the loan agreement itself is described in item 5 of the mortgage. The charging clause refers to and incorporates the schedule which is in general all money terms. Mr Jackson QC referred to *Chandra*[89] and *Cipri*[90] to support the submission that a personal covenant does not attract the benefit of indefeasibility where, on the proper construction of the mortgage or for other reasons of invalidity, no debt is in fact owed and therefore secured by a mortgage. These decisions rely upon equivalent provisions in the New South Wales *Real Property Act* 1900 and are similar to s 184 of the *Land Title Act*. A mortgage is a charge on the land to secure a debt.[91] As the authorities make clear, the indefeasibility provisions secure the debt if it is identified as secured by the mortgage. In *Provident Capital Ltd v Printy*,[92] where Basten JA considered this argument, the loan was not referred to in the mortgage and was held not to be secured by the mortgage. The money loaned had been obtained by fraud against the registered proprietor.

[98] It may be argued that beyond the sums secured against the land, the plaintiff can have no recourse against Port Ballidu on its personal covenant to pay should the land return insufficient funds from sale. That is because, as I have found under the general law, the loan agreement was entered into with Port Ballidu when Mr O'Rourke did not have authority to do so. That case was not pleaded.

Conclusion

[99] In summary the conclusions from the above discussion are:

1. Trevor O'Rourke held a valid power of attorney on behalf of Port Ballildu.
2. The directors, Mr Rory Burns and Mr Paul Burns, did not actually authorise Port Ballidu to enter into the security and loan agreement.
3. Trevor O'Rourke did not have actual implied authority or ostensible authority to bind Port Ballidu to the loan agreement and the security over the property at 17 Manning Street, South Brisbane.
4. Port Ballidu has not acquiesced in the mortgage and loan agreement by authorising the variation of the loan agreement and security in November 2006.
5. The fraud exception to the indefeasibility of the plaintiff's registered bill of mortgage has not been established such that the defendant is not entitled to the relief it seeks on the counterclaim.
6. The mortgage secures the debt the subject of the loan agreement with the plaintiff.

I will hear submissions as to the form of orders in light of the above findings.

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89 *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675.
90 *Perpetual Trustees Victoria Ltd v Cipri* [2008] NSWSC 1128 at [65].
91 *Land Title Act* 1994, Schedule 2 s 4.
92 [2008] NSWCA 131.