

SUPREME COURT OF QUEENSLAND

CITATION: *Trouton v Trouton & Another* [2022] QSC 210

PARTIES: **PATRICIA ANN TROUTON**
(plaintiff)
v
NEIL SIMON TROUTON
(first defendant)
LEANNE TROUTON
(second defendant)

FILE NO/S: BS No 6965 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 September 2022

DELIVERED AT: Brisbane

HEARING DATE: 13 September 2021 – 30 September 2021; 6 December 2021;
7 December 2021; 16 December 2021

JUDGE: Williams J

ORDER: **1. I will hear further from the parties as to the appropriate orders in light of these reasons and costs.**
2. Further, the parties should agree directions for:
(a) the provision of draft agreed orders, or if orders cannot be agreed, for the provision of competing draft orders and brief submissions in support; and
(b) the provision of brief submissions and any supporting material in respect of costs.

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – FRAUD OR FORGERY – where a Form 1 Transfer was executed under an enduring power of attorney – where the enduring power of attorney had been revoked due to the death of the donor – where the Form 1 transfer was registered with the Registrar of Titles – where the plaintiff alleges fraud by the registered proprietors – where the plaintiff alleges she did not know what document she was signing – whether the Form 1 Transfer was invalid – whether the deficiencies in the Form 1 Transfer amount to

fraud by the registered proprietors

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DOCTRINE OF PART PERFORMANCE – WHAT ACTS CONSTITUTE PART PERFORMANCE – ACTS CONSTITUTING PART PERFORMANCE – where the defendants allege that there is an agreement for the sale and purchase of the property – where the plaintiff alleges no such agreement exists – whether there is an agreement – whether the agreement is written or oral or partly written and partly oral – where the defendants acted in reliance of the agreement – whether the defendants' conduct amounts to part performance of the agreement

PROCEDURE — CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS — FORM OF PLEADING – MATTERS TO BE PLEADED SPECIFICALLY — where there is a requirement for fraud to be pleaded and particularised — where fraud exception to indefeasibility pleaded under s 184(3)(b) – where the plaintiff alleges exception to indefeasibility under 184(3)(a) and/or s 185(1)(a) of the Land Title Act – where the plaintiff does not specifically plead exception to indefeasibility under s 184(3)(a) and/or s 185(1)(a) of the Land Title Act – whether the plaintiff should be precluded from pursuing a claim under s 184(3)(a) and/or s 185(1)(a) of the Land Title Act.

Land Title Act 1994 (Qld), s 127, s 184, s 185, s 187

Powers of Attorney Act 1998 (Qld), s 44, s 90

Uniform Civil Procedure Rules 1999 (Qld), r 149, r 150

Assets Company Limited v Roihi (1905) AC 176

Australian Guarantee Corp Ltd v De Jager [1984] VR 483

Bahr v Nicolay (No 2) (1988) 164 CLR 604

Bank of South Australia Limited v Ferguson (1998) 192 CLR 248

Banque Commerciale S.A. En Liquidation v Akhil Holdings Limited (1990) 169 CLR 279

Briginshaw v Briginshaw (1938) 60 CLR 336

Browne v Dunn (1893) 6 R. 67, H.L

Butler v Fairclough (1971) 23 CLR 78

Cassegrain v Gerard Cassegrain & Co Pty Ltd (2015) 254 CLR 425

Corin v Paton (1990) 169 CLR 540

Davis v Williams (2003) 11 BRP 21313

Hinds v Uellendahl (1992) 107 FLR 254

Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133

National Australia Bank v Maher [1995] 1 VR 318

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

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

Waimiha Sawmilling Company Limited (in liq) v Waione Timber Co Ltd [1926] AC 101

White v Tomasel & Anor [2004] QCA 89

Williams v Turner [2009] 1 Qd R 296

Young v Hoger [2001] QCA 453

COUNSEL: A J H Morris KC, with I Erskine for the plaintiff;
G Allan for the defendants

SOLICITORS: Creagh Weightman Lawyers for the plaintiff;
Walt Allan for the defendants

- [1] These proceedings involve a claim by the plaintiff against the first and second defendants and also a counterclaim by the first and second defendants against the plaintiff.
- [2] Following are the main defined terms adopted and used throughout these reasons:

“**2ADCC**” means the Second Amended Defence and Counterclaim;

“**4ARej**” means the Fourth Amended Rejoinder to the Reply and Defence to the Counterclaim;

“**5ARD**” means the Fifth Amended Reply to Defence and Defence to Counterclaim;

“**9 March Written Agreement**” means the purported agreement contained in the written document dated 9 March 2007 between the plaintiff, Colin Trouton and the defendants;

“**Form 1 Transfer**” means the Form 1 Transfer instrument number 710716147 signed on 19 June 2007;

“**Colin Trouton Power of Attorney**” means the Form 2 Enduring Power of Attorney entered into and executed by Colin Trouton on 27 February 2003;

“**Dagmar Street Property**” means Lot 6 on survey plan 128612, title reference 50306460, situated at 53 Dagmar Street, Holland Park West;

“**DCS**” means the Defendant’s Written Closing Submissions;

“**DRCS**” means the Defendant’s Reply to the Plaintiff’s Written Closing Submissions;

“**Harbut Street Property**” means Lot 7 on survey plan 128612, title reference 50306461, situated at 1 Harbut Street, Holland Park West;

“**Land Title Act**” means *Land Title Act 1994 (Qld)*;

“**Original Block**” means the real property at 1 Harbut Street, Holland Park West;

“**PCS**” means the Plaintiff’s Written Closing Submissions;

“**Plaintiff’s Caveat**” means caveat 717953437 lodged by the plaintiff on 10 April 2017;

“**POA Act**” means *Powers of Attorney Act 1998 (Qld)*;

“**RAMS Facilities**” means:

- (i) RAMS home loan account number 001367390, in the names of the plaintiff and Colin Trouton; and
- (ii) RAMS home loan account number 001922533, in the names of the plaintiff and Colin Trouton;

“**Registrar’s Caveat**” means caveat 718136397 lodged by the Registrar of Titles on 6 July 2017;

“Scaasi” means the retail fashion business Scaasi Enterprises Pty Ltd ACN 081 139 399 operated by the plaintiff and Christine Trouton;

“SOC” means Statement of Claim;

“UCPR” means the *Uniform Civil Procedure Rules 1999* (Qld)

- [3] The plaintiff in the SOC claims the following relief:
- (a) An order pursuant to s 187 of the Land Title Act cancelling the registration of the Form 1 transfer instrument being dealing number 710716147 dated, and lodged for registration, on 19 June 2007 over and on the Harbut Street Property.
 - (b) An order for recovery of possession of the Harbut Street Property.
- [4] By the 2ADCC, the defendants seek the following relief:
- (a) Pursuant to s 127(1) of the Land Title Act, an order for removal of the Plaintiff’s Caveat.
 - (b) Pursuant to s 127(1) of the Land Title Act, an order for removal of the Registrar’s Caveat.
 - (c) Damages for deceit if the title to the Harbut Street Property is not transferred to the plaintiff, the amounts of:
 - (i) \$516,817.88 being the total of the payments made by the defendants in respect of the RAMS Facilities to 30 June 2021; and
 - (ii) Such additional payments made by the defendants on the RAMS Facilities from 1 July 2021 to the date of judgment.
 - (d) Damages for breach of contract:
 - (i) \$516,817.88 being the total of the payments made by the defendants in respect of the RAMS Facilities to 30 June 2021; and
 - (ii) Such additional payments made by the defendants with respect to the RAMS Facilities from 1 July 2021 to the date of judgment.
 - (e) A declaration that the plaintiff is liable for repayment of the RAMS Facilities.
 - (f) An order that the plaintiff repay the RAMS Facilities and discharge the mortgages against the Harbut Street Property which are security for the RAMS Facilities.
 - (g) A declaration that the plaintiff is estopped from seeking an order under s 187 of the Land Title Act cancelling the registration on 19 June 2007 of the Form 1 Transfer over the Harbut Street Property, and is estopped from seeking any consequential order for recovery of possession of the Harbut Street Property.
 - (h) Alternatively, if the Court makes an order under s 187 of the Land Title Act to direct the Registrar to cancel the registration of the Form 1 Transfer, and to

register the plaintiff as the registered owner of the Harbut Street Property, then the defendants seek:

- (i) A declaration that the Harbut Street Property is held by the plaintiff on constructive trust for the benefit of the defendants to the extent of the amounts determined by the Court in respect of the defendants' claims for unjust enrichment and allowances.
- (ii) A declaration that the plaintiff is liable for repayment of the RAMS Facilities.
- (iii) Restitution for unjust enrichment, alternatively damages for deceit, in the amount of \$1,525,597.22 or such another amount determined by the Court.
- (iv) An enquiry into the value of the energy, skill and expertise contributed by the defendants to the increasing value of the Harbut Street property.
- (v) An order for payment of all just allowances in such amounts as may be found due by the Court upon conducting an enquiry.
- (vi) An order that the plaintiff pay to the defendants such additional payments made by the defendants on the RAMS Facilities from 1 July 2021 to the date of judgment.

Admitted facts – Facts not in contention

- [5] Whilst many issues are in dispute between the parties, there are some facts set out in the SOC and 2ADCC which are admitted and not in dispute. Set out below is a summary of these facts. These facts provide useful background and context for the disputed facts which will be dealt with later in these reasons.
- [6] As several of the matters raised in the 2ADCC occur chronologically prior to the matters pleaded in the SOC, the order does not follow the order set out in the pleadings. However, the relevant footnotes contain the pinpoint reference to the relevant paragraph of the relevant pleadings.
- [7] Patricia Ann Trouton was born on 20 June 1942 and is the plaintiff in these proceedings.¹ The plaintiff was married to Colin Trouton in or about 1964.² The plaintiff remained married to Colin Trouton until he died on 15 June 2007.³
- [8] The plaintiff is the mother of Neil Simon Trouton, the first defendant. The plaintiff also has four daughters, Deanne Hummelstad, Margo Powell, Anna Hughes and Christine Trouton.⁴

¹ SOC 1(a) and 2ADCC 10(a).

² SOC 1(b) and 2ADCC 10(a).

³ SOC 1(c) and 2ADCC 10(a).

⁴ SOC 1(d) and 2ADCC 10(a).

- [9] Leanne Trouton, the second defendant, is the wife of the first defendant and the daughter-in-law of the plaintiff.⁵
- [10] The first defendant was born on 5 May 1968.⁶ The first defendant is the only son of the plaintiff and Colin Trouton.⁷
- [11] In or about 1996, the first defendant married the second defendant.⁸ The second defendant is the daughter-in-law of the plaintiff.⁹
- [12] In or about 1997, the plaintiff and Colin Trouton were contemplating subdividing the Original Block.¹⁰
- [13] Over a period of several months, the first defendant (on his own behalf and on behalf of the second defendant) and the plaintiff (on her own behalf and on behalf of Colin Trouton) had discussions.¹¹
- [14] Part of the dwelling on the Original Block would be demolished and cleared to enable a new lot to be subdivided.¹² The proposed new lot would be valued after the partial demolition of the existing dwelling and the clearing of the proposed new lot.¹³
- [15] The first defendant, in consultation with the plaintiff, prepared an indicative budget of approximately \$30,000 for the work, including to apply for approval of the proposed subdivision and the subsequent site and building works.¹⁴
- [16] The first defendant caused a subdivision approval application to be lodged which was prepared in the name of, and signed by, the plaintiff and Colin Trouton. Approval was granted on or about 17 August 1999.¹⁵
- [17] The first defendant prepared drawings for the renovation of the existing dwelling on the original block to assist the plaintiff and Colin Trouton in carrying out a

⁵ SOC 1(e) and 2ADCC 10(a).

⁶ SOC 2(a) and 2ADCC 11(a).

⁷ SOC 2(b) and 2ADCC 11(a).

⁸ SOC 2(c) and 2ADCC 11(a).

⁹ SOC 3(a) and 2ADCC 12(a).

¹⁰ 2ADCC 1 and 5ARD 1.

¹¹ 2ADCC 3 and 5ARD 3(a).

¹² 2ADCC 3(c) and 5ARD 3(d).

¹³ 2ADCC 3(d) and 5ARD 3(e).

¹⁴ 2ADCC 4(a) and 5ARD 4(a).

¹⁵ 2ADCC 4(c) and 5ARD 4(c).

- renovation.¹⁶ The partial demolition of the existing dwelling was completed by about 6 January 2000.¹⁷
- [18] The first defendant and the second defendant obtained a valuation report from Corbetts dated 18 January 2000 which valued the proposed new lot at between \$150,000 and \$170,000.¹⁸
- [19] On or about 3 April 2000, the original block was subdivided into the Dagmar Street Property¹⁹ and the Harbut Street Property^{20, 21}
- [20] On or about 19 April 2000, title to the Dagmar Street Property was transferred from the plaintiff and Colin Trouton (as transferors) to the first and second defendants (as transferees).²²
- [21] At all material times from in or about March 2000:
- (a) the first and second defendants became the registered proprietors as joint tenants of the Dagmar Street Property; and
 - (b) on or about 19 June 2007, Colin Trouton and the plaintiff were the registered proprietors as joint tenants of the Harbut Street Property.²³
- [22] The plaintiff and Colin Trouton did not live at the Dagmar Street Property.²⁴
- [23] On 27 February 2003, Colin Trouton entered into and executed a Form 2 Enduring Power of Attorney appointing as his attorney for financial and personal/health matters each of:
- (a) the plaintiff;
 - (b) the first defendant; and
 - (c) Deanne Hummelstad.

¹⁶ 2ADCC 4(d) and 5ARD 4(d).

¹⁷ 2ADCC 4(e) and 5ARD 4(e).

¹⁸ 2ADCC 4(f) and 5ARD 4(f).

¹⁹ Lot 6 on survey plan 128612, title reference 50306460, situated at 53 Dagmar Street, Holland Park West.

²⁰ Lot 7 on survey plan 128612, title reference 50306461, situated at 1 Harbut Street, Holland Park West.

²¹ 2ADCC 4(i) and 5ARD 4(i).

²² 2ADCC 4(j) and 5ARD 4(j).

²³ SOC 5 and 2ADCC 14.

²⁴ 5ARD 18(b)(vi) and 4ARej 6(b)(vi).

- [24] Each of the attorneys duly executed and accepted the appointment under the Colin Trouton Power of Attorney.²⁵
- [25] The Colin Trouton Power of Attorney was:
- (a) expressed by clause 5 to begin immediately;
 - (b) an enduring power of attorney within the meaning of s 44(1) of the POA Act; and
 - (c) subsequently lodged for registration with the Registrar of Land Titles and registered as dealing number 710602341.²⁶
- [26] On or about 16 October 2006, the plaintiff caused a further loan of \$124,000 from RAMS to be advanced which was secured by a mortgage over the Harbut Street Property.²⁷
- [27] By letter dated 15 December 2006, the plaintiff was advised by her then solicitor to the effect as follows:
- (a) Any sale of the Harbut Street Property could be achieved by entering into a standard contract which would be made subject to finance and the sale of Dagmar Street;
 - (b) The plaintiff should obtain an appraisal of the house prior to any repairs or improvements;
 - (c) Any agent engaged to carry out the appraisal must refer to at least three recent comparable sales in the area;
 - (d) The appraisal would fix the value for stamp duty purposes; and
 - (e) That the first defendant could lodge a “consent caveat” to partially protect his position.²⁸
- [28] In or about February 2007:
- (a) the plaintiff drew down the following further amounts against loan facilities from RAMS which were secured by a mortgage over the Harbut Street Property:
 - (i) \$10,000 on or about 16 February 2007;
 - (ii) \$5000 on or about 16 February 2007;
 - (iii) \$15,000 on or about 26 February 2007; and
 - (iv) \$15,000 on or about 27 February 2007.

²⁵ SOC 6 and 2ADCC 15.

²⁶ SOC 7 and 2ADCC 31.

²⁷ 2ADCC 23 and 5ARD 21.

²⁸ 5ARD 16A(c) and 4ARej 3(c).

- (b) The total amount was \$45,000.²⁹
- (c) The plaintiff did not inform the first or second defendants about the further advances.³⁰

- [29] Colin Trouton lacked the mental capacity to understand the nature of the alleged written agreement pleaded by the defendants to have been entered into on or about 9 March 2007.³¹
- [30] In or about May 2007, the second defendant prepared a draft Form 1 Transfer to convey title to the Harbut Street Property from the plaintiff and Colin Trouton to the first and second defendants.³²
- [31] The first and second defendants, the plaintiff and Colin Trouton did not sign the Form 1 Transfer during the visit over the night of 3 - 4 June 2007.³³
- [32] Colin Trouton died at the Gold Coast Hospital, Southport, on 15 June 2007.³⁴ The Queensland Death Certificate 6273977 bearing registration number 2007/07847 is dated 7 August 2007.³⁵
- [33] By operation of s 90 of the POA Act, the Colin Trouton Power of Attorney was revoked on and from the date of death of Colin Trouton, being 15 June 2007.³⁶
- [34] The defendants prepared or caused to be prepared the unsigned Form 1 Transfer instrument³⁷ and the Form 1 Transfer was signed on 19 June 2007.³⁸
- [35] On 19 June 2007 the defendants procured the signature of the plaintiff on the Form 1 Transfer by meeting the plaintiff at the Garden City Shopping Centre.³⁹

²⁹ 2ADCC 25 and 5ARD 23.

³⁰ 2ADCC 26 and 5ARD 24.

³¹ 5ARD 17(a) and 4ARej 4(b).

³² 2ADCC 33 and 5ARD 30.

³³ 2ADCC 35 and 5ARD 32.

³⁴ 2ADCC 37 and 5ARD 34.

³⁵ SOC 11 and 2ADCC 50.

³⁶ SOC 12 and 2ADCC 51.

³⁷ SOC 14(a) and 2ADCC 53(a)(i).

³⁸ SOC 14(b)(i) and 2ADCC 53(b)(i).

³⁹ SOC 14(b)(i)(B) and 2ADCC 53(b)(iii).

- [36] On 19 June 2007, the defendants procured the signature of the plaintiff on the Form 1 Transfer by accompanying the plaintiff to an office within the Garden City Shopping Centre.⁴⁰
- [37] On 19 June 2007, the first and second defendants lodged the signed Form 1 Transfer dated 19 June 2007⁴¹ with the Registrar of Land Titles at the Brisbane Land Titles Office for registration over and on the title of the Harbut Street Property.⁴²
- [38] The signed Form 1 Transfer instrument recorded, on its face:⁴³

2. Lot on Plan Description	County	Parish	Title Reference
Lot 7 on SP 128612	Stanley	Yeerongpilly	50306461

3. Transferors

Colin William Trouton and Patricia Ann Trouton

4. Consideration

five hundred and twenty five thousand dollars (\$525,000)

5. Transferee Given names	Surname	(include tenancy if more than one)
Neil Simon	Trouton	Joint Tenants
Leanne	Trouton	

- [39] At the time of executing and lodging the Form 1 transfer on 19 June 2007:
- (a) The defendants knew that Colin Trouton had died on 15 June 2007.⁴⁴
- (b) The defendants knew that the Registrar of Land Titles had no knowledge of the death of Colin Trouton on 15 June 2007.⁴⁵

⁴⁰ SOC 14(b)(i)(C) and 2ADCC 53(b)(iii).

⁴¹ SOC 8 and 2ADC 47.

⁴² SOC 14(d) and 2ADCC 53(d).

⁴³ SOC 9 and 2ADCC 48.

⁴⁴ SOC 15(d) and 2ADCC 54(d).

⁴⁵ SOC 15(e) and 2ADCC 54(e).

- [40] The Registrar of Land Titles registered the Form 1 Transfer instrument over and on the title of the Harbut Street Property, as dealing number 710716147.⁴⁶
- [41] The execution by the first defendant and the plaintiff of the Form 1 Transfer instrument on behalf of Colin Trouton, purportedly pursuant to the Colin Trouton Power of Attorney:
- (a) was of no effect as the Colin Trouton Power of Attorney had been revoked from the date of his death.⁴⁷
 - (b) was of no effect.⁴⁸
- [42] As at approximately 19 June 2007, the following facilities were held by the plaintiff secured by mortgage against the Harbut Street Property:
- (a) RAMS home loan account number 001367390, in the name of the plaintiff and Mr Colin Trouton, with a balance of -\$297,068.44;
 - (b) RAMS home loan account number 001922533, in the name of the plaintiff and Mr Colin Trouton, with a balance of -\$123,999.23,
- and the total amount was -\$421,067.67.⁴⁹
- [43] The Plaintiff's Caveat was lodged on 10 April 2017 at 12:25pm.⁵⁰
- [44] On or about 6 July 2017, the Registrar of Titles lodged the Registrar's Caveat, following receipt of a statutory declaration sworn by the plaintiff regarding the alleged circumstances relevant to the registration of Land Titles Office dealing number 710716147.⁵¹
- [45] The plaintiff never resided in a granny flat at the Harbut Street Property as provided for in the alleged agreement or at all.⁵²

Issues in dispute

- [46] Prior to the commencement of the trial, the parties were required to agree the issues in dispute. The parties were unable to agree on the issues in dispute and two competing versions of the issues in dispute were provided.

⁴⁶ SOC 16 and 2ADCC 55.

⁴⁷ 2ADCC 52(a) and 5ARD 44.

⁴⁸ SOC 13(a) and 2ADCC 52(a).

⁴⁹ 2ADCC 27 and 5ARD 25.

⁵⁰ 2ADCC 60 and 5ARD 56.

⁵¹ 2ADCC 63 and 5ARD 59.

⁵² 5ARD 18(b)(iii) and 4ARej 6(b)(iii).

- [47] As a consequence, the closing submissions of both parties do not directly engage on the same issues in a logical and efficient way. Consequently, the submissions do not assist in analysis of some of the key issues.
- [48] The plaintiff's summary of the issues in dispute is set out at **Annexure A** to these reasons as they have some relevance to a pleading issue considered below.
- [49] The inclusion of the plaintiff's summary of issues in no way constitutes an acceptance of the plaintiff's case or the issues set out in the summary. It merely provides a convenient way to refer to the plaintiff's own summary of the plaintiff's case as at the commencement of the trial.

Pleading issue

- [50] On the final day of the hearing when the parties were providing oral closing submissions, it became apparent that a pleading point had emerged of some significance.
- [51] The issue is whether, on the plaintiff's pleading, it is open for the plaintiff to rely on s 184(3)(a) as well as subsection (b) of the Land Title Act (the latter is specifically referred to in paragraph 19(a) of the SOC).
- [52] The plaintiff's closing written submissions discuss at [35] and [36] the plaintiff's reliance on s 185 of the Land Title Act being "an equity arising from the act of the registered proprietor".
- [53] The exceptions to indefeasibility other than fraud are referred to in s 184(3)(a) of the Land Title Act, which incorporates the exceptions in s 185.
- [54] As previously indicated, the SOC specifically raises fraud within the meaning of s 184(3)(b) of the Land Title Act.
- [55] The DRCS specifically takes issue with the plaintiff's submissions where s 184(3)(a) and s 185 of the Land Title Act are raised.
- [56] The defendants submit:
- (a) the plaintiff's pleaded case is exclusively based on, and confined to, proving fraud by the registered proprietors: that is, the title of the first and second defendants as joint tenants and registered owners of the Harbut Street Property is defeasible by reason of fraud as pleaded at paragraph 19(a) of the SOC and as particularised in the plaintiff's Further and Better Particulars that were filed on 9 September 2021.⁵³
 - (b) the plaintiff's case does not plead or rely upon any of the exceptions in s 185 of the Land Title Act.⁵⁴

⁵³ DRCS [31].

⁵⁴ DRCS [31].

- (c) the plaintiff appears to be seeking to rely on a case that is based on exceptions to indefeasibility as provided for in s 185(1)(a) of the Land Title Act.⁵⁵
- (d) if the plaintiff had wished to conduct its case based on some type of “*in personam*” exception under s 185(1)(a) as well as fraud, then this needed to be specifically pleaded in the alternative.⁵⁶

[57] In oral submissions, Counsel for the plaintiff submitted it was open for the “*in personam*” claim to be made on the material facts as pleaded in the SOC. Further, the plaintiff submitted:

“[The statement of claim] pleads in paragraph 19 a conclusion of law and it identifies one of the things that the rules required to be specifically identified, and that is fraud. But that doesn’t curtail reliance on other legal conclusions which arise from the same facts. And if the same facts are capable of giving rise to a person[al] equity or statutory fraud or an *in personam* liability to relief, then the pleading sets out the parameters of the case.”⁵⁷

[58] Further, Counsel for the plaintiff also submitted:

“Throughout the course of ... 12 days of evidence, not once was objection taken to questions which could not be relevant to a case of fraud but were plainly relevant to a case of equitable obligations, constructive fraud, in *personam* liability. and not once... was objection taken. ... [T]here is no basis for saying that if we make up the case pleaded on the facts set forth in paragraphs 1 to 18 of the pleading [the plaintiff] is not entitled to the [relief] under the law of Queensland which arises from those facts.”⁵⁸

[59] The plaintiff provided a written opening that:

- (a) outlined the evidence that was anticipated to be given by the various witnesses to be called as part of the plaintiff’s case; and
- (b) incorporated a summary of issues (reproduced as Annexure A to these reasons).

[60] The summary of issues was expressly divided into two parts: the Claim and then the Counterclaim. The Claim reflects the issues relevant to the plaintiff’s pleaded cause of action. Three issues are set out as follows:

⁵⁵ DRCS [32(b)].

⁵⁶ DRCS [32(b)]; *Banque Commerciale S.A. En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 292-293.

⁵⁷ T 15-22, lines 3-8.

⁵⁸ T 15-22, lines 10-16.

- “1. Whether the title to Harbut St was procured by the *fraud* of NT and LT within the meaning of s.184(3)(b) of the *Land Title Act 1994* (“LTA”), such *fraud* consisting of -
 - procuring PT’s signature on the Form 1 Transfer in the circumstances pleaded in paragraph 14 SOC and lodging it for registration
 - the conduct set out in the Further and Better Particulars filed 9 September 2021
2. If *fraud* is established, what order should be made under s.187 of the LTA
 - if title to Harbut St is to be reconveyed to PT should it be conditional upon an order for payment of equitable compensation to NT and LT (for the cost of improvements to the land, etc)
3. If *fraud* is not established, what order should be made under s.127 of the LTA
 - for removal of Caveat (717953437) and Caveat (718136397)
 - conditional upon an order for payment of equitable compensation to PT (for balance purchase price not paid)”.

[61] What is clear from the statement of the issue in paragraph 1 is that the relevant question concerns the operation of s 184(3)(b) of the Land Title Act. As at the opening of the trial, the plaintiff did not identify that the Court needed to consider or deal with a claim under s184(3)(a) of the Land Title Act.

[62] Pursuant to r 150 UCPR, fraud is one of the specifically listed items which needs to be specifically pleaded.

[63] Rule 150 is subject to r 149 of the UCPR. Rule 149(c) provides that a pleading must state specifically any matter that if not stated specifically may take another party by surprise.

[64] Whilst r 150 UCPR does not specifically list a claim in respect of “an equity arising from the act of the registered proprietor”, given the serious nature of an exception to indefeasibility, this is a matter that should have been specifically pleaded if it was to be relied upon so as to avoid the defendants being taken by surprise.

[65] The Further and Better Particulars filed 9 September 2021 are also relevant. The particulars provided are of paragraph 19(a) of the SOC. Paragraph 19 states:

“In the premises

- (a) The registration of the Harbut Street property in the joint names of the first and second defendants was procured by the first and second defendants’ fraud within the meaning of s 184(3)(b) of the [Land Title Act];
- (b) The plaintiff claims the relief sought in the prayer for relief below.”

[66] The relief claimed included an order pursuant to s 187 of the Land Title Act and an order for recovery of possession of the Harbut Street Property.

[67] The Further and Better Particulars state “the ‘fraud’ on the part of the Defendants is comprised in, evidenced by or to be inferred from”. The particulars then set out two categories:

- (a) “the Defendants’ conduct” and five identified acts, including some in the alternative; and
- (b) “The fact that the Defendants never had any intention of paying the purchase price for the Harbut Street property, such fact being inferred from [six listed facts after registration of title in the Defendant’s joint names]”.

[68] In respect of the alleged conduct of the defendants, the Further and Better Particulars state:

- “(a) Unlawfully and surreptitiously executing the Form 1 Transfer instrument on behalf of [Colin Trouton] after his death purportedly under Power of Attorney No. 710602341 (invalid Form 1).
- (b) Lodging the invalid Form 1 for registration with intent to effect a transfer of the title of the Harbut Street property to each of the Defendants absent any valid contract for the sale or transfer of the Harbut Street property from the Plaintiff and [Colin Trouton] to the Defendants.
- (c) Alternatively, if the Harbut Street Agreement⁵⁹ is valid (which is denied), lodging the invalid Form 1 for registration with intent to effect a transfer of the title of the Harbut Street property to each of the Defendants in circumstances where it was the case, and the Defendants knew that:

⁵⁹ The reference to the Harbut Street Agreement is taken to be a reference to the defined agreement at [20] and [21] of the 2ADCC. Where the reference is only to the written agreement dated 9 March 2007 the defined term of the 9 March Written Agreement will be used.

- (i) the deposit of \$10,000 under cl.6.4 was not paid to the Plaintiff;
 - (ii) there was no variation in writing signed by the parties to the Harbut Street Agreement for deferring payment of the said deposit;
 - (iii) There was no variation in writing signed by the parties to the Harbut Street Agreement varying the time for payment of the purchase price; and
 - (iv) there was no provision in the Harbut Street Agreement for the transfer of title prior to payment of the purchase price.
- (d) Further or alternatively, lodging the invalid Form 1 for registration with intent to effect a transfer of the title of the Harbut Street property to each of the Defendants in circumstances where, at the time of lodgement, the Defendants:
- (i) had not paid the consideration of \$525,000 stated in the Form 1 transfer, or any part thereof;
 - (ii) had not paid the consideration stated in the alleged Harbut Street Agreement of \$550,000, or any part thereof; and
 - (iii) had not paid the adjusted consideration stated in the alleged Harbut Street Agreement of \$500,000, or any part thereof.
- (e) Further or in the alternative, lodging the invalid Form 1 for registration with intent to effect a transfer of the title of the Harbut Street property to each of the Defendants in circumstances where, at the time of lodgement, the Defendants:
- (i) had taken no steps to sell 53 Dagmar Street;
 - (ii) were not in a financial position to pay the purchase price for the transfer of the Harbut St[reet] property or any significant part thereof;
 - (iii) failed to inform the mortgagee of the fact of the transfer of the Harbut Street property; and
 - (iv) failed to make any payments or contributions towards the RAMS mortgage secured over the Harbut Street property prior to September 2018.”

- [69] The conduct identified in (1)(a) is clearly directed at fraud under s 184(3)(b) of the Land Title Act. While “unlawful” may also include “ineffectual”, the phrase “unlawfully and surreptitiously” executing the Form 1 transfer can only be construed as raising fraud by the defendants.
- [70] The conduct identified in 1(b) picks up the defined term of “invalid Form 1” thereby importing the conduct in 1(a) into 1(b) in the particular circumstances of there being no valid contact for the sale or transfer of the Harbut Street property. The SOC at [17(a)] already pleads that “there was, at material times, never any contract in writing for the sale of the Harbut St[reet] property to the defendants executed by the plaintiff or at all”. The effect of the pleading and the particulars is to be construed as raising fraud under s 184(3)(b) of the Land Title Act.
- [71] The conduct identified in 1(c) is in the alternative and deals with the inferences from the conduct if the Harbut Street Agreement is found to be valid. Again the “invalid Form 1” defined term is imported. It is combined with there being an agreement, a key term of which the defendants did not intend to comply with, and there being no written variation of that requirement. Again, the effect of the pleading and particulars is to be construed as raising fraud under s 184(3)(b) of the Land Title Act.
- [72] Importantly, while paragraph 1(c) of the particulars does raise the effect of the alleged Harbut Street Agreement, it is deployed against the defendants as the foundation of fraud rather than in a positive way to found an equity in favour of the plaintiff as a result of the conduct of the defendants.
- [73] The conduct identified in 1(d) is also in addition or in the alternative, and again imports the defined term of the “invalid Form 1”, this time into the context of the non-payment of consideration⁶⁰ at the time the transfer was lodged. Again, the effect of the pleading and particulars is to be construed as raising fraud under s 184(3)(b) of the Land Title Act.
- [74] Similar to (c) above, while paragraph 1(d) of the particulars does raise the effect of the alleged Harbut Street Agreement, it is deployed against the defendants as the foundation of fraud rather than in a positive way to found an equity in favour of the plaintiff as a result of the conduct of the defendants.
- [75] The conduct identified in 1(e) is also in addition or in the alternative, and again imports the defined term of the “invalid Form 1” into the context that, at the time the transfer was lodged, no steps had been taken to sell the Dagmar Street Property, the defendants were not in a financial position to pay the purchase price for the Harbut Street Property, the defendants failed to inform the mortgagee of the transfer of the Harbut Street Property and the defendants failed to make any payments towards the RAMS Facilities secured by the mortgage prior to September 2018. Again, the effect of the pleading and particulars is to be construed as raising fraud under s 184(3)(b) of the Land Title Act.

⁶⁰ Either the amount stated in the transfer or the full amount, or adjusted amount, in the Harbut Street Agreement.

[76] Similar to (c) and (d) above, while paragraph 1(e) of the particulars does raise interactions between the plaintiff and the defendants at the time of the lodgement of the transfer,⁶¹ this is deployed against the defendants as the foundation of fraud rather than in a positive way to found an equity in favour of the plaintiff as a result of the conduct of the defendants.

[77] Paragraph (2) of the particulars is stated to be particulars of the fraud. The fraud is said to be evidenced by or inferred from what is set out. The matters identified in (a) to (f) arise after the date of lodgement of the transfer but are said to give rise to the inference that the defendants “never had any intention of paying the purchase price”.

[78] Paragraphs (2)(a) to (f) state the that the defendants:

- “(a) have not made any payments to the Plaintiff with respect to the purchase of the Harbut Street property;
- (b) have taken no steps to sell 53 Dagmar Street;
- (c) have paid no part of the purchase price, whether from the proceeds of sale of 53 Dagmar Street or at all;
- (d) have never provided to the Plaintiff a ‘granny flat’ in which to live;
- (e) on or about 12 December 2012, obtained a development approval deleting the proposed ‘granny flat’ shown in plans and drawings ...; and
- (f) by email dated 13 December 2012 from the First Defendant, instructed the Plaintiff not to contact the mortgagee with respect to arranging a discharge of the mortgage.”

[79] These “facts” are largely contentious between the parties.

[80] The plaintiff does plead at paragraph 17 of the SOC relevantly:

- “(b) the defendants have not paid and the plaintiff has not received, the, or any part of the, consideration of \$525,000 referred to at Item 4 of the Form 1 Transfer Instrument ...; and
- (c) that no liability for payment of the, or any part of then (sic), said consideration was assumed by the defendants; ...”

[81] The particulars logically are particulars of the fraud alleged within s 184(3)(b) of the Land Title Act. Paragraph 19(a) of the SOC expressly says that. The opening sentence of the Further and Better Particulars links back to paragraph 19(a) of the SOC. Then the matters set out in (1) and (2) of the particulars go to “[t]he ‘fraud’

⁶¹ Although (e)(iv) extends post lodgement up to September 2018.

on the Defendants” in the sense of being “comprised in, evidenced by or to be inferred from”.

- [82] The facts or conduct identified in the particulars cannot logically be the basis for anything other than the claim of fraud identified in paragraph 19(a) of the SOC which is limited to s 184(3)(b) of the Land Title Act.
- [83] The particulars, whilst introducing dealings between the plaintiff and defendants prior to the execution and lodgement of the Form 1 Transfer and also post lodgement, cannot form the basis in relation to a claim in respect of “an equity arising from the act of the register proprietor” for the purposes of s 184(3)(a) and/or s 185 of the Land Title Act.
- [84] The SOC does plead some limited facts that, in isolation, could arguably be part of what would need to be established in respect of a claim under s 185(a) of the Land Title Act. But the structure and content of the SOC is not consistent with a claim of that nature being included.
- [85] The plaintiff’s SOC clearly sets out a claim based upon fraud in respect of the execution of the Form 1 Transfer. It does not plead the circumstances of any agreement prior to that, such as the Harbut Street Agreement or other “interactions” between the plaintiff and the first and second defendants which may have resulted in a claim in personam by the plaintiff against the defendants.
- [86] To the extent that the SOC does plead some wider facts (for example, paragraphs 17(A), (b) and (c)), those facts are limited in scope and do not “link” to a form of pleading that supports a claim other than that identified as “fraud within the meaning of s 184(3)(b) of the [Land Title Act].”
- [87] The 2ADCC raises significant factual issues in respect of interactions between the plaintiff and the first and second defendants that predate the execution and lodgement of the Form 1 Transfer and also post that time. The defendants plead various different causes of action relying on material facts that emerge from those interactions. These are relevant to claims by the defendants of a constructive trust and unjust enrichment, deceit by the plaintiff and estoppel.
- [88] In the 5ARD, the plaintiff traversed those factual matters raised by the defendants but does not raise any claim in respect of an equity that would fit within s 185(1)(a) of the Land Title Act.
- [89] If, such a claim was to be made by the plaintiff in light of the matters pleaded in the 2ADCC, the plaintiff should have taken steps to amend the SOC to squarely raise those issues. She did not do so.
- [90] The submission made on behalf of the plaintiff that no objection was taken to evidence does not really assist with resolution of the issue. Whilst some of the evidence at trial may arguably be relevant to the type of claim now sought to be raised by the plaintiff, it arguably is equally relevant to the causes of action pleaded by the defendants in the 2ADCC. The explanation for the absence of any objection is logically that the relevance of the subject evidence could only have been to the

claims made in the 2ADCC as the plaintiff did not make any claim other than fraud under s 184(3)(b) of the Land Title Act.

[91] Counsel for the defendants also points to the relief sought by the plaintiff as being consistent with only a fraud claim under s 184(3)(b) of the Land Title Act being raised on the pleading. The relief sought is an order pursuant to s 187 of the Land Title Act cancelling the registration of the Form 1 Transfer and an order for recovery of possession of the Harbut Street Property.

[92] It is necessary to consider the relevant provisions of the Land Title Act at this stage.

[93] Section 184 of the Land Title Act states:

“184 Quality of registered interests

- (1) A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.
- (2) In particular, the registered proprietor—
 - (a) is not affected by actual or constructive notice of an unregistered interest affecting the lot; and
 - (b) is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot.
- (3) However, subsections (1) and (2) do not apply—
 - (a) to an interest mentioned in section 185; or
 - (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.”

[94] Section 185(1) of the Land Title Act states:

- “(1) A registered proprietor of a lot does not obtain the benefit of section 184 for the following interests in relation to the lot—
- (a) an equity arising from the act of the registered proprietor;
 - (b) the interest of a lessee under a short lease;
 - (c) the interest of a person entitled to the benefit of an easement if its particulars have been omitted from, or misdescribed in, the freehold land register;

- (d) the interest of a person who, on application, would be entitled to be registered as owner of the lot because the person is an adverse possessor;
 - (e) the interest of another registered proprietor making a valid claim under an earlier existing indefeasible title for all or part of the lot;
 - (f) the interest of another registered owner if there are 2 indefeasible titles for the same interest in the lot and the inconsistency has arisen through failure on transfer to cancel, wholly or partly, the indefeasible title of the first registered owner;
 - (g) the interest of another registered proprietor if the lot described in the indefeasible title wrongly includes land in which the other registered proprietor has an interest;
- ...”

[95] Section 186 gives the Registrar power to correct the title if s 185(1)(g) applies.

[96] Section 187 gives the Supreme Court certain power in respect of fraud and other identified interests and states as follows:

“187 Orders by Supreme Court about fraud and competing interests

- (1) If there has been fraud by the registered proprietor or section 185(1)(c), (d), (e), (f) or (g) or (1A) applies, the Supreme Court may make the order it considers just.
- (2) Without limiting subsection (1), the Supreme Court may, by order, direct the registrar—
 - (a) to cancel or correct the indefeasible title or other particulars in the freehold land register; or
 - (b) to cancel, correct, execute or register an instrument; or
 - (c) to create a new indefeasible title; or
 - (d) to issue a new instrument; or
 - (e) to do anything else.”

[97] Specifically, the Supreme Court has power to cancel the registration of the transfer where there is:

- (a) “fraud” by the registered proprietor (this is relevantly the exception to indefeasibility of title in s 184(3)(b) of the Land Title Act); and

(b) Sections 185(1)(c), (d), (e), (f) or (g) of the Land Titles Act (also section 185(1A) in respect of a relevant mortgagee) apply.

[98] Relevantly for current considerations, s 187 of the Land Title Act does not apply in respect of the exceptions in s 185(1)(a) and (b).

[99] The relief pleaded is consistent with the claim of fraud pursuant to s 184(3)(b) and is inconsistent with a claim under s 184(3)(a) on the basis of an equity pursuant to s 185(1)(a) of the Land Title Act.

[100] The authority of *Williams v Turner*⁶² is relied upon to highlight the different relief that would be relevant if a claim pursuant to s 185(1)(a) had been pleaded by the plaintiff. In that case, Wilson J also had to consider sections 184, 185 and 187 of the Land Title Act. Relevantly, her Honour stated at [33] in respect of a claim of an equity within s 185(1)(a):

“Although the Court’s powers under s 187 would not have been applicable, relief could have been granted by making a vesting order under s 82 of the *Trusts Act* 1973, which could be registered under s 110A of the *Land Title Act* 1994.”

[101] In *Real Property Law in Queensland*⁶³ the authors consider the differences between the scope of s 184(3)(a) and (b) and s 185(1)(a) of the Land Title Act. Relevantly:

(a) At [10.220] at page 325 in respect of s 184(3)(b):

“Fraud, as an exception to the indefeasibility of Torrens Title, is codified in the [Land Title Act], s 184(3)(b). This provision stipulates that the quality of indefeasibility will be destroyed “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”.⁶⁴ Fraud, as used in the context of this section, “may not have fixed and definite boundaries”;⁶⁵ however, two propositions can be stated with certainty:

1. The fraud complained of must relate to the current state of the title. Unless the current registered proprietor, or the current registered proprietor’s agent, can be implicated in the fraud, fraud on the part of a

⁶² [2009] 1 Qd R 296; [2008] QSC 327.

⁶³ A Wallace, M Weir and L McCrimmon, *Real Property Law in Queensland* (4th Edition, Lawbook Co, 2015).

⁶⁴ Land Title Act, s 184(3)(b).

⁶⁵ *Hinds v Uellendahl* (1992) 107 FLR 254 at 258 per Asche CJ (NTSC).

predecessor in title will not make the title of the current registered proprietor defeasible.⁶⁶

2. Fraud means actual dishonesty by the registered proprietor or her or his agent. Accordingly, the meaning of the term “fraud” is more restricted under the [Land Title Act], s 184(3)(b), than under the general law.”

- (b) At [10.330] at pages 348 - 349 in respect of s 185(1)(a):

“The [Land Title Act], s 185(1)(a), codifies the current state of the law by stipulating that a registered proprietor does not obtain the benefits of indefeasibility as against “an equity arising from the act of the registered proprietor”. Unfortunately, the section is drafted in terms of an “equity” arising from the act of the registered proprietor, but it is clear that the section is referring to a claim *in personam* that arises from the act of the registered proprietor and extends to both legal and equitable claims. The use of the term “equity” in this context is apt to be misleading because it appears to leave out of account legal claims such as those arising from breach of contract. For that reason the term “*in personam*” claim is preferred.⁶⁷ Registered proprietors cannot rely on the protection indefeasibility of title confers to escape obligations personally incurred by them. In other words, registered proprietors cannot create legal or equitable interests in their land and then purport to disregard them on the basis that such interests are not recorded on the Register. The court will enforce “an equity arising from the act of the registered proprietor”,⁶⁸ notwithstanding that the interest is not reflected on the registered proprietor’s title.”

- (c) At [10.375] at page 358 as to the potential overlap between the two and the differences in remedies:

“... there are some circumstances where a claim can be categorised as either fraud or within the *in personam* exception, for example, the claim in *Bahr v Nicolay* and a claim for accessory liability under the second limb of *Barnes*

⁶⁶ Footnote omitted.

⁶⁷ Wu, “Beyond the Torrens Mirror: A Framework of the In Personam Exception to Indefeasibility” (2008) 32 Melb Uni LR 672 at 679. It is acknowledged that the term “*in personam*” is not a precise description and has its own limitations and critics: see Moses and Edgeworth, “Taking it Personally: Ebb and Flow in the Torrens System’s In Personam Exception to Indefeasibility” (2013) 35 Syd LR 107 at 108; Low, “The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities” (2009) 33 Melb Uni LR 205 at 208 (who suggests the ‘inter se’ rule is a better description).

⁶⁸ Land Title Act, s 185(1)(a).

v Addy. For many purposes, it may not matter which category is relied upon, but it is probably wise to plead both. The remedies available for each category differ slightly. If fraud is established, an order for rectification of the register by removing the relevant registered interest may be available under s 187 of the [Land Title Act]. This remedy is not available for a claim under s 185(1)(a) and instead the court will need to make orders against the defendant to transfer property to the plaintiff, along with a vesting order under the Trusts Act 1973.⁶⁹ The end result is likely to be the same but the form of the orders and procedure is different and more cumbersome.”

- [102] The plaintiff’s pleaded case in the SOC, including the particulars, is consistent with the plaintiff bringing a claim based on fraud pursuant to s 184(3)(b) only. The pleading clearly raises fraud and s 184(3)(b) of the Land Title Act. This is also reflected in the summary of issues stated by the plaintiff (reproduced at Annexure A).
- [103] Further, the relief sought in the SOC and as identified in the summary of issues is also consistent with that position. An order pursuant to s 187 of the Land Title Act is available if fraud is established, including reconveyance of the title to the plaintiff and payment of equitable compensation to the defendants for the costs of the improvements to the land.
- [104] Further, if fraud is not established, the only additional issue identified in the summary of issues in respect of the plaintiff’s claim is whether an order should be made pursuant to s 127 to the Land Title Act for the removal of the caveats and payment of equitable compensation to the plaintiff for the balance of the purchase price.
- [105] There is no issue identified by the plaintiff in the summary of issues which goes to a claim “*in personam*” pursuant to s 185(1)(a) of the Land Title Act, nor to the form of relief that would give effect to that claim if it was established.
- [106] Even if some material facts pleaded are arguably consistent with a claim under s 185(1)(a) of the Land Title Act,⁷⁰ the catch all relief sought of “[s]uch further or other order as the Honourable Court deems meet” is not sufficient to support a claim “*in personam*” having been made.

⁶⁹ For further detail see Chapter 12, [12.30]. See also *Williams v Turner* [2008] 1 QdR 296; [2008] QSC 327.

⁷⁰ I do not determine whether this is the case as the plaintiff has not endeavoured to identify how the pleading is said to support an “*in personam*” claim other in a very general way.

[107] All of these factors support the conclusion that:

- (a) the plaintiff has not pleaded a claim under s 184(3)(a) and/or s 185 of the Land Title Act; and
- (b) the plaintiff is precluded from now pursuing a claim for relief on the basis of s 184(3)(a) and/or s 185(1)(a) of the Land Title Act outside of the plaintiff's pleaded case.

[108] Accordingly, the plaintiff's claim is limited to establishing fraud within the meaning in s 184(3)(b) of the Land Title Act.

Evidence and onus

[109] The onus of proof is on the plaintiff in order to succeed in respect of the claim of fraud.

[110] The relevant standard of proof is the civil standard and the principles in *Briginshaw v Briginshaw*⁷¹ apply.

[111] The *Briginshaw* principles do not change the standard of proof from the balance of probabilities but acknowledge that where serious and grave allegations have been made, there must be "actual persuasion" that the allegation has been established and not be "oppressed by reasonable doubt". The practical approach is that given the serious consequences, stronger and more reliable evidence must establish a fact.

[112] It is necessary at the outset to say something of the witnesses. The submissions that have been made on behalf of both parties highlight the level of distrust between the plaintiff and the first and second defendants, and the wider family. Some of the correspondence in evidence and the submissions are illustrative of the total breakdown of the family relationship. As a consequence, the submissions are often emotive and the choice of language is sometimes, at best, inappropriate and at worst inflammatory.

[113] Given the nature of the serious allegations which are in issue in this case, the witnesses did not deliver affidavits or witness statements. Witness summaries were given outlining the evidence which was anticipated to be given by the witnesses.

[114] During the course of the hearing, some issues also arose in respect of the rule in *Browne v Dunn*.⁷² Whilst the plaintiff does raise the *Browne v Dunn* issues, it is recognised in submissions that it is unlikely to have any major bearing on the outcome of this case.

[115] In respect of the plaintiff's evidence, the plaintiff's submissions are that while her memory was "admittedly imperfect" her evidence on critical aspects was consistent and "unequivocal in evidence in chief" and "unshaken in cross-examination". It is

⁷¹ (1938) 60 CLR 336.

⁷² (1893) 6 R. 67, H.L.

also submitted that given the length of the cross-examination and the plaintiff's age, memory lapses must be fairly taken into account.

- [116] The plaintiff also submits that the Court ought to approach the evidence of the first defendant with particular caution. It is submitted that "his answers were considered and careful, seeking (as it were) to establish in his own mind whether a particular answer would aid or damage his own case". The plaintiff acknowledges that the first defendant had hearing difficulties which contributed to some delay in providing answers, however it is submitted that this is not sufficient to explain the manner in which he provided answers to questions generally.⁷³
- [117] Similarly, the plaintiff submits that the Court should approach the evidence of the second defendant with caution. It is submitted that her answers were considered, careful and deliberate "again seeking (as it were) to establish in her mind whether a particular answer would aid or damage her case".⁷⁴ It is also submitted that the second defendant's evidence appeared to be rehearsed.⁷⁵
- [118] Overall, the plaintiff submits that the Court should not accept either the first or second defendants' evidence on critical events unless it was corroborated by another witness, or by contemporaneous documents.
- [119] Conversely, the submissions on behalf of the first and second defendants are that the Court should have no difficulty in accepting the entirety of the first defendant's evidence. It is submitted that the first defendant's evidence was clear, concise, responsive and was given in a direct manner. Further, the first defendant acknowledged when he could not specifically recall certain matters.⁷⁶
- [120] It is also submitted that the first defendant's testimony is directly corroborated by the email communications and other documentary evidence contained in the Court Book, exhibit 2. The plaintiff has accepted the truth of the statements and facts contained in those documents.⁷⁷
- [121] The first and second defendants also submit that the evidence of the second defendant should also be accepted. It is submitted that the second defendant's demeanour was calm and the second defendant was doing her best to give responsive answers to the questions asked, notwithstanding that those events occurred many years ago.⁷⁸
- [122] In relation to the plaintiff's evidence, the first and second defendants submit that it is open to the Court to find that the plaintiff was not a witness of truth. It is

⁷³ PCS [9].

⁷⁴ PCS [71].

⁷⁵ PCS [72].

⁷⁶ DCS [123].

⁷⁷ DCS [124].

⁷⁸ DCS [125(i)].

submitted that she lied in her testimony.⁷⁹ Ultimately, the first and second defendants submit that the Court should reject the entirety of the plaintiff's testimony where it is in conflict of the testimony of the first defendant, second defendant and Luke Cashin in respect of:

- (a) the events leading to the Harbut Street Agreement the plaintiff and Colin Trouton entered into with the first and second defendants;
- (b) the signing of the 9 March Written Agreement;
- (c) the plaintiff's actions to register Colin Trouton's Power of Attorney in May 2007;
- (d) the purpose of the plaintiff and Colin Trouton visiting the first and second defendants on 3 June 2007; and
- (e) the communications and dealings the plaintiff had with the first and second defendants.⁸⁰

[123] It is submitted that the plaintiff's testimony was not responsive to questions, she made speeches, was deliberately evasive, and introduced new matters which were inconsistent with her own case, as well as the documents in evidence.⁸¹

[124] The first and second defendants also submit that Christine Trouton was an unreliable witness and the Court should not accept any of her evidence.⁸²

[125] Both parties submit that the evidence of Dr Deanne Hummelstad should be accepted by the Court.⁸³

[126] I had the benefit of seeing all of the witnesses give evidence at trial and have considered my contemporaneous notes taken during the trial.

[127] While it is necessary for me to make specific findings in respect of the evidence of various issues, at a general level I make the following findings in respect of the plaintiff's evidence:

- (a) The evidence of the plaintiff was plainly implausible in a number of respects.
 - (i) One example is the plaintiff's evidence as to why she did not list the Harbut Street Property as an asset when completing her application for a Centrelink pension if she thought that she still owned the Harbut Street Property. As she was then living at the Gold Coast as her principal place of residence, the Harbut Street Property would have

⁷⁹ DCS [126].

⁸⁰ DCS [127].

⁸¹ DCS [128].

⁸² DCS [129].

⁸³ PCS [105]; DCS [160].

been an investment property if she still owned it. I find that the plaintiff's explanation of an oversight is implausible.

- (ii) Another example is the plaintiff's explanation of her lack of knowledge concerning the District Court proceedings by RHG seeking orders in respect of the default on the RAMS facilities and the related Supreme Court proceedings by the defendants seeking orders, in effect, permitting the defendants to make payments in respect of the RAMS Facilities and preserving the position until the determination of these proceedings. These proceedings were more recent in time and also had serious consequences if the plaintiff was still the owner of the Harbut Street Property. The mortgagee could have taken possession of the Harbut Street Property and sold it. Given the central importance of the Harbut Street Property to these proceedings it is implausible that the plaintiff would not have had a greater involvement in, and knowledge of, those proceedings if she was in fact the rightful owner of the Harbut Street Property.
- (b) The plaintiff's evidence was largely unresponsive to questions asked, and the plaintiff kept repeating matters in a way that suggested she was giving evidence consistent with her own case.
- (c) The plaintiff's evidence was not credible or reliable.
- (d) Overall, I do not accept the evidence of the plaintiff except where it is consistent with the evidence of the first and second defendants, or it is consistent with contemporaneous documents.

[128] I do not agree with the submissions made on behalf of the plaintiff in respect of the evidence of the first defendant.

[129] The first defendant has a hearing impairment and was provided with technology by the Court to assist him in giving evidence and for use during the trial. There were difficulties with the technology at various points which required adjustments to be made. The suggestion that the demeanour of the witness in those circumstances should be given considerable weight in evaluating the truth of the evidence is dangerous.

[130] It was clear from observing the first defendant during the time he was giving evidence that there were difficulties in him clearly hearing the questions put to him by both Counsel. At times the technology did not assist and may have in fact exacerbated the first defendant's hearing difficulties. The plaintiff submits that the observed delay in the first defendant providing answers to questions should operate against his credit. I consider there is no basis for that conclusion.

[131] This is particularly so when the evidence given by the first defendant is consistent in many respects with contemporaneous documents which are in evidence. In these circumstances, I do not accept the submission that the first defendant's demeanour in giving evidence reflects on his credibility or truthfulness.

- [132] Similarly, in relation to the second defendant, I do not accept the plaintiff's submissions that the demeanour of the second defendant in any way diminishes the testimony that the second defendant gave.
- [133] I accept the evidence of the first and second defendants as credible and reliable. I also accept the evidence of Dr Deanne Hummelstad.
- [134] In respect of the evidence of Christine Trouton, I find that her evidence was not reliable or credible in respect of the key areas relevant to the issues in dispute. In particular, I find that her account of how she first realised that the Harbut Street Property had been transferred to the defendants is implausible. I do not accept the evidence of Christine Trouton.
- [135] It is necessary to further consider the evidence that was given on the key material facts relevant to the plaintiff's claim.

Execution of the Form 1 Transfer

- [136] Central to the plaintiff's claim, as set out in the SOC, are the circumstances giving rise to the execution of the Form 1 Transfer in relation to the Harbut Street property.
- [137] It is not contentious that the Form 1 Transfer was executed on 19 June 2007 and that on the face of the document, the "transferors" are listed as Colin Trouton and the plaintiff, and the transferees are recorded as the first and second defendants, both as joint tenants.
- [138] Further, it is not contentious that Colin Trouton died on 15 June 2007, prior to the execution of the Form 1 Transfer.
- [139] The evidence of the plaintiff in respect of the Form 1 Transfer is:
- (a) The plaintiff received a telephone call from the first defendant asking the plaintiff to come to Brisbane quickly because "we had to address something with the estate".⁸⁴
 - (b) The first defendant asked the plaintiff to sign the Form 1 Transfer.⁸⁵
 - (c) The plaintiff did not know what it was about.⁸⁶
 - (d) The first defendant did not explain to the plaintiff what she was signing.⁸⁷
 - (e) The second defendant did not explain to the plaintiff what she was signing.⁸⁸

⁸⁴ T 1-55, lines 19-25.

⁸⁵ T 1-56, lines 34-35.

⁸⁶ T 1-56, lines 36-38.

⁸⁷ T 1-56, lines 39-40.

⁸⁸ T 1-56, line 44.

- (f) The plaintiff did not ask what she was signing as she was too grief stricken. She also trusted the first and second defendants.⁸⁹
- (g) The plaintiff signed things for the first defendant when he brought them to her. “It was never in [her] mind to think that this would happen”.⁹⁰
- (h) The plaintiff first learned that the title had been transferred when her daughter Christine Trouton discovered that the title was no longer in her or Colin Trouton’s name.⁹¹
- (i) The plaintiff had no idea that the title had been transferred. The plaintiff stated:
- “I always thought it was my land and my son would be building on it”.⁹²
- (j) The plaintiff gave evidence that she never received \$525,000.⁹³
- (k) If the plaintiff had understood that the document was to transfer the title she would not have signed it at the time.⁹⁴
- (l) The first defendant did not mention that title had transferred when the first defendant made enquiries as to why the RAMS home loan was in default. The first defendant did not mention to her that the title had been transferred.⁹⁵
- (m) The plaintiff asked the first defendant to pay the arrears on the RAMS home loan. The plaintiff thought at the time the first defendant agreed to take over the mortgage payments that it would only be for a year or so, or two years like a normal build would be.⁹⁶
- (n) The plaintiff “expected the build to go ahead on [her] land”. She further said “At the completion of the build, I would then speak to the rest of my children – four daughters, seek – and the advice, and go to my solicitor – he’d already given me the advice – go to my solicitor, and the expectation would be, in conjunction with everything, we’d all get together, we’d sort out the finances, I’d be paid and the amount that Neil was owed, he’d be paid to. But it would be done legally”.⁹⁷

⁸⁹ T 1-56, lines 46-47 and T 1-57, lines 1-4.

⁹⁰ T 1-57, lines 1-4.

⁹¹ T 1-57, lines 36-44.

⁹² T 1-57, lines 45-46.

⁹³ T 1-58, line 7.

⁹⁴ T 1-58, lines 9-10.

⁹⁵ T 1-60, lines 20-22.

⁹⁶ T 1-61, lines 14-18.

⁹⁷ T 1-61, lines 37-43.

[140] For the plaintiff to be successful on her pleaded claim the plaintiff's evidence in respect of the circumstances that the Form 1 Transfer was executed needs to be accepted.

[141] In particular, the plaintiff needs to establish the matters pleaded in [14(b)] of the SOC, namely:

“On 19 June 2007 [the defendants]:

- i. procured the signature of the plaintiff on the Form 1 Transfer Instrument by:
 - A telephoning the plaintiff on the morning of 19 June 2007 informing her, in substance or effect, that there was a problem that required her to travel to Brisbane immediately to sign some documents;
 - B meeting the plaintiff at Garden City Shopping Centre;
 - C accompanying the plaintiff to an office within Garden City Shopping Centre;
 - D Handing the plaintiff, in said office, a bundle of documents (including the Form 1 Transfer Instrument) (herein after the “**bundle**”);
 - E requesting the plaintiff to sign documents in the bundle (including the Form 1 Transfer Instrument); and indicating by hand gesture where the plaintiff was to sign;
 - F failing at any stage to explain, or otherwise inform, the plaintiff of the legal nature and effect of documents including the Form 1 Transfer Instrument; and
 - G having the plaintiff's various signatures witnessed by a justice of the peace.”

[142] The evidence of the first defendant in respect of the circumstances leading up to the signing of the Form 1 Transfer on 19 June 2007 includes:

- (a) The second defendant prepared the Form 1 Transfer in early May.⁹⁸
- (b) The plaintiff and Colin Trouton met the first and second defendant on 3 June 2007 at the Carindale Shopping Centre in the afternoon.⁹⁹

⁹⁸ T 10-57, lines 34-35.

⁹⁹ T 10-57, lines 38-40.

- (c) Colin Trouton fell ill on the night of 3 June 2007 and as a consequence, the Form 1 Transfer was not signed by the plaintiff and the first defendant. The plaintiff and Colin Trouton returned to the Gold Coast on 4 June 2007.¹⁰⁰
- (d) The day after Colin Trouton's death, on 16 June 2007, the first defendant received a telephone call from John Hummelstad, Dr Deanne Hummelstad's husband, who advised that arrangements were being made to remove certain care items from the Gold Coast unit. The first and second defendants travelled to the Gold Coast to see what was happening in respect of the removal of the care items.¹⁰¹
- (e) When the first and second defendants arrived at the Breakers North unit on the Gold Coast, they observed that care items were being removed and taken away by a third party.¹⁰²
- (f) The first defendant was quite shocked. The first and second defendants stayed at the Breakers North unit on the evening of 16 June 2007.¹⁰³ The first defendant had a discussion with Dr Deanne Hummelstad to the following effect:
- “Deanne asked me when I was at the computer in the alcove. She said that, ‘are you still going to proceed with the Harbut Street property?’ ... I said we had already invested a huge amount of time and money and that mum would have the granny flat.”¹⁰⁴
- (g) The first defendant returned to Brisbane and spoke to the plaintiff next on 18 June 2007 when the first defendant rang the plaintiff as he was upset that he was not included in the casket and funeral arrangements in respect of Colin Trouton.¹⁰⁵
- (h) During the telephone conversation between the first defendant and the plaintiff on 18 June 2007:
- (i) the first defendant told the plaintiff that Dr Deanne Hummelstad had asked him the “other night” whether he would be proceeding with Harbut Street. The plaintiff responded by saying “the girls are asking questions”.¹⁰⁶

¹⁰⁰ T 10-58, lines 1-8.

¹⁰¹ T 10-59, line 38 to T 10-60, line 2.

¹⁰² T 10-60, lines 4-10.

¹⁰³ T 10-60, lines 13-16.

¹⁰⁴ T 10-60, lines 46-47 to T 10-61, lines 1-2.

¹⁰⁵ T 10-61, lines 18-31.

¹⁰⁶ T 10-61, lines 31-34.

- (ii) the first defendant asked the plaintiff did the plaintiff still want to proceed with Harbut Street. The plaintiff replied “definitely yes” and commented that “it’s what dad wanted”.¹⁰⁷
- (iii) the plaintiff said that she was coming up to Brisbane the next day and the plaintiff and the first defendant would “organise what we had to do tomorrow”, that is, arrange the transfer.¹⁰⁸
- (i) On 19 June 2007, the first defendant telephoned the plaintiff in the morning, which is what had been discussed the day before. During the telephone conversation, the transfer was discussed and finding “a JP to witness the transfer” and “locating a JP”.¹⁰⁹
- (j) The plaintiff indicated that she would assist in finding a Justice of the Peace and she would make some phone calls. The first defendant would also make some phone calls to locate a Justice of the Peace.¹¹⁰
- (k) The first defendant spoke to the second defendant and the second defendant assisted in making some phone calls to find a Justice of the Peace while the plaintiff was also making phone calls.¹¹¹
- (l) The plaintiff telephoned the first defendant and said that she had found a Justice of the Peace at the Garden City Shopping Centre through Mortgage Choice.¹¹²
- (m) The plaintiff said that she would come up to Brisbane and that the first and second defendants would meet her at Garden City. A time was arranged based on how much time the plaintiff needed to travel to Brisbane.¹¹³
- (n) A time around 10 o’clock, midmorning, was arranged.¹¹⁴
- (o) The plaintiff said that she would bring the Colin Trouton Power of Attorney.¹¹⁵
- (p) The first and second defendants and their children travelled to Garden City Shopping Centre to meet the plaintiff.¹¹⁶

¹⁰⁷ T 10-64, lines 4-6.

¹⁰⁸ T 10-64, lines 8-13.

¹⁰⁹ T 10-64, lines 17-26.

¹¹⁰ T 10-64, lines 36-43.

¹¹¹ T 10-65, lines 3-9.

¹¹² T 10-65, lines 14-24.

¹¹³ T 10-65, lines 26-28.

¹¹⁴ T 10-65, lines 30-31.

¹¹⁵ T 10-65, lines 33-38.

¹¹⁶ T 10-65, lines 42-46.

- (q) Mortgage Choice was located in the Centre Manager's area, on level 1 above the main section of the shopping centre. There was a lift and a staircase. The first and second defendants met the plaintiff where the staircase went up to the Centre Manager's area.¹¹⁷
- (r) The plaintiff, the first and second defendants and their children, greeted each other and went up the stairs to Mortgage Choice. Mortgage Choice was in an enclosed office. They went through a doorway and up to a reception desk.¹¹⁸
- (s) A person (now known as Luke Cashin) came out of the back office and came up to the side of the reception desk. The second defendant introduced herself and others to Luke Cashin and said that we were there to get him to witness a transfer document.¹¹⁹
- (t) The second defendant had the Form 1 Transfer and put it on the reception desk.¹²⁰
- (u) The plaintiff produced the Colin Trouton Power of Attorney and put that on the reception desk.¹²¹
- (v) Prior to signing the Form 1 Transfer, Mr Cashin asked for a driver's licence as identification and each of the plaintiff and the first and second defendants produced their drivers' licences.¹²²
- (w) Mr Cashin briefly looked at the documents on the table (being the Form 1 Transfer and the Colin Trouton Power of Attorney).¹²³
- (x) Mr Cashin asked if everyone understood document they were about to sign. The plaintiff and the first and second defendants each said yes.¹²⁴
- (y) The first defendant heard the plaintiff say "yes" in response to Mr Cashin's question whether everyone understood the document they were about to sign.¹²⁵
- (z) The first defendant did not direct the plaintiff as to where to sign on the Form 1 Transfer.¹²⁶

¹¹⁷ T 10-66, lines 3-9.

¹¹⁸ T 10-66, lines 13-26.

¹¹⁹ T 10-66, lines 21-26.

¹²⁰ T 10-66, lines 28-32.

¹²¹ T 10-66, lines 31-32.

¹²² T 10-67, lines 11-13.

¹²³ T 10-67, lines 13-16.

¹²⁴ T 10-67, lines 15-17.

¹²⁵ T 10-67, lines 19-24.

¹²⁶ T 11-61, lines 15-27.

- (aa) The plaintiff signed the Form 1 Transfer first, the first defendant signed the Form 1 Transfer second and the second defendant signed the Form 1 Transfer third.¹²⁷
- (bb) Following the plaintiff and the first and second defendants signing the Form 1 Transfer, Mr Cashin completed his signature and applied his stamp as the Justice of the Peace.¹²⁸
- (cc) The first defendant does not recall who wrote the dates on the Form 1 Transfer. It is not the first defendant's writing.¹²⁹
- (dd) The handwritten words immediately under the transferor's signature in respect of Colin Trouton were on the Form 1 Transfer prior to signing.¹³⁰
- (ee) The plaintiff and the first and second defendants were standing at the high reception desk when signing the document.¹³¹
- (ff) After the Form 1 Transfer was signed, the plaintiff, the first and second defendants and their two children went downstairs and walked through the Garden City Shopping Centre.¹³²
- (gg) They grabbed a takeaway coffee on the way up to Harvey Norman. The first and second defendants at the time were looking at replacing a kettle. The plaintiff indicated she was going to look around at some other things in the store. They were in the store for 15-20 minutes, maybe a bit longer, half an hour.¹³³
- (hh) By the time they left Harvey Norman, it was getting close to lunch. The first and second defendants said that they were taking their children home for lunch. The plaintiff said she was going to go visit her daughter Margo Powell who was then living at Wynnum.¹³⁴
- (ii) The whole process of signing the Form 1 Transfer took less than 10 minutes.¹³⁵

¹²⁷ T 10-67, lines 8-9.

¹²⁸ T 10-67, lines 28-35.

¹²⁹ T 10-67, lines 37-38.

¹³⁰ T 10-67, lines 40-45.

¹³¹ T 10-68, lines 9-12.

¹³² T 10-68, lines 14-16.

¹³³ T 10-68, lines 16-24.

¹³⁴ T 10-68, lines 24-30.

¹³⁵ T 10-68, lines 31-33.

- (jj) The first defendant observed the plaintiff's demeanour as being "normal" in that she was happy to see them and was talking normally.¹³⁶
- (kk) After having lunch at home, the first and second defendants and their children got into their car and went into the city. They went to Charlotte Street for the Office of State Revenue. The second defendant was dropped off as the first defendant could not find a parking spot. The first defendant drove around the block.¹³⁷
- (ll) The second defendant returned and the first defendant drove to the Titles Office and dropped off the second defendant. The second defendant went into the Titles Office and returned sometime later.¹³⁸

[143] It is submitted on behalf of the first and second defendants as follows:

"The details in the ... testimony from [the first defendant] highlights the fact that [the plaintiff's] version of all of the events that led to the signing of the form 1 transfer is a lie. This prospect of any witness being able to fabricate or make up the facts with the detail recounted by [the first defendant] and of being able to testify with the fluency that he did when giving his testimony are so remote that the court would have no hesitation in accepting his testimony in its entirety."

[144] Counsel on behalf of the plaintiff cross-examined the first defendant in relation to these circumstances. This included putting to the first defendant that he had approached the plaintiff with a form for the registration of the Colin Trouton Power of Attorney and asked her to fill it in. The first defendant rejected this proposition.¹³⁹

[145] Further, it was put to the first defendant that the reason that the Form 1 Transfer document was not executed on 3 or 4 June 2007 was that the registered power of attorney had not yet come back from the Titles Office. The first defendant rejected this proposition.¹⁴⁰

[146] The plaintiff led no evidence to establish when the Colin Trouton Power of Attorney was received back from the Titles Office and did not point to any evidence in support of the proposition. On the face of the document, there is a date stamp of 21 May 2007 at 14:25 under the amount of money that had been paid. This date and time is also endorsed on the front page of the Colin Trouton Power of Attorney.

¹³⁶ T 10-68, lines 35-40.

¹³⁷ T 10-68, lines 42-47; T 10-69, lines 1-19.

¹³⁸ T 10-69, lines 22-37.

¹³⁹ T 11-59, lines 41-47.

¹⁴⁰ T 11-60, lines 4-10.

- [147] The first defendant's evidence in respect of 3 and 4 June 2007 is that the plaintiff and the first defendant were to sign the transfer as the attorneys of Colin Trouton on 3 or 4 June.¹⁴¹
- [148] The transfer document was prepared in May and the second defendant wrote the words "Colin William Trouton by his duly constituted attorney". It was not the plan to sign under the Colin Trouton Power of Attorney until June.¹⁴²
- [149] The first defendant was also cross-examined about the events on 18 June 2007. This evidence is consistent with the first defendant's evidence in chief, which included:
- (a) there was a conversation that the plaintiff wanted to proceed with the Harbut Street Property.¹⁴³
 - (b) the plaintiff indicated that she would be travelling to Brisbane and brought the Colin Trouton Power of Attorney with her.
 - (c) the first defendant recalls that the plaintiff volunteered to bring the Colin Trouton Power of Attorney.¹⁴⁴
- [150] The first defendant reiterated in cross-examination that he never said that he "had some documents" and "had a problem".¹⁴⁵
- [151] The first defendant was also cross-examined about the events on 19 June 2007. The first defendant's evidence was that:
- (a) On 19 June when the plaintiff brought the Colin Trouton Power of Attorney to the Garden City Shopping Centre, that was the first time the first defendant had seen it since it was executed years earlier.¹⁴⁶
 - (b) The first defendant had not seen the document when the plaintiff and Colin Trouton visited on 3 and 4 June 2007.¹⁴⁷
 - (c) When the first defendant saw the Form 1 Transfer on 19 June 2007, it already had the words "Colin William Trouton by his duly constituted attorney" written on it.¹⁴⁸
 - (d) The only writing he observed on the Form 1 Transfer on the day that it was executed at the Garden City Shopping Centre on 19 June 2007 were the

¹⁴¹ T 11-14, lines 20-43.

¹⁴² T 11-14, line 20 to T 11-16, line 15.

¹⁴³ T 11-57, lines 35-37.

¹⁴⁴ T 11-58, lines 32-45.

¹⁴⁵ T 11-60, line 40 to T 11-61, lines 1-4.

¹⁴⁶ T 11-16, lines 16-21.

¹⁴⁷ T 11-16, lines 40-41.

¹⁴⁸ T 11-17, lines 18-19.

signatures. He was not absent at any time during the document being executed.¹⁴⁹

- (e) The Form 1 Transfer was produced at the Garden City Shopping Centre for execution and the first defendant did not indicate to the plaintiff where to sign.¹⁵⁰
- (f) The first defendant did not tell the plaintiff what the document was that she was signing as the plaintiff knew what the document was and the plaintiff knew she was signing a transfer.¹⁵¹

[152] In cross-examination, Counsel for the plaintiff put it to the first defendant that the plaintiff was presented with a number of other documents and the first defendant indicated the places to sign. The first defendant gave evidence that there were no other documents other than the Form 1 Transfer.¹⁵²

[153] Counsel on behalf of the plaintiff also cross-examined the first defendant in relation to the circumstances where the first and second defendants went into the city after lunch to lodge the Form 1 Transfer with the Titles Office. The first defendant was questioned as to why they did it that afternoon and did not wait. The first defendant gave evidence that the first and second defendants were home with their children and did it that day.¹⁵³

[154] The first defendant was questioned as to whether the document was lodged urgently as the first and second defendants were fearful that the first defendant's sisters would not be happy if they found out about the transfer. The first defendant denied this and also denied that he was fearful.¹⁵⁴

[155] The second defendant also gave evidence in relation to the signing of the Form 1 Transfer on 19 June 2007. The second defendant's evidence relevantly was:

- (a) The first time she saw Colin Trouton's Power of Attorney was on the evening of 3 June 2007 when she was talking to the plaintiff in the first and second defendants' son's bedroom.¹⁵⁵
- (b) The plaintiff asked the second defendant whether the second defendant needed the Colin Trouton Power of Attorney as tentative arrangements had been made to transfer the property on 4 June 2007.¹⁵⁶

¹⁴⁹ T 11-17, lines 21-46.

¹⁵⁰ T 11-61, lines 3-27.

¹⁵¹ T 11-61, lines 22-23.

¹⁵² T 11-61, lines 25-27.

¹⁵³ T 11-61, line 29 to T 11-62, line 5.

¹⁵⁴ T 11-62, lines 10-40.

¹⁵⁵ T 12-5, lines 34-40.

¹⁵⁶ T 12-6, lines 1-5.

- (c) The second defendant wrote the endorsement relating to Colin Trouton's Power of Attorney on the Form 1 Transfer on the night of 3 June 2007 using the registration number shown on the Colin Trouton Power of Attorney.¹⁵⁷
- (d) Earlier, on or about 31 May 2007 or 1 June 2007, the second defendant had made enquiries of the Titles Office enquiry line and had been informed that an Enduring Power of Attorney was required to be registered before a transfer could be lodged for registration and the form of endorsement that would need to be made.¹⁵⁸
- (e) The second defendant put the endorsement on the Form 1 Transfer so that the first defendant and the plaintiff would be able to sign the transfer as attorneys for Colin Trouton.¹⁵⁹
- (f) The endorsement was the only words written on the Form 1 Transfer on the evening of 3 June 2007.¹⁶⁰
- (g) Once the endorsement had been made on the Form 1 Transfer, the second defendant left the Colin Trouton Power of Attorney on top of the plaintiff's handbag which was located in the first and second defendants' son's bedroom.¹⁶¹
- (h) The first and second defendants and their children were at the plaintiff's unit on 16 June 2007.¹⁶² There, the second defendant overheard a conversation between the first defendant and Dr Deanne Hummelstad as follows:

“Deanne asked if we would still be proceeding with the Harbut Street property and [the first defendant] told her that we had invested a substantial amount of time and money and that his mum would still have the granny flat to live in.”¹⁶³

[156] Relevantly, the second defendant was not a party to the conversation between the first defendant and Dr Deanne Hummelstad on 16 June 2007 and she was also not a party to the various conversations between the first defendant and the plaintiff on 18 June 2007.¹⁶⁴

[157] In respect of the execution of the Form 1 Transfer on 19 June 2007, the second defendant's evidence relevantly included:

¹⁵⁷ T 12-6, lines 18-40.

¹⁵⁸ T 12-8, lines 25-36.

¹⁵⁹ T 12-8, lines 21-23.

¹⁶⁰ T 12-6, lines 45-46.

¹⁶¹ T 12-8, lines 44-46.

¹⁶² T 12-9, lines 7-13.

¹⁶³ T 12-9, lines 18-21.

¹⁶⁴ T 12-9, lines 42-46. It is noted that the second defendant was present for the first conversation and overheard it, but was not a party to it.

- (a) The first and second defendants and their children attended the Garden City Shopping Centre midmorning to meet with the plaintiff.¹⁶⁵
- (b) The second defendant took the Form 1 Transfer to the Garden City Shopping Centre in her handbag.¹⁶⁶
- (c) The second defendant understood that the purpose of the meeting was to meet with a Justice of the Peace to sign the Form 1 Transfer.¹⁶⁷
- (d) The first and second defendants, their children and the plaintiff walked up some stairs to a mortgage broking business where the Justice of the Peace was.¹⁶⁸
- (e) The first and second defendants, their children and the plaintiff entered an office and the second defendant introduced herself to a male person, Luke Cashin, first. The only person in the room was Luke Cashin.¹⁶⁹
- (f) The second defendant put the unsigned Form 1 Transfer on the reception counter.¹⁷⁰
- (g) The plaintiff took the Colin Trouton Power of Attorney out of her handbag and put it on the reception counter.¹⁷¹
- (h) Luke Cashin asked the plaintiff and the first and second defendants to provide identification.¹⁷²
- (i) The second defendant produced her driver's licence. The second defendant observed the first defendant and the plaintiff do the same.¹⁷³
- (j) Luke Cashin looked at the Form 1 Transfer and asked the plaintiff and the first and second defendants whether they understood the transfer.¹⁷⁴
- (k) The second defendant responded "yes". The second defendant heard the plaintiff and the first defendant also say "yes".¹⁷⁵

¹⁶⁵ T 12-9, lines 35-36.

¹⁶⁶ T 12-10, lines 16-17.

¹⁶⁷ T 12-10, lines 8-9.

¹⁶⁸ T 12-10, lines 33-34.

¹⁶⁹ T 12-10, lines 40-46.

¹⁷⁰ T 12-11, lines 4-6.

¹⁷¹ T 12-11, lines 4-6.

¹⁷² T 12-11, lines 15-16.

¹⁷³ T 12-11, lines 18-21.

¹⁷⁴ T 12-11, lines 23-28.

¹⁷⁵ T 12-11, lines 30-38.

- (l) The second defendant saw the plaintiff sign the Form 1 Transfer first. Next, the second defendant saw the first defendant sign the Form 1 Transfer.¹⁷⁶
- (m) The second defendant signed the Form 1 Transfer last.¹⁷⁷
- (n) The second defendant observed Luke Cashin sign and stamp the Form 1 Transfer.¹⁷⁸
- (o) The second defendant took the signed Form 1 Transfer and the plaintiff took the Colin Trouton Power of Attorney.¹⁷⁹

[158] In respect of what happened after the execution of the Form 1 Transfer, the second defendant's evidence was that they left the Mortgage Choice office and the first and second defendants, the plaintiff, and the first and second defendants' children stayed at Garden City for a little while. They purchased a coffee and did some shopping. The plaintiff accompanied them as they did some shopping. The plaintiff's demeanour was that she seemed calm and was coping well. The second defendant was not aware what the plaintiff did after they left.¹⁸⁰

[159] Further, the second defendant's evidence was that after they left the Garden City Shopping Centre:

- (a) The first and second defendants and their children went back to their home and had some lunch.¹⁸¹
- (b) Then they travelled by car to the city.¹⁸²
- (c) The first defendant dropped the second defendant off at the Office of State Revenue to pay the transfer duty. The first defendant then picked up the second defendant and took her to the Titles Office so she could lodge the transfer.¹⁸³
- (d) The second defendant took to the Office of State Revenue the 9 March Written Agreement, and the Form 1 Transfer and the valuation from SLR Valuations. The second defendant paid the stamp duty, was picked up by the first defendant and they then drove to the Titles Office.¹⁸⁴

¹⁷⁶ T 12-11, lines 40-44.

¹⁷⁷ T 12-11, line 44.

¹⁷⁸ T 12-11, lines 46-47.

¹⁷⁹ T 12-12, lines 1-2.

¹⁸⁰ T 12-12, lines 4-18.

¹⁸¹ T 12-12, lines 20-23.

¹⁸² T 12-12, lines 24-25.

¹⁸³ T 12-12, lines 25-27.

¹⁸⁴ T 12-12, lines 29-36.

- (e) The second defendant then went into the Titles Office and lodged the transfer for registration.¹⁸⁵
- (f) The second defendant subsequently received confirmation that the Form 1 Transfer had been registered.¹⁸⁶

[160] Counsel for the plaintiff cross-examined the second defendant in respect of the events leading up to 3 June 2007. The second defendant's evidence was that she had made enquiries with the Titles Office enquiry line about the procedure for the transfer to be executed and then registered. She did not ask about whether it was appropriate for the attorney also to be the transferee. The second defendant conceded that she did not think to ask anybody as she did not turn her mind to it and did not believe there was an issue about the power of attorney.¹⁸⁷

[161] The second defendant was further cross-examined about whether she turned her mind to there being any issue about the first defendant acting as attorney but also being the transferee and the second defendant gave evidence that she did not believe it was an issue. Her evidence was that she did not believe it was an issue as it was a family transaction that was beneficial to both the first and second defendants, and also to the plaintiff and Colin Trouton.¹⁸⁸

[162] Further, the second defendant was cross-examined about the arrangements in place to execute the Form 1 Transfer on 3 and 4 June 2007. The second defendant's evidence was:

- (a) A tentative arrangement had been made to execute the document on 4 June 2007. This arrangement was made between the plaintiff and the first defendant.¹⁸⁹
- (b) The Form 1 Transfer was on her desk on the evening of 3 June 2007. She did not show the plaintiff. Further, she did not show anyone the words that she had inserted beneath the signature section.¹⁹⁰

[163] The second defendant was cross-examined as to why it was necessary for the Form 1 Transfer to be executed by his attorneys, rather than by Colin Trouton himself as he was present. The second defendant gave evidence that:

- (a) There had been a deterioration in Colin Trouton's health after he went into respite care on 18 May 2007 and subsequently, Allamanda Hospital.¹⁹¹

¹⁸⁵ T 12-12, lines 36-37.

¹⁸⁶ T 12-12, lines 39-43.

¹⁸⁷ T 12-22, lines 14-45.

¹⁸⁸ T 12-23, lines 1-4.

¹⁸⁹ T 12-22, lines 1-10.

¹⁹⁰ T 12-43, lines 10-17.

¹⁹¹ T 12-43, lines 23-27.

- (b) The second defendant inserted the words on the Form 1 Transfer as at that time the plaintiff and the first defendant were going to sign as Colin Trouton's attorneys. It was not the second defendant's decision in that regard.¹⁹²
- (c) She inserted the words because the person she spoke to at the Titles Office said those words were necessary if the Form 1 Transfer was going to be executed under a power of attorney.¹⁹³
- (d) The second defendant does not recall the discussion where she was told that the Form 1 Transfer at that time would be executed under the power of attorney.¹⁹⁴

[164] Counsel on behalf of the plaintiff also cross-examined the second defendant in relation to the events on 16 June 2007. The second defendant gave evidence under cross-examination that the first defendant, in the conversation with Dr Deanne Hummelstad, had indicated that the first and second defendants had spent a lot of time and money. The first defendant did not say that there was a signed agreement.¹⁹⁵

[165] Counsel of behalf of the plaintiff put to the first defendant that after Dr Deanne Hummelstad raised the issue of whether they were going to proceed, that the first and second defendants decided to get the transfer executed as quickly as possible.¹⁹⁶ This was denied by the second defendant. The second defendant's evidence was:

- (a) She did not turn her mind to the fact that as Colin Trouton was deceased he had no continuing interest in the property.¹⁹⁷
- (b) She was not aware that an attorney under a power of attorney could not execute any instrument on behalf of a deceased donor.
- (c) She admitted that she is embarrassed that a mistake was made but she was not aware of it at that time.¹⁹⁸

[166] The second defendant also was cross-examined about the specific execution of the Form 1 Transfer on 19 June 2007. The second defendant gave evidence that:

¹⁹² T 12-43, lines 36-39.

¹⁹³ T 12-43, lines 44-46.

¹⁹⁴ T 12-44, lines 1-10.

¹⁹⁵ T 12-45, lines 1-10.

¹⁹⁶ T 12-45, lines 25-28.

¹⁹⁷ T 12-45, lines 34-35.

¹⁹⁸ T 12-45, lines 41-43.

- (a) She did not turn her mind to the fact that upon Colin Trouton's death the title in the property would have passed to the plaintiff.¹⁹⁹
- (b) She was not aware at the time that a power of attorney ceases to have effect on the death of the donor.²⁰⁰
- (c) On 18 June 2007 the second defendant became aware that the plaintiff would be coming to Brisbane on 19 June 2007 and there had been a discussion between the plaintiff and the first defendant as to signing the transfer.²⁰¹
- (d) The second defendant did not know they were going to the Garden City Shopping Centre until 19 June 2007.²⁰²
- (e) The second defendant recalls that the first defendant told her that he had been speaking to the plaintiff and the plaintiff had said she was coming up to Brisbane the following day, and there had been a discussion about signing the transfer on 19 June 2007 when the plaintiff came to Brisbane.²⁰³
- (f) The second defendant also recalls some mention that the plaintiff was coming to Brisbane to visit her daughter, Margo Powell.²⁰⁴

[167] The second defendant was cross-examined as to whether it was "a little bit ghoulish" to be signing the transfer so soon after Colin Trouton's death. The second defendant gave evidence that they were proceeding with the arrangement and that the plaintiff was happy to go ahead as the plaintiff would have the granny flat to live in.²⁰⁵

[168] Further, the second defendant gave evidence that later in the afternoon on 19 June 2007 the first and second defendants went into the city to go to the Office of State Revenue first and then the Titles Office. The second defendant's evidence was that:

- (a) The first and second defendants chose to do it that afternoon as the first and second defendants were not working that week and the children were home that week. They had time in the afternoon and decided to do it.²⁰⁶
- (b) The second defendant had with her the 9 March Written Agreement, the Form 1 Transfer and the SLR Valuation when she went to the Office of State

¹⁹⁹ T 12-18, lines 10-14.

²⁰⁰ T 12-18, lines 23-25.

²⁰¹ T 12-42, lines 20-26.

²⁰² T 12-42, lines 25-27.

²⁰³ T 12-42, lines 20-38.

²⁰⁴ T 12-44, lines 32-37; although Margo Powell's evidence does not support this: see T 4-83, line 30.

²⁰⁵ T 12-44, lines 39-45.

²⁰⁶ T 12-46, lines 40-46.

Revenue. The second defendant recalls the clerk at the Office of State Revenue being more focused upon the valuation.²⁰⁷

- [169] Counsel on behalf of the plaintiff also cross-examined the second defendant in relation to the plaintiff at the time of the execution of the Form 1 Transfer. It was put to the second defendant that the plaintiff was obviously in a state of distress. This was denied by the second defendant. The second defendant's evidence was that the plaintiff was not outwardly distressed.²⁰⁸
- [170] The second defendant was also questioned as to what documents were looked at on the occasion when the Form 1 Transfer was executed. The second defendant's evidence was the Form 1 Transfer which she brought along and the Colin Trouton Power of Attorney which the plaintiff brought along. They were the only documents that were looked at. No-one brought along the 9 March Written Agreement.²⁰⁹
- [171] Counsel on behalf of the plaintiff questioned the second defendant as to whether anybody mentioned that the property was being transferred without the plaintiff receiving the proceeds of sale. The second defendant's evidence was that this was not mentioned.²¹⁰
- [172] Further, Counsel asked whether anyone mentioned that the property was being transferred on the basis that the plaintiff would have ongoing liability for the debt that was secured by the property. The second defendant's evidence was no, as the loan was for the plaintiff to deal with.²¹¹
- [173] The plaintiff's evidence was in sharp contrast to the first and second defendants'. The plaintiff gave evidence that she did not recall much of the day of 19 June 2007. She does recall a phone call from her son who said "we had a problem, or he had a problem". The second defendant asked her to come to Brisbane pretty quickly "because we had to address something to do with my husband's estate, eg, documents".²¹²
- [174] The plaintiff's evidence was that the first defendant said to meet him at Garden City. The plaintiff can recall meeting the first and second defendants at Garden City. The plaintiff recalls that they had to wait for a period in "blackness" for whoever it was to arrive.²¹³

²⁰⁷ T 12-47, lines 1-12.

²⁰⁸ T 12-51, lines 1-13.

²⁰⁹ T 12-51, lines 15-24

²¹⁰ T 12-51, lines 40-41

²¹¹ T 12-51, lines 43-45.

²¹² T 1-55, lines 19-25.

²¹³ T 1-55, lines 27-41.

- [175] The plaintiff's evidence was that the first defendant did not say why he wanted the plaintiff there.²¹⁴
- [176] In respect of the execution of the Form 1 Transfer, the plaintiff's evidence was that she was asked to sign the documents. She thinks it was her son who asked her to sign the documents.²¹⁵ The plaintiff recalls that the second defendant was also present.²¹⁶
- [177] In evidence in chief, the plaintiff acknowledged that two of her signatures are on the documents.²¹⁷ When asked about the capacity that she signed the documents, her response was that her husband was dead at the time. The plaintiff indicated that she signed it.²¹⁸
- [178] In respect of the plaintiff's evidence, there is a lot of detail that she cannot remember. For example, she cannot remember how she got to Garden City and cannot remember driving there.²¹⁹
- [179] Further, she has no recollection of the name of the place where the document was executed,²²⁰ no recollection of what she signed, or how she signed it, or anything.²²¹ She cannot recall whether the witness was male or female.²²²
- [180] Further, the plaintiff's evidence was that the first and second defendants did not explain what she was signing.²²³ The plaintiff did not ask the defendants what she was signing. Her evidence was "I was just too grief stricken or just wrapped up in my own situation".²²⁴
- [181] The plaintiff's evidence was that she did not recall the Form 1 Transfer.²²⁵ Further, whilst she signed the form, she did not know the effect of signing the document was to transfer the property.²²⁶

²¹⁴ T 1-56, lines 1-7.

²¹⁵ T 1-56, lines 29-37.

²¹⁶ T 1-56, line 42.

²¹⁷ T 1-56, lines 14-23.

²¹⁸ T 1-87, lines 17-23.

²¹⁹ T 1-55, lines 31-32.

²²⁰ T 1-56, lines 4-5.

²²¹ T 1-56, lines 22-23.

²²² T 1-56, lines 31-32.

²²³ T 1-56, lines 35-44.

²²⁴ T 1-56, lines 46-47 to T 1-57, lines 1-4.

²²⁵ T 1-87, lines 31-35.

²²⁶ T 1-87, lines 43-45.

- [182] The plaintiff's evidence was that she did not know that she had transferred the Harbut Street Property until her daughter Christine Trouton showed her a copy of the transfer that she had obtained from Citec.²²⁷
- [183] Counsel on behalf of the defendants put it to the plaintiff that that was a lie. It was put to the plaintiff that she knew she had transferred the property and she knew on that day i.e. 19 June 2007. Further, it was put to the plaintiff that she voluntarily, with full knowledge of what she was doing, signed the Form 1 Transfer on 19 June 2007. In response to that question, the plaintiff's evidence was that she did not know that she had transferred the property until around the beginning of 2017.²²⁸
- [184] Again, when Counsel for the defendants asked the plaintiff to confirm that she did not intend on the day that she signed the transfer to transfer it, the plaintiff's evidence was:

“I did not sign the transfer in that context. I said to you, I didn't know I had sold the property. I didn't know I had – I didn't know I didn't own the property until 2017.”²²⁹

Luke Cashin's evidence

- [185] In considering the evidence of the plaintiff and the first and second defendants in relation to the crucial circumstances of the execution of the Form 1 Transfer, it is also appropriate to consider the testimony of Luke Cashin, who was the Justice of the Peace who witnessed the execution of the Form 1 Transfer.
- [186] The plaintiff in her submissions acknowledges that Mr Cashin was an honest witness who tried to answer in a forthright manner questions concerning matters and events that occurred a long time ago. Further, it is acknowledged that the evidence of Mr Cashin is relevant only to the events that occurred at the Garden City Shopping Centre.
- [187] The plaintiff points to Mr Cashin's evidence that he had no independent recollection of the actual events that occurred on that day.²³⁰ Mr Cashin did give evidence of his usual practice of taking steps to verify the identity of a person and clarification of eligibility by sighting a relevant document for the particular transaction. Here, under cross-examination, Mr Cashin conceded that in this case it would be merely the production of a power of attorney that would have satisfied him on the issue of eligibility.²³¹

²²⁷ T 1-100, lines 43-45.

²²⁸ T 1-53, lines 1-18.

²²⁹ T 3-78, lines 25-32.

²³⁰ T 12-74, lines 30-45 and T 12.76, lines 30-37.

²³¹ T 12-77, line 43 to T 12-78 line 4.

- [188] Further, the plaintiff points to Mr Cashin’s evidence being equivocal as to whether he asked any of the signatories to the Form 1 Transfer whether they understood the transfer or that he explained to any of them the effect of the transfer.²³²
- [189] The plaintiff submits that the evidence of Mr Cashin is not inconsistent with the evidence of the plaintiff.
- [190] Conversely, the defendants rely on the evidence of Mr Cashin as to his usual practice when witnessing documents as a Justice of the Peace.
- [191] The defendants rely upon the evidence in chief of Mr Cashin, including:
- (a) As a Justice of the Peace Mr Cashin was aware that he had to identify a person and to make sure they were eligible to sign a document.²³³
 - (b) He does not have any recollection of actually placing his signature on the Form 1 Transfer, nor does he have any recollection of placing his stamp on the Form 1 Transfer.²³⁴
 - (c) Mr Cashin took it as “a common-sense thing” in respect of documents such as a transfer, enduring power of attorney or medical directives “that the person does understand and is not under duress”.²³⁵
 - (d) Here, given the words on the Form 1 Transfer that was being executed by attorneys as part of his practice he would have required production of the power of attorney. This was to make sure that people signing were eligible to sign.²³⁶
 - (e) In respect of his “standard practice” Mr Cashin gave evidence as follows:

“In a normal case most would be my client and they would fully understand. But in – I guess if someone came to me, you know, four people, to do a transfer to transferees – transferors. I guess I would want to make sure that they understood that they were transferring property, yes.”²³⁷
 - (f) Mr Cashin could not recall an occasion in respect of witnessing a registerable instrument as a Justice of the Peace where he was unsure whether they had capacity or they were under duress. He could recall one occasion in relation

²³² T 12-75, line 36 and following.

²³³ T 12-75, lines 43-45.

²³⁴ T 12-74, lines 41-45.

²³⁵ T 12-75, lines 16-23.

²³⁶ T 12-75, lines 25-34.

²³⁷ T 12-75, lines 36-41

to a will when he felt that two beneficiaries may have been overpowering and he took the individual aside.²³⁸

- (g) He could also recall one incident when a solicitor had asked him to sign a form in relation to re-financing and he asked for evidence of eligibility. He would not sign the document as the individual said that she did not need to provide evidence of eligibility.²³⁹

[192] The defendants submit that Mr Cashin's evidence was not subject to any serious challenge and was not contradicted. Further, his evidence in relation to his usual practice corroborates the evidence of the first and second defendants as to what was done when the Form 1 Transfer was signed on 19 June 2007.

[193] Further, the defendants also submit that Mr Cashin's evidence casts serious doubt on the plaintiff's assertion that she was in such a state of grief that she does not recall signing the Form 1 Transfer. The defendants submit that the Court could be satisfied from Mr Cashin's testimony that, had the plaintiff been exhibiting any signs of not being aware that she was signing a Form 1 Transfer, that he would not have proceeded to witness the signatures on the transfer.

Other witnesses relevant to transfer issue

[194] The evidence of Dr Deanne Hummelstad is also relevant in part to the consideration of this evidence. Dr Hummelstad's evidence in respect of the conversation on 16 June 2007 largely corroborates the first defendant's recollection. Dr Hummelstad's evidence was that the "general tenor" of the conversation between the first defendant and herself was to the effect of "we have already invested a substantial amount of time ... and money and mum will still have the granny flat to live in".²⁴⁰

[195] It was following this conversation between the first defendant and Dr Hummelstad that the first defendant contacted the plaintiff to confirm that she wanted to proceed with the completion of the sale of the Harbut Street Property.²⁴¹

[196] Further, Dr Hummelstad gave evidence that in conversations with her the plaintiff had referred to "the agreement that they had in place for the sale of the land".²⁴² This tends to support the defendants' contention that there was an agreement in place between the plaintiff and the defendants.

[197] Further, Dr Hummelstad was asked about her understanding of the arrangement at the time of Colin Trouton's death. Dr Hummelstad's evidence was as follows:

²³⁸ T 12-76, lines 10-18.

²³⁹ T 12-76, lines 1-8.

²⁴⁰ T 7-88, lines 17-23.

²⁴¹ See testimony of first defendant at T 10-63, line 40 to T 10-64, line 6.

²⁴² T 7-101, lines 40-47.

“At the time of my father’s passing was that my parents had agreed to sell the [Harbut Street Property] to my brother for a particular price and that he was going to redevelop – initially going to renovate... and then the plans changed to actually demolish and rebuild and include a granny flat for my parents.

Now, you meant the – you used the expression “a particular price”. Were you privy to that price?— Only from what Mum told me.

And what did she tell you? – Five hundred and fifty thousand.

All right. And did she tell you anything else about the so-called arrangement? Not much because it – the way she had described it was that she had told me that the conversations were to be kept quiet - - -

Yes? - - - because [the first defendant] didn’t want my sisters involved because of the spitefulness of my other sisters.”²⁴³

[198] This evidence is consistent in many respects with the evidence of the defendants in relation to the Harbut Street Agreement (discussed further below). Importantly, it can be inferred from this evidence that on or before 15 June 2007 the plaintiff told Dr Hummelstad about the Harbut Street Agreement. While this evidence does not deal directly with the Form 1 Transfer, it does undermine the plaintiff’s evidence that there was no agreement with the defendants prior to the execution of the Form 1 Transfer.

[199] Christine Trouton gave some evidence which touched on the relevant evidence concerning the execution of the Form 1 Transfer on 19 June 2007. Christine Trouton recalls her mother returning home on 19 June 2007 but does not recall her leaving. Ms Trouton gives evidence that she did not know where her mother was and contacted her sisters and she was “panicking”.²⁴⁴

[200] When the plaintiff returned home, Christine Trouton asked the plaintiff where she had been and she said she had been for a long drive. Christine Trouton gave evidence that she asked the plaintiff whether she had gone to Burleigh and the plaintiff responded “yes I went to Burleigh. I went for a long drive. I went to find Col”. She did not say anything about seeing the first defendant that day.²⁴⁵

[201] It can be inferred from this evidence that the plaintiff was not full and frank with her daughter Christine Trouton, as the plaintiff did not say truthfully where she had been and what she had done. Not only had the plaintiff been to Garden City to sign the Form 1 Transfer, she had seen the defendants and their children, and bought a new television.²⁴⁶ This position is consistent with the evidence of Dr Hummelstad

²⁴³ T 8-11, lines 10-29.

²⁴⁴ T 5-19, lines 18-23.

²⁴⁵ T 5-19, lines 27-33.

²⁴⁶ See evidence discussed below.

that the Harbut Street Agreement (and logically the transfer of the property) was to be kept “quiet”.

Other contemporaneous evidence

- [202] There is other contemporaneous evidence that also needs to be considered when evaluating the evidence about what occurred on 19 June 2007.
- [203] In the Exhibit 2, CB Volume 7, pages 3330-3331, there is documentary evidence that the plaintiff purchased an LCD television from Harvey Norman at 3:07 pm on 19 June 2007. This is the afternoon that the Form 1 Transfer was signed.
- [204] The defendants submit that this does not align with the plaintiff’s version that she was significantly grief stricken. If anything, it confirms the evidence of the first and second defendants that they went to Harvey Norman and then left the plaintiff at the Garden City Shopping Centre.

Documentary evidence post 19 June 2007

- [205] The defendants also rely on documentary evidence post 19 June 2007, that is in evidence as to the truth of the contents, that establishes that the plaintiff accepted at least as early as December 2007 that she no longer owned the Harbut Street property and that it was the first and second defendants’ property. It is submitted that this evidence directly conflicts with her oral testimony at trial that she first became aware in around March 2017 that she had transferred the Harbut Street Property.
- [206] The relevant documentary evidence is contained in exhibit 2, being the Court Book, which was tendered as evidence on an agreed basis, including as truth of the contents of the documents.
- [207] There are six documents or categories of documents which are relied upon by the defendants as a basis upon which it may be inferred that the plaintiff voluntarily and with full knowledge of what she was doing signed the Form 1 Transfer on 19 June 2007. This includes:
- (a) Email communications between the plaintiff and first defendant describing the house at 1 Harbut Street as “Neil’s home” or like description and emails confirming the existence of a sale agreement in respect of the Harbut Street Property.
 - (b) Other Form 1 Transfers signed by the plaintiff.
 - (c) Email communications between the first defendant and the plaintiff in respect of payments made by the first defendant towards the purchase price of the Harbut Street Property.
 - (d) The 2016 Magistrates Court pleading in the matter of *Stone Group Lawyers v Patricia Trouton*.
 - (e) Centrelink documents.
 - (f) Rates notices and schedules.

[208] It is necessary to consider each of these documents or categories of documents.

Emails between the plaintiff and first defendant consistent with the property having been transferred

[209] The first category of documents is the emails between the plaintiff and the first defendant with descriptions of the Harbut Street Property and emails confirming the existence of a sale agreement in respect of the Harbut Street Property.

[210] The defendants rely upon an email dated 14 December 2007 sent at 10:37 am from the first defendant to the plaintiff.²⁴⁷ The email states:

“Hi Mum, We are planning on putting our house on the market in February or March next year. I am expecting that nothing would have changed with Chrissie, so unfortunately your money will have to be used to pay out the Scaasi and Unit loans.

Can you please fax me the current loan statement showing the current payout value for both the loans. On settlement of our house, we will draw up cheques to RAMS to pay-out the balances at that time. The remaining monies from the **\$550K purchase price** (less the current \$44K in advances) will be paid directly to you.

Regarding the Granny Flat I don’t believe there is any point in fitting it out for ‘fulltime’ occupancy.

We will maintain the ensuite, but make the following changes:

1. Delete the dividing glass wall and door to the Bedroom – install a sofa bed;
2. Delete the separate A/C unit to the bedroom area – the larger secondary unit will cool the whole space;
3. Delete the provision for Washing Machine/Dryer/Laundry tub in the Storeroom including the separate exhaust system;
4. Simplify the kitchenette to a single bench, with sink and bar fridge;
5. Simplify the electrical and lighting;
6. Delete the wardrobe in the Ensuite.

This will still enable you to stay when it suits ...” (emphasis added in bold).

²⁴⁷ Exhibit 2, CB Volume 8 page 3829-3830.

- [211] The reference to “our house” in the first paragraph is a reference to the defendants’ Dagmar Street Property.²⁴⁸
- [212] The reference at the end of the first paragraph to “both the loans” is also to be understood in the context of exhibit 57, being an email chain from John Hummelstad to the first defendant dated between 14 and 17 November 2007.²⁴⁹
- [213] The defendants submit that this email provides evidence:
- (a) That there was a contract in existence imposing obligations on the first defendant and the second defendant to pay the plaintiff the purchase price for the Harbut Street Property.
 - (b) The plaintiff was responsible for the payment of the RAMS loans over the Harbut Street Property.
 - (c) As at 14 December 2007, the defendants had already made payment to or on behalf of the plaintiff in the amount of \$44,000 towards the purchase price of the Harbut Street Property.
 - (d) The reference to the original purchase price of \$550,000 was not adjusted. There was a binding agreement between the defendants and the plaintiff for the sale of the Harbut Street Property that entitled the plaintiff to receive the net sale proceeds from the sale of Dagmar Street Property. The reference is to the original purchase price of \$550,000 and not the adjusted purchase price of \$500,000 which was recorded in the 9 March 2007 Agreement (exhibit 60).
- [214] The defendants also rely on the email that was sent from the plaintiff to the first defendant in response on 14 December 2007 at 5:54 pm. That email relevantly states:

“... please do whatever you and Leanne feel is appropriate for *your new home* ... I also feel I cannot be a burden to anybody which is why it would seem sensible for me to try & find my own place, wherever it may be. I am considering, as you know, the sale of this unit, *purchasing somewhere else, staying for at least a year, doing it up & selling. As this will be my primary residence it should be capital gain free & therefore I may be able to claw my way back up the financial ladder.*

Dad & I never wanted to impact on our Family, understanding full well the possible effects of close proximity which is why I am so grateful to you & Leanne for offering us the opportunity to live with you ... not an easy decision for you Leanne ... & one which I wish to thank you so sincerely for. Unhappily for me it was not to be.”
(emphasis added)

²⁴⁸ T 10-72, lines 20-29.

²⁴⁹ See also T 10-72 to T 10-78.

- [215] In particular, the defendants refer to the reference by the plaintiff to “your new home” as being a reference to the new house being built on the Harbut Street Property by the defendants. The first line in the quote above is a response to the first defendant’s proposed changes not to fit out the proposed granny flat for permanent occupancy.
- [216] The content of these emails has been admitted by the plaintiff. It is in these circumstances that the defendants submit that the evidence contained in the emails is contrary to the plaintiff’s sworn evidence.
- [217] In particular, the defendants rely on these emails as evidencing that the plaintiff knew she had transferred the Harbut Street Property on 19 June 2007, as the emails acknowledge that the first defendant was building a new house on the property with a granny flat which was going to be the defendants’ new home. Further, the emails acknowledge that the plaintiff agreed with proposed changes to the design of the granny flat so that she could occupy that area of the new house when she stayed with the defendants.
- [218] Relevantly, the plaintiff’s email of 14 December 2007 also acknowledges that she was, at that time, not proposing to live fulltime in the granny flat. The email is evidence that she wanted to find her own place to live and that she was considering selling the Breakers North unit to purchase another residential house or unit.
- [219] Also relevantly, the defendants submit that the statements in the email are illustrative of the plaintiff’s business and commercial acumen. It is the plaintiff’s pleaded case that she had limited experience in business and commercial matters, however this sits in contrast to the comments in the email where she expresses the benefits of renovating a residential property while living in it as a principal place of residence so as not to attract capital gains tax.
- [220] The defendants also rely upon an email dated 24 January 2008 at 2:35 pm from the first defendant to the plaintiff²⁵⁰ which states:
- “I am also sick and tired of the backstabbing and inuendo regarding the sale of Land (53 Dagmar Street) and House (1 Harbut Street) from the girls. I don’t like the implication that we have ripped you and Dad off! I will therefore provide the girls with the sale prices as well as copies of the Registered Valuations *which form the basis of our agreement.*” (emphasis added)
- [221] The defendants submit that the contents of this email are contrary to the plaintiff’s sworn evidence that she only found out about the transfer in early 2017. The email is consistent with the plaintiff knowing that she had sold the defendants the Harbut Street Property.

²⁵⁰ Exhibit 2, CB Volume 8 page 3831.

[222] Further, the defendants rely on an email dated 30 January 2009 at 10:35 am from the first defendant to the plaintiff²⁵¹ which relevantly states:

“... What I would like is for Chrissie to pay what she owes us after she has paid her debts to you. At present, the total is around \$ 48,000 including interest. I have attached a summary of the payments we have made. Whilst we did retrieve money from the sale of Chrissie’s ring, most has gone back into the \$ 68,000 in direct payments to you (net \$46,000) to pay off credit cards for Scaasi purchases as well as cash advances to Chrissie and payments to Anna to offset further Scaasi debt owed.

Whilst the \$48,000 will ultimately go back to you as part of the 1 Harbut Street sale to us (Scaasi + Unit Debt), I object to being burdened with additional Scaasi debt and interest in the short term which has drained our financing originally allocated to complete the house to a stage where we can occupy the Lower Ground and sell 53 Dagmar Street. Why is Chrissie is not held accountable for her debts? ***Why should the sale proceeds from 1 Harbut Street*** be used to pay for Chrissie’s stealing, lies and deceit?” (emphasis added)

[223] It was accepted by the plaintiff in cross-examination that she did not immediately send an email back to the first defendant in response to this email correcting him that there was no sale of the Harbut Street Property, if that was in fact the case.²⁵²

[224] The email is in evidence as truth of its contents, which includes evidence that the plaintiff was at least told that the Harbut Street Property had been sold to the defendants.

[225] The defendants also rely on an email dated 21 December 2012 sent at 3:31 pm from the first defendant to the plaintiff²⁵³ which relevantly states:

“Chrissie, with your un-dying support, has managed to destroy our lives and our future (along with many others) due to greed, self-serving desires and deceit. I can’t even begin to explain the helplessness Leanne and I feel knowing the impact on [our children] and their uncertain future. Everything that we have worked so hard for has been taken away. How are we supposed to provide for our children’s future? How are we supposed to retire one day when even that has gone?

You said in one of your recent emails ‘I can assure you there was absolutely no malicious intent & I am so grieved that others have

²⁵¹ Exhibit 2, CB Volume 1 page 569.

²⁵² T 3-14, lines 40-44 and T 3-17, lines 9-13.

²⁵³ Exhibit 2, CB Volume 7 page 3445.

been so affected by it all ... unfortunately I cannot undo it'. If that was the case, *why would a mother go behind her sons family's back when they were prepared to care and look after them in their later years and add another mortgage to a property without their knowledge? Why would a mother allow an existing loan over the property to be drawn to its maximum amount (1/3 of the loan or approx. \$100,000 in less than 6 months after our agreement to purchase) without their knowledge?* Why would a mother not force her other daughter to remove her belongings from the house, knowing the delays were affecting the start date and cost of the house that was also for them to live in? Why would a mother not tell her son that the loan repayments were in default so they had to find a debt collector on their doorstep, basically making it impossible for them to re-finance? Why would a mother constantly defend and provide unconditional support for a daughter who has stolen from them in the knowledge that her continued support and decisions would clearly jeopardise her son and his family? Do I need to go on?" (emphasis added)

[226] Reliance is also placed on an email dated 23 February 2013 sent at 9:12 am from the plaintiff to the first defendant²⁵⁴ where the plaintiff relevantly states:

"... the intent was always to move into *your home* which you were preparing for Dad & I & have the unit as a place that all the Family could use ... be it holidays, weekends or whatever ..." (emphasis added)

[227] This is consistent with the plaintiff's oral evidence²⁵⁵ (but see further discussion below at [282]-[291] about "recent invention").

[228] The defendants rely upon this evidence as a further admission by the plaintiff that the Harbut Street Property was improved with the addition of the defendants' home. Further, that it can be implied that the home at the Harbut Street Property, consistently with the 9 March Written Agreement, contained a granny flat for Colin Trouton and the plaintiff to live in.

[229] The defendants also rely on a text message on or about 19 April 2013 that the plaintiff sent to her youngest daughter, Christine Trouton.²⁵⁶ One of the messages states:

"My Family has been torn asunder, *I have lost my Home*, my Unit, Dad's & my hard earned Money ..." (emphasis added)

²⁵⁴ Exhibit 2, CB Volume 7 page 3458.

²⁵⁵ Cross-examination of the plaintiff at T 2-16, lines 26-38.

²⁵⁶ Exhibit 2, CB Volume 7 pages 3471-3473.

[230] Further, the defendants rely on an email sent on 7 July 2015 at 5:37 am from the plaintiff to the first defendant²⁵⁷ which states:

“Dear Neil, I would really like to be able to take [your children] out on Thursday to celebrate [the defendants’ children]’s Birthdays. Also, at some stage I would really love to see **your house**. What a spectacular achievement.” (emphasis added)

[231] The defendants rely on an email on 8 July 2015 at 1:09 pm where the plaintiff emailed the first defendant²⁵⁸ which relevantly states:

“Thank you for showing me **your house** it is absolutely amazing & exactly how I imagined it. Your workmanship would have made Dad proud ... Honestly Neil, it is WOW! **It will be a beautiful home for you & your family.**” (emphasis added)

[232] The defendants submit that the 19 April 2013 text, the 7 July 2015 and 8 July 2015 emails contained further implied admissions by the plaintiff that she knew that she had transferred the Harbut Street Property to the defendants on 19 June 2007.

Other form 1 transfers signed by the plaintiff

[233] The defendants also rely on form 1 transfers signed by the plaintiff in respect of other properties as evidence of the plaintiff knowing exactly the purpose of signing a form 1 transfer.

[234] On 19 April 2000, the plaintiff and Colin Trouton transferred the Dagmar Street Property to the defendants by way of a form 1 transfer dealing number 704007907.²⁵⁹ This form 1 transfer is signed by the plaintiff.

[235] The plaintiff was cross-examined about the Dagmar Street Property form 1 transfer. The plaintiff acknowledged that it was her signature on the Dagmar Street Property form 1 transfer. While the plaintiff acknowledged that it was her signature, she could not remember the “wretched thing”. When questioned further about whether she did not understand that she was transferring ownership of the Dagmar Street Property to the defendants by signing the transfer form together with her husband, the plaintiff’s evidence was as follows:

“No I ... must’ve understood it at the time. I cannot remember it. So I’ll have to say yes, I must’ve understood it.”²⁶⁰

[236] The defendants also pointed to a further occasion when the plaintiff was involved in the execution of a form 1 transfer for the transfer of real property. On 1 April 2004,

²⁵⁷ Exhibit 2, CB Volume 7 page 3481.

²⁵⁸ Exhibit 2, CB Volume 7 page 3482.

²⁵⁹ Exhibit 2, CB Volume 2 page 1028.

²⁶⁰ T 1-86, lines 9-27.

the plaintiff in her capacity as one of the directors of Scaasi Enterprises Pty Ltd (**Scaasi**), transferred a retail space to a Mr Phillip Tanner and Mrs Belinda Lorking-Tanner through a transfer with dealing number 707691034.²⁶¹

- [237] Scaasi was a retail fashion business with a number of retail stores, operated by the plaintiff and Christine Trouton. The plaintiff was director and secretary for a number of years from 1997.²⁶²
- [238] The plaintiff was again cross-examined in relation to the Scaasi transfer form and the effect of her evidence was that she knew the consequences of signing the form 1 transfer; that is, it effected the legal transfer of real property. The plaintiff's evidence included as follows:

“Did you understand, when you signed that form in your capacity as a director, that [Scaasi], the company, was selling that particular unit, lot 4 on BUP3292? Did you understand that, Mrs Trouton?--- Yes, I would've understood it.”²⁶³

Emails regarding part payment of purchase price

- [239] The third category of documents referred to and relied upon by the defendants relates to emails from the first defendant about paying part of the purchase price of the Harbut Street Property.
- [240] Reliance is placed on an email dated 25 January 2008 sent at 1:28 pm, approximately seven months after the Harbut Street Property had been transferred by the plaintiff to the defendants, the first defendant sent an email to the plaintiff stating:

“Given your current circumstances, I was going to arrange a sizeable payment (maybe \$50k) for 1 Harbut Street. Can you get a letter or email from RAMS confirming the current payout value of the loans on 1 Harbut Street so we know the total exposure.”²⁶⁴
(emphasis added)

- [241] The defendants submit that the only inference open on the email is that the payment was intended to be part of the purchase price of the Harbut Street Property.
- [242] The oral evidence from the first defendant was that a payment in the amount of \$25,000 was made on 25 January 2008. Further, the evidence of the first defendant

²⁶¹ Exhibit 2, CB Volume 7 page 3334.

²⁶² 2ADCC [10(a)(i)]; 5ARD [10(a)].

²⁶³ T 1-86, lines 31-44.

²⁶⁴ Exhibit 2, CB Volume 8 page 3832.

was that the reference to “the current circumstances” was a reference to the plaintiff being short of funds and he was offering to assist.²⁶⁵

- [243] It is submitted that the email evidences the intention to make a “sizeable payment” and that this amount is included in the schedule of payments made to or at the direction of the plaintiff in relation to the Harbut Street Property purchase price and is consistent with the first defendant’s evidence.²⁶⁶
- [244] The defendants submit that the evidence given by the plaintiff under cross-examination in respect of the cheque of \$25,000 was inconsistent as to whether it had been made towards the purchase price of the Harbut Street Property.²⁶⁷ The plaintiff’s evidence was that she did not recall any conversation about the \$25,000 cheque and “What it’s for, I have absolutely no idea. I do not recall”. Further, as to the reference to \$50,000, the plaintiff’s evidence was it could have been anything.²⁶⁸
- [245] The defendants submit that the plaintiff’s evidence does not contradict the first defendant’s testimony that the \$25,000 was paid towards the purchase price of the Harbut Street Property. The evidence supports that the plaintiff received the amount of \$25,000.
- [246] The defendants also point to the evidence of the plaintiff as not contradicting the evidence of the first defendant. The first defendant’s evidence is that the amount was paid as part-payment for the Harbut Street Property and that this also evidences the plaintiff’s knowledge that she had transferred the property to the defendants.

Court documents signed by the plaintiff

- [247] The next category of documents relied upon by the defendants is the 2016 Court documents signed by the plaintiff in the proceedings between *Stone Group Lawyers v Patricia Trouton* (M222/15).
- [248] The relevant document is a Notice of Intention to Defend and Defence dated 26 September 2016 which was filed by the plaintiff in the Magistrates Court of Queensland, Southport Registry. Stone Group Lawyers Pty Ltd were solicitors who had provided legal services and were seeking to recover unpaid legal costs from the plaintiff.
- [249] Relevantly, at paragraph 4 of the Defence, the plaintiff, who was the defendant in the Magistrates Court proceeding, stated:

“4. Further, the Plaintiff was made fully aware before signing the costs agreement that the Defendant:

²⁶⁵ T 10-88, –lines 13-48.

²⁶⁶ See T 10-88, lines 25-48.

²⁶⁷ T 2-69 to T 2-70.

²⁶⁸ T 2-69, lines 20-30.

- c) *Did not own any property or other assets to utilise to pay for legal services;*
- d) Was honest with the Plaintiff as to her financial circumstances.”²⁶⁹ (emphasis added)

[250] The plaintiff signed the pleading in her capacity as the defendant.²⁷⁰

[251] The defendants rely upon the statement in the Defence (admitted into evidence going to the truth of the document in these proceedings) as being inconsistent with the evidence of the plaintiff.

[252] Further, the plaintiff was cross-examined about the Defence and it is submitted that her responses “highlight her complete lack of credibility” and provide a further example of her “tailoring her testimony” in an attempt to establish that she only became aware in 2017 that she had signed the Form 1 Transfer on 19 June 2007.

[253] The plaintiff was cross-examined about the Magistrates Court Defence and states as follows:

“I don’t recall putting that in. I don’t recall it. It is in a court document. I think it was an absolute oversight and I can’t say I didn’t because it’s in a court document and I’ve signed it. So what else can I say?”²⁷¹

...

Well, I’ve obviously signed the document. I can’t remember exactly what it is, but I am not going to lie and say I have signed a document and then lie about it. I’ve obviously done that, but it’s obviously an absolute oversight and I ha – I can’t remember it.”²⁷²

Centrelink documents

[254] The next category of documents that the defendants rely upon as being inconsistent with the plaintiff’s evidence are Centrelink documents included in exhibit 2, the Court Book.

[255] The Centrelink income statement dated 15 April 2014²⁷³ does not record any real property as an asset of the plaintiff. When questioned about this in cross-examination, the plaintiff’s evidence was as follows:

²⁶⁹ Exhibit 2, CB Volume 2 page 862B.

²⁷⁰ Exhibit 2, CB Volume 2 page 862D.

²⁷¹ T 3-19, lines 21-23.

²⁷² T 3-20, lines 34-37.

²⁷³ Exhibit 2, CB Volume 8 pages 3727-3728.

“There is no asset referred to in that record that includes any house or real property, is there?---No.

And you would’ve been required, in order to obtain – and you are required to correctly record the details of your assets when you make an application for the aged pension, aren’t you? You’ve got to be truthful and - - -?---Yep.

- - - properly and honest - - -?---Yes. And I said - - -

Hold on, please. You’ve got to be truthful and honest, and declare, accurately, to Centrelink, what your assets are?---Yes. It’s in the document.

Yes. And you did – and you were truthful to that extent, where you didn’t include any house at 1 Harbut Street being in your own ownership?---An honest oversight. I can’t recall the actual ins and outs of this. But I’m saying to you it would’ve been an honest – it was an honest oversight.”²⁷⁴

[256] Further, the plaintiff continued to give evidence under cross-examination as follows:

“I beg your pardon?---I’m reading it here. The cash investments are two-three and the household personal effects, 1000 - - -

Yes?--- - - - and what are you asking me?

I’m asking you – that is the extent that – of your assets that you have historically declared to Centrelink in order to receive the aged pension - - -?---Yes.

- - - since you were first receiving it in September 2007?---Yes.

You agree with that?---Yes.²⁷⁵

...

Now, you don’t, and never have, declared to Centrelink that you were the owner of the property at 1 Harbut Street, Holland Park West as part of your assets. That’s correct, isn’t it?---Well, looking by this I didn’t, but I don’t recall.”²⁷⁶

[257] Exhibit 2, the Court Book, contains a summary of the Centrelink benefits received by the plaintiff for each financial year since she was first granted the pension on 5 September 2007. The Centrelink income statements able to be sourced by the

²⁷⁴ T 3-22, lines 5-20.

²⁷⁵ T 1-74, lines 35-45.

²⁷⁶ T 1-75, lines 3-5.

defendants are at Volume 8 pages 3727-3784 of the Court Book. These have been admitted for the truth of the information contained in them.

- [258] The Centrelink documents are therefore evidence that the plaintiff declared to Centrelink that her assets did not include the Harbut Street Property. This is inconsistent with the evidence given by the plaintiff at the trial that she first became aware that she transferred the Harbut Street Property in early 2017.
- [259] In September 2007 the plaintiff was residing at Unit GC ‘Breakers North’ 50 Old Burleigh Road, Surfers Paradise QLD 4217, as her principal place of residence.²⁷⁷ If the plaintiff thought that she owned the Harbut Street Property, the Harbut Street Property should have been listed as an asset with Centrelink, and probably as an investment property as it was not her principal place of residence at the time. The Breakers North unit was sold in or about 21 August 2009 and from that time, if the plaintiff thought she still owned the Harbut Street Property, it should have remained listed as an asset with a revised description if appropriate.
- [260] A plausible explanation for not notifying Centrelink of her ownership of the Harbut Street Property is that the plaintiff knew that she had transferred the property to the defendants on 19 June 2007. On the balance of probabilities this is the most plausible explanation consistent with various statements by the plaintiff in the contemporaneous documents.

Payment of rates and utilities by the first and second defendants from 8 May 2007

- [261] The next category of documents relied upon by the defendants are documents evidencing payment of rates and utilities by the defendants from 8 May 2007.
- [262] Relevantly, the plaintiff accepted during cross-examination that the defendants did pay for the rates for the Harbut Street Property from 8 May 2007 to 30 June 2021. The plaintiff’s evidence was that “my son said he would pay the rates”.²⁷⁸
- [263] Exhibit 8 includes two Brisbane City Council rate notices as annexures. The first Brisbane City Council rate notice is in the name of Colin Trouton and the plaintiff. The address is the Breakers North apartment. The notice relates to the period 1 April 2007 to 30 June 2007 for the Harbut Street Property (being referred to as 53A Dagmar Street which is the same property).
- [264] The second Brisbane City Council rate notice for the Harbut Street Property was issued on 16 May 2007. It is issued in the name of Colin Trouton and the plaintiff. The address is the Breakers North apartment and is for the period 1 April 2007 to 30 June 2007. This notice was for an additional payment of \$66.05.
- [265] Exhibit 2, CB Volume 2 at page 887 contains the Brisbane City Council rate notice issued on 3 July 2007. The 3 July 2007 notice is issued in the name of the defendants, consistent with a change of ownership on 19 June 2007.

²⁷⁷ T 1-75, lines 28-34; Exhibit 2, CB Volume 8 pages 3620 and 3629.

²⁷⁸ T 2-82, lines 28-46.

- [266] Further, the defendants submit that the payment of the rates for the Harbut Street Property from 8 May 2007 by the defendants was also in compliance with clause 6.5 of the 9 March Written Agreement (exhibit 60).
- [267] The 9 March Written Agreement provided that the defendants would be responsible for the payment of rates on the Harbut Street Property from the date of demolition of the original dwelling on the Harbut Street Property.
- [268] It is submitted on behalf of the defendants that it is illogical and nonsensical that the defendants would pay 58 rates invoices between 8 May 2007 and 7 May 2021, totalling \$46,805.01, to the Brisbane City Council on land that they did not own. Further, it is also submitted that it is illogical and nonsensical that in May 2007 there would be a change to who was paying rates after 40 plus years if the defendants did not own the land.
- [269] Further, the defendants point to 46 Urban Utilities invoices for the period from 8 February 2010 to 30 June 2021, totalling \$7,976.46, in respect of those services on the Harbut Street Property as being in the same category.
- [270] Whilst maintaining that she still owned the land in respect of the Harbut Street Property, the plaintiff's evidence was that she did not make a single enquiry as to why she no longer received rates notices. On the plaintiff's evidence, the first defendant "volunteered"²⁷⁹ to pay the rates as the plaintiff was having financial difficulties.²⁸⁰
- [271] The defendants contend that the payment of the Brisbane City Council rates and Urban Utilities invoices was consistent with the 9 March Written Agreement.
- [272] The defendants contend that they started paying the rates on 8 May 2007 prior to Colin Trouton's death and prior to the 19 June 2007 transfer. The defendants submit that this is before the plaintiff was in financial difficulty and the plaintiff's evidence should not be accepted.

Analysis of documentary evidence

- [273] The defendants submit that the analysis of this documentary evidence on its own supports the plaintiff's fraud claim being dismissed. That is, the evidence is consistent with the plaintiff "voluntarily and knowingly" signing the Form 1 Transfer. Further it also supports the conclusion that the plaintiff signed the Form 1 Transfer in her personal capacity and as attorney for Colin Trouton.
- [274] The defendants also submit that the oral evidence of the first defendant was "entirely consistent" with this documentary evidence and should be accepted.
- [275] The plaintiff chose not to address this documentary evidence in submissions. Counsel for the plaintiff stated:

²⁷⁹ T 2-86, line 25.

²⁸⁰ T 2-86, lines 27-29.

“Rightly or wrongly, [we] considered that in a case of this complexity and size, it was not really necessary to waste time going through the sorts of propositions advanced by [the defendants] to the effect that some adverse inference is to be drawn from the fact that there are emails going back over a number of years, referring to things like “your new home”.

[The defendant’s] proposition seems to be that because [the plaintiff] referred to “your new home” that means she was conscious that title had already been transferred and that she was therefore aware of what had happened on the 19th of June 2007. It’s pointless.... No one can draw from those documents an inference or conclusion that is adverse to [the plaintiff].”²⁸¹

- [276] The plaintiff’s submission in this regard does not pay full attention to the contents of some of the documents and the aspect of consistency of evidence. Some of the statements in the documents only make sense in the context of the facts consistent with the defendants’ evidence. They are at odds with the plaintiff’s evidence.
- [277] While these documents are not conclusive on their own, they support or otherwise corroborate facts consistent with the defendants’ version of events, rather than the plaintiff’s.

Other evidence

- [278] In Exhibit 2, CB Volume 7 page 3479, there is another email dated 5 May 2015 from John Hummelstad to the first defendant. John Hummelstad is the husband of Dr Deanne Hummelstad and did not give evidence at the trial. The email is in evidence as to truth of its contents and states:

“... the family fell apart not in short form based on #1 Harbut street and the transactions that occurred around its title ... I still dont [sic] know what the in’s and out’s of it was [sic] – but I see the effect that it and Scassi has had”.

- [279] This statement is consistent with there being a transaction “around the title” to the Harbut Street Property having occurred prior to 5 May 2015. Whilst John Hummelstad did not know the details of the transaction he was aware that it had occurred.
- [280] While this is not probative of the plaintiff’s knowledge it tends to support the defendants’ contention that the transfer of the Harbut Street Property to the defendants was not “surreptitiously” done as alleged by the plaintiff.
- [281] This document was not addressed in submissions.

New arrangement – defendants’ house/plaintiff’s land

²⁸¹ T 15-29, lines 35-45.

- [282] It is also necessary to consider the plaintiff's evidence at trial that the first and second defendants owned the house but she owned the land. The defendants describe this evidence as a "recent invention" in that it arose for the first time during the evidence in chief of the plaintiff.²⁸²
- [283] It is also noted that this evidence was not opened by Counsel for the plaintiff. The plaintiff's summary of opening states "she thought she still owned the land at Harbut Street". Further, there is reference to "she thought at the end of the day that once renovations were completed the house would be sold and there would be an accounting to [the first defendant] for the renovation".²⁸³
- [284] The plaintiff's own evidence is inconsistent with a renovation as the plaintiff accepted that the house on the Harbut Street Property would be demolished and a new house would be built, including a 'granny flat'.²⁸⁴ Further, the plaintiff gave evidence that the defendants were responsible for the design and construction of the new house.²⁸⁵
- [285] The plaintiff in her evidence outlined a scenario as follows ("**New Arrangement**"):
- (a) The defendants were to build a house on the plaintiff's land.
 - (b) The defendants were to pay all the costs of construction of the new house containing the granny flat.
 - (c) The defendants would own the house but not the land. The land was to remain in the ownership of the plaintiff.
 - (d) The defendants would receive "compensation" for building the house at the end of the plaintiff selling the land to the defendants.
- [286] The defendants contend that the last two of these elements emerge for the first time in the plaintiff's oral testimony during evidence in chief at the trial. It arose during an attempt to explain how the plaintiff first came to be aware that the Harbut Street Property had been transferred.²⁸⁶
- [287] In cross-examination in respect of the email dated 23 February 2013 (referred to above) including the reference to "his home", the plaintiff again gave evidence that her understanding was it was the first defendant's home but it was on her land. Further, in cross-examination, the plaintiff gave evidence that she owned the land

²⁸² T 1-57.

²⁸³ Paragraph 55 of the summary of opening of the plaintiff.

²⁸⁴ T 3-10, lines 26-47. The evidence establishes that the previous house on the Harbut Street Property was demolished between 27 and 29 March 2007.

²⁸⁵ T 3-11, lines 1-16.

²⁸⁶ T 1-57, line 36 to T 1-58, line 5.

and the house on it was very different from the land. The plaintiff's evidence was that a person can own the land and another person can own the house on the land.²⁸⁷

[288] This alleged "New Arrangement" had never been pleaded and is inconsistent with the plaintiff's pleading in the SOC.

[289] Further, the defendants submit that if the "New Arrangement" was as purported by the plaintiff then it ought to have been pleaded at [15] of the plaintiff's 5ARD where the plaintiff denied there was any agreement to sell the Harbut Street Property as alleged. The plaintiff's case as pleaded was that there were many discussions but no agreement was reached.

[290] The defendants contend that this is part of the plaintiff's fraud claim and pursuant to the rules ought to have been specifically pleaded. Further, the late introduction of this evidence may have had an impact on the way the defendants conducted the cross-examination as they were not previously aware of this alternative scenario.

[291] The defendants rely on it as adverse to the plaintiff's credit. This is distinctly a departure from the plaintiff's pleaded case.

Wider evidence

[292] Because of the way the plaintiff has ultimately articulated the fraud case, it is necessary to consider wider evidence than just the execution of the Form 1 Transfer.

[293] Further, in the closing submissions, the plaintiff's case was put on a slightly different basis to what was put in the SOC and Further and Better Particulars.²⁸⁸ The plaintiff puts its case as follows:

"This entire proceeding arises out of a conscious, calculated and premeditated scheme to take advantage of [the plaintiff's] vulnerability ... so as effectively to strip from her the only substantial asset, the value of the former family home, and ensure that none of [the first defendant's] siblings could share in the inheritance which represented the fruits of their parents' lifetime of work, love, care and devotion."²⁸⁹

[294] The plaintiff in her closing submissions identifies four objective facts which "show conclusively that this was a pre-concerted and dastardly plan by [the defendants]".

[295] Those facts are stated to be as follows:

²⁸⁷ T 1-101, line 28 to T 1-103, line 2 and T 2-14, lines 45-50; T 2-15, lines 1-10 and T 2-24, lines 20-26.

²⁸⁸ Excluding any submissions in respect of an "*in personam*" claim.

²⁸⁹ PCS [11].

- “(a) First, that [the defendants] wrote to QTCU on 22 December 2006 [Ex. 2, pp. 2407 to 2409], foreshadowing their intention to obtain title to Harbut Street by May 2007;
- (b) Secondly, that [the plaintiff] consulted and obtained advice from her solicitors, Stockley Furlong, in December 2006 [Ex.2, p.543-544], and was advised how best to protect her and [Mr Colin Trouton’s] interests in relation to any sale of Harbut Street;
- (c) Thirdly, the registration of the [Enduring Power of Attorney]; and
- (d) Fourthly, that [the defendants] procured a bank cheque in order to be able to pay exigible transaction duty on the very day that the Form 1 Transfer was executed.”²⁹⁰

[296] The plaintiff’s submissions contend that the defendants were required to make full disclosure to QTCU but withheld those details from the plaintiff.

[297] Further, it is contended that having obtained advice from Stockley Furlong in December 2006, the plaintiff would not have knowingly transferred title to the defendants “in complete abnegation of that advice”.

[298] In respect of the registration of the Colin Trouton Power of Attorney, it is accepted that it was registered by the plaintiff at the Titles Office on the Gold Coast. The plaintiff contends that she was requested by the first defendant to register it. The plaintiff submits that apart from the Harbut Street Property there was no suggestion of any other real property transaction which would have required the registration of the Colin Trouton Power of Attorney.

[299] The issue in relation to the bank cheque for payment of the stamp duty arose during cross-examination of the second defendant. The plaintiff contends that it is “utterly implausible” that the defendants were able to arrange this in the brief hours between the execution of the Form 1 Transfer and the lodgement of the instrument for assessment of transaction duty. The second defendant was unable to provide any specific explanation as to how she obtained a bank cheque. The plaintiff’s submissions also seek to give significance to the fact that borrowed money was used to pay the stamp duty and there was no explanation for the urgency in making payment of the stamp duty other than the plaintiff’s fraud claim.

[300] The plaintiff’s case in its closing submissions refers to these first two “facts” in support of its contention that the defendants secured the title to the Harbut Street Property through “personal dishonesty ... amounting to moral turpitude”.²⁹¹

²⁹⁰ PCS [12].

²⁹¹ PCS [137].

- [301] The plaintiff submits that the disclosures in the correspondence with the QTCU²⁹² disclose the defendants' "broader agenda" and that these details were withheld from the plaintiff. The timing is not of itself determinative. The defendants plead that there were discussions in 2005 which resulted in the oral agreement for the purchase of the Harbut Street Property by the defendants.²⁹³
- [302] The Stockley Furlong advice in December 2006 is also not determinative.²⁹⁴ The advice is quite short and does not appear to be based on a consideration of all of the matters relied upon by the defendants. The letter appears to be directed at the plaintiff's relationship with Scaasi, in particular the debt owed by the company to the plaintiff and the plaintiff's retirement as a director. The letter deals with the risks associated with the timing of both of these aspects and the plaintiff being an unsecured creditor of the company.
- [303] The letter appears to provide advice about protecting the plaintiff and her assets in respect of exposure to and risks associated with Scaasi. To the extent that the letter addresses "[w]ith respect to your house, we note your intention to sell it to your son", the advice offered is in general terms and is subject to a further discussion after the plaintiff has considered these issues further. It can be inferred from the structure of the letter that the financial position of Scaasi and the identified steps were directed to the plaintiff's risks as an unsecured creditor of the company.
- [304] Further, the statement that the first defendant could "lodge a "consent caveat" to partially protect his position" expressly highlighted the risk of the mortgagee exercising its powers. Given the subject matter of the letter is dealing with the risks of the plaintiff's exposure as an unsecured creditor, the inference is available that the transaction being considered was to protect the Harbut Street Property to the extent possible from the risks associated with the existing debts.
- [305] The Stockley Furlong advice is not structured in a way that suggests that the plaintiff was unaware of the proposal to transfer the Harbut Street Property to the first defendant. Rather, it supports an inference that the plaintiff was considering options for the transfer that safeguarded the property, to the extent possible, from the exposure to the plaintiff's debts and money owed by Scaasi in particular.
- [306] In respect of the registration of the Colin Trouton Power of Attorney, there is some evidence that the plaintiff was aware that a power of attorney needed to be registered to enable it to be used in respect of real property.²⁹⁵ I accept the evidence of the defendants that the plaintiff arranged for the registration of the Colin Trouton Power of Attorney. I do not accept the plaintiff's submission that this can be relied upon in respect of the plaintiff's fraud case theory.

²⁹² Exhibit 2, CB Volume 5 page 2407.

²⁹³ See [17] 2ADCC.

²⁹⁴ Exhibit 2, CB Volume 7 page 3335 to 3336.

²⁹⁵ Exhibit 2, CB Volume 1 pages 460 and 478, Volume 2, pages 599, 607-609. See also T 3-27, line 26 to T 3-31, line 29; T 4-7, lines 20-30.

- [307] Further, in respect of the bank cheque to pay the stamp duty on the Form 1 Transfer, there is no evidence to establish that it was impossible to obtain the cheque on the day in question. The submissions on behalf of the plaintiff seek to make much of this issue but offer nothing to support the submission. Reference is made to an “unprecedented instance of exceptional co-operation and alacrity from their bank” and that the arrangement of the cheque was “an element in their preconcerted plan”. I do not accept this contention.
- [308] The executed and registered Form 1 Transfer has a receipt printed on it showing the payments of \$10,500 stamp duty on 19 June 2007 at 16:13:56. The printed receipt from the Titles Office is the same day at 16:25.²⁹⁶
- [309] The second defendant’s evidence in respect of the payment of the stamp duty was as follows:
- (a) The second defendant does not recall having a bank cheque to pay the stamp duty but assumes she did.²⁹⁷
 - (b) The second defendant does not recall arranging the bank cheque but it “must have been that day” as she does not recall doing it another time.²⁹⁸
 - (c) The second defendant does not believe it was arranged before that day.²⁹⁹
 - (d) She assumes that the bank cheque was arranged before the defendants went to the Titles Office.³⁰⁰
 - (e) There was time after they went home for lunch and before going to the city.³⁰¹
 - (f) The defendants had an overdraft account from which the bank cheque was drawn.³⁰²
- [310] While this evidence is equivocal in some respects, it is evidence of payment of the stamp duty that day. Further, the second defendant unequivocally denied that the stamp duty was paid and the Form 1 Transfer was registered as soon as possible to avoid her “sisters-in-law” finding out.
- [311] Counsel for the plaintiff submitted in oral submissions that there is “no other explanation” for paying the stamp duty and lodging the Form 1 Transfer for registration other than the defendants being concerned that the plaintiff or the

²⁹⁶ Exhibit 2, CB Volume 1 page 468.

²⁹⁷ T 12-49, lines 1-10.

²⁹⁸ T 12-49, lines 12-15.

²⁹⁹ T 12-49, line 17.

³⁰⁰ T 12-49, lines 19-23.

³⁰¹ T 12-49, lines 25-31.

³⁰² T 12-50, lines 1-11.

second defendant's sisters "would wake up to what was happening".³⁰³ However, this is only made out if the plaintiff's evidence is accepted and the second defendant's evidence is not. The second defendant does provide an explanation: the defendants were at home that afternoon and they decided to pay the stamp duty and lodge the Form 1 Transfer for registration. It is a plausible explanation that does not attract the sinister overtones contended by the plaintiff.

Further and better particulars

- [312] The plaintiff provided Further and Better Particulars of paragraph 19(a) of the SOC setting out the "fraud" in the meaning of s 184(3)(b) of the Land Title Act. The particulars refer to the defendant's conduct relied upon as evidence of fraud or from which fraud can be inferred.
- [313] The central component of the allegation of fraud is that the plaintiff was unaware of the effect of the Form 1 Transfer and also did not agree to the transfer of the 1 Harbut Street Property.
- [314] Another component is the absence of any valid contract for the sale or transfer of the Harbut Street Property from the plaintiff and Colin Trouton to the defendants. The defendants point to the Harbut Street Agreement. However, the plaintiff equally points to the non-compliance with a number of the terms set out in the Harbut Street Agreement, if it is in fact valid (which the plaintiff denies).
- [315] The plaintiff also points to the lack of consideration and further to a lack of the defendants having an intention to pay the purchase price. It is alleged that no payments have been made in respect of the purchase price and that a 'granny flat' has not been provided.
- [316] The defendants' submissions address the conduct set out in the Further and Better Particulars. In general terms, the defendants contest the basis of fraud as articulated in the Further and Better Particulars. These include:
- (a) The execution of the Form 1 Transfer was not "surreptitious" as Mr Cashin, the independent Justice of the Peace was involved.³⁰⁴
 - (b) The Form 1 Transfer was not invalid as the execution of it by the plaintiff as transferor to the defendants was sufficient. The defendants' position is that the mistaken execution on behalf of Colin Trouton utilising the Colin Trouton Power of Attorney was otiose.³⁰⁵
 - (c) The defendants contend that there was a valid contract of sale which was partly written and partly oral. The defendants also rely on acts of part-performance supporting the Harbut Street Agreement which, at 19 June 2007, included giving and taking of possession of the Harbut Street Property as

³⁰³ T15-31 line 13 to 24.

³⁰⁴ DCS [216].

³⁰⁵ DCS [217].

shown by the demolition of the existing dwelling between 27 and 29 March 2007.³⁰⁶

- (d) The defendants rely on an oral variation to the agreement where there was no requirement for a variation to be in writing.³⁰⁷
- (e) The evidence of both defendants was that the plaintiff did not require payment of the deposit of \$10,000.
 - (i) The evidence of the first defendant was that he asked the plaintiff whether she wanted the payment and she said she received some funds from Christine Trouton and it was not necessary at that point. Further, the deposit is one of the payments that has been made.³⁰⁸
 - (ii) The second defendant gave evidence that the plaintiff did not require a payment of the deposit immediately upon demolition but that she did start to request payments against the Harbut Street Property purchase price from early June 2007.³⁰⁹
 - (iii) The plaintiff gave evidence that she could not recall the variation but did not deny the variation to the Harbut Street Agreement. The evidence was that she did not recall the agreement.³¹⁰
- (f) Further, there was no requirement that any variation for the time of the payment of the purchase price be in writing. The defendants' evidence is that the purchase price has been paid at the plaintiff's direction (see exhibit 67) and also by the RAMS mortgage repayments (see exhibit 71).
- (g) The Harbut Street Agreement, to the extent that it was in writing, was not an entire agreement and there was no entire agreement clause. The second defendant expressly gave evidence that the agreement in writing was not intended to be the entire agreement. It was a family transaction. There were discussions and an arrangement, and the document was prepared in that context.³¹¹
- (h) There was an oral agreement between the first defendant and the plaintiff that the title would be transferred prior to payment of the purchase price and the plaintiff voluntarily and knowingly executed the Form 1 Transfer on 19 June 2007.³¹²

³⁰⁶ DCS [218].

³⁰⁷ DCS [219]; see also T 11-86, lines 8-12.

³⁰⁸ T 11-86, lines 8-12.

³⁰⁹ T 12-28, lines 7-19.

³¹⁰ T 3-82, lines 22-27.

³¹¹ T 12-60, lines 32-45.

³¹² DCS [223].

- (i) There was no requirement in the written part of the agreement that the purchase price had to be paid prior to the transfer of title and the plaintiff orally agreed to the transfer of title before the Dagmar Street Property was sold.³¹³
- (j) The defendants were taking steps to sell the Dagmar Street Property, including renovating it with a view to placing it on the market. However, as a result of the plaintiff's default on the RAMS loans, the defendants had to commence payments on those loans and were unable to continue to fund the renovations of the Dagmar Street Property.³¹⁴
- (k) The defendants again looked to potentially sell 53 Dagmar Street in 2010, but the plaintiff advised that she was working on something to get some money. This included money out of the insurance claim against Asteron Insurance by Christine Trouton and also the matrimonial claim of Christine Trouton.³¹⁵
- (l) The defendants' position is that they were not in a financial position to pay the purchase price for the transfer of the Harbut Street Property at the time but submit that it is irrelevant because it was not part of the agreement as varied that they had to pay the purchase price or any significant part of it upon lodgement of the Form 1 Transfer.³¹⁶
- (m) The defendants contend that there was no requirement or obligation to inform the mortgagee of the fact of the transfer.³¹⁷
- (n) Further, the defendants contend that there was no requirement or obligation on the defendants, pursuant to the agreement, as varied to make any payments or contributions towards the RAMS mortgage, either before or after September 2018.³¹⁸
- (o) The defendants submit that they have made payments to or at the direction of the plaintiff in respect of the purchase price. These are set out in exhibits 67 and 71.³¹⁹
- (p) The defendants contend that whilst the design has changed, space for the granny flat has been constructed. Further, the variations to the design were agreed to by the plaintiff in the email dated 14 December 2007.³²⁰

³¹³ DCS [224].

³¹⁴ T 11-87, lines 6-40 in the evidence of the first defendant; see also DCS [225].

³¹⁵ T 10-96, lines 26-44; see also DCS [226].

³¹⁶ DCS [226]; [227].

³¹⁷ DCS [228].

³¹⁸ DCS [229].

³¹⁹ See also DCS [230].

³²⁰ Exhibit 2, CB Volume 8 pages 3829-3830.

- (q) The plaintiff seeks to rely on the signing of the 9 March Written Agreement as being relevant to a determination of fraud in respect of the transfer of the property.
- (i) It is contended by the defendants that it is irrelevant to any determination of fraud.³²¹
 - (ii) The plaintiff's evidence was that she knew nothing of the existence of the 9 March Written Agreement and did not see it until after these proceedings had been commenced in July 2017.³²²
 - (iii) Accordingly, the defendants contend that the 9 March Written Agreement could have no operative effect on her mind in terms of inducing her to sign the Form 1 Transfer.

Harbut Street Agreement

[317] The defendants plead in paragraph 20 of the 2ADCC that the Harbut Street Agreement was the result of the combination of the matters pleaded at:

- (a) [17] 2ADCC, the oral agreement in 2005;
- (b) [18] 2ADCC, the variation to the oral agreement by a further oral agreement in approximately February 2007; and
- (c) [19] ADCC, the 9 March Written Agreement.

[318] The defendants plead that the Harbut Street Agreement was to the following effect:

- (a) The defendants would purchase the Harbut Street Property for a price of \$550,000;
- (b) The defendants would cause the existing dwelling on the Harbut Street Property to be demolished and would build a new dwelling thereon for them and their children to live in;
- (c) The new dwelling would include customised self-contained accommodation in the form of a 'granny flat' in which the plaintiff and Colin Trouton would live;
- (d) The plaintiff and Colin Trouton would have the benefit of the defendants present to assist in Colin Trouton's care;
- (e) The defendants would be responsible for the design and construction of the new dwelling;
- (f) The plaintiff would be responsible for paying out any loans secured by mortgage registered over the Harbut Street Property;
- (g) During the construction of the new dwelling, the plaintiff and Colin Trouton would live on the ground floor of the dwelling of the Dagmar Street Property;

³²¹ DCS [237].

³²² DCS [239]; [240]; see also, for example, T 1-47, lines 20-25.

- (h) Once the construction of the new dwelling was completed to lock up stage, the defendants would list the Dagmar Street Property for sale; and
- (i) The defendants would pay the purchase price for the Harbut Street Property to the plaintiff and Colin Trouton upon settlement of the sale of the Dagmar Street Property.

[319] At [21] of the 2ADCC the defendants plead that the Harbut Street Agreement was in writing or alternatively partly written and partly oral or implied. The plea that the Harbut Street Agreement was in writing is inconsistent with the pleaded position in [20]. Clearly some of the terms are from the oral agreements and the 9 March Written Agreement did not deal with all the matters. The alternative plea of the Harbut Street Agreement being partly written and partly oral is consistent with the plea in [20] 2ADCC and how the defendants' case was run at trial.

[320] The further alternative plea is that the agreement was implied from the conduct of the parties:

- (a) By the conversations pleaded in [17] and [18];
- (b) By the conduct pleaded at [28] to [30]³²³, [32],³²⁴ [33],³²⁵ [34]³²⁶ and [38] to [45];³²⁷
- (c) By engaging in that conduct in the context of their previous dealings in relation to the Dagmar Street Property pleaded at [1] to [9].

³²³ Arranging a valuation of the Harbut Street Property from SLR Valuations of \$525,000; the existing dwelling being demolished between 27 March 2007 and 29 March 2007; commencement of construction of the new dwelling in approximately September 2007; the defendants paying the rates, sewerage and water charges from 8 May 2007. The further agreement in May 2007 for the Harbut Street Property to be transferred to the defendants prior to them incurring the costs of construction of the new dwelling.

³²⁴ The plaintiff registered the Colin Trouton Power of Attorney on or about 21 May 2007 at the Gold Coast to give effect to the Harbut Street Agreement and the transfer of the Harbut Street Property.

³²⁵ The second defendant prepared a draft Form 1 Transfer in order to give effect to the agreement to transfer.

³²⁶ The first defendant and the plaintiff made an arrangement for the plaintiff and Mr Colin Trouton to visit the defendants' home on 3 and 4 June to sign the Form 1 Transfer.

³²⁷ The telephone conversation between the first defendant and the plaintiff on 18 June 2007 regarding arrangements for the Form 1 Transfer to be signed in front of a Justice of the Peace in Brisbane on 19 June 2007. The further telephone conversation between the first defendant and the plaintiff on 19 June 2007 agreeing to meet at Garden City shopping centre to meet with a Justice of the Peace. The execution of the Form 1 Transfer on 19 June 2007 before a Justice of the Peace and the surrounding circumstances. Payments made by the defendants to or at the request of the plaintiff, including expenses of Scaasi as per Schedule 2. The payments would be treated as part payments of the purchase price. When the plaintiff stopped making payments in respect of the RAMS facilities secured by a mortgage against the Harbut Street Property, the defendants made payments against those facilities as per Schedule 3.

[321] The defendants in closing submissions addressed the Harbut Street Agreement in the context of:

- (a) A response to the plaintiff's Further and Better Particulars dated 9 September 2021;
- (b) Submissions that the circumstances of signing of the 9 March Written Agreement were irrelevant to the determination of fraud; and
- (c) The oral agreement pleaded at [17], [18], [29] and [30] 2ADCC being valid and enforceable by reason of part-performance.

[322] It is necessary to consider each of these aspects in turn.

[323] The plaintiff's Further and Better Particulars contend in respect of the Harbut Street Agreement that:

- (a) There was no "valid contract for the sale or transfer" of the Harbut Street Property. The defendants submit in response that the contract was partly written and partly oral and there were acts of part-performance as at 19 June 2007, including taking possession of the Harbut Street Property and the first defendant causing the demolition of the existing dwelling on 27 to 29 March 2007.
- (b) If there was a valid contract, the deposit had not been paid and there was no variation in writing. The defendants submit that there was an oral variation that the deposit of \$10,000 was not required to be paid and there was no requirement for any variation to be in writing.³²⁸
- (c) There was no variation in writing varying the time for payment of the purchase price. The defendants submit that there was no requirement that any variation in timing of payment of the purchase price be in writing. The purchase price was paid at the plaintiff's direction (Exhibit 67) and by way of the payments made by the defendants against the RAMS facilities (Exhibit 71).
- (d) There was no provision in the agreement for transfer of title prior to payment of the purchase price. The defendants submit that the 9 March Written Agreement was not an entire agreement and there was no entire agreement clause.³²⁹ Further, the defendants contend (consistent with [30] of the 2ADCC) that it was orally agreed between the plaintiff and the first defendant that title would be transferred prior to the payment of the purchase price.³³⁰
- (e) Further or alternatively, that the defendants lodged the Form 1 Transfer with the intent to transfer title where the purchase price had not been paid in full or in part (any of the possible amounts being \$500,000, \$525,000 or \$550,000). The defendants submit in response that there was no requirement in the 9

³²⁸ T 11-86, lines 8-12; T 12-28, lines 7-19; and T 3-82, lines 22-27.

³²⁹ See T 12-60, lines 32-45.

³³⁰ T 12-61, lines 9-25; T 11-26, lines 5- 12; and T 11-26, line 38 to T 11-27, line 2.

March Written Agreement that the purchase price had to be paid prior to the transfer of title. Further, the plaintiff orally agreed to the transfer of the title of the Harbut Street Property before the Dagmar Street Property was sold.

- [324] The defendants' submissions are consistent with the Harbut Street Agreement being partly in writing and partly oral and supported by acts of part performance.
- [325] In respect of the 9 March Written Agreement, the plaintiff relies on the circumstances of the signing of the written agreement as consistent with the fraud allegations. The defendants submit that the circumstances are irrelevant to the fraud case as the plaintiff denies ever seeing the written agreement (or drafts), denies discussing the written agreement with the first defendant and gave evidence that she had not seen the 9 March Written Agreement until after these proceedings were commenced on 7 July 2017. In those circumstances, the defendants contend that the 9 March Written Agreement and the circumstances of its execution could not have "operated on the mind" of the plaintiff, nor "induced the detrimental action" by the plaintiff.
- [326] Logically, the defendants' contention has some force and the 9 March Written Agreement cannot have a direct relevance to the plaintiff's fraud case as, on her own evidence, she had not seen it. However, it is relevant to consider the validity of the 9 March Written Agreement as that has some bearing on what constitutes the Harbut Street Agreement. Accordingly, it is necessary to consider the circumstances of the signing of the 9 March Written Agreement.
- [327] In [17A] of the 5ARD the plaintiff contended that the signature of Colin Trouton on the 9 March Written Agreement was a forgery. Expert opinion of Mr Marheine and Mr Heath was obtained in respect of this issue. The plaintiff's closing submissions accepts that the expert evidence does not support a finding of actual forgery.³³¹ Mr Heath does express "substantial suspicion" given the nature of the "completion" of the signatures.³³²
- [328] A review of the 9 March Written Agreement does show that the signature and initials of Mr Colin Trouton are very shaky and not clearly executed. Around this time Colin Trouton's health was deteriorating and an innocent explanation may be consistent with that development. The "suspicion" identified in the expert opinion is not of itself probative of the issue.
- [329] At [17] of the 5ARD the plaintiff raises that Colin Trouton lacked mental capacity to enter into the 9 March Written Agreement. The defendants admitted Colin Trouton's lack of mental capacity to understand the nature of the written agreement in [4(b)] of the 4ARej. That is not in dispute between the parties.
- [330] The plaintiff did tender a report of Professor Morris and Dr Zuscak (Exhibit 39) in respect of Colin Trouton's capacity. No other medical evidence was tendered and Professor Morris and Dr Zuscak were not cross-examined.

³³¹ PCS [150].

³³² Exhibit 40 at page 3.

[331] The plaintiff in closing submissions relies upon the conclusions of Professor Morris and Dr Zuscak in [6.3] and [6.4], including:

- (a) Around 9 March 2007 Colin Trouton exhibited significant dementia, including poor attention and concentration, a decreased ability to obey commands, severe deficits in basic cognition and a reduced capacity for new learning.
- (b) Cognitive testing resulted in a MMSE score of 18/30 in 2002 and 7/30 on 2 February 2007.
- (c) In their opinion Colin Trouton would not have had the mental capacity to understand the nature and effect of the 9 March Written Agreement.
- (d) It is likely his legal capacity deteriorated from 2002 until his death in 2007.³³³

[332] It is not entirely clear in the written closing submissions that the references to the Harbut Street Agreement are just a reference to the 9 March Written Agreement or to the broader agreement defined by the defendants in [20] of the 2ADCC. As a result some of the submissions are also not entirely clear.

[333] The plaintiff makes a number of submissions about the Harbut Street Agreement including:

- (a) The Harbut Street Agreement created no legally enforceable obligations on the part of Colin Trouton or his estate.³³⁴
- (b) Consequently, it cannot subsist as an agreement binding on the plaintiff independently of Colin Trouton.³³⁵
- (c) An agreement entered into by joint tenants, dealing with their rights as joint tenants, cannot survive as an agreement which binds one of them where it does not impose a legally enforceable obligation on the other.³³⁶
- (d) Consequently, there can be no Harbut Street Agreement at all.³³⁷
- (e) The discussions do not identify any offer or acceptance of the asserted oral terms.³³⁸
- (f) The evidence does not support consensus ad idem on any of the alleged oral terms.³³⁹

³³³ PCS [155]-[159].

³³⁴ PCS [143].

³³⁵ PCS [144].

³³⁶ PCS [146].

³³⁷ PCS [147].

³³⁸ PCS [148(b)].

³³⁹ PCS [148(c)].

- (g) Any agreement reached was void for uncertainty.³⁴⁰
- (h) At best, the defendants could establish an agreement to agree.³⁴¹

[334] Further, the plaintiff submits that the defendants are not seeking to enforce the Harbut Street Agreement against Colin Trouton or his estate by way of specific performance. If Colin Trouton's legal representatives were parties to the proceeding, they could elect whether or not to avoid the Harbut Street Agreement.³⁴²

[335] Further the plaintiff contends that there are two consequences to consider:

- (a) If the Harbut Street Agreement was invalid then the defendants had no justification or purpose in obtaining the transfer of the Harbut Street Property. That is, there was no contract pursuant to which a transfer of title could be effected. The plaintiff submits this results in the fraud being established and there being no indefeasibility of title.³⁴³
- (b) If the Harbut Street Agreement was valid then the defendants were in breach from at least from December 2007 and certainly from 2014 onwards. The 9 March Written Agreement required for payment of the purchase price upon the sale of the Dagmar Street Property, which would be implied to be within a reasonable time. There has been no discharge of that obligation.
 - (i) Arguably a reasonable time would be December 2007, when the first defendant estimated to QTCU that the building would reach lock up stage.
 - (ii) Actual lock-up was achieved no later than 2014. Therefore, a generous interpretation of the time for payment of the purchase price was 2014.
 - (iii) It can be inferred that the defendants had no intention of paying the purchase price under the 9 March Written Agreement.
 - (iv) There has been a total failure of consideration: the purchase price has not been paid and the granny flat has not been constructed or been made available for occupation.³⁴⁴

[336] The end result is that the plaintiff contends that in any event the defendants are in breach of major or essential terms of the 9 March Written Agreement and would not be able to enforce it. There has been a total failure of consideration and the agreement would be unenforceable. Further, it would not be enforceable in the proceedings as the agreement includes joint obligations of Colin Trouton.

³⁴⁰ PCS [148(d)].

³⁴¹ PCS [148(e)].

³⁴² PCS [168].

³⁴³ PCS [173]-[174].

³⁴⁴ PCS [180]-[187].

[337] The defendants' position in response is:

- (a) The 9 March Written Agreement is voidable as a result of the incapacity of Colin Trouton, but is valid "unless and until it is avoided by that party or his representatives".³⁴⁵ Colin Trouton did not avoid the agreement before his death and his executor or other representative have not purported to avoid the agreement.³⁴⁶
- (b) The plaintiff signed the 9 March Written Agreement knowing what it was and intending to be bound by it.³⁴⁷

[338] The defendants submit that even if the 9 March Written Agreement is void, the oral agreement is established as pleaded in [17] and [18] of the 2ADCC. Alternatively, there is an implied agreement based on the oral agreement and the conduct pleaded and also the context of the previous dealings in respect of the Dagmar Street Property.³⁴⁸

[339] The defendants also rely on part performance in respect of the oral agreement pleaded at [17], [18], [29] and [30] of the 2ADCC. The specific acts of part performance relied upon include:

- (a) The first defendant undertook the preliminary design and approval work.
- (b) The first defendant undertook design and construction work in part performance of the agreement, including:
 - (i) In 2005, preliminary design and consultation regarding details of the granny flat.³⁴⁹
 - (ii) On or about 23 November 2005, lodgement of the Brisbane City Council applications for assessment and siting relaxations, which were approved in December 2005.³⁵⁰
 - (iii) In May 2006, the preparation of drawings for the proposed dwelling, including a granny flat and garage space in accordance with discussions with the plaintiff.³⁵¹
 - (iv) On or about 19 September 2006, lodgement of the Development Application (Building Approval) for the new dwelling.³⁵²

³⁴⁵ *Gibbons v Wright* (1954) 91 CLR 423 at 439 per Dixon CJ, Kitto and Taylor JJ.

³⁴⁶ PCS [244]-[245].

³⁴⁷ PCS [247]

³⁴⁸ At [21] 2ADCC.

³⁴⁹ Exhibit 2, CB Volume 5, pages 2248-2251.

³⁵⁰ Exhibit 2, CB Volume 5 pages 2320-2323; Volume 3 pages 1551-1552.

³⁵¹ Exhibit 2, CB Volume 5 pages 2330-2370.

³⁵² Exhibit 2, CB Volume 7 pages 3563-3564; Volume 3 pages 1930-1936.

- (v) On or about 10 November 2006, that building approval was obtained.³⁵³
- (vi) In December 2006, an application (with the second defendant) to increase the overdraft limit with QTCU to cover construction costs.³⁵⁴
- (vii) The defendants took physical possession of the Harbut Street Property on or about 27 March 2007 when the existing dwelling was demolished.³⁵⁵
- (viii) On or about April/May 2007, the defendants commenced paying rates and water and sewerage charges for the Harbut Street Property.³⁵⁶
- (ix) The defendants made payments to or on behalf of the plaintiff at her request from 5 June 2007 to 28 August 2009 against the purchase price totalling \$94,547.75 (Exhibit 67).
- (x) In or about September 2007, the first defendant commenced construction of the new dwelling as an Owner Builder. The defendants paid for all construction costs.
- (xi) On or about 15 December 2008, the defendants paid the loan arrears of \$7,148 on behalf of the plaintiff to prevent RAMS (RHG) foreclosing on the Harbut Street Property on the understanding that this amount would be off-set against the purchase price.
- (xii) From 30 September 2008, the defendants made repayments under both RAMS Facilities on behalf of the plaintiff and on the understanding that they were to be off-set against the purchase price.
- (xiii) In or about November 2008 the first defendant ceased construction of the new dwelling as the defendants could not pay the construction costs as well as the payments in respect of the RAMS Facilities and their own QTCU loan.
- (xiv) In or about January 2009 to March 2010 there were delays in construction as a result of inclement weather and damage done.³⁵⁷
- (xv) In or about March to April 2010 damaged flooring was removed.³⁵⁸
- (xvi) The building work recommenced in April 2013 to 3 December 2013 following delays due to lack of funds and the lapsing of the building approval. Additional costs of approximately \$100,00 were incurred due to the rebuilding work required.

³⁵³ Exhibit 2, CB Volume 5 pages 2371-2406.

³⁵⁴ Exhibit 2, CB Volume 5 pages 2407-2409.

³⁵⁵ Exhibit 2, CB Volume 3 pages 1952.

³⁵⁶ Exhibit 2, CB Volume 2 pages 883-954.

³⁵⁷ Exhibit 2, CB Volume 5 pages 2450-2460.

³⁵⁸ Exhibit 2, CB Volume 5 pages 2450-2460.

(xvii) In or about November 2014 the external construction of the dwelling was substantially complete.

(xviii) From January to November 2016 the first defendant designed and commenced renovations of the Dagmar Street Property with the intention of selling the property.

(xix) In April 2017, the defendants and their children moved into the new Harbut Street dwelling. The dwelling was incomplete but habitable.

[340] The defendants rely upon the decisions of *McBride v Sandland* (1918) 25 CLR 69 and *Regent v Millett* (1976) 133 CLR 679 (applying *McBride*) in respect of part performance.

[341] In *McBride v Sandland*, Isaacs and Rich JJ at 78 to 79 relevantly stated the principles as follows:

“... certain elements of part performance essential to raise the equity: -

- (1) The act relied on must be unequivocally and in its own nature referable to “some such agreement as that alleged.” That is, it must be such as could be done with no other view than to perform such an agreement ...
- (2) By “some such agreement as that alleged” is meant some contract of the general nature of that alleged...
- (3) The proved circumstances in which the “act” was done must be considered in order to judge whether it refers unequivocally to such an agreement as is alleged if the circumstances under which the possession was given are proved, then the Court may judge whether the act indicates permission or contract, and, if contract, its general character...the expression “some agreement” is used ... in contradistinction to the specific terms of the agreement, and not in the most general sense of any agreement whatever.
- (4) It must have been in fact done by the party relying on it on the faith of the agreement, and further the other party must have permitted it to be done on that footing....
- (5) It must be done by a party to the agreement.

These requirements must be satisfied before the actual terms of the alleged agreement are allowed to be deposed to.

Further, when those terms are established, it still remains to be shown:-

- (6) That there was a completed agreement...
- (7) That the act was done under the terms of that agreement by force of the agreement...”. (footnotes omitted)

[342] Further, the Court in *Regent v Millett* recognised at 683:

- (a) The acts must be unequivocal and in their own nature referable to some contract of the general nature of that alleged.

- (b) The acts must have been done under the terms of the agreement and by force of that agreement.
- (c) The taking of possession was sufficient if the taking of possession was pursuant to the contract.
- (d) Improvements on property, including those which were neither required nor permitted, may be acts of part performance.

[343] Counsel for the plaintiff in oral submissions rightly conceded that a partly written, partly oral agreement which has been partly performed may be enforced.³⁵⁹ The plaintiff nonetheless submits that is not the position here as there is such a lack of certainty as to the terms, that there is no actual agreement. However, if the Court finds that there is sufficient certainty to be an oral contract, then part performance is open to be considered.³⁶⁰

Fraud by the registered proprietor

[344] Paragraph 19 of the SOC particularises the nature of the plaintiff's case. That is that the registration of the Harbut Street Property in the joint names of the first and second defendants was procured by the first and second defendants' fraud within the meaning of s 184(3)(b) of the Land Title Act.

[345] Section 184 of the Land Title Act is set out at [93] above.

[346] Section 184(3)(b) operates as an exception to s 184(1). This is often described as being an exception to the indefeasibility of title obtained once a transfer or other instrument is registered.

[347] Here, the defendants are the current registered proprietors of the Harbut Street Property.

[348] The question is then: for the purposes of s 184(3)(b) of the Land Title Act, what needs to be shown to constitute fraud by the registered proprietor.

[349] Reference is made in submissions to the requirement for there to be "personal dishonesty or moral turpitude", "actual fraud, moral turpitude". This would be required by each registered owner.³⁶¹

³⁵⁹ T 15-32, lines 4-8.

³⁶⁰ T 15-32, lines 28-32.

³⁶¹ *Butler v Fairclough* (1971) 23 CLR 78 at 90 per Griffith CJ and 97 per Isaacs J (with whom Barton J agreed); *Young v Hoger* [2001] QCA 453 at [11] per McMurdo P, Davies JA and Holmes J. In *Butler*, Isaacs J followed and applied as settled law the oft cited seminal decision on the meaning of "fraud" of the Privy Council in *Assets Company Limited v Rohi* (1905) AC 176 at 210. *Butler* has been followed and applied by the Queensland Court of Appeal, see for example, *Young v Hoger* [2001] QCA 453 at [11] and *Assets Company* has been followed and applied by the Queensland Supreme Court, see for example, *Hilton v Gray* [2007] QSC 401 at [46] citing the analysis of *Assets Company* by Hayne JA in *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188, 192 -194 and *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64 at [40].

[350] The defendants' position is:

- (a) The evidence establishes that the plaintiff signed the Form 1 Transfer on 19 June 2007 in circumstances where she voluntarily signed the document, she knew she was signing a Form 1 Transfer document and she knew that the document related to the transfer of her interest in the Harbut Street Property to the first and second defendants.³⁶²
- (b) At the time of signing the Form 1 Transfer, the plaintiff was the sole owner of the Harbut Street Property, as a result of the operation of the right of survivorship upon Colin Trouton's death on 15 June 2007.³⁶³
- (c) The mistaken signing of the Form 1 Transfer by both the plaintiff and the first defendant, purportedly as Colin Trouton's attorneys, is irrelevant.³⁶⁴
- (d) There can be no fraud if the plaintiff knew and understood what she was signing.³⁶⁵
- (e) The relevant test is:

“For fraud to be operative, it must operate on the mind of the person said to have been defrauded and to have induced detrimental action by that person.”³⁶⁶

- (f) It would be necessary for the plaintiff to establish fraud by each of the registered owners. Further, even if the fraud of one is proved, it is not the fraud of the other.³⁶⁷
- (g) The evidence supports a finding that the second defendant, on behalf of the first and second defendants, presented the Form 1 Transfer to the Titles Office on 19 June 2007 believing it to be a genuine document which could be properly acted upon.
- (h) The relevant principle is as follows:

“A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not

³⁶² DCS [9].

³⁶³ DCS [10]; *Corin v Paton* (1990) 169 CLR 540 at 575 per Deane J.

³⁶⁴ DCS [11].

³⁶⁵ DCS [12].

³⁶⁶ *Bank of South Australia Limited v Ferguson* (1998) 192 CLR 248 at 258, [19] per Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ.

³⁶⁷ DCS [15]; *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425 at 443 [55] per French CJ, Hayne, Bell and Gageler JJ.

guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”³⁶⁸

[351] In these circumstances the defendants submit that the fraud as claimed by the plaintiff has not been made out.

[352] The plaintiff’s pleading also arguably includes a claim in respect of “fraud against the registrar”.

[353] The defendants contend that the concept of “fraud against the registrar” is raised by the plaintiff’s pleading at paragraphs 15(e) to 15(g) of the SOC. The material facts pleaded are:³⁶⁹

- (a) That the Registrar of Land Titles had no knowledge as at 19 June 2007 of the death of Colin Trouton on 15 June 2007.
- (b) That the Registrar of Land Titles would not have registered and executed Form 1 Transfer instrument:
 - (i) “had the defendant [sic]” informed the Registrar of Land Titles of the death of Colin Trouton on 15 June 2007; and
 - (ii) absent execution by, or on behalf of, Colin Trouton on the face of the Form 1 Transfer instrument.
- (c) By adding the words referring to the execution under the power of attorney, “the defendants” conveyed to the Registrar of Land Titles a false impression, statement or representation that Colin Trouton knew or approved the registration of the Form 1 Transfer instrument or that the power of attorney authorised the first defendant and the plaintiff to execute the Form 1 Transfer instrument on behalf of Colin Trouton, notwithstanding his death on 15 June 2007.³⁷⁰

[354] The defendant refers to a discussion about the concept of “fraud against the registrar” in an article which describes the concept as follows:

“There are five different kinds of fact scenarios that have historically been treated as cases of fraud against the Registrar. These scenarios are where: (1) the registered proprietor or his or her agent did not have a hand in, and was not aware of, the forgery but falsely attested the forged signature; (2) the registered proprietor altered the instrument (whether forged or not) after execution but before lodgement for registration; (3) the registered proprietor did not have a hand in, and was not aware of, the forgery or the false attestation but caused the forged and falsely attested instrument to

³⁶⁸ *Assets Company Limited v Roihi* (1905) AC 176 at 210. See also *Butler v Fairclough* (1971) 23 CLR 78 at 90 per Griffith CJ and 97 per Isaacs J.

³⁶⁹ DCS [20].

³⁷⁰ DCS [21].

be registered; (4) the instrument was not forged but it was falsely attested by the registered proprietor or his or her agent; and (5) the registered proprietor or his or her agent attested the signature of an imposter. The first, fourth and fifth scenarios are situations where there has been a false attestation by the registering party. The second and third scenarios do not involve false attestation by the registering party, however, may also give rise to a claim of fraud against the Registrar.

An examination of the cases reveals that in each kind of case the moniker of ‘fraud against the Registrar’ is either unnecessary or unhelpful, or both, and is, furthermore, prone to lead to inconsistent and, in some cases, inappropriate outcomes.”³⁷¹ (footnotes omitted)

- [355] The defendants contend that the present circumstances do not fit within any of these recognised categories of fraud against the Registrar.
- [356] The current case does not involve forged signatures on the transfer, false witness attestations on the transfer or alterations of the transfer after execution and before registration.
- [357] The plaintiff submits that in respect of s 184(3)(b), fraud is an exception to indefeasibility under the Torrens title system. Pursuant to the codification in s 184(3)(b) of the Land Title Act, indefeasibility will be destroyed “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”.³⁷²
- [358] The Land Title Act does not define fraud and it is necessary therefore to consider the relevant authorities to identify the conduct which amounts to fraud for the purposes of the legislation.³⁷³
- [359] The plaintiff recognises³⁷⁴ that fraud for the purposes of the Land Title Act requires two elements:
- (a) actual fraud; and
 - (b) the fraud must be “brought home to the registered proprietor or his or her agent”.³⁷⁵

³⁷¹ ‘Fraud against the Registrar – An Unnecessary, Unhelpful and Perhaps, No longer Relevant Complication in the Law on Fraud under the Torrens System’ (2014) 40(3) Monash University Law Review 821 at 827.

³⁷² PCS [38]-[39].

³⁷³ PCS [39].

³⁷⁴ PCS [40].

³⁷⁵ *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64.

[360] The Privy Council decision in *Assets Company Limited v Roihi*³⁷⁶ contains the statement on the meaning of “fraud” which has been followed in cases including the Queensland Court of Appeal and this Court. Lindley LJ stated at 210:

“... fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud ... further it appears to their lordships that the fraud which must be proved in order to invalidate the title of a registered proprietor for value ... must be brought home to the person whose registered title is impeached or to his agents... The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn [sic] that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”

[361] The High Court of Australia in *Bahr v Nicolay (No 2)*³⁷⁷ adopted a similar approach. Mason CJ and Dawson J in joint reasons reviewed the relevant authorities and concluded that “actual fraud, personal dishonesty or moral turpitude lie at the heart of the [fraud provision]”.³⁷⁸

[362] Further, the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*³⁷⁹ determined that for the purposes of constituting an exception under the relevant Torrens legislation, fraud must involve “actual fraud [or] moral turpitude”.

[363] The plaintiff acknowledges that the requirement for “actual fraud” has been affirmed in the case law.³⁸⁰

[364] Further, the plaintiff recognises that what is required to establish fraud is actual fraud in the sense of personal dishonesty, not constructive or equitable fraud in the sense of mere knowledge of a prior right.³⁸¹

[365] The plaintiff, however, contends that the relevant law is that while knowledge is not fraud in and of itself, it may be a factor in establishing fraud. But that is the case

³⁷⁶ [1905] AC 176.

³⁷⁷ (1988) 164 CLR 604 at 614 per Mason CJ and Dawson J; at 631-632 per Wilson and Toohey JJ.

³⁷⁸ At 614 per Mason CJ and Dawson J.

³⁷⁹ (2007) 230 CLR 89 at 169 [192].

³⁸⁰ PCS [44].

³⁸¹ PCS [45]. See *Assets Company Limited v Mere Roihi* [1905] AC 176 and *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

only to the extent that such knowledge amounts to deliberately turning a blind eye, or registration of an interest as part of a plan to deliberately cheat a person of an existing right.³⁸²

[366] An example is considered by the Privy Council in *Assets Company Limited v Mere Roihi*.³⁸³ In that case, it was made clear that where a registered proprietor suspects that a person with an interest in land is being fraudulently deprived of his or her interest and deliberately abstains from making enquiries “for fear of learning the truth” such a person will be deemed to have acted fraudulently.

[367] The plaintiff also submits that fraud may be established by the actions of the registered proprietor after registration. In support of this proposition, the plaintiff points to at least two judges in the High Court in *Bahr v Nicolay (No 2)*³⁸⁴ suggesting that fraud can occur after registration by the dishonest repudiation of a prior interest which the registered proprietor had agreed to recognise as a basis for acquiring the title.

[368] Mason CJ and Dawson J in considering whether either the fraud or the “*in personam*” exception was applicable, reached the view that the fraud exception included the fraudulent repudiation of a prior interest which the registered proprietor had acknowledged or agreed to recognise as a basis for obtaining title.³⁸⁵

[369] The case of *Waimiha Sawmilling Company Limited (in liq) v Waione Timber Co Ltd*³⁸⁶ is also relied upon by the plaintiff. In that case, the Privy Council commented as follows in respect of fraud in the context of the Torrens system:

“If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ... The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.”³⁸⁷

³⁸² See for example *Waimiha Sawmilling Company Limited (in liq) v Waione Timber Co Ltd* [1926] AC 101.

³⁸³ [1905] AC 176.

³⁸⁴ (1988) 164 CLR 604 at 615 per Mason CJ and Dawson J.

³⁸⁵ If the plaintiff’s reliance on this authority in part is in support of its submission that the exception under s 184(3)(a) is open to it on the pleading, in light of my ruling above, this is not the case. To the extent that it is relevant to [2] of the Further and Better Particulars, it is open for the plaintiff to rely on this authority.

³⁸⁶ [1926] AC 101 at 106-107.

³⁸⁷ At 106-107.

[370] The plaintiff in its submissions also acknowledges that fraud must be “brought home” to the registered proprietor. Fraud is not established by mere want of care in checking the circumstances surrounding the execution of a document.³⁸⁸

[371] The plaintiff also seeks to rely on the authority of *White v Tomasel & Anor.*³⁸⁹ In particular, reference is made to the reasons of McMurdo J (as his Honour then was) at [74] and also [69]-[72]. However, these comments are relevant to s 185(a) of the Land Title Act. In light of my earlier ruling, the plaintiff’s claim does not extend to the exception under s 184(3)(a) of the Land Title Act.

[372] In any event, the comments by McMurdo J at [74] do have some relevance here. His Honour stated:

“... In the circumstances of those cases, the establishment of the cause of action depended upon proof of some knowledge of the forgery or other invalidity of the instrument which would have made it unconscientious or unconscionable to have enforced the mortgage. A mere failure to make careful inquiries as to the validity of the mortgage instrument was not sufficient to provide an obligation under the general law, irrespective of the impact of registration...”

[373] That statement may be of assistance to the issues to be determined in any event.

[374] At paragraph 52 of the PCS, the plaintiff states that fraud will be found where there is notice of the unregistered interest and either:

- “(a) an assurance prior to transfer, not intended to be kept; or
- (b) an acknowledgement or assurance, after transfer, that the interest will be preserved.”

[375] This is clearly a submission in respect of s 184(3)(a) of the Land Title Act encompassing exception in s 185(1)(a). The basis for fraud articulated in that paragraph is not open on the plaintiff’s pleading.

[376] In any event, the defendants contend that in this case, it is “all or nothing”. Either the fraud has been established if the plaintiff’s evidence is accepted or alternatively, there is no fraud if the evidence of the first and second defendants, Mr Luke Cashin and the whole of the evidence is accepted. It is submitted that there can be “no lesser” conduct that can amount to “an equity” referred to in s 185(1)(a) of the Land Title Act in any event.³⁹⁰

³⁸⁸ See *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133; *Young v Hoyer* [2001] QCA 453.

³⁸⁹ [2004] 2 QdR 438; [2004] QCA 89.

³⁹⁰ DRCS [35].

- [377] The plaintiff also submits that there is a line of cases concluding that statutory fraud may be established against a registered proprietor where, prior to the time of lodging the instrument for registration, the registered proprietor knows that the instrument has not been properly executed in accordance with the statutory formalities or knows that the document, in some other material respect, is a false document.
- [378] The plaintiff relies on a number of cases in support of this proposition: *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483; *National Commercial Banking Corp of Australia Ltd v Hedley* (1984) 3 BPR 9477; *Grgic v Australian & New Zealand Banking Group Ltd* (1994) 33 NSWLR 202; *Westpac Banking Corp v Sansom* (1994) 6 BPR 13,790; *Sansom v Westpac Banking Corp* (1996) 7 BPR 14,615; *Beatty v ANZ Banking Group Ltd* [1995] 2 VR 301; *Hickey v Powershift Tractors Pty Ltd* (1998) 9 BPR 17,339; *Davis v Williams* (2003) 11 BPR 21,313.
- [379] The plaintiff relies on authorities where the fraud lay in the misrepresentation made to the Registrar and, in those circumstances, it was not necessary to show that the fraud was actually practised against the person deprived of the interest in land. In this regard, reference is made to *Australian Guarantee Corp Ltd v De Jager*³⁹¹, where the mortgagee was not aware that the wife's signature on the instrument of mortgage was a forgery but employees of the mortgagee were aware that her signature had not been duly attested. On the facts in that case, the conduct of the mortgagee constituted fraud within the meaning of the Torrens statute.
- [380] Tadgell J stated:
- “... to lodge an instrument for registration in the knowledge that the attesting witness had not been present at execution must deprive the lodging party of an honest belief that it is a genuine document on which the Registrar can properly act.”³⁹²
- [381] Reference is also made to the case *National Australia Bank v Maher*.³⁹³ In that case, the Full Court of the Supreme Court of Victoria held that the registration of the Bank's mortgage was procured through fraud where the Bank's employee had included in the mortgage instrument the particulars of additional land after the instrument had been executed by the mortgagor and then caused it to be registered.
- [382] The plaintiff contends that these cases illustrate that, even where there is no intention to disadvantage a person, fraud may nonetheless be established where a representation is made to the Registrar knowing it is false in a material respect, with

³⁹¹ [1984] VR 483.

³⁹² At 498.

³⁹³ [1995] 1 VR 318.

the intention that the Registrar be induced by the representation to act in a way materially different from what would have been done otherwise.³⁹⁴

[383] In paragraphs 58 to 60 of the PCS, the plaintiff again refers to cases in respect of the “*in personam*” exception to indefeasibility. Again, these submissions are directed at the exception within s 185(1)(a) of the Land Title Act which has not been pleaded by the plaintiff.

[384] The relief sought by the plaintiff under s 187 of the Land Title Act is as follows:

- (a) An order pursuant to s 187 of the Land Title Act cancelling the registration of the Form 1 Transfer instrument being dealing number 710716147 dated and lodged for registration on 19 June 2007 in respect of the Harbut Street Property.
- (b) The plaintiff then lodge a notice of transmission on death that would have the effect of placing the property in her sole name as registered proprietor.
- (c) Any order should be conditional upon an equitable adjustment.

[385] It appears from the submissions that the plaintiff seeks the balance purchase price of the Dagmar Street Property should be brought into account or set off against any claim made by the defendants. Further, the plaintiff acknowledges that there should be some compensation to the first and second defendants but does not accept the total amounts claimed.

[386] The plaintiff accepts the following amounts would be included in any order:

- (a) The amount of \$49,900.69 paid to the plaintiff or for her benefit.³⁹⁵
- (b) A portion of the amounts in schedule 3 totalling \$531,726.18 being payments made by the defendants to RAMS on account of the RAMS’ facilities in the plaintiff’s name and secured over the Harbut Street Property.
- (c) The amount of \$745,497.74 set out in schedule 4 being the amounts expended by the defendants towards the development and construction costs of the Harbut Street Property from 23 November 2005 to 13 April 2017.

[387] The defendants submit that the plaintiff’s fraud claim must fail and no orders are required to be made under s 187 of the Land Title Act. This is based on finding that:

- (a) the first defendant did not commit the alleged fraud and his title as registered proprietor as a joint tenant of the Harbut Street Property, is not defeasible; and

³⁹⁴ See McDonald, McCrimmon, Wallace and Weir, *Real Property Law in Queensland*, 3rd ed, Law Book Co. 2010, Sydney at pp. 318 to 320, citing *Davis v Williams* (2003) 11 BRP 21,313 at 21,318.

³⁹⁵ It is only this amount from schedule 2 which the plaintiff accepts as allegedly made to or at the direction of the plaintiff.

- (b) the second defendant did not commit the alleged fraud and her title as registered proprietor as a joint tenant of the Harbut Street Property, is not defeasible.

[388] Further, the defendants submit that orders should be made pursuant to s 127 of the Land Title Act for:

- (a) the removal of caveat 717953437 lodged by the plaintiff on 10 April 2017; and
- (b) the removal of caveat 718136397 lodged by the Registrar of Titles on 6 July 2017.

Consideration and findings

Key issues to be determined

[389] Given the way that the plaintiff's fraud claim has been articulated, it is necessary to consider three issues:

- (a) Question 1: Was the Form 1 Transfer signed without the plaintiff knowing or understanding the legal effect of the Form 1 Transfer and the plaintiff never intending to transfer the title of the Harbut Street property to the defendants by the execution of the Form 1 Transfer?
- (b) Question 2: Did the defendants never have any intention of paying the purchase price of the Harbut Street property as pleaded at [17(a)], [17(b)] and [17(c)] of the SOC and/or by their conduct after the registration of the title as particularised in [2] of the Further and Better Particulars?
- (c) Question 3: Did the second defendant when lodging the Form 1 Transfer on behalf of herself and the first defendant with the Registrar of Land Titles:
 - (i) know that the document was not properly executed and/or was a false document;
 - (ii) know that the Registrar of Land Titles would not have registered the Form 1 Transfer had they been informed of the death of Colin Trouton and absent the purported execution of the Form 1 Transfer by or on behalf of Colin Trouton; or
 - (iii) had the intention that the Registrar be induced by the misleading representation that Colin Trouton knew or approved of the registration of the Form 1 Transfer or that the power of attorney authorised the first defendant and plaintiff to execute the Form 1 Transfer on behalf of Colin Trouton, notwithstanding his death on 15 June 2007?

Findings of fact

[390] I accept the evidence of the first and second defendants as to the circumstances of the execution of the Form 1 Transfer on 19 June 2007. In particular, I find that:

- (a) The plaintiff knew and understood the legal effect of the Form 1 Transfer at the time it was executed.

- (b) The plaintiff knowingly and voluntarily signed the Form 1 Transfer.
- (c) The plaintiff, by executing the Form 1 Transfer in both her personal capacity and purportedly as an attorney on behalf of Colin Trouton, intended to transfer the Harbut Street Property to the defendants.
- (d) The plaintiff, the first defendant and the second defendant honestly, but mistakenly, thought the Form 1 Transfer was properly executed on behalf of Colin Trouton.
- (e) The first and second defendants were not dishonest in the preparation of and execution of the Form 1 Transfer.

[391] Further, in respect of the Form 1 Transfer I find that:

- (a) The execution of the Form 1 Transfer was defective to the extent that it purported to be executed by or on behalf of Colin Trouton under the Colin Trouton Power of Attorney.
- (b) The Colin Trouton Power of Attorney was revoked on and from 15 June 2007 when Colin Trouton died.
- (c) The correct procedure to effect a transfer of the Harbut Street Property where one of the registered joint tenants had died was as follows:
 - (i) A certified copy of the official certificate of death to be provided to Titles Queensland;
 - (ii) Completion of Form 4 – Request to record death to be completed and lodged with Titles Queensland;
 - (iii) The Harbut Street Property to be registered solely in the name of the surviving joint tenant, being the plaintiff; and
 - (iv) Completion and execution of a form 1 transfer from the plaintiff to the defendants.
- (d) Had the Registrar of Titles known of the death of Colin Trouton, the Form 1 Transfer would have been requisitioned and the procedure at (c) would have been required to complete the transfer.
- (e) The plaintiff, the first defendant and the second defendant did not know that the execution of the Form 1 Transfer by or on behalf of Colin Trouton was defective.
- (f) The plaintiff, the first defendant and the second defendant did not know the correct procedure outlined at (c) above was required by Titles Queensland to effect the transfer of the Harbut Street Property from the plaintiff as the sole surviving joint tenant to the defendants.

[392] It is also necessary to make additional findings in respect of factual disputes arising both before and after the registration of the Form 1 Transfer.

[393] As to matters arising before 19 June 2007 concerning the plaintiff, I find that:

- (a) The plaintiff had more than limited experience in business and commercial matters. Her relevant experience included being a director of a clothing business and also executing other form 1 transfers to complete transfers of real property.
- (b) The plaintiff was not reliant on the first and second defendant in relation to the transfer of the Harbut Street Property as alleged in [1(g)] of the SOC.
- (c) The plaintiff on the evidence was capable of, and did, make decisions in respect of commercial and legal matters without the input of the defendants. This included the increase of the drawdown amounts under the RAMS Facilities and liaising with RAMS in respect of the facilities.
- (d) The plaintiff lodged the Colin Trouton Power of Attorney with Queensland Titles for registration.

[394] I make findings in respect of the Harbut Street Agreement separately below at [404]-[410].

[395] In light of these initial findings of fact, I make the following findings in respect of the key issues to be determined:

- (a) Question 1: At the time the Form 1 Transfer was signed the plaintiff knew and understood the legal effect of the Form 1 Transfer and the plaintiff intended to transfer the title of the Harbut Street Property to the defendants by the execution of the Form 1 Transfer.
- (b) Question 2:
 - (i) The defendants intended to pay the purchase price of the Harbut Street Property and subsequently did so by way of:
 - (A) payments made at the request of or at the direction of the plaintiff in the amount of \$94,547.55 (Exhibit 67); and
 - (B) payment of the amounts owing under the RAMS Facilities in the amount of \$531,726.18 as at 30 November 2021 (Exhibit 71).
 - (ii) The amount paid towards the purchase price is in excess of the purchase price of \$500,000 as per the Harbut Street Agreement³⁹⁶ (or alternatively \$525,000 is stated on the Form 1 Transfer and the unadjusted purchase price of \$550,000. Each of these amounts has been exceeded on what has been paid by the defendants).
 - (iii) Further, while the design has changed with the consent of the plaintiff,³⁹⁷ a space that can be used as a ‘granny flat’ by the plaintiff remains as part of the design of the new dwelling built on the Harbut Street Property.

³⁹⁶ See separate discussion below.

³⁹⁷ See email dated 14 December 2007 at 5:54pm.

- (c) Question 3: The second defendant when lodging the Form 1 Transfer on behalf of herself and the first defendant with the Registrar of Land Titles:
- (i) Did not know that the document was not properly executed and/or was a false document.
 - (ii) Believed the document to be properly executed.
 - (iii) Did not know that the Registrar of Land Titles would not have registered the Form 1 Transfer had they been informed of the death of Colin Trouton.
 - (iv) Did not have the intention that the Registrar be induced by the misleading representation that Colin Trouton knew or approved of the registration of the Form 1 Transfer or that the power of attorney authorised the first defendant and plaintiff to execute the Form 1 Transfer on behalf of Colin Trouton, notwithstanding his death on 15 June 2007.

[396] Given these findings, the plaintiff has not established fraud for the purposes of s 184(3)(b) of the Land Title Act.

[397] Both the plaintiff and the defendants intended the Form 1 Transfer to be effective in transferring the Harbut Street Property to the defendants. While the Form 1 Transfer had significant deficiencies, none of the parties were aware of the deficiencies and the parties believed it to be a genuine document to transfer the ownership of the Harbut Street Property to the defendants.

[398] As a consequence of these findings, the plaintiff's claim as pleaded in the SOC must fail.

[399] In the circumstances, the defendants obtained indefeasible title upon registration of the Form 1 Transfer.

[400] It is appropriate that orders be made that the caveats lodged by both the plaintiff and the Registrar of Titles be removed.

[401] To the extent that the plaintiff submits that any orders pursuant to s 127(1) of the Land Title Act for the removal of the caveats should be conditional on the plaintiff being discharged from the mortgage over the Harbut Street Property, I consider it is not appropriate to impose such a condition.

[402] The mortgagee (now RHG) has an interest under the mortgage and to alter that interest in the absence of the mortgagee is not appropriate. The plaintiff has a legal relationship with the mortgagee under the terms of the RAMS Facilities and the plaintiff remains responsible to RHG in respect of the amounts owing under the RAMS Facilities.

[403] It is not appropriate to vary the security by way of the mortgage over the Harbut Street Property in the way proposed by the plaintiff, at least without hearing from the mortgagee and there being a proper basis to do so.

Findings in respect of the Harbut Street Agreement

- [404] While there are arguments both ways, given the various significant difficulties that arise due to the Colin Trouton's lack of mental capacity and the nature of the joint obligations of the plaintiff and Colin Trouton in the 9 March Written Agreement, the better view is that the 9 March Written Agreement does not give rise to legally enforceable obligations.
- [405] However, I accept the evidence of the defendants as to the circumstances in which the plaintiff and Colin Trouton signed the 9 March Written Agreement. Accordingly, I do not accept the plaintiff's contentions in respect of the 9 March Written Agreement being an aspect of the plaintiff's fraud case.
- [406] Whilst there are issues which result in the 9 March Written Agreement being unenforceable, I accept that there were discussions between the plaintiff and the first defendant as to the terms contained in the written agreement and that the plaintiff accepted those terms.
- [407] In respect of the Harbut Street Agreement, I find that the agreement in or about February 2007 was an oral agreement reached between the first defendant (on his own behalf and on behalf of the second defendant) and the plaintiff (on her own behalf and on behalf of Colin Trouton) with the following terms:
- (a) The first defendant agreed to purchase and the plaintiff agreed to sell the Harbut Street Property for a purchase price of \$500,000.
 - (b) The defendants would demolish the existing house on the Harbut Street Property and build a new house to live in with their children, including a "granny flat" for the plaintiff and Colin Trouton to live in.
 - (c) The defendants agreed to assist in providing care to Colin Trouton and the plaintiff and Colin Trouton would have the benefit of living in the "granny flat" and the defendants being able to provide care.
 - (d) The defendants would be responsible for the design and construction of the new house.
 - (e) The plaintiff would be responsible for paying the RAMS Facilities secured by a mortgage over the Harbut Street Property.
 - (f) Once the construction of the new house was completed to lock-up stage, the defendants would list the Dagmar Street Property for sale.
 - (g) The defendants would pay the purchase price for the Harbut Street Property to the plaintiff and Colin Trouton upon settlement of the sale of the Dagmar Street Property.
- [408] The oral agreement was varied further by agreement between the first defendant and the plaintiff:
- (a) In May 2007 for the Harbut Street Property to be transferred to the defendants prior to them incurring the costs of construction of the new house.

- (b) On or about 5 June 2007 that payments made by the defendants to the plaintiff or at her direction (including payments made in respect of Scaasi debts or expenses) were part payments of the purchase price.
- (c) On or about 15 September 2008 that the payment by the defendants of the RAMS Facilities arrears of \$7,148 was a part payment of the purchase price.
- (d) From on or about 30 September 2008 onwards that the on-going payments by the defendants of the RAMS Facilities on behalf of the plaintiff were part payments of the purchase price.

[409] I also find that acts of part performance of the oral agreement were performed by the first and/or second defendants including:

- (a) Taking possession of the Harbut Street Property and the existing house being demolished between 27 and 29 March 2007.
- (b) Commencement of construction of the new dwelling in approximately September 2007.
- (c) The defendants paying the rates, sewerage and water charges from 8 May 2007.
- (d) The second defendant prepared a draft Form 1 Transfer in order to give effect to the agreement as varied.
- (e) The first defendant and the plaintiff made an arrangement for the plaintiff and Colin Trouton to visit the defendants' home on 3 and 4 June to sign the Form 1 Transfer.
- (f) The telephone conversation between the first defendant and the plaintiff on 18 June 2007 regarding arrangements for the Form 1 Transfer to be signed in front of a Justice of the Peace in Brisbane on 19 June 2007.
- (g) A further telephone conversation between the first defendant and the plaintiff on 19 June 2007 agreeing to meet at Garden City shopping centre to meet with a Justice of the Peace.
- (h) The execution of the Form 1 Transfer on 19 June 2007 before a Justice of the Peace.
- (i) Payments made by the defendants to or at the request of the plaintiff, including expenses of Scaasi as per Schedule 2 as part payments of the purchase price. Exhibit 67 records total payments of \$94,547.55.
- (j) Payments made by the defendants on behalf of the plaintiff in respect of the RAMS facilities secured by a mortgage against the Harbut Street Property as per Schedule 3 as part payments of the purchase price. Exhibit 71 records payments as at 30 November 2021 of \$531,726.18.

[410] Relevant context for the part performance is also demonstrated by the plaintiff registering the Colin Trouton Power of Attorney on or about 21 May 2007 at the Gold Coast to give effect to the Harbut Street Agreement and the transfer of the Harbut Street Property.

Counterclaim

[411] The 2ADCC pleads several further claims that need to be considered, including some in the alternative.

Payments made in respect of Dagmar Street

[412] In the 2ADCC the defendants plead circumstances relevant to the subdivision of the original block of land and also the transfer of the Dagmar Street Property to the defendants.

[413] The relevant paragraphs of the 2ADCC are [1] to [9].

[414] The defendants' contention is that there was an agreement, called the Dagmar Street Agreement, between the plaintiff, and Colin Trouton and the defendants by which the original property was to be subdivided, which included the partial demolition of the existing house. The defendants contend that the costs to obtain the approval of the subdivision and the necessary site and building works would originally be paid by the first defendant but that costs would be deducted from the purchase price of the new lot.

[415] On or about 3 April 2000, the Original Block was subdivided creating the Dagmar Street Property and the Harbut Street Property. Further, on or about 19 April 2000, the title to the Dagmar Street Property was transferred from the plaintiff and Mr Colin Trouton to the defendants.

[416] The defendants contend that a purchase price of \$160,000 for the Dagmar Street Property was agreed between the plaintiff and the first defendant, and following a deduction in respect of development costs of \$42,002.69, the balance of the purchase price payable was \$117,997.31.

[417] Further, it is alleged that there was an oral agreement between the defendants and the plaintiff, for herself and on behalf of Colin Trouton, that the balance of the purchase price did not need to be paid immediately and could be repaid pursuant to a payment arrangement. This payment arrangement is said to be inferred from the matters pleaded at [6], [7], [8] and [9] of the 2ADCC.

[418] That is, payments made by the defendants made to or at the direction of the plaintiff were payments towards the purchase price owing in respect of the Dagmar Street Property. Schedule 1 sets out the claimed charges made to the defendant's Mastercard account by the plaintiff totalling \$147,451.14.

[419] The defendants claim they overpaid the plaintiff and Colin Trouton by an amount of \$29,453.83. Further, at [9], the defendants plead that the plaintiff repaid the overpayment of \$29,453.83 by a payment of \$5000 made on or about 31 January 2004 and \$24,454 paid on or about 19 April 2004.

[420] The position of the plaintiff is that she denies that the costs of the subdivision were to be set off against the purchase price of \$160,000. The plaintiff contends that the first defendant was to pay all costs of the subdivision on a permanent basis. In

contrast, the plaintiff contends that the costs of any subdivision were to be paid by the first and second defendants.³⁹⁸

- [421] Specifically, the plaintiff pleads that she agreed to a sale price of \$160,000 on the basis that the first defendant paid the cost of the subdivision.³⁹⁹
- [422] Overall, the plaintiff contends that the full purchase price of \$160,000 was owed together with a further amount of \$10,000 repayment of a loan from the plaintiff to the defendants.⁴⁰⁰
- [423] The plaintiff acknowledges that it was agreed that the defendants were not required to tender the balance of the purchase price for the Dagmar Street Property immediately upon subdivision but to pay the balance purchase price promptly over a time to be agreed.⁴⁰¹
- [424] Further, the plaintiff contends that she never agreed that any payments or advances by the defendants to or for Scaasi would be offset against the purchase price payable in respect of the Dagmar Street Property.⁴⁰²
- [425] In respect of the amounts identified in Schedule 1 to the 2ADCC, the plaintiff alleges that this includes payments made to or on behalf of Scaasi in the amount of \$82,488.88 which were not to the benefit of the plaintiff.⁴⁰³
- [426] In respect of the amounts allegedly paid from the plaintiff to the defendants, the plaintiff denies that she made a payment of \$29,453.83 and says that amount was paid by Scaasi in repayment of loans.⁴⁰⁴
- [427] The plaintiff's written submissions also address the Dagmar Street Property and make a claim for equitable compensation. The plaintiff acknowledges that there was no demand for payment of the balance of the purchase price and she did not make common law claim in the proceeding. However, in dealing with the defendants' equitable claim, it is submitted that the outstanding amount in respect of the balance purchase price of Dagmar Street should be brought into account or otherwise offset against any claim made by the defendants.
- [428] The defendants contend that no equitable compensation is payable by the defendants to the plaintiff as it has not been pleaded and there is no relief sought in respect of it by the plaintiff. In any event, the defendants' primary position is that the Dagmar Street purchase price has been paid as set out in Schedule 1.

³⁹⁸ ARD [4(g)]; [4(h)].

³⁹⁹ ARD [4(h)].

⁴⁰⁰ ARD [5].

⁴⁰¹ ARD [6].

⁴⁰² ARD [6(b)].

⁴⁰³ ARD [6(b)(iii)].

⁴⁰⁴ ARD [8]; [9].

- [429] The plaintiff gave evidence in respect of the schedule marked Exhibit 3. Exhibit 3 is a list of the payments accepted by the plaintiff paid on her behalf and offset against the purchase price for the Dagmar Street Property. The total amount accepted by the plaintiff is \$52,843.85.
- [430] Accordingly, the plaintiff's primary case is that the balance of \$107,156.15 remains payable in respect of the Dagmar Street Property. Alternatively, the balance owing is \$94,607.29.⁴⁰⁵
- [431] Exhibit 17 sets out the payments that the plaintiff contends were payments for and on behalf of Scaasi, totalling \$94,607.29.
- [432] Exhibit 50 is a list of the payments identified by the defendants as payments made to or at the direction of the plaintiff in relation to the Dagmar Street Property purchase price. This reflects Schedule 1 to the 2ADCC. The total of the payments is \$147,451.14.
- [433] For the reasons articulated previously in these reasons, I accept the evidence of the first and second defendants in respect of the issues at trial.
- [434] The first defendant gave evidence in chief in respect of the Dagmar Street Agreement. Pages 3421A and 3421B of the Court Book are a document prepared using an accountancy package which identifies the costs claimed by the defendants in respect of costs paid against the defendant's Mastercard, transfers, cheques and cheque butts. It is described as being a full summary of all the costs associated with the subdivision.
- [435] Further, page 3421C of the Court Book is a record of what was done in relation to the subdivision and organising the various plans and includes an approximation of the time spent on the relevant activities.
- [436] These documents were provided with a letter to the plaintiff.
- [437] The first defendant's evidence clearly was that he had discussions with the plaintiff in relation to the Scaasi loan and the first defendant gave evidence that that was to be used as a payment towards the purchase of the Dagmar Street Property.⁴⁰⁶ As a result of that discussion, he prepared the schedules in relation to how the costs were to be dealt with.⁴⁰⁷
- [438] The first defendant gave evidence that he prepared a spreadsheet from primary documents including Mastercard statements, cheque butts, cheque statements and other primary documents and imported the dollar values into the spreadsheet maintained by him in respect of the payments which were being offset against the Dagmar Street Property purchase price.

⁴⁰⁵ This is slightly different to the amount in question 4 of Annexure A Summary of Issues prepared on behalf of the plaintiff.

⁴⁰⁶ T 9-22, lines 30-34.

⁴⁰⁷ T 9-22, line 40.

- [439] In respect of the payments that were made, the first defendant gave evidence that these were done following requests from his mother for the specific payment to be made on her behalf or on behalf of the company, Scaasi.
- [440] The first defendant also gave evidence that occasionally, the second defendant would be contacted by the plaintiff and ask for a specific payment to be made. Payments of this nature were factored into the spreadsheet.
- [441] Exhibit 50 is the version of Schedule 1 which was addressed by the first defendant in giving evidence. This reflects the payments made at the direction of the plaintiff in relation to Dagmar Street.
- [442] I accept the first defendant's evidence in respect of the agreement reached between the plaintiff and the defendants to set off amounts paid for and on behalf of the plaintiff including payments for and on behalf of Scaasi as offsetting against the Dagmar Street Property purchase price. In this respect, I find that the payments made by the defendants on account of the purchase price of the Dagmar Street Property are as set out in exhibit 50, totalling \$147,451.14.
- [443] I accept the evidence of the defendants in respect of the amounts that were paid by the plaintiff to, in effect, repay the claimed overpayment of \$29,453.83.⁴⁰⁸ Accordingly, on the evidence of the defendants, which I accept, the purchase price of \$160,000, including the offset of the subdivision costs, has been paid and no balance remains outstanding.

Alternative claims - Harbut Street Property

- [444] The defendants' 2ADCC raises a number of alternative claims in respect of the Harbut Street Property. As I have found that the plaintiff has not established fraud and the Harbut Street Property is not to be re-conveyed to the plaintiff, these claims do not arise.
- [445] I consider these claims in the alternative below in case I am wrong about the plaintiff's claim. However, given the nature of the claims it is not possible to consider every possible scenario in respect of these claims and the issues may need to be further considered in light of the outcome of any appeal.

Alternative claim - Specific performance of the Harbut Street Agreement

- [446] The 2ADCC includes a pleading at [65] to [67] under the heading "Specific Performance of the Harbut Street Agreement." However, in the prayer for relief it appears that the defendants are not seeking any relief and that the claim for specific performance has been abandoned.

⁴⁰⁸ 2ADCC [8].

Alternative claim - Harbut Street Property constructive trust and unjust enrichment

- [447] Further or in the alternative, if the Harbut Street Property is conveyed to the plaintiff and is not to be reconveyed to the defendants, the defendants allege that the plaintiff holds the title to the Harbut Street Property on constructive trust for the defendants to the extent of the amounts determined in respect of the defendants' claims for unjust enrichment.
- [448] The amounts claimed by the defendants include the sum of \$745,497.74 which they expended in the development and construction of the new house on the Harbut Street Property, the payments as directed by the plaintiff pleaded at Schedule 2 to the 2ADCC, the time and energy expended in the construction of the new house on the Harbut Street Property, the money in payment of the rates, sewerage and water charges in relation to the Harbut Street Property and the payments on behalf of the plaintiff in respect of the RAM Facilities secured by registered mortgage over the Harbut Street Property.
- [449] The plaintiff accepts that if the Court was to make an order pursuant to s 187 of the Land Title Act cancelling the registration of the Form 1 Transfer a condition could be imposed requiring equitable compensation to be paid to the defendants.
- [450] The amount of that equitable compensation is in dispute, however some components are not contentious. The plaintiff accepts the amount of \$49,900.69 in respect of the claim in Schedule 2. The plaintiff does not accept that the whole of the payments made in respect of the RAMS Facilities should be allowed as some of the delay was caused by the defendants rather than the plaintiff. The plaintiff does now accept the Schedule 4 costs of \$745,497.74 but does not accept the Schedule 6 costs as recoverable.
- [451] Further to the findings made above, some further relevant findings of fact are set out below at [501]-[512].
- [452] If it is necessary to consider this alternative claim, then further submissions should be made in light of any matters identified by the Court of Appeal and the basis that requires the claim to be considered.

Alternative claim – damages for deceit

- [453] The defendants also seek relief by way of damages for deceit if an order is made pursuant to s 187 of the Land Title Act.
- [454] The amount claimed is similar and in the alternative to the claim in respect of a constructive trust and unjust enrichment.
- [455] As a claim in deceit is also brought if the Harbut Street Property is not transferred to the plaintiff, the principles in respect of a claim in deceit are deal with below.

Alternative claim - Estoppel

- [456] Further, the defendants contend that the plaintiff, by her conduct as pleaded, represented to the defendants that she would cause the title to the Harbut Street Property to be transferred to the defendants and did not subsequently challenge the defendants' entitlement to be registered as proprietors of the Harbut Street Property.
- [457] Further alternatively, the defendants also allege that the plaintiff's conduct induced the defendants to assume that she would cause the title to the Harbut Street Property to be transferred and would not subsequently challenge the defendants' entitlement to be registered as proprietors of the Harbut Street Property.
- [458] The defendants point to the money that they have expended and the time and effort spent in relation to the Harbut Street Property. Materially, the defendants contend that they believed that the plaintiff would not subsequently challenge the defendants' entitlement to be registered as proprietors of the Harbut Street Property.
- [459] The defendants contend that they placed reliance on the representations by the plaintiff and made the payments as directed by the plaintiff pleaded at Schedule 2 to the 2ADCC, expended time and energy in the construction of the new house on the Harbut Street Property, expended money in payment of the rates, sewerage and water charges in relation to the Harbut Street Property and made significant payments on behalf of the plaintiff in respect of the RAM Facilities secured by registered mortgage over the Harbut Street Property.
- [460] Further, the defendants point to the sum of \$745,497.74 which they expended in the development and construction of the new house on the Harbut Street Property. This is particularised in Schedule 4 to the 2ADCC.
- [461] Further in the alternative, the defendants allege that in reliance on the assumptions and in the belief that they were true, they took those steps. Further, it is alleged that the plaintiff knew that the defendants held and were relying upon the assumptions.
- [462] The defendants' position is that if the plaintiff is successful in obtaining the relief claimed in the SOC, the defendants would suffer detriment. The detriment is, in particular, the contributions to the purchase price in Schedule 2, the expended amounts particularised in Schedule 3, the expended amounts particularised in Schedule 4 and the time and energy they exerted in constructing the new dwelling for which they have received no benefit.
- [463] It is in these circumstances that the defendants also contend that it would be unconscionable for the plaintiff to assert against the defendants that the representations are incorrect. A similar position is taken in respect of the assumptions. Further or in the alternative, the defendants assert that it will be unconscionable for the plaintiff to assert against the defendants that she is entitled to an order for recovery or possession of the Harbut Street Property.
- [464] Further to the findings made above, some further relevant findings of fact are set out below.
- [465] If it is necessary to consider this alternative claim, then further submissions should be made in light of any matters identified by the Court of Appeal and the basis that requires the claim to be considered.

Further claims by the defendants

[466] The defendants also seek further relief in the event that the property is not re-conveyed to the plaintiff, as I have found in respect of the plaintiff's claim.

Liability for RAMS facilities – declaration and order for repayment

[467] The RAMS facilities are loan agreements entered into by the plaintiff and Colin Trouton in respect of monies advanced to them, security for which was a mortgage over the Harbut Street Property. The relevant facilities are the RAMS home loan account number 001367390 and also RAMS home loan account number 001922533.

[468] The defendants contend that it was a term of the Harbut Street Agreement that the plaintiff would be responsible for the repayment of any RAMS Facilities secured by mortgage against the Harbut Street Property. I have found such a term.

[469] Alternatively, the defendants plead that it was an implied term of the Harbut Street Agreement that the plaintiff would remain liable for repayment of the RAMS Facilities. The defendants contend that such a term is reasonable and equitable, necessary to give business efficacy to the Harbut Street Agreement, obvious and not inconsistent with any express term of the Harbut Street Agreement. Given my finding of a term of the oral agreement it is not necessary to separately consider this issue.

[470] The defendants seek to infer that the plaintiff denies liability for the RAMS Facilities which is to be inferred from her failing to make payments against those loan facilities since September 2008.

[471] The plaintiff, in the response to this pleading in paragraph 81A(a) of the 5ARD, denies that the plaintiff denies liability for the RAMS Facilities. Whilst several matters are pleaded by the plaintiff (including that the Harbut Street Agreement was not valid or was terminated) she also specifically pleads as follows at [81A(f)]:

- (a) That she is and was the mortgagor under the RAMS facilities;
- (b) That she is and was the co-borrower under the RAMS facilities secured against the Harbut Street Property;
- (c) That the plaintiff paid or caused to be paid, and continued to pay, the mortgage payments required under the RAMS facilities until in or about August 2008;
- (d) On 21 September 2008 the plaintiff sent a facsimile to RAMS requesting leniency on hardship grounds;
- (e) RAMS refused any accommodation on the grounds of leniency;
- (f) In September 2008 the plaintiff provided written authority for RAMS to speak with the first defendant in respect of the RAMS mortgage facility and that future correspondence be addressed to the defendants;

(g) In email correspondence between the plaintiff and the first defendant an RHG authority to discharge form was executed by the plaintiff.⁴⁰⁹

[472] In reliance on these matters, the plaintiff contends that from in or about December 2012 she understood that the RAMS Facilities would be discharged by the first and second defendants on completion of the works to the Harbut Street Property and/or alternatively on the sale of Dagmar Street in accordance with the email from the first defendant dated 13 December 2012.

[473] Further, the plaintiff denies that she caused the defendants to suffer loss and damage as alleged or at all as she believes the allegations to be untrue and relies on the various matters pleaded in the reply.

[474] The defendants found themselves in the position of effectively being guarantors of the RAMS Facilities. Supreme Court proceedings were taken in relation to steps by RAMS (RHG) to take possession of the property. The defendants commenced separate proceedings in the Supreme Court for orders that they be permitted to pay the amounts owing under the RAMS Facilities until these Court proceedings were determined so that the RAMS Facilities were not in default.

[475] The defendants, in effect, have made the necessary repayments in respect of the RAMS Facilities on behalf of the plaintiff.

[476] In the defence and counterclaim, the defendants seek a declaration that the plaintiff is liable for repayment of the RAMS Facilities, and order that the plaintiff repay the RAMS Facilities and discharge the mortgages against the Harbut Street Property which are securing the RAMS facilities.

[477] As between the plaintiff and the defendants, I have found there was a term of the oral agreement that the plaintiff was responsible for paying out the RAMS Facilities secured by the mortgage registered over the Harbut Street Property. Further, the plaintiff remains liable to RAMS/RHG for the amounts owing under the RAMS Facilities by the terms of the original loan agreements.

[478] The difficulty is that this claim fails to take into account that the defendants are seeking to rely on the payments made in respect of the RAMS Facilities on behalf of the plaintiff as being part payment of the purchase price for the Harbut Street Property. The defendants cannot seek to deploy these amounts as meeting the contractual obligation to pay the purchase price, as well as claiming that they are amounts owing to the defendants.

[479] While the plaintiff was and remains primarily responsible for the payment of the amounts owing under the RAMS Facilities, by becoming the registered owners of the Harbut Street Property with notice of the mortgage, the defendants in effect became guarantors for the amounts outstanding. Where the plaintiff is unable to make the required payments, the plaintiff would be in default and the mortgagee could take steps in respect of the security over the Harbut Street Property. The

⁴⁰⁹ This seems to envisage that Mr Colin Trouton's component of the release was to be dealt with.

defendants are faced with that risk as they had notice of the mortgage and obtained the title subject to the mortgage.

- [480] It is not appropriate to make the declaration in the terms sought by the defendant. It is too broad and does not deal with the impact of the amounts paid being part payment of the purchase price.
- [481] In respect of the order sought for repayment of the RAMS Facilities and discharge of the mortgage, I am not satisfied that a sufficient basis has been established to support the making of the orders sought. In any event, the defendants could not seek to be paid in respect of the amounts that are claimed to be part payment of the purchase price.

Damages for deceit

- [482] The defendants also make a claim that the plaintiff represented to the defendants the total amount of debt, owing to RAMS, secured by mortgage over the Harbut Street Property in June 2007, relevantly being the time of the transfer of the title of the Harbut Street Property to the defendants, was approximately \$240,000. It is contended that the plaintiff knew that this was false and that the plaintiff intended the defendants to rely on the representation.⁴¹⁰
- [483] The defendants allege that the two amounts secured by mortgage over the Harbut Street Property totalled approximately \$421,067.67 as a result of the plaintiff causing further amounts to be drawn down against the facilities without informing the defendants. Further, the plaintiff caused an additional facility to be advanced secured by a mortgage against the Harbut Street Property without informing the defendants.⁴¹¹
- [484] The defendants contend that, acting in reliance of the representation, the defendants caused to Form 1 Transfer to be lodged and made contributions to the Harbut Street Property price in accordance with the amounts in Schedule 2 to the 2ADCC, and also expended sums in payment of the rates, sewerage and water charges in respect of the Harbut Street Property and also expended the amounts particularised in Schedule 3 and Schedule 4 to the 2ADCC.
- [485] If the Court finds that the Harbut Street Property is not transferred to the plaintiff, then the defendants claim loss and damage in the amounts particularised at Schedule 3 to the 2ADCC and any additional payments made by the defendants on the RAMS facilities from 1 July 2021 to the date of judgment.
- [486] In respect of the defendant's claim based on deceit, the plaintiff contends that the claim is misconceived and should fail. The case alleges fraudulent misrepresentation and must be established to the *Briginshaw* standard of proof.

⁴¹⁰ DCS [267]-[269].

⁴¹¹ 2ADCC [90].

- [487] In particular, the plaintiff argues that there is no evidence of any “unequivocal” representation or statement made by the plaintiff capable of being relied upon or capable of being considered to be an inducement for the defendants to enter into the Harbut Street Agreement.
- [488] Even if it is accepted that the plaintiff made a representation that the RAMS Facilities were drawn down in an amount of \$240,000, in order to succeed the defendants would need to establish that the statement was untrue when it was made and/or there was an express promise not to draw down additional amounts on the RAMS Facilities. Neither of these two latter matters are pleaded by the defendants.
- [489] The plaintiff submits that it is not alleged that any representation that the facility was drawn down in the amount of \$240,000 was coupled with a collateral or additional representation that the amount drawn down would remain and there would be no further drawdowns. Without there being such a collateral promise or representation, the claim must fail.⁴¹²
- [490] Further, the plaintiff points to there being no evidence that the plaintiff promised there would not be any further draw down. Nor is there any evidence that at the time when the representation that \$240,000 was drawn down was made that it was false or made with reckless indifference as to the truth or falsity.⁴¹³
- [491] I am not satisfied that the defendants have discharged the onus on them of proving the necessary elements to establish deceit. Accordingly, the claim for damages for deceit fails.

Breach of contract

- [492] The defendants also claim damages for breach of contract in the amounts particularised at Schedule 3 to the 2ADCC and any additional payments made by the defendants on the RAMS facilities from 1 July 2021 to the date of judgment.
- [493] The plaintiff submits that the claim for damages for breach of contract must fail as:
- (a) There was no such agreement or if there was such an agreement, its terms are unascertainable and it is void for uncertainty;
 - (b) The defendants are in fundamental breach;
 - (c) There has been a total failure of consideration;
 - (d) A necessary party – Colin Trouton’s estate – has not been joined to the proceedings;
 - (e) Had the estate been sued, it would have had a complete defence due to the admitted lack of capacity; and

⁴¹² PCS [219].

⁴¹³ PCS [220]; [222].

(f) The 9 March Written Agreement gives rise to no enforceable obligations on the estate of Colin Trouton, it cannot survive as an agreement enforceable solely against the plaintiff.⁴¹⁴

[494] The plaintiff also raises a further issue: a party in breach is not entitled to seek damages against the innocent party. Here the plaintiff submits that the defendants were in breach of the contract by not paying the purchase price within a reasonable period of time and that was the reason why the defendants ended up having to pay the RAMS Facilities for the extended period since 2008.⁴¹⁵

[495] There is a further conceptual difficulty in respect of the claim for damages for breach of contract. Again, this claim fails to take into account that the defendants are seeking to utilise the payments identified in Schedule 3 as being part payment of the purchase price for the Harbut Street Property. The defendants cannot seek to deploy these amounts as meeting the contractual obligation as well as claiming that they are a loss to be compensated for by damages.

[496] The plaintiff was and remains primarily responsible for the payment of the amounts owing under the RAMS Facilities. By becoming the registered owners of the Harbut Street Property with notice of the mortgage, the defendants in effect became guarantors for the amounts outstanding.

[497] Absent the requirement to pay the purchase price and the agreement to pay the required amounts under the RAMS Facilities on behalf of the plaintiff in part payment of the purchase price, the defendants did arguably suffer loss. But, there was no loss when the amounts were paid as part payment of the purchase price.

[498] To the extent that the amount paid may exceed the purchase price, there may arguably be a basis for an amount owing from the plaintiff to the defendant. However, the submissions and the evidence at trial did not deal with this possibility.

[499] The contention that the defendants contributed to any loss as a result of the delay in paying the purchase price over such an extended period is also a relevant factor.

[500] In all of the circumstances, I am not satisfied that the defendants have established an entitlement to damages for breach of contract.

Further findings of fact

[501] If it is necessary and appropriate to consider the alternative or additional claims, I make the following additional findings.

[502] Exhibit 71 is the consolidation of exhibits 59 and 69, to reflect all payments made by the defendants in respect of the RAMS Facilities secured by the mortgage over the Harbut Street Property. As at 30 November 2021, the total payments made by the defendants in respect of the RAMS facilities is \$531,726.18.

⁴¹⁴ PCS [191].

⁴¹⁵ PCS [192].

- [503] I accept the evidence of the defendants in relation to the amounts paid by them in respect of the RAMS Facilities and find as at 30 November 2021, the total amount paid by the defendants in relation to the relevant RAMS facilities is \$531,726.18.
- [504] In respect of the amounts paid by the defendants to or at the direction of the plaintiff in relation to the Harbut Street Property purchase price, exhibit 67 sets out the amounts in Schedule 2 totalling \$94,547.55. This is in contrast to the amounts identified by the plaintiff and accepted by the plaintiff as being payments in part payment of the purchase price.
- [505] The plaintiff identifies payments made before and on behalf of Scaasi which the plaintiff says should not be included in Schedule 2. Exhibit 18 is a schedule of the amounts said to be payments for and on behalf of Scaasi totalling \$44,646.86.
- [506] I accept the evidence of the defendants in relation to the payments made to or at the direction of the plaintiff in relation to the Harbut Street Property purchase price and find that it included the payments made for and on behalf of Scaasi. Accordingly, the total amount paid to or at the direction of the plaintiff in relation to the Harbut Street Property purchase price is \$94,547.55.
- [507] In respect of the money expended by the defendants on the development of and construction upon the Harbut Street Property, Schedule 4 to the 2ADCC itemises those amounts claimed by the defendant. Exhibit 61 sets out the construction costs and expenses claimed totalling \$745,497.74 including GST.
- [508] Exhibits 62, 63 and 64 provide evidence of the work undertaken by the first defendant in the design, project management and construction of the new Harbut Street dwelling. This includes, relevantly, detailed drawings, onsite work and offsite work.
- [509] Exhibit 66 reflects Schedule 6 to the 2ADCC, being the first defendant's time and effort in design and managing and building the new dwelling on the Harbut Street Property. This claims an amount per week of \$1500 for the relevant periods totalling \$190,500.
- [510] I accept the defendants' evidence in respect of these costs and expenses and make the findings in accordance with the exhibits.
- [511] I find that the amount claimed in Schedule 6 and set out in exhibit 66 is a reasonable estimate of the costs reflecting the time and work undertaken by the first defendant in respect of the management of the development and construction of the Harbut Street dwelling.
- [512] The defendants also claim in respect of the payment of rates, sewerage and water charges in relation to the Harbut Street Property. As at 30 June 2021, the amount claimed in total is \$54,781.47. Relevantly, I find that the defendants have paid the amount of \$54,781.47 in respect of rates and utilities for the Harbut Street Property up to 30 June 2021.

Orders

[513] I will hear further from the parties as to the appropriate orders in light of these reasons and costs.

[514] Further, the parties should agree directions for:

- (a) the provision of draft agreed orders, or if the orders cannot be agreed, competing draft orders and brief submissions in support; and
- (b) the provision of brief submissions and any supporting material in respect of costs.

Annexure A

SUMMARY OF ISSUES

Claim

2. Whether the title to Harbut St was procured by the *fraud* of NT and LT within the meaning of s.184(3)(b) of the *Land Title Act 1994* (“LTA”), such *fraud* consisting of -
 - procuring PT’s signature on the Form 1 Transfer in the circumstances pleaded in paragraph 14 SOC and lodging it for registration
 - the conduct set out in the Further and Better Particulars filed 9 September 2021
3. If *fraud* is established, what order should be made under s.187 of the LTA
 - if title to Harbut St is to be reconveyed to PT should it be conditional upon an order for payment of equitable compensation to NT and LT (for the cost of improvements to the land, etc)
4. If *fraud* is not established, what order should be made under s.127 of the LTA
 - for removal of Caveat (717953437) and Caveat (718136397)
 - conditional upon an order for payment of equitable compensation to PT (for balance purchase price not paid)

Counterclaim

Dagmar St

5. Whether \$94,673.85 of the claimed \$147,451.14 in **Schedule 1** should be offset against the \$160,000 purchase price for Dagmar St.

Harbut St

6. Whether the 2007 Harbut St Agreement is valid and efficacious -
 - was it signed by PT
 - was it signed by CT
 - is CT’s signature a forgery
 - if not, did CT have capacity to enter into the 2007 Harbut St Agreement
 - if CT did not have capacity, is the 2007 Harbut St Agreement
 - void (degree of incapacity so high as to constitute *non-est factum*), or

- voidable (for want of capacity)
 - if voidable was is [sic] avoided by CT or a representative of CT
- 7. If the 2007 Harbut St Agreement is valid and binding on the parties,
 - what were the terms of that Agreement
 - terms in writing
 - partly in writing, partly oral or implied
- 8. Did NT and LT comply with its terms by -
 - payment of the deposit
 - payment of the balance purchase price -
 - by sale of Dagmar St (as stated in the 2017 Agmt)
 - re **Schedule 2** amounts -
 - whether PT and NT agreed those payments were made in reduction of the purchase price of Harbut St
 - provision of a granny flat
 - if not, ought there be an order for payment by any party to the other of equitable compensation by way of an equitable adjustment as a condition of equitable relief

Constructive Trust/Unjust Enrichment

9. If the Harbut St property is reconveyed to PT:
- does PT hold any part of the property on constructive trust for NT and LT
 - ought an order for reconveyance to PT be conditional upon the payment of equitable compensation so as to avoid PT being unjustly enriched

Deceit

10. Whether PT is liable for damages for deceit -
- was the representation at para. 89 Def/CC made by PT
 - was it knowingly false
 - did NT and LT suffer loss in reliance on the representation
 - if so, what amount of loss was suffered in reliance thereon

Estoppel

11. Is PT estopped from asserting that title should be reconveyed to PT or seeking an order under s.187 LTA cancelling registration of the Form 1 Transfer -

- was the estoppel representation at para. 70 Def/CC made by conduct of PT
- did that conduct induce an assumption pleaded in 71 Def/CC
- did NT and LT act to their detriment relying on the representation or assumption
- is it unconscientious for PT to assert otherwise and is PT estopped from so asserting

Enquiry

12. Whether there is any need for an order for enquiry to determine the value of the energy, skill and expertise contributed by the Defendants to increase the value of the Harbut St property together with an order for payment of any at all just allowances upon the taking of such enquiry
- 13.