

SUPREME COURT OF QUEENSLAND

CITATION: *Issa v Owens & Ors* [2023] QSC 4

PARTIES: **HIND ISSA (ALSO KNOWN AS HEND KARBOTLI)**
(Plaintiff)

v

BARRY OWENS
(First Defendant)

BARRY WAYNE OWENS
(Second Defendant)

CORINE MAJORY JOYCE OWENS
(Third Defendant)

GUSTIN GROUP PTY LTD (ACN 006 152 361)
(Fourth Defendant)

JOHN RAMSAY
(Fifth Defendant)

OXYGEN FUNDING SOLUTIONS PTY LTD
(ACN 107 769 415)
(Sixth Defendant)

CATALYST PROVISIONAL LENDING PTY LTD
(ACN 139 887 264)
(Seventh Defendant)

JESS ERNEST MORECROFT
(Eighth Defendant)

JACQUELINE RITA HAINES
(Ninth Defendant)

REGISTRAR OF TITLES
(Tenth Defendant)

STATE OF QUEENSLAND
(Eleventh Defendant)

JAMES KARBOTLI (ALSO KNOWN AS JIHAD KARBOTLI)
(First Third Party)

STEPHEN RICHARD PICKEN
(Twelfth Defendant/Second Third Party)

FILE NO: BS 10465 of 2018

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 February 2023

DELIVERED AT: Brisbane

HEARING DATE: 6, 7, 8 and 9 September 2022

JUDGE: Crowley J

- ORDER:
1. In respect of the mortgage bearing dealing number 718076402, I declare:
 - (a) the mortgage was procured by the fraud of another person;
 - (b) the mortgage is null and void;
 - (c) the First to Sixth Defendants failed to take reasonable steps to verify the identity of the mortgagor before registering the mortgage, as required by s 11A(2) of the *Land Title Act 1994* (Qld); and
 - (d) the First to Seventh Defendants were not entitled to exercise a power of sale under the mortgage in respect of the property located at 30 Francis Street, Mermaid Waters.
 2. In respect of the transfer of mortgage bearing dealing number 718410563, I declare:
 - (a) the First to Seventh Defendants failed to take reasonable steps to verify the identity of the mortgagor before registering the transfer of mortgage, as required by s 11B(2) of the *Land Title Act 1994* (Qld); and
 - (b) the transfer is void and of no effect.
 3. Pursuant to s 187 of the *Land Title Act 1994* (Qld), I direct the registrar of titles to cancel the instruments bearing dealing numbers:
 - (a) 718076402 (mortgage);
 - (b) 718410563 (transfer of mortgage);
 - (c) 718763578 (correction of name);
 - (d) 718815263 (unregistered transfer); and
 - (e) 718858716 (Registrar's caveat).
 4. In respect of the property at 42 Barak Street, Bulleen, Victoria:
 - (a) I declare the First to Seventh Defendants do not have any interest in the property; and
 - (b) pursuant to s 90(3) of the *Transfer of Land Act 1958* (Vic), I direct the registrar of titles to remove the caveat bearing dealing number AQ638142L within 14 days.

5. **The Plaintiff's claim for payment of compensation by the Eleventh Defendant pursuant to s 188A(1) of the *Land Title Act 1994* (Qld) is dismissed.**
6. **The First to Seventh Defendants' counterclaim against the Plaintiff is dismissed.**
7. **Judgment for the Eighth and Ninth Defendants against the First to Sixth Defendants in the sum of \$2,751,666.32 for damages for breach of contract.**
8. **The Eleventh Defendant's third-party claims against each of the First Third Party and the Second Third Party/Twelfth Defendant are dismissed.**

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – FRAUD OR FORGERY – AGAINST REGISTERED PROPRIETOR – where the plaintiff and her son were directors of a company – where a property belonging to the plaintiff was mortgaged as security for a loan advanced to the company – where the original mortgagees subsequently transferred the mortgage to new mortgagees – where the plaintiff alleges her son forged her signature on the mortgage and related documents and mortgaged the property without her knowledge, permission or approval – where the plaintiff's son claims his mother willingly and knowingly signed the mortgage – whether the mortgage was procured by fraud – whether the mortgagees obtain the benefit of indefeasibility by registration of the mortgage

REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – GENERALLY – where the mortgagees relied on the solicitor's supposed attestation to the witnessing of the plaintiff's signature and his certificates of identity to verify the identity of the mortgagor – whether the original mortgagees took reasonable steps to verify the identity of the mortgagor before registering the mortgage, as required by s 11A of the *Land Title Act 1994* (Qld) – whether the new mortgagees took reasonable steps to verify the identity of the mortgagor before registering the transfer of mortgage, as required by s 11B of the *Land Title Act 1994* (Qld) – whether the original mortgagees obtained the benefit of indefeasibility when they registered the mortgage – whether the new mortgagees obtained the benefit of indefeasibility when they registered the transfer of mortgage

MORTGAGES – PRIORITY BETWEEN PRIOR LEGAL AND SUBSEQUENT EQUITABLE INTERESTS – where the company defaulted on repayment of the loan – where the property was repossessed by the mortgagees – where the mortgagees sold the property at auction – where the

purchasers were oblivious to the alleged fraud when they purchased the property – where the transfer to the purchasers could not be registered because the Registrar lodged a caveat on the title – where the plaintiff remains the registered proprietor of the property but the purchasers are in possession of the property – whether the purchasers' interest in the property should prevail over that of the plaintiff

REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – POWERS OF COURT – where the mortgagees also lodged a caveat over the plaintiff's Victorian property – whether the caveat over the Victorian property should be removed under s 90(3) of the *Transfer of Land Act 1958* (Vic)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – DISMISSAL OF PROCEEDINGS – GENERALLY – where the mortgagees filed a counterclaim against the plaintiff – where the purchasers filed a claim against the mortgagees for breach of contract – where the mortgagees did not appear at trial – whether the mortgagees' counterclaim against the plaintiff should be dismissed under r 476(2) of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the purchasers are entitled to judgement against the mortgagees under r 476(1) of the *Uniform Civil Procedure Rules 1999* (Qld)

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – where the mortgagees warranted to the purchaser in the contract of sale that they were capable of completing the contract – whether the purchasers are entitled to damages against the mortgagees for breach of contract

DAMAGES – DATE FOR ASSESSMENT OF DAMAGES – where the value of the property has increased since the date of breach – whether it would be unjust to assess the purchasers' damages for breach of contract at the date of the breach – whether the mortgagees should be ordered to compensate the purchasers for their loss by reference to the current value of the property

REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – WITHDRAWAL BY PARTY TO A CAVEAT – where the plaintiff lodged a caveat over the title to the property before the auction – where the plaintiff agreed to withdraw her caveat on the express proviso that 'all her rights' were reserved – whether the plaintiff is estopped from asserting her interest in the property because of her conduct in withdrawing the caveat

REAL PROPERTY – TORRENS TITLE – ASSURANCE FUNDS, COMPENSATION AND REMEDIES FOR

DEPRIVATION – DEPRIVATION OF INTEREST IN LAND – whether the purchasers will be deprived of their equitable interest in a lot because of the fraud of another person – whether an equitable interest is an ‘interest in a lot’ under s 188 of the *Land Title Act 1994* (Qld) – whether the purchasers are entitled to compensation from the State

REAL PROPERTY – TORRENS TITLE – ASSURANCE FUNDS, COMPENSATION AND REMEDIES FOR DEPRIVATION – IN RESPECT OF WHAT MATTERS – OTHER MATTERS – where the plaintiff claims compensation from the State for loss or damage based on the incorrect registration of the mortgage and/or the incorrect registration of the transfer – whether the registration of fraudulent instruments which, on their face, were correct and entitled to be registered, amounts to ‘incorrect registration’ under s 188A of the *Land Title Act 1994* (Qld) – whether the plaintiff is entitled to compensation from the State

EQUITY – GENERAL PRINCIPLES – EQUITABLE DOCTRINES AND PRESUMPTIONS – SUBROGATION – GENERALLY – whether, upon payment of compensation by the State, the State is entitled under s 190 of the *Land Title Act 1994* (Qld) to be subrogated to the rights of the plaintiff and/or the purchasers

Acts Interpretation Act 1954 (Qld), s 1, s 36, sch 1

Body Corporate and Community Management Act 1997 (Qld), sch 3

Civil Proceedings Act 2011 (Qld), s 58

Evidence Act 1977 (Qld), s 59(2), s 92

Land Act 1994 (Qld), s 526, sch 4

Land Title Act 1994 (Qld), s 3, s 11A, s 11A(2), s 11B, s 11B(2), s 17, s 17(2)(e)(ii), s 28, s 30, s 31, s 37, s 38, s 72, s 74, s 79, s 153, s 181, s 182, s 183, s 184, s 184(1), s 184(3), s 185, s 185(1A), s 185(5), s 187, s 187(2)(e), s 188, s 188(1), s 188(1)(a), s 188A, s 188A(1), s 188A(1)(b), s 188B, s 189, s 189(1)(b), s 190, sch 2

Natural Resources and Other Legislation Amendment Act 2005 (Qld)

Property Law Act 1974 (Qld) s 84, s 346(1)(a)

Transfer of Land Act 1958 (Vic), s 90(3)

Uniform Civil Procedure Rules 1999 (Qld), r 150(1)(s), r 476(1), r 476(2)

Abigail v Lapin (1934) 51 CLR 58, distinguished

Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57, cited

Ashton v Hunt [1999] 1 Qd R 571; [1998] QCA 308, cited

Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd (2017) 18 BPR 36,683; [2017]

NSWCA 99, cited

Barclays Bank plc v O’Brien [1994] 1 AC 180; [1993] UKHL

6, cited

Barlin Investments Pty Ltd v Westpac Banking Corporation (2012) 16 BPR 30,671; [2012] NSWSC 699, cited

Barnes v James (1902) 27 VLR 749, cited

Barry v Heider (1914) 19 CLR 197; [1914] HCA 79, distinguished

Beames v Leader [1998] QSC 44, cited

Beames v Leader [2000] 1 Qd R 347; [1998] QCA 368, cited

Breskvar v Wall (1971) 126 CLR 376; [1971] HCA 70, followed

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited

Butler v Fairclough (1917) 23 CLR 78; [1917] HCA 9, cited

C&F Nominees Mortgage Securities Ltd v Karbotli [2020] VCC 987, cited

C&F Nominees Mortgage Securities Ltd v Karbotli [2021] VSCA 134, cited

Chan v Cresdon Pty Ltd (1989) 168 CLR 242; [1989] HCA 63, cited

Chan v Liu [2020] VSCA 28, distinguished

Chandra v Perpetual Trustees Victoria Ltd (2007) 13 BPR 25,259; [2008] NSWSC 178, applied

Clark v Raymor (Brisbane) Pty Ltd (No 2) [1982] Qd R 790, cited

Commonwealth Bank of Australia v Perrin [2011] Q ConvR ¶54-765; [2011] QSC 274, cited

Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd (2016) 260 CLR 1; [2016] HCA 26, cited

DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728; [2011] NSWCA 348, cited

Diemasters Pty Ltd v Meadowcorp Pty Ltd (2001) 52 NSWLR 572; [2001] NSWSC 495, applied

El Ali v Tritton (2019) 19 BPR 39,447; [2019] NSWCA 111, cited

Elderly Citizens Homes of SA Inc v Balnaves (1998) 72 SASR 210, cited

Grgic v Australian and New Zealand Banking Group Ltd (1994) 33 NSWLR 202; [2002] NSWCCA 343, cited

Heid v Reliance Finance Corporation Pty Ltd (1983) 154 CLR 326; [1983] HCA 30, cited

IWC Industries Pty Ltd v Sergienko (2021) 20 BPR 41,785; [2021] NSWCA 292, cited

J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) 125 CLR 546; [1971] HCA 57, cited

Johnson v Perez (1988) 166 CLR 351; [1988] HCA 64, cited

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited

Klement v Pencoal [2000] QCA 152, distinguished

Lapin v Abigail (1930) 44 CLR 166; [1930] HCA 6, cited

Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965) 113 CLR 265; [1965] HCA 17, cited

London Joint Stock Bank v Simmons [1892] AC 201, cited

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, applied
Performance Capital Mortgage Pty Ltd v Motive Finance and Leasing Pty Ltd (2010) 15 BPR 29,267; [2010] NSWSC 429, cited
Perpetual Trustees Victoria Ltd v Tsai (2004) 12 BPR 22,281; [2004] NSWSC 745, cited
Platzer v Commonwealth Bank of Australia [1997] 1 Qd R 266, cited
Registrar of Titles v Spencer (1901) 9 CLR 641; [1090] HCA 69, cited
Registrar-General v Behn (1981) 148 CLR 562; [1981] HCA 36, cited
Rice v Rice (1853) 2 Drew 73, cited
Rimmer v Webster [1902] 2 Ch 163, cited
Roberts Gray Pty Ltd v Brunner [2021] VSC 76, cited
Robinson v Harman (1848) 154 ER 363, cited
Sinclair v Hope Investments Pty Ltd [1982] 2 NSWLR 870, cited
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 135; [2003] HCA 57, cited

COUNSEL: G Handran KC with B W Wacker for the Plaintiff
 No appearance for the First to Seventh Defendants
 G Coveney for the Eighth and Ninth Defendants
 D Keane for the Tenth and Eleventh Defendants
 The First Third Party appeared on his own behalf
 No appearance for the Twelfth Defendant/Second Third Party

SOLICITORS: Marino Law for the Plaintiff
 No appearance for the First to Seventh Defendants
 Shand Taylor Lawyers for the Eighth and Ninth Defendants
 Crown Law for the Tenth and Eleventh Defendants
 The First Third Party appeared on his own behalf
 No appearance for the Twelfth Defendant/Second Third Party

Introduction

- [1] The Plaintiff, Ms Hind Issa, is 83 years old. She has Alzheimer's dementia. English is not her first language. Her adult daughter, Ms Jennifer Halik, acts as her litigation guardian in these proceedings.
- [2] Ms Issa and her former husband, Mr Ziad Karbotli, immigrated to Australia from Lebanon in the 1960s. They worked hard to provide for themselves and their three children, James, Jennifer and Jumanah. Over the years, they ran several convenience stores, takeaways and other small businesses, first in Melbourne, and later on the Gold Coast when they moved there in around 2001. The businesses did well enough to allow Ms Issa and her husband to buy two residential properties. The first, located at 42 Barak Street, Bulleen, was the family home in Victoria. The second, located at 30 Francis Street, Mermaid Waters, became their home when they moved to Queensland.
- [3] In 2006, Ms Issa and her husband divorced. As part of the matrimonial property adjustment, Ms Issa became the sole registered proprietor of the two residential

properties. For Ms Issa, these properties were not simply assets; they were her homes, and they would provide her with financial security in retirement.

- [4] After the divorce, Ms Issa continued to live at 30 Francis Street, together with her son, James Karbotli. By this time, James had taken over the family's Gold Coast businesses and continued to operate them through a company named Mazop Pty Ltd (**'Mazop'**).
- [5] In early 2018, Ms Halik discovered that the property at 30 Francis Street had been mortgaged as security for a \$1,000,000 loan advanced to Mazop (the **'Mortgage'**), apparently without her mother's knowledge or approval. The initial mortgagees were the First to Sixth Defendants in these proceedings (the **'Original Mortgagees'**). The Original Mortgagees subsequently transferred the Mortgage to the First to Seventh Defendants (the **'Mortgagees'**). The Mortgagees have been aptly described in these proceedings as 'lenders of last resort'.
- [6] Ms Issa's apparent signing of the relevant Mortgage and associated documentation was purportedly witnessed by Mr Stephen Picken, a former solicitor. Mr Picken has since admitted that he did not, in fact, witness Ms Issa sign any of the documents. He subsequently pleaded guilty to a charge of making false declarations and received a suspended sentence of imprisonment.
- [7] In these circumstances, Ms Issa claims she is the victim of fraud. She alleges her son, James Karbotli perpetrated the fraud by forging her signatures and mortgaging her property without her knowledge, permission or approval.
- [8] Mr Karbotli denies perpetrating any fraud. He claims his mother willingly and knowingly signed the Mortgage.
- [9] By the time Ms Issa apparently became aware of the allegedly fraudulent Mortgage, Mazop had already defaulted on repayment of the loan and the lenders were in the process of taking action to enforce their supposed rights as mortgagees. The Mortgagees took possession of 30 Francis Street and arranged to sell the property at auction. They also lodged a caveat over 42 Barak Street, preventing Ms Issa from dealing with that property (the **'Victorian Caveat'**).¹ The Mortgagees claimed to have an interest in that property as 'Chargee[s]' under the terms of the memorandum to the Mortgage.
- [10] In an effort to protect her interest in the property at 30 Francis Street, Ms Issa engaged a lawyer and lodged a caveat of her own over the title to that property. She informed the Mortgagees and the Tenth Defendant, the Registrar of Titles (the **'Registrar'**) that she had been the victim of fraud. She also reported the matter to the police.
- [11] Notwithstanding Ms Issa's complaints of fraud, the auction went ahead. The property was sold to the Eighth and Ninth Defendants, Mr Jess Morecroft and Ms Jacqueline Morecroft (née Haines), (the **'Purchasers'**), who subsequently entered into a contract of sale with the Mortgagees (the **'Purchase Contract'**).²

¹ Exhibit 1 – Trial bundle, 771 (Caveat AQ638142L).

² Exhibit 6 – REIQ Contract for Houses and Residential Land, dated 28 March 2018.

[12] Clause 7.4(1) of the Purchase Contract relevantly provided:³

7.4 Seller's Warranties

(1) The Seller warrants that, except as disclosed in this contract at settlement:

...

(c) it will be capable of completing this contract (unless the seller dies or becomes mentally incapable after the Contract Date) ...

...

[13] Annexure A to the Purchase Contract included several special conditions. Notably, cl 18(a) provided:

The Buyer acknowledges that he is aware that the Seller sells the Property and exercises the power of sale conferred by the Mortgage from Hind Issa to the Seller.

[14] The Purchasers were oblivious to the alleged fraud at the time they entered into the Purchase Contract.

[15] Following the auction, lawyers acting for the Mortgagees requested that Ms Issa remove the caveat so that the sale could complete. The Mortgagees denied knowledge of any fraud and insisted they were entitled to act on the signed Mortgage and documents they had been provided.

[16] Ms Issa maintained her signature had been forged and she had been the victim of fraud. She sought to take further steps to protect her interest in 30 Francis Street, but ultimately could not afford to commence proceedings to stop the sale.

[17] Determined to bring about the completion of the sale, the Mortgagees commenced their own proceedings, seeking removal of Ms Issa's caveat. After subsequent negotiations, Ms Issa eventually agreed to withdraw her caveat in return for payment of \$40,000 by the Mortgagees, but on the express proviso that she reserved 'all her rights'.

[18] Once the caveat had been removed, settlement of the sale of 30 Francis Street completed. The Purchasers paid the balance of the purchase monies to the Mortgagees and, in return, they received an executed transfer (the '**Transfer**'). They took possession of the property and lodged the Transfer for registration. In the interim, however, the Registrar decided to take action in respect of Ms Issa's complaint of fraud and lodged her own caveat on the title (the '**Registrar's Caveat**').⁴ Accordingly, the Transfer has not yet been registered.

[19] As a result, although the Purchasers are currently in possession of the property they paid for and where they have lived since settlement, they are not the registered proprietors of 30 Francis Street. Conversely, whilst Ms Issa is the registered proprietor of the property, she does not have possession of her home.

[20] Ms Issa seeks to vindicate her property interests. She wants her home back and she wants the Victorian Caveat removed. She claims the Mortgage is void for fraud. She maintains that her title as the registered proprietor is not defeated by, or subject to,

³ Ibid cl 7.4 (Seller's warranties).

⁴ Exhibit 1 – Trial bundle, 1503 (Caveat no. 718858716).

any interest purportedly created by the Mortgage. She further claims that her interest in the property at 30 Francis Street prevails over any interest acquired by the Purchasers.

- [21] Accordingly, Ms Issa seeks declarations and orders, pursuant to s 187 of the *Land Title Act 1994* (Qld) (the '*LTA*'), necessary to undo the effects of the various transactions and supposed interests created as a consequence of the fraud.
- [22] The Purchasers, on the other hand, claim they have an equitable interest in the property at 30 Francis Street, which should prevail over Ms Issa's interest. They contend they have acquired a right for the Transfer to be registered, and that the Registrar must register the Transfer, which would then make them the registered proprietors. They further claim that in the event Ms Issa's interest is confirmed, she should nonetheless be estopped from asserting her legal interest in the property because of her conduct in withdrawing the caveat and allowing the sale of the property to complete.
- [23] Subject to the resolution of Ms Issa's claim, the Purchasers also seek damages against the Original Mortgagees for breach of contract or, alternatively, an order for monies had and received.⁵
- [24] Further, each of Ms Issa and the Purchasers also make claims against the Eleventh Defendant, the State of Queensland (the '*State*'), for compensation under the *LTA* in respect of any deprivation of their interests or consequent losses they have incurred or may incur as a result of any declarations and orders I may make in determining whose interest is to prevail.
- [25] Ms Issa also brings a contingent claim for damages for negligence against Mr Picken. This is dependent upon the resolution of her primary claim and her claim for compensation against the State. In addition, the State seeks to have the question of Mr Picken's alleged negligence determined as between itself and Mr Picken in respect of its opposition to Ms Issa's claim for compensation under the *LTA*.
- [26] Finally, in the event that any such compensation is payable by the State to either Ms Issa or the Purchasers, the State seeks to be subrogated to the rights of the claimants, pursuant to s 190 of the *LTA*.⁶

Issues

- [27] To untangle the web of transactions and decide whose interest in 30 Francis Street is to prevail and what declarations or orders are appropriate to make, it is necessary to consider the following issues:
 1. Was the Mortgage procured by fraud?
 2. Did the Original Mortgagees obtain an indefeasible interest upon registration of the Mortgage?

⁵ The third-party claim filed by the Purchasers only names the First to Sixth Defendants, being the Original Mortgagees, as defendants to the claim. The Seventh Defendant was not a party to the Purchase Contract.

⁶ The State's third-party claims in this respect are only against Mr Karbotli and Mr Picken and are solely premised upon Ms Issa obtaining an order for payment of compensation. There is no similar third-party claim by the State against any of the Mortgagees, nor is there any pleaded claim for subrogation in respect of any compensation that may be payable by the State to the Purchasers. However, in submissions, the State argued that it seeks to be subrogated to the rights of the claimants in respect of any compensation payable to either Ms Issa or the Purchasers.

3. Whose interest in the property should prevail? Is Ms Issa estopped from asserting her interest because of her conduct in withdrawing the caveat?
4. Should the Victorian Caveat be removed?
5. In the event that Ms Issa obtains the relief she claims, are the Purchasers entitled to relief against the Original Mortgagees for breach of contract or for monies had and received?
6. Are either of Ms Issa or the Purchasers entitled to compensation from the State under the *LTA*? If so, is the State entitled to be subrogated to the rights of the claimants, pursuant to s 190 of the *LTA*?
7. If Ms Issa is not entitled to compensation from the State under the *LTA*, is she nonetheless entitled to judgment against Mr Picken for his alleged negligence?

The Mortgage

- [28] Before considering the specific issues, it is first necessary to set out a number of relevant details concerning the Mortgage and the circumstances in which it and associated documents were executed.
- [29] The Mortgage was purportedly executed on 8 June 2017.⁷ At item 1 of the mortgage instrument, the interest mortgaged was noted as the fee simple interest in Lot 25 on Registered Plan 46282, commonly referred to as 30 Francis Street, Mermaid Waters. The named mortgagor was ‘Hind Issa’. The named mortgagees were the Original Mortgagees.
- [30] The debt or liability purportedly secured by the Mortgage was stated at item 5 of the mortgage instrument as ‘\$1,000,000 and Amount of Credit as defined in standard terms document no. 716726942’.
- [31] At item 6, the ‘Covenant/Execution’ section of the Mortgage stated:
- The Mortgagor covenants with the Mortgagee in terms of the attached schedule and standard terms document no. 716726942 and charges the estate or interest described in item 1 with the repayment/payment to the Mortgagee of all sums of money referred to in item 5.
- [32] The Mortgage was purportedly executed by ‘Hind Issa’ as mortgagor, and her signature was supposedly witnessed by Stephen Richard Picken, solicitor.
- [33] The attached schedule to the Mortgage referred to a document described as the ‘Schedule to Memorandum between the Mortgagees, Mazop Pty Ltd ACN 082 155 155 and the Mortgagor dated on or about the same date as this Mortgage’ (the ‘**Schedule**’)⁸ and noted as a ‘special condition’ that the provisions of the Schedule were incorporated in the Mortgage.
- [34] The Schedule relevantly noted it was the ‘Schedule to Summer Lawyers – Memorandum – 2015 also known as...Queensland Registered Standard Terms 716726942’ (the ‘**Memorandum**’).⁹

⁷ Exhibit 1 – Trial bundle, 728, 1038 (Mortgage). There are several copies of the Mortgage within Exhibit 1.

⁸ Exhibit 1 – Trial bundle, 1042–7 (Schedule).

⁹ Ibid 985–1003 (Memorandum).

[35] The Schedule further noted it was a deed and was to be interpreted as if all the provisions set out in the Memorandum were set out in the deed.

[36] The Schedule recorded the following relevant details:

| | |
|---------------|--|
| Loan Date | _____ June 2017 ¹⁰ |
| Term Date | The same day of the month which is 2 Months after the Loan Date. |
| Interest Rate | 120% per annum |
| Borrower | Mazop Pty Ltd ACN 082 155 155, Hind Issa and Jihad (nee James) Karbotli |
| Guarantor | Hind Issa and Jihad (nee James) Karbotli |

[37] The Schedule was purportedly executed as a deed on behalf of Mazop by James Karbotli and 'Hind Issa' as 'Borrower/Chargor', each signing in their apparent capacity as a director of Mazop. Each also apparently signed as 'Guarantor/Chargor'. Mr Picken signed each section, purporting to have witnessed each of Mr Karbotli and Ms Hind Issa sign the deed in his presence.

[38] In addition to the Mortgage supposedly executed by Ms Issa in respect of her interest in the property at 30 Francis Street, Mr Karbotli simultaneously mortgaged a property of his own, located at 8 Amalfi Drive, Surfers Paradise.¹¹ That mortgage was also dated 8 June 2017.

[39] As I understand these documents and the evidence given at trial, the \$1,000,000 loan provided by the Original Mortgagees to Mazop was secured by mortgages over both Mr Karbotli's property at 8 Amalfi Drive and Ms Issa's property at 30 Francis Street. Further, both Mr Karbotli and Ms Issa were to be personal guarantors in respect of the loan to Mazop and granted the Original Mortgagees a charge over all their property as security for ensuring Mazop discharged its obligations.

[40] On 9 June 2017, an electronic version of the Mortgage was lodged online by Summer Lawyers, the lawyers acting for the Original Mortgagees and later the Mortgagees. It was subsequently registered and allocated dealing no. 718076402.¹² The original Mortgage, supposedly executed by 'Hind Issa' and witnessed by Mr Picken the previous day, was retained by Summer Lawyers and was not physically lodged with the Registrar. The original Schedule was also not lodged or registered.

[41] On or about 15 August 2017, the Mortgagees, Mazop, Mr Karbotli and Ms Issa purportedly entered into a deed of variation ('**Deed of Variation**'),¹³ whereby the Schedule in respect of the Mortgage was varied (the '**Substituted Schedule**'). The Substituted Schedule indicated the amount of the loan was increased to \$1,125,000 and added Catalyst Provisional Lending Pty Ltd, the Seventh Defendant, as one of the credit providers.¹⁴ The 'Loan Date' was stipulated as 9 June 2017 and the 'Term Date' was varied to '4 months after the Loan Date'.¹⁵ The Deed of Variation was again purportedly executed on behalf of Mazop by Mr Karbotli and Ms Issa as

¹⁰ An exact date was not included.

¹¹ Exhibit 1 – Trial bundle, 1040 (Amalfi Drive mortgage).

¹² Ibid 980 (Mortgage no. 718076402).

¹³ Ibid 1049–56 (Letter from Stephen Pick, Solicitor to Sumner [sic] Lawyers, dated 15 August 2017, enclosing executed Deed of Variation).

¹⁴ Ibid 1050–8 (Deed of Variation).

¹⁵ Ibid 1052 (Deed of Variation – Substituted Schedule).

directors and each again purportedly signed as personal guarantors in respect of the loan to Mazop. The Substituted Schedule was not lodged or registered.

- [42] On 12 September 2017, the Original Mortgagees executed a transfer of the Mortgage to the Mortgagees (the '**Mortgage Transfer**'). The Mortgage Transfer was registered on 21 November 2017.¹⁶
- [43] On 23 May 2018, an instrument was registered to correct the details of the name of the Seventh Defendant recorded on the register.¹⁷
- [44] Under the terms of the Mortgage, the Memorandum and the Substituted Schedule:
 - (a) Mazop covenanted to repay the loan on or before the Term Date;¹⁸
 - (b) Mazop granted the Mortgagees the Mortgage over the 'Charged Property', 30 Francis Street, to secure the repayment of the loan;¹⁹
 - (c) Mazop granted a charge over all its Personal Property to secure repayment of the loan²⁰ and acknowledged, warranted and represented that its 'property'²¹ was now 'charged property';²²
 - (d) Mr Karbotli and 'Ms Issa', as 'guarantors',²³ purportedly guaranteed all payment obligations of the Borrower, Mazop;²⁴ and
 - (e) all 'property' of the guarantors was purportedly charged as security for the performance by the guarantors of their obligations.²⁵

Was the Mortgage procured by fraud?

- [45] Although the First to Seventh Defendants filed a Defence and Counterclaim some time ago, none of the Mortgagees appeared at trial, nor did the Twelfth Defendant/Second Third Party.²⁶
- [46] Ms Issa submitted that I would find that her signatures on the various mortgages and associated documents within the Trial bundle (Exhibit 1) were forged and that the mortgages were procured by fraud. The State and the Registrar made similar submissions.
- [47] The Purchasers did not make any submissions as to the authenticity of the signatures.
- [48] Mr Karbotli, who appeared for himself at trial as a third-party, filed a defence in which he variously contended:
 - (a) Ms Issa did execute the Mortgage;

¹⁶ Ibid 982 (Transfer no. 718410563).

¹⁷ Dealing no. 718763578. The Seventh Defendant had erroneously been recorded as 'Catalyst Provision Lending Pty Ltd'.

¹⁸ Exhibit 1 – Trial bundle, 994 (Memorandum, cl 7.1).

¹⁹ Ibid 997 (Memorandum, cl 31).

²⁰ Ibid 999 (Memorandum, cl 35).

²¹ 'Property' being defined in the Memorandum to mean 'any asset in rem or in personam'.

²² Exhibit 1 – Trial bundle, 999 (Memorandum, cl 36.1).

²³ Ibid 1052 (Deed of Variation – Substituted Schedule).

²⁴ Ibid 996 (Memorandum, cl 24).

²⁵ Ibid 996 (Memorandum, cl 29.1).

²⁶ However, Mr Picken did appear as a witness and gave evidence at trial in response to a subpoena issued on behalf of the Plaintiff.

- (b) Ms Issa's assertion that he forged her signature on the Mortgage remains an unsubstantiated allegation, unsupported by any evidence; and
- (c) with respect to the State's third-party claim against him, Ms Issa would first need to prove that he was the perpetrator of the fraud, and she has not provided any evidence to support her claim.

[49] In support of his position, Mr Karbotli swore an affidavit in which he stated:²⁷

Issa's assertion that she did not sign the documents relating to this loan is false. I saw her sign these documents and others.

Other witnesses also saw Issa in the company of Stephen Picken during meetings held at my business premises at Ashmore - a fact which she continues to deny.

...

...it is my contention that, had the business continued and the loan been repaid, there would have been no dispute whatsoever regarding the loan. The truth is that Issa was happy to use the property as security whilst the loans were repaid. On this occasion the loan could not be repaid by the business and, only then, did she claim to have no knowledge!

[50] Mr Karbotli gave evidence at trial. He confirmed his affidavit was true and correct to the best of his knowledge and belief and that he wished to rely upon it in the proceedings.

[51] Mr Karbotli gave the following evidence during cross-examination.

[52] In mid-2016, he had three businesses at the Gold Coast which were operated by Mazop, being a kebab shop, a tobacconist and a pizza shop. He was the sole director of Mazop at the time. By the middle of 2016, a friend of his, named Chris Smith, was involved in his businesses. Around this time, he had a plan to expand the number of shops or businesses that he was operating and to undertake other ventures, such as commercial property acquisition and residential property development. At some point in 2016, the three shops operated by Mazop in Surfers Paradise were shut down.

[53] At this time, he occupied commercial premises at 7 Expo Drive, Ashmore. From December 2016 through to June 2017, there were between 12 to 20 employed or contracted staff working from the premises. One of those persons was his business broker, Paul Tuddenham.

[54] By early 2017, he was looking for finance to fund the acquisition of a leasehold to franchises. A meeting was held in the board room at Expo Drive, where he, Mr Smith, Mr Tuddenham and at least one other person met with Mr Picken. At the meeting, Mr Karbotli explained that he was looking to expand the tobacconist arm of the business and undertake some other activities such as commercial property and residential property development. Following the meeting, Mr Karbotli engaged Mr Picken to undertake legal work for his businesses.

[55] At some point in time, he offered up his mother's houses as security for the loans he required to undertake his business expansion. He submitted an application for finance to 'C&F Mortgage Fund' on behalf of Mazop, seeking a loan for the

²⁷ Exhibit 9 – Affidavit of James Karbotli, affirmed 2 September 2022.

purchase of additional leasehold franchise premises. The property at 42 Barak Street was offered as security.²⁸ He maintained that the Barak Street property was offered as security after a discussion with his mother and that his mother had signed the finance application. He denied the suggestion that he, or someone else, had forged his mother's signature. He confirmed that 'C&F Nominees' subsequently approved a loan in favour of Mazop, following the application for finance.

- [56] Mr Karbotli was shown, and identified, a copy of a mortgage instrument which recorded the details of the mortgagor as 'Hend Karbotli' and the mortgagee as 'C&F Nominees Mortgage Securities Limited'.²⁹ The mortgage document recorded the principal sum as \$800,000, which was to be repaid by 15 March 2018. The document was dated 3 April 2017.³⁰
- [57] He agreed he had signed the mortgage as the sole director/sole secretary of Mazop as well as the 'Guarantor'. The mortgage was also purportedly signed by 'Hend Karbotli'. He denied the suggestion that he had forged the 'Hend Karbotli' signatures. He confirmed that the mortgage was in respect of the 42 Barak Street property, which was provided as security for the loan advanced by C&F Nominees.
- [58] He gave evidence that in about the first six months of 2017, his mother had happily signed up to mortgages on about five occasions to support lending to Mazop. Most of the loans were short term loans with high interest rates from 'lenders of last resort'. He agreed that his mother did not have any guaranteed source of income at the time and that he provided the only source of funds to repay the loans. He acknowledged that Ms Issa risked losing her mortgaged property if he defaulted on repayment of the loans. He agreed that by June 2017, securities had been registered over his mother's homes in support of lending in excess of \$1.8 million.
- [59] Mr Karbotli identified a further mortgage in respect of the property at 42 Barak Street, purportedly signed by his mother, using the name 'Hend Karbotli', as mortgagor, in favour of 'FX Moneylink International Pty Ltd' to secure a loan of \$350,000.³¹ Mr Karbotli denied the suggestion that he had signed the mortgage as 'Hend Karbotli'.³²
- [60] Mr Karbotli was further shown documents, dated 27 February 2017, relating to his mother, under the name 'Hind Issa', being appointed and consenting to act as a director of Mazop.³³ Mr Karbotli denied that he had signed the documents as 'Hind Issa'. He maintained his mother became a director so that they could refinance the homes to get the next loan for Mazop.
- [61] Mr Karbotli further identified mortgage no. 717949065 executed in favour of 'Nivex Pty Ltd', purportedly signed by 'Hind Issa' on 3 April 2017 as mortgagor to secure a loan of \$893,000.³⁴ The loan was to be repaid on or before 3 July 2017 at a

²⁸ Exhibit 10 – Application for finance.

²⁹ C&F Nominees pursued a claim in the County Court of Victoria against Ms Issa. The claim was unsuccessful at trial: *C&F Nominees Mortgage Securities Ltd v Karbotli* [2020] VCC 987 ('**C&F Nominees v Karbotli**'). A subsequent appeal was also unsuccessful: *C&F Nominees Mortgage Securities Ltd v Karbotli* [2021] VSCA 134.

³⁰ Exhibit 11 – Mortgage of land.

³¹ Exhibit 1 – Trial bundle, 717–18 (42 Barak Street mortgage).

³² The stated name of the mortgagor is 'Hend Karbotli' but the mortgage is signed in the name 'Hind Karbotli'.

³³ Exhibit 1 – Trial bundle, 719–21 (Memorandum of resolution of the directors and consent to act as director).

³⁴ Ibid 723–5 (Mortgage no. 717949065).

specified rate of 96% per annum and a lower rate of 58.8% per annum, with interest payable monthly in arrears. The witness to the 'Hind Issa' signatures was Stephen Picken, solicitor. Mr Karbotli could not recall, but he thought that he was there at the time he and his mother signed the documents in the presence of Mr Picken. He denied that he was the person who placed his mother's signature on the documents. He agreed that he used the document after it was signed, but he denied that he did so without his mother's knowledge.

- [62] Mr Karbotli was then shown a copy of the Mortgage for 30 Francis Street, purportedly signed by his mother as 'Hind Issa',³⁵ and a series of other associated documents signed by, or relating to, his mother, including a copy of the Deed of Variation.³⁶ He confirmed that each of those documents, including the Mortgage, were supposedly witnessed by Stephen Picken. He denied that he had forged his mother's signatures on the documents. He accepted that he did not know whether Mr Picken actually witnessed his mother sign any documents.
- [63] Mr Karbotli identified a photograph of his mother holding her driver licence and passport for identification purposes.³⁷ He thought he had taken the photograph, but he denied the proposition that he had told his mother that he needed to take the photograph of her for the purposes of taking a holiday. He maintained that he told her it was for the loans. In response to the further proposition that his mother never had any face-to-face interaction with Mr Picken for the purposes of executing any documents or having him explain them to her, Mr Karbotli stated that his mother saw Mr Picken in the office.
- [64] Mr Karbotli was shown a copy of a letter addressed to 'Mrs H Nessa' of 30 Francis Street, Mermaid Beach, dated 7 June 2017, written by Stephen Picken.³⁸ He could not remember if it was a letter Mr Picken had prepared for him that day. The letter outlined that Mr Picken had been instructed by Mr Karbotli, on behalf of Mazop, in relation to a loan to it from 'Gustin Group Pty Ltd' (the Fourth Defendant). The letter further stated:

I consider myself acting for James and Mazop. However James tells me that we met many years ago, although I cannot recall. If he is correct it may have been when Mazop acquired the business in Surfers Paradise. In any event, I think you should obtain separate legal advice as I am told the loan is for working capital for Mazop, and you will have no control over how it is spent or how it will be repaid. James tells me the loan must be finalised tomorrow. You are being asked to give a mortgage over Francis Street and your personal guarantee, thereby exposing all of your assets.

All I can do is to tell you the advice I have given to James and to Mazop.

I have told James to seek main stream [*sic*] finance from one of the Banks as the terms of the loan are very onerous. You will see from the schedules to the mortgage that the Interest rate is 10 % per month or 120% per annum. The mortgage will secure \$1,125,000. Interest of

³⁵ Ibid 728–30 (Mortgage).

³⁶ Ibid 744–9 (Deed of Variation).

³⁷ Ibid 758 (Photograph of Hind Issa holding identity documents). A similar photograph of Mr Karbotli appears at 759.

³⁸ Exhibit 1 – Trial bundle, 1212 (Letter from Stephen Picken to Hind Nessa, dated 7 June 2017).

\$80,000 plus the other items listed on page 5 of the schedule will deducted [*sic*] at settlement. It will also secure any default costs, including further interest until repaid. The Lender does not have to pursue James or Mazop first before enforcing against you.

I understand from James that a meeting is scheduled for tomorrow for you and James to sign the documents. I will be asked to witness the documents. I need to see the ID documents required by the Lender, and which James has agreed to supply.

I look forward to seeing you tomorrow. Please call me if you have any concerns.

- [65] Mr Karbotli did not recall talking to his mother about the letter. He stated that she just trusted him and that he did tell her about the loan.
- [66] He denied forging his mother's signature on any of the documents he had been shown. He agreed that he used the documents, but he said that he only did so with his mother's understanding and acceptance.
- [67] Notwithstanding the evidence given by Mr Karbotli, I consider there is clear and compelling evidence that Ms Issa's signatures on the various mortgage documents and associated documents were forged and the mortgages in question were procured by fraud. I am satisfied that Ms Issa's signatures on the Mortgage and its associated documents were forged. Further, I am satisfied to the requisite standard that Mr Karbotli, whether alone or with others associated with him, forged those signatures and perpetrated the fraud in respect of the Mortgage.³⁹
- [68] The contrary evidence commences with the evidence of Ms Issa. I admitted various previous statements made by Ms Issa as evidence in the trial, pursuant to s 92 of the *Evidence Act 1977* (Qld), on the basis that Ms Issa was unable to attend to give evidence as she was unfit by reason of a medical condition.⁴⁰ Throughout her various statements, Ms Issa repeatedly and consistently maintained that she had been the victim of fraud, her signature had been forged and her homes had been mortgaged without her knowledge, agreement or permission. In particular, she denied signing the Mortgage.

³⁹ Having regard to the gravity, nature and consequences of those allegations in accordance with *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁴⁰ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 8 September 2022) 4-7:32-12:20. The various statements that were admitted were Exhibit 1 – Trial bundle, 3507–19 (Queensland Police Service fraud report form, together with an attached Word document, submitted 18 April 2018), 1198 –1200 (Copy of a Queensland Police Service witness statement signed by Ms Issa, dated 23 April 2018), 1587–1591(Affidavit of Hind Issa in respect of the proceedings in the Victorian County Court in *C&F Nominees v Karbotli*, sworn 28 August 2018), 1732–41 (Witness statement of Hind Issa provided in respect of the proceedings in the Victorian County Court, dated 4 May 2020), 1742–67 (Transcript of the evidence given by Hind Issa in the Victorian County Court proceedings on 4 May 2020), 1380 (Email sent on behalf of Ms Issa to the Registrar of Titles (Qld), dated 10 May 2018), 1499 (Email sent on behalf of Hind Issa to the Registrar of Titles (Qld), dated 3 July 2018). As a supplement to these statements, a bundle of copies of some of the statements, annotated to highlight sections which were not admitted as evidence, in accordance with my ruling, was provided by the Plaintiff and marked for identification 'E' (and later admitted into evidence as Exhibit 14).

[69] Relevantly, in her written statement attached to the Queensland Police Service Fraud Report Form, dated 18 April 2018, Ms Issa stated:⁴¹

My name is Ms Hind Issa. I'm a 79 year old woman. I am currently penniless, homeless and involved in an emotional and financial crisis. I'm the victim of fraud.

I had 2 homes, one located in Queensland and one in Victoria – I've worked hard my whole life for these homes since I migrated to Australia in the late 1960s. 7 days a week small businesses – milk bars and convenience stores. Both my homes were... mortgaged without my knowledge, agreement or permission and now both been repossessed by the finance companies involved... I have not signed, agreed or received one piece of paper, ever been in contact with or received one penny from the mortgagees.

My home in Queensland has been sold at auction on the 25/03/18. My home in Victoria is currently in possession of the mortgagee.

...

I used to live in my Queensland house with my son James Karbotli who would come and go as he pleased. My ex husband, James and myself were involved in a company called Mazop in which we had 3 shops in Surfers Paradise since 2001. James has been paying my bills since my divorce from his father in 2006. James has been running the shops without my involvement since then...

At the beginning of 2017, James introduced me to a business partner of his that he said has a lucrative business proposition – it was a mining venture. His name is Christopher Bruce Smith and his wife is Julie Archer. My daughter Jennifer, son in law Bill and I were present at a meeting which he presented the 'scheme'. We all agreed it was highly dubious and didn't think twice about it. Over the course of a few months Chris and Julie were coming and going to my Queensland home in the presence of James. They were attempting to persuade me on several occasions to get involved with their businesses. I told them without a moment's hesitation 'NO, THANK YOU!' James took me on drives to places I don't know about and showing me what he's doing. I kept telling him good luck, but I have no involvement in this. I'm too old and physically incapable of handling any stress to be involved. I'm tired, in chronic pain and my health is failing. They also discussed a holiday, where James would take me to London and other places. They requested a photo of me holding my passport and drivers licence for the travel agent. I didn't even think at that time to question James about this. It wasn't until about 3 weeks ago, I realised that this was part of the deception.

They offered to put my homes in a trust as they kept telling me the company Mazop that James had his business interests in, was in trouble and they wanted to protect my assets and my name was in Mazop. They bought papers saying that they were going to buy my homes, but after I showed these papers to my daughter Jennifer, we

⁴¹ Exhibit 1 – Trial bundle, 1193–5 (Statement of Hind Issa to the Queensland Police Service).

both felt highly dubious as the paperwork was unofficial. Like someone had typed it on a word document. I told James and Chris many, many times that I do not want to be involved in any of the new businesses with Chris. I believed that was the end of that.

I did have a mortgage of about \$200,000 on Queensland house at the time. James kept saying he will pay it off. On the 11/2/18 Jennifer contacted the NAB on the phone and they told us both that the loan was paid off, but was refinanced for \$1,000,000 through a power of attorney. We attended the Broadbeach branch on the 13/2/18. Confronting James about this, he responded this was all paperwork and everything was going to be paid off and be ok. His words: 'under control and relax'.

Approximately since February 2018 Chris and James told me to leave my home in Queensland and to live with Jennifer as there were bad people coming to the house and he feared for my safety. James told me he owed money to bad people, but he promised he was working on paying them off. He told me it was for a short time. He promised a few weeks at the most. I would go back and forth sometimes sleeping at my house as I needed some alone time and I would go and come to get some clothes and personal effects when I needed them. It was a very stressful time and I was believing every word James told me.

... Jennifer, Bill and I confronted James. He told us it was connected to Mazop. Then Jennifer showed James the title searches and he took the papers and left saying he needed to ask Chris.

... They both assured me on many occasions that the loan would be repaid. I believed them as I had no choice. Chris assured me that settlement was going to be on 17/2/18 and I would get my house back. Then Chris kept saying they were awaiting a payout figure from Paul Reece – the lawyer who is on the NAB discharge papers and the same lawyer representing the mortgagees who repossessed my house and sold my Queensland home at auction even though Jennifer had informed Paul Reece of the fraud via email.

...

I finally gave up believing James and Chris around the 19/03/18. Chris and James promised me that the loans would be repaid. All their promises were empty...

... Mark Steele firstly advised getting an injunction – but I couldn't afford \$10-15,000 to do this. Then he put a caveat on both properties. He advised that may prevent the sale of Queensland house, but it was still sold at auction under the mortgagee represented by Paul Reece...
[sic]

...

Stephen Picken is a lawyer who's [sic] name appears a lot on the mortgage documents. I have not seen this man since we first came to the Gold Coast many many years ago [sic]. He was James' lawyer.

...

- [70] As Ms Issa's statements were admitted by me as evidence in circumstances where she was unfit to attend to give evidence at trial, she was not available to be cross-examined. Mr Karbotli sought to resist the admission of her statements on various bases, including that he had a right to confront his accuser and that he wished to cross-examine Ms Issa. I noted at the time that I ruled on the admissibility of the statements that I would take these matters into account when assessing the weight to be given to Ms Issa's evidence.
- [71] In doing so, I also have regard to the further evidence that was adduced at trial, which in my view undoubtedly implicates Mr Karbotli in the frauds perpetrated upon his mother and substantially corroborates the evidence of Ms Issa in all material respects.
- [72] *First*, there is the evidence of Jennifer Halik. In her affidavit evidence, Ms Halik stated:⁴²

...

18. In 2006, my parents got divorced.

...

23. After the divorce, my Mum said to me that she did not want to carry my father's name anymore...

24. In 2008, at Mum's request, I helped her formally change her surname to Issa, her maiden name...

25. As far as I am aware, Mum has not used the name 'Karbotli' since.

...

26. Early in March 2016, James told me that he wanted to introduce his new business partner to Mum, Bill and me.

27. Shortly after that discussion, my husband, Bill, and I went to Mum's house at Francis Street. Bill and I sat around the dining table with my Mum, James and a man who he introduced to us as Chris (and who I now know to be Christopher Bruce Smith) ...

28. Chris talked to all of us around the table about mining opportunities and at one stage said words to the effect of, are you interested in being involved?...

29. I saw Chris and/or his wife Julie Archer... on a handful of times over the next couple of years with James, and on at least 3 occasions at my Mum's house.

30. Mum said to me a few times words to the effect that James and Chris had asked her to go into business with them, but she had said that she was not interested because she was too old and sick and had already worked hard all her life.

...

38. In or about late January 2018, James and Chris came to my house and, in the presence of both me and Bill, James said words to the effect of, can Mum move in with you for a few days, a week at the

⁴² Exhibit 1 – Trial bundle, 188–200 (Affidavit of Jennifer Halik, sworn 5 May 2022).

most? James went on to say words to the effect that he had borrowed money from some underworld figure in Melbourne and that for Mum's safety she needed to move in with Bill and I until he repaid the money.

...

40. After hearing what James had said to us...I performed an electronic title search of the Francis Street Property. Based on my discussions with Mum, I understood that National Australia Bank...had a mortgage on the property. When I searched the title, I noticed there were two other mortgages on the property...
41. I also performed an electronic title search of the Bulleen Property and saw that there was a mortgage registered against it.
42. ... When I showed Mum the title search for both properties, she said to me words to the effect that she did not know anything about those mortgages...
43. On 4 February 2018...James, Mum and I sat at a table and I showed him the documents from my searches...James said words to the effect of '*Chris helped me and we took money from the finance companies so we can get the businesses off the ground*'. He said words to the effect that he had '*made a mistake*' but that he is '*fixing it*'. Mum said words to the effect of '*why did you bring me into this mess?*' James said in response words to the effect that '*Chris will tell you all about it*'. James then said words to the effect of, '*are you going to send me to jail?*' At this point I looked at Mum. She looked shocked, scared and went pale, her eyes went wide...James said to Mum and I words to the effect that Chris had a plan to fix everything and help repay the loans and to trust him.
44. Soon after, Chris came to my house with James...Chris said words to the effect that James had done wrong. He said words to the effect that '*You didn't know anything about this because James didn't want you to know that he was a failure. He couldn't tell his family that he was in such trouble.*'... Mum said words to the effect that '*I had no idea about these mortgages*'. Chris said words to the effect that he and Julie were refinancing their own properties and that they had a contract with Summer Lawyers that was going to settle on 17 February 2018 for \$2.6 million and that refinance would clear the mortgages. He said words to the effect that once that was done, Mum would get her properties back and she could then put them into a trust to protect them.

[73] In cross-examination, Mr Karbotli put a question to Ms Halik about an occasion she had deposed to in her affidavit where, on 13 February 2018, Chris Smith and James had called her and said words to the effect that 'everything was on track to repay the debts and get Mum's house back'. Mr Karbotli suggested that it was in fact he who had called and that he had put Chris Smith on the phone to tell Ms Halik that they were working on refinancing. In response, Ms Halik stated, 'To my recollection, Chris said that he refinanced his properties to repay the loans that they fraudulently took out in my mum's name.'

[74] Mr Karbotli did not further challenge this evidence, nor did he challenge any other evidence given by Ms Halik relating to Ms Issa's properties being mortgaged without her knowledge and both his and Chris Smith's apparent involvement in those matters.

[75] *Second*, there is the evidence of Mr John Heath. Mr Heath is a forensic document examiner. He provided a report, dated 25 November 2019,⁴³ and a supplementary report, dated 4 March 2020,⁴⁴ in which he expressed his opinions regarding the authorship of a number of questioned documents. Those documents included the Mortgage in respect of the property at 30 Francis Street.⁴⁵ In his original report, Mr Heath concluded:

There is an abundance of evidence present to conclude that the questioned signatures are false [simulated] signatures, and not written by the specimen provided, notwithstanding the copied nature of questioned signatures available for examination purposes.

[76] Mr Heath gave evidence at trial, confirming that he still held the opinions expressed in his reports. Mr Heath gave the following evidence when cross-examined by Mr Karbotli:

... Can you state conclusively that the signature on the documents you examined is not that of Hind Issa? --- Yes, I can.

...

Can you guarantee that this is not the signature of Hind Issa? --- In my – in my opinion it's not Hind Issa... I can guarantee it in my expertise. I wasn't there when they were signed... but in my opinion they are false signatures.

[77] *Third*, there is the evidence of Mr Stephen Picken. Mr Picken gave evidence confirming that he was a retired solicitor but had acted for James Karbotli for about 15 years, up until late 2017. He gave evidence of having a meeting in early 2017 with Mr Karbotli, Chris Smith and Mr Smith's wife, Julie Archer. He stated they discussed a potential change of lawyers from the firm that had, at the time, been acting for Mazop. He recalled that Mr Smith outlined a proposed expansion of the tobacconist shops as well as plans to acquire commercial and domestic land for some sort of development purposes. He further stated that they had discussed refinancing Hind Issa's properties and a property owned by Mr Karbotli.

[78] Mr Picken confirmed that he was later instructed to act in respect of transactions involving borrowings secured by Ms Issa's properties, both in Queensland and in Victoria. He recalled that the lenders were private lenders and the terms of the loans were very usurious in terms of interest rates, costs and expenses and set up fees.

[79] With respect to the property at 42 Barak Street, Mr Picken confirmed he was involved in a previous loan and mortgage in favour of C&F Nominees. He confirmed that his role principally involved witnessing Ms Issa's signature on several security documents and personal guarantees. He confirmed that he did not

⁴³ Ibid 308–438 (Expert handwriting report request, dated 25 November 2019).

⁴⁴ Ibid 439–47 (Expert handwriting report request, dated 4 March 2020).

⁴⁵ Ibid 318–19 (Examined copy of the mortgage, dated 8 June 2017, by which 30 Francis Street was mortgaged to the First to Sixth Defendants as security for a loan of \$1,000,000), 320–2 (Examined copy of the mortgage, dated 3 April 2017, by which 30 Francis Street was mortgaged as security for a loan of \$893,000 from Nivex).

have any face-to-face dealings with Ms Issa, whether in respect of that transaction or any other transaction, and that he never spoke to her.

- [80] Mr Picken confirmed that he had signed the Mortgage in respect of the \$1,000,000 loan secured by 30 Francis Street, purporting to witness Ms Hind's signature as mortgagor on 8 June 2017. He confirmed that Ms Issa was not in his presence, and he did not witness her sign any documents. He further explained:

I was advised by Mr Karbotli that the refinancing transactions...had to be concluded on or before the 8th of June and it was extremely urgent that they be completed by then... and I was instructed to carry out all the usual searches and inquiries or satisfy the requirements of the lenders... I said, 'Well, look, yourself and your mother would have to come in before the 8th, which is the deadline which Mr Smith has imposed and she would have to bring some identification documents; passport, drivers licence and the like....

- [81] Mr Picken stated that this conversation occurred on 7 June 2017, with a view to the matter being completed the following day on 8 June 2017.
- [82] In addition to acting for Mr Karbotli and Mazop in respect of the Mortgage, Mr Picken also performed the role of 'Identifier' on behalf of the Original Mortgagees. In that capacity, Mr Picken completed a Combined Appointment as Identifier Certificate and Identification Certificate,⁴⁶ in which he falsely claimed to have met with Ms Issa face-to-face and to have carried out an identification procedure which involved him comparing Ms Issa's appearance to that depicted in identification documents she supposedly produced to him.
- [83] Mr Picken gave evidence that on 7 June 2017, he gave Mr Karbotli a copy of the security documentation and a letter to take with him. In the letter, which was addressed to Mr Karbotli's mother, Mr Picken stated that he considered himself to be acting for the company, Mazop, and its director, James Karbotli; that she should get her own separate legal advice; and that he had advised the company not to sign the documents as the terms were very onerous.
- [84] Mr Picken gave further evidence that on 8 June 2017, he met with Mr Karbotli who told him that his mother could not attend the meeting as she was at the hospital. He stated that Mr Karbotli then produced a large number of security documents which had already been signed by his mother, but not witnessed. He stated that he then witnessed Mr Karbotli sign all the documents in his presence. He further stated that Mr Karbotli produced Ms Issa's passport, driver licence and Medicare card or bank card and he compared the signatures on those documents with the signatures of Ms Issa on the security documents. He stated that, being satisfied that the signatures were one and the same, he signed the documents purporting to witness Ms Issa's signature even though she was not in his presence. He subsequently provided the security documents and certified copies of Ms Issa's identification documents to Summer Lawyers, the lawyers acting for the Original Mortgagees.
- [85] Mr Picken was shown a copy of a photograph of Ms Issa holding her driver licence and passport, signed by Mr Picken, dated 9 June 2017, which he had certified was a

⁴⁶ Ibid 731–2 (Combined appointment as identifier certificate and identification certificate, dated 8 July 2017).

copy of the original sighted by him.⁴⁷ Mr Picken explained in his evidence the circumstances in which he had certified that document, stating:

From memory, the lender imposed, at a very late stage in the proceedings, an additional condition. Namely, that the identity documents which had been checked by me and signed and forwarded to their office, they then responded saying ‘well, no, that’s not good enough. We want the individuals, namely Mr Karbotli and ... his mother to stand in front of the camera and someone to take a photograph holding... their respective identity documents’...

[86] It is to be noted that Ms Issa’s driver licence expired on 15 January 2017. Thus, the copy of the driver licence certified by Mr Picken, forwarded to the Original Mortgagees and depicted in the photograph which he also certified, was no longer a current, valid licence.

[87] Mr Picken was taken to further documents, including a letter dated 29 August 2018, written by him and addressed to his professional indemnity insurer, Lexon Insurance.⁴⁸ Mr Picken confirmed it was a letter he had written in response to a letter he had received from his insurer. The letter written by Mr Picken stated, in part:

I must admit that following a ‘brain snap’ I did sign the certificates, following assurances given to me by James Karbotli, one of the Directors, who has now implicated me in an alleged fraud committed by him. Clearly I have been duped by him into giving the certificates, but that does not assist me.

[88] Mr Picken also confirmed that on 10 October 2019, he provided a statement to the police regarding the matter, in which he confirmed that he had never witnessed Ms Issa’s signatures on any of the loan and mortgage documents associated with the Nivex and Gustin Group loans and mortgages.⁴⁹ In that statement, Mr Picken had also confirmed that it was Mr Karbotli who presented him with the loan and mortgage documents, which had already been signed by Ms Issa, and that he had been assured by Mr Karbotli that she had signed the documents in his presence.

[89] Mr Picken further confirmed that on 24 March 2020, he pleaded guilty to an offence of making false declarations and was sentenced to 6 months’ imprisonment, to be suspended for an operational period of 18 months.

[90] Mr Picken agreed that he had completed and signed the independent solicitor certificate documents, which purported to confirm that he had provided independent advice to Ms Issa as the borrower in respect of the loan advanced by C&F Mortgage Securities Ltd and the mortgage in respect of the 42 Barak Street property, in circumstances where he did not give Ms Issa any such advice and did not meet with her in respect of those matters.⁵⁰

[91] In cross-examination by Mr Karbotli, Mr Picken was asked if he recalled a meeting at Mr Karbotli’s Ashmore offices with himself, two other staff members and Ms

⁴⁷ Ibid 758 (Photograph of Hind Issa holding identity documents).

⁴⁸ Ibid 1713 (Letter from Stephen Picken to Lexon, dated 29 August 2018).

⁴⁹ Ibid 1805–16 (Witness Statement of Stephen Picken, dated 10 October 2019).

⁵⁰ Exhibit 3 – Solicitor’s certificate and client’s certificate, dated 4 March 2017; Exhibit 4 – Independent solicitor’s certificate, dated 4 May 2017.

Issa, in mid-2017. Mr Picken stated he did not recall seeing Mr Karbotli's mother there.

- [92] Mr Karbotli did not challenge any of the other evidence given by Mr Picken.
- [93] *Fourth*, there is the evidence of the signatures on the documents themselves. I have compared the purported signatures of Ms Issa on each of the alleged forged mortgages and associated documents against Ms Issa's confirmed signatures on other documents in evidence adduced at trial.⁵¹ I have also done the same exercise in respect of the documents purportedly signed by Ms Issa appointing her as a director of Mazop. Quite aside from the fact that some of the alleged forged signatures are in the name 'Hind Karbotli', being a name that Ms Issa no longer used at the time, in my opinion it is clear that the purported signatures are pictorially different from the known signatures and writing of Ms Issa.
- [94] *Fifth*, there are the odd and, to my mind, implausible, surrounding facts and circumstances in which Ms Issa apparently agreed to mortgage her properties and signed the mortgage documents. It is inherently improbable and unlikely that Ms Issa, a retired, elderly woman with no source of income other than her pension, would have knowingly and willingly mortgaged her homes as security for loans of significant sums of money, apparently advanced by lenders of last resort to her son's company, in circumstances where the interest rates and repayments were extremely onerous and oppressive.
- [95] *Finally*, it is pertinent to note that although Mr Karbotli maintained that he was not involved in any forgery of his mother's signatures or in the fraudulent procuring of the mortgages over her properties, he did not give any evidence directly contradicting the evidence, given by Ms Halik and in his mother's statements, that he admitted to them that he was involved. The uncontradicted evidence of these statements against interest further bolsters my conclusions.

Did the Original Mortgagees obtain an indefeasible interest?

- [96] Having concluded that the Mortgage was procured by fraud, the next issue to consider is whether the Mortgagees nevertheless obtained an indefeasible interest when they registered the Mortgage.
- [97] The *LTA* regulates the registration of freehold land and interests in freehold land in Queensland. Amongst other things, it provides for a system for registering title to, and transferring interests in, freehold land.⁵² It creates a system of title by registration, rather than a system of registration of title.⁵³
- [98] The foundation of the system under the *LTA* is the freehold land register kept by the Registrar. In that regard, s 28 of the *LTA* provides:

28 Particulars the registrar must record

- (1) The registrar must record in the freehold land register the particulars necessary to identify—
 - (a) every lot brought under this Act; and
 - (b) every interest registered in the register; and

⁵¹ Pursuant to s 59(2) of the *Evidence Act 1977* (Qld), the Court may compare a disputed writing with any writing that is genuine and act upon its own conclusions in relation thereto.

⁵² *LTA* s 3.

⁵³ *Breskvar v Wall* (1971) 126 CLR 376, 385–6 (Barwick CJ) (*'Breskvar'*).

- (c) the name of the person who holds, and the name of each person who has held, a registered interest; and
 - (d) if the person who holds a registered interest is a minor—the minor’s date of birth; and
 - (e) all instruments registered in the register and when they were lodged and registered.
- (2) The registrar must also record in the freehold land register anything else required to be recorded by this or another Act.

[99] A ‘lot’ is relevantly defined within sch 2 of the *LTA* as:

a separate, distinct parcel of land created on—

- (a) the registration of a plan or subdivision; or
- (b) the recording of particulars of an instrument.

[100] The *LTA* does not define an ‘interest in a lot’ or an ‘interest’. However, sch 1 of the *Acts Interpretation Act 1954* (Qld) (*AIA*) provides the following applicable definitions:⁵⁴

interest, in relation to land or other property, means—

- (a) a legal or equitable estate in the land or other property; or
- (b) a right, power or privilege over, or in relation to, the land or other property.

estate includes easement, charge, right, title, claim, demand, lien and encumbrance, whether at law or in equity.

land includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land.

[101] Pursuant to s 37 of the *LTA*, an indefeasible title for a lot is created upon the recording of the particulars of the lot in the freehold land register. Section 38 of the *LTA* further provides that the indefeasible title for a lot is the current particulars in the freehold land register about the lot.

[102] With respect to the obligation of the Registrar to register instruments, s 30 of the *LTA* provides:

30 Registrar must register instruments

- (1) On lodgement of an instrument, the registrar must register the instrument if—
 - (a) the person who lodged it complies with the requirements of this Act for its registration; and
 - (b) the instrument is not inconsistent with another Act or law; and

⁵⁴ By virtue of s 36 of the *AIA*, in any Act, a term defined in sch 1 has the meaning stated in the schedule.

- (c) if the instrument is a plan of survey—it is not inconsistent with another plan of survey.
- (2) However, subsection (1) does not prevent the person from withdrawing the instrument.
- (3) If the instrument is a plan of survey and it is inconsistent with another plan of survey, the registrar may—
 - (a) give a written notice to a registered proprietor of a lot that may be affected by registration of the plan of survey; or
 - (b) require the person who lodged the instrument to give a written notice, in the way the registrar requires, to a person mentioned in paragraph (a).

[103] Pursuant to s 31 of the *LTA*, upon registration of an ‘instrument’⁵⁵ in the freehold land register, the instrument forms part of the register.

[104] Section 182 of the *LTA* deals with the effect of registration of an instrument. It provides:

182 Effect of registration on interest

On registration of an instrument that is expressed to transfer or create an interest in a lot, the interest—

- (a) is transferred or created in accordance with the instrument; and
- (b) is registered; and
- (c) vests in the person identified in the instrument as the person entitled to the interest.

[105] When an interest in a lot is registered, it becomes indefeasible. In that respect, s 184 provides:

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

⁵⁵ ‘Instrument’ is defined in sch 2 to include ‘a request, application or other document that deals with a lot and may be registered under this Act’.

- (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.

[106] Exceptions to the indefeasibility of registered interests are set out in s 185, which relevantly provides:

185 Exceptions to s 184

- (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;

...

- (e) the interest of another registered proprietor making a valid claim under an earlier existing indefeasible title for all or part of the lot;

...

- (1A) A registered proprietor of a lot (the relevant mortgagee) who is recorded in the freehold land register as a mortgagee of the lot or an interest in the lot does not obtain the benefit of section 184 for the relevant mortgagee's interest as mortgagee if—

- (a) the relevant mortgagee—
 - (i) in relation to the instrument of mortgage or amendment of mortgage, failed to comply with section 11A(2); or
 - (ii) in relation to a transfer of the instrument of mortgage, failed to comply with section 11B(2); and
- (b) the person who was the mortgagor under the instrument of mortgage or amendment of mortgage was not the person who was, or who was about to become, the registered proprietor of the lot or the interest in a lot for which the instrument was registered.

- (1B) For subsection (1A)(b), a person was the mortgagor under an instrument of mortgage or amendment of mortgage if the person executed the instrument as mortgagor, including, if the instrument is an electronic conveyancing document, through a subscriber digitally signing the instrument under the Electronic Conveyancing National Law (Queensland).

- (1C) Also, for subsection (1A)(b), a person was the mortgagor under an instrument of mortgage or amendment of mortgage if the instrument is an electronic conveyancing

document and the person signed, as mortgagor, a document that under the participation rules under the Electronic Conveyancing National Law (Queensland)—

- (a) was required as a supporting document for the instrument of mortgage or amendment of mortgage; and
- (b) was required to be kept by the original mortgagee mentioned in section 11A(2).

...

- (5) If an issue arises in a proceeding as to whether a person registered as a mortgagee does not obtain the benefit of section 184 because of subsection (1A), proof that the person complied with section 11A(2) or 11B(2) rests on the person.

...

- [107] Schedule 2 of the *LTA* provides the following relevant definitions in respect of a registered proprietor of a lot:

registered proprietor of a lot means a person recorded in the freehold land register as a proprietor of the lot.

proprietor of a lot means a person entitled to an interest in a lot, whether or not the person is in possession.

- [108] Part 6 of the *LTA* provides for dealings directly affecting lots. Division 3 of pt 6 deals with mortgages. Within that division, s 72 provides:

72 Mortgage lot etc. by registration

- (1) A lot or an interest in a lot may be mortgaged by registering an instrument of mortgage for the lot or interest.
- (2) However, a mortgage is not an interest in a lot that can be mortgaged.

- [109] The effect of registration of a mortgage is dealt with by s 74 which provides:

74 Effect of registration of a mortgage

A registered mortgage of a lot or an interest in a lot operates only as a charge on the lot or interest for the debt or liability secured by the mortgage.

- [110] As noted previously, the relevant property the subject of the Mortgage in this case is commonly described as 30 Francis Street, but more particularly known as Lot 25 on RP46282, an estate in fee simple.⁵⁶ Ms Issa is currently recorded on the register as the ‘registered owner’ of the lot.⁵⁷

- [111] Upon registration, the Mortgage operated as an indefeasible charge on the lot for the debt or liability which it secured, subject to s 184(3) of the *LTA*. Registration of the

⁵⁶ Exhibit 1 – Trial bundle, 1771–2 (Current title search, 26 April 2022).

⁵⁷ Schedule 2 of the *LTA* provides that a ‘registered owner’ of a lot means the person recorded in the freehold land register as the person entitled to the fee simple interest in the lot.

Mortgage did not create or transfer any legal estate in the lot, including the estate held by Ms Issa as the registered owner.

- [112] Similarly, registration of the Mortgage Transfer did not create or transfer any legal estate in the lot, including the estate held by Ms Issa. Rather, the Mortgage remained an indefeasible charge, subject to s 184(3).
- [113] As the terms of s 185(1A) stipulate, a mortgagee who registers a mortgage instrument will not obtain the benefit of indefeasibility in respect of their interest where the mortgagee has failed to comply with the requirements of ss 11A(2) or 11B(2) of the *LTA*.
- [114] Section 11A of the *LTA* provides:

11A Original mortgagee to confirm identity of mortgagor

- (1) This section applies to—
 - (a) the mortgaging of a lot or an interest in a lot; and
 - (b) an amendment of a mortgage mentioned in paragraph (a).
- (2) Before the instrument of mortgage or amendment of mortgage is lodged for registration, the mortgagee under the instrument (the original mortgagee) must take reasonable steps to ensure the person who is the mortgagor under the instrument is identical with the person who is, or who is about to become, the registered proprietor of the lot or the interest in a lot.
- (2A) For subsection (2), a person is the mortgagor under an instrument of mortgage or amendment of mortgage if the person executes the instrument as mortgagor, including, if the instrument is an electronic conveyancing document, through a subscriber digitally signing the instrument under the Electronic Conveyancing National Law (Queensland).
- (2B) Also, for subsection (2), a person is the mortgagor under an instrument of mortgage or amendment of mortgage if the instrument is an electronic conveyancing document and the person signs, as mortgagor, a document that under the participation rules under the Electronic Conveyancing National Law (Queensland)—
 - (a) is required as a supporting document for the instrument of mortgage or amendment of mortgage; and
 - (b) is required to be kept by the original mortgagee.
- (3) Without limiting subsection (2), the original mortgagee takes reasonable steps under the subsection if the original mortgagee complies with practices included in the manual of land title practice under section 9A for the verification of identification of mortgagors.

- (4) The original mortgagee must, for 7 years after the instrument is registered, and whether or not there is registered a transfer of the interest constituted by the mortgage—
- (a) keep, in the approved form, a written record of the steps taken under subsection (2); or
 - (b) keep originals or copies of the documents and other evidence provided to or otherwise obtained by the original mortgagee in complying with subsection (2).

Maximum penalty—20 penalty units.

- (5) The registrar may, whether before or after the registration of the instrument, and whether or not there has been registered a transfer of the interest constituted by the mortgage, ask the original mortgagee—
- (a) to advise the registrar about the steps taken by the original mortgagee under subsection (2); and
 - (b) to produce for the registrar's inspection the written record mentioned in subsection (4)(a) or the originals or copies mentioned in subsection (4)(b).
- (6) The original mortgagee must comply with a request under subsection (5) unless the original mortgagee has a reasonable excuse.

Maximum penalty—20 penalty units.

- (7) This section applies to an instrument of mortgage only if it is executed after the commencement of this section.

[115] Section 11B of the *LTA* provides:

11B Mortgage transferee to confirm identity of mortgagor

- (1) This section applies to the transfer of the interest constituted by the mortgage of a lot or an interest in a lot.
 - (2) Before the instrument of transfer is lodged for registration, the transferee under the instrument of transfer (the mortgage transferee) must take reasonable steps to ensure the person who was the mortgagor under the instrument of mortgage was identical with the person who, when the instrument of mortgage was registered, was the registered proprietor of the lot, or the interest in a lot.
- (2A) For subsection (2), a person was the mortgagor under an instrument of mortgage if the person executed the instrument as mortgagor, including, if the instrument is an electronic conveyancing document, through a subscriber digitally signing the instrument under the Electronic Conveyancing National Law (Queensland).

- (2B) Also, for subsection (2), a person was the mortgagor under an instrument of mortgage if the instrument is an electronic conveyancing document and the person signed, as mortgagor, a document that under the participation rules under the Electronic Conveyancing National Law (Queensland)—
- (a) was required as a supporting document for the instrument of mortgage; and
 - (b) was required to be kept by the original mortgagee mentioned in section 11A(2).
- (3) Without limiting subsection (2), the mortgage transferee takes reasonable steps under the subsection if the mortgage transferee complies with practices included in the manual of land title practice under section 9A for the verification of identification of mortgagors.
- (4) The mortgage transferee must, for 7 years after the instrument of transfer of the mortgage is registered, and whether or not there is registered a further transfer of the interest constituted by the mortgage—
- (a) keep, in the approved form, a written record of the steps taken under subsection (2); or
 - (b) keep originals or copies of the documents and other evidence provided to or otherwise obtained by the mortgage transferee in complying with subsection (2).

Maximum penalty—20 penalty units.

- (5) The registrar may, whether before or after the registration of the instrument of transfer of the mortgage, and whether or not there has been registered a further transfer of the interest constituted by the mortgage, ask the mortgage transferee—
- (a) to advise the registrar about the steps taken by the mortgage transferee under subsection (2); and
 - (b) to produce for the registrar's inspection the written record mentioned in subsection (4)(a) or the originals or copies mentioned in subsection (4)(b).
- (6) The mortgage transferee must comply with a request under subsection (5) unless the mortgage transferee has a reasonable excuse.

Maximum penalty—20 penalty units.

- (7) This section applies to an instrument of transfer of a mortgage only if the instrument of transfer is executed after the commencement of this section.
- (8) However, this section applies in relation to an instrument of mortgage whenever executed.

- [116] Sections 11A and 11B, and related amendments, were introduced into the *LTA* by the *Natural Resources and Other Legislation Amendment Act 2005* (Qld) to reduce the State's exposure to claims for payments of compensation for fraud related to land title in circumstances where a mortgagee did not take reasonable steps and due diligence measures.⁵⁸ These provisions cast an obligation on a mortgagee to take 'reasonable steps' to confirm that the mortgagor, under the mortgage instrument, is in fact the person who is the registered proprietor of the lot, or interest in the lot, that is mortgaged.
- [117] Although ss 11A and 11B do not stipulate what amounts to 'reasonable steps', a mortgagee will have taken reasonable steps if the mortgagee complies with the practices set out in the *Manual of Land Title Practice (Queensland)* for the verification of identification of mortgagors.⁵⁹
- [118] The circumstances in which the Original Mortgagees purported to take steps to identify Ms Issa's identity as the mortgagor are set out above. In summary, they claimed to rely upon Mr Picken's supposed meeting with Ms Issa on 8 June 2017, at which time she purportedly executed the Mortgage, signed other documents in his presence and produced her original passport and driver licence.
- [119] Further, the Original Mortgagees relied upon the fact that Mr Picken also apparently later met with Ms Issa, at which time a photograph was taken of her holding her passport and driver licence identity documents, and Mr Picken signed a copy of the original photograph, certifying it as a copy of the original which he had sighted.⁶⁰ As I have outlined above, Mr Picken did not meet with Ms Issa and did not witness her signatures.
- [120] In my view, the verification procedure was wholly inadequate, and the Original Mortgagees did not take reasonable steps to verify Ms Issa's identity as mortgagor as required. It was not sufficient for them to simply rely upon Mr Picken's supposed attestation to the witnessing of the signature of 'Hind Issa' and his certifications of identity in circumstances where the Original Mortgagees would have known, or ought reasonably to have known, that:
- (a) Ms Issa's driver licence had expired and so was not a current, valid identity document;
 - (b) Mr Picken did not initially comply with the identity verification procedure set out in the 'Combined Appointment as Identifier Certificate and Identification Certificate' document he completed, as he failed to provide 'a separate colour photograph of each person being identified holding identification document (photograph) taken at the time of signing the security documents...';⁶¹

⁵⁸ Explanatory Notes, *Natural Resources and Other Legislation Amendment Bill 2005* (Qld) 1, 31–2.

⁵⁹ Under ss 11A(3) and 11B(3) of the *LTA*, a mortgagee takes reasonable steps if they comply with the practices included in the 'manual of land title practice under s 9A'. The 'manual of land title practice under s 9A' is the *Land Title Practice Manual (Queensland)*. The prescribed verification procedure outlined at [61-2700] in the manual requires a face-to-face meeting between an 'Identity Verifier' and the 'Person Being Identified', during which the Identity Verifier must sight original identification documents, such as a passport, driver licence and Medicare card.

⁶⁰ Exhibit 1 – Trial bundle, 758 (Photograph of Hind Issa holding identity documents). See the Defence of the First to Seventh Defendants, filed 23 November 2018, 2 – 5 [2]–[8], 7 [10]–[12], 8–9 [17]–[20].

⁶¹ Exhibit 1 – Trial bundle, 731–2 (Combined appointment as identifier certificate and identification certificate, dated 8 July 2017).

- (c) the Combined Appointment as Identifier Certificate and Identification Certificate completed by Mr Picken is dated 8 July 2017, whereas the Mortgage and other associated documentation purportedly signed by Ms Issa are dated 8 June 2017; and
 - (d) the copy of the photograph of Ms Issa holding her driver licence and passport subsequently provided by Mr Picken also did not comply with the requirements of the Combined Appointment as Identifier Certificate and Identification Certificate. The copy of the photograph is dated 9 June 2017. It was therefore not taken at the time the Mortgage was signed, as was required. Further, it was endorsed with a certification by Mr Picken in these terms: ‘I certify this to be a true copy of the original which I have sighted.’ However, the requirement was for the copy of the photograph to have written on it the ‘date, time and place at which the photograph was taken’, and to be ‘signed by the person who took the photograph with their contact details provided’.
- [121] I find that the Original Mortgagees failed to take reasonable steps to ensure that Ms Issa executed the Mortgage, as required under s 11A(2). As the same circumstances apply in respect of the Mortgage Transfer, I further find that the Mortgagees failed to take reasonable steps to ensure that Ms Issa had executed the Mortgage, as required by s 11B(2), before they lodged the Mortgage Transfer for registration. The First to Seventh Defendants have not discharged the onus cast upon them by s 185(5) in either respect.⁶²
- [122] That being so, pursuant to s 185(1A) of the *LTA*, the Original Mortgagees did not obtain indefeasibility of their interest upon registration of the Mortgage, and the Mortgagees did not obtain indefeasibility of their interest upon the subsequent registration of the Mortgage Transfer.
- [123] In those circumstances, it will be appropriate that I make an order, pursuant to s 187 of the *LTA*, directing the Registrar to cancel the following dealings: no. 718076402 (the Mortgage); no. 718410563 (the Mortgage Transfer) and no. 718763578 (Correction of Name – Catalyst Provisional Lending).
- [124] In addition, given that the Mortgage is a fraud, it is consequently null and void and of no effect.⁶³
- [125] The Mortgagees therefore have no entitlement to be paid anything by Ms Issa. She is the victim of fraud. She did not authorise any person to act on her behalf to mortgage her property and she did not enter into any contractual arrangements with the Original Mortgagees or the Mortgagees. She is not bound by the personal covenant in the Mortgage. Consequently, she is not indebted to the Mortgagees and is not liable for the repayment of the loaned funds advanced by the Mortgagees, either as a director of Mazop, a borrower or a guarantor.
- [126] It will therefore be appropriate to make the declaration sought by Ms Issa that the Mortgage is null and void. It will also be appropriate to make an order that the

⁶² Noting that the First to Seventh Defendants bear the onus of proving such compliance, pursuant to s 185(5).

⁶³ *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, 224 (Powell JA, Meagher JA agreeing at 203, Handley JA agreeing at 203); *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22,281, 22,283 [16] (Young CJ in Eq).

Victorian Caveat bearing dealing no. AQ 637142L in respect of the 42 Barak Street property be removed, pursuant to s 90(3) of the *Transfer of Land Act 1958* (Vic).

Whose interest in the property should prevail?

- [127] Having concluded that the Mortgage was a fraud and the Mortgagees did not obtain indefeasibility of their interest, the next issue to consider is the interests of the Purchasers vis-à-vis Ms Issa. To do so, it is first necessary to set out in more detail the factual background to the sale and settlement of 30 Francis Street and the lodging of the various caveats.

The sale of 30 Francis Street

- [128] On 20 March 2018, Ms Issa and Ms Halik met with Mr Mark Steele, a solicitor at Marino Law, to seek advice about the Mortgage and the impending sale of 30 Francis Street. Ms Halik's husband, Bill Halik, also attended that meeting.
- [129] On 21 March 2018, Mr Steele sent a letter to the Mortgagees' solicitors, Summer Lawyers, raising issues with respect to the forgery of Ms Issa's signatures on the Mortgage and associated documentation. Mr Steele requested documents relating to the Mortgage and loan and demanded that the property not be sold until the matter had been resolved. Later that day, Mr Paul Reese, a partner at Summer Lawyers, emailed Mr Steele copies of the requested documents but advised he was instructed to proceed with the sale of the property.
- [130] Mr Steele emailed Mr Picken asking that he urgently contact him.
- [131] On 22 March 2018, Ms Issa, Ms Halik and Mr Halik again met with Mr Steele. In that meeting, Ms Halik asked how they could stop the auction of 30 Francis Street. Mr Steele explained proceedings would need to be commenced to have the Mortgage declared void and to obtain an injunction to restrain the sale. Ms Halik or Ms Issa advised that they did not have the money to proceed. Mr Halik advised that he had money but was not prepared to risk it given the need to provide an undertaking as to damages. Mr Steele further advised Ms Issa that she could lodge a caveat to prevent any transfer of her land on the basis that the Mortgage was a forgery. Ms Issa instructed Mr Steele to lodge a caveat.
- [132] On 23 March 2018, Marino Law lodged the caveat over 30 Francis Street on behalf of Ms Issa.⁶⁴ The stated grounds of claim in the caveat were:
- The registration of mortgage number 718076402 was procured by fraud, namely it was purportedly signed by the registered owner in circumstances where the registered owner had not in fact signed the mortgage. In those circumstances, the purported mortgage does not secure any indebtedness of the registered owner to the purported mortgagee and no power of sale has arisen pursuant to the purported mortgage.
- [133] On 24 March 2018, Ms Halik exchanged messages with Mr Steele regarding the pending auction of 30 Francis Street. Mr Steele again advised that the caveat would not stop the sale and that the only way to prevent it was to apply to the Court for an injunction, but he noted that he was not instructed to do so.
- [134] On 25 March 2018, 30 Francis Street was sold at auction by the Mortgagees. The Purchasers were the successful bidders. They signed the Purchase Contract that

⁶⁴ Exhibit 1 – Trial bundle, 1135 (Caveat no. 718652857).

day.⁶⁵ The purchase price was \$1,265,000. The Purchasers paid a deposit of \$126,500. The sellers signed and accepted the Purchase Contract on 28 March 2018.

- [135] Settlement was due to complete on 24 April 2018. However, cl 14(b) of the special conditions to the Purchase Contract provided that the date could be extended by the sellers if, on the settlement date, the property was affected by a caveat which would prevent registration of the Purchasers' transfer.
- [136] On 12 April 2018, Summer Lawyers sent a letter to Ms Halik about Ms Issa's caveat.⁶⁶ They advised that the Mortgagees were prepared to pay Ms Issa \$5,000 for the removal of the caveat by 5.00 pm on 13 April 2018, failing which the offer would be withdrawn and they would commence proceedings in the Supreme Court of Queensland for removal of the caveat. The letter also stated, 'We note, this Offer does not extinguish Ms Issa's rights in respect of any future claims against our Client.'
- [137] By 13 April 2018, Mr Steele had ceased acting for Ms Issa. That day, Mr Reese sent an email to Ms Halik which included the following:⁶⁷

Your mother placed a caveat over her home to prevent the completion of our clients [*sic*] sale. The \$5,000 is a little compensation to get her to remove the caveat. The removal of the caveat will not prevent her (if she so chooses) to bring a claim against my client or the government for the loss of her house (if it is agreed that the mortgage was created by fraud). If the caveat isn't removed we will have to go to court next week and I would like to avoid the cost.

- [138] On 18 April 2018, Ms Issa made her complaint to the police.
- [139] On 19 April 2018, Summer Lawyers wrote to the Purchasers' solicitors, Hughes Lawyers, requesting an extension of settlement on the basis that 'a caveat has been lodged over the Property by the registered proprietor which is preventing progress towards settlement.'⁶⁸ The letter further stated that Summer Lawyers were in the process of submitting an application to the Supreme Court of Queensland for the removal of the caveat.
- [140] On 24 April 2018, Mr Steele again attempted to contact Mr Picken by email.
- [141] On 3 May 2018, Mr Steele received a letter from Mr Picken, dated 1 May 2018, in which he admitted that he had not seen Ms Issa sign the Mortgage and associated documents, but had nevertheless attested to witnessing her signature.
- [142] On 8 May 2018, Summer Lawyers filed an application in the Supreme Court of Queensland for removal of the caveat.⁶⁹ The application was returnable on 22 May 2018.
- [143] On 10 May 2018, Ms Issa sent an email to the Registrar about the caveat she had lodged. In that email, she advised that her home had been 'fraudulently mortgaged by criminals' and the matter was now under investigation by the police.⁷⁰ She requested advice on what she could do to save her home.

⁶⁵ Exhibit 6 – Contract for houses and residential land, dated 28 March 2018.

⁶⁶ Exhibit 1 – Trial bundle, 1172 (Letter from Summer Lawyers to Jennifer Halik, dated 12 April 2018).

⁶⁷ Ibid 1178 (Email from Paul Reese to Jennifer Halik dated 13 April 2018).

⁶⁸ Ibid 1197 (Letter from Summer Lawyers to Hughes Lawyers, dated 19 April 2018).

⁶⁹ *Owens v Issa* (BS 4894/18).

⁷⁰ Exhibit 1 – Trial bundle, 1380–1 (Email from Hind Issa to Registrar of Titles (Qld), dated 10 May 2018).

[144] On 15 May 2018, Ms Issa and Ms Halik sought advice from Marino Law about the application to remove the caveat. In light of Mr Picken's letter and admissions, Mr Steele advised that it may not be possible to 'sheet home' the fraud to the Mortgagees, and in those circumstances, Ms Issa may not have a 'caveatable interest'. Mr Steele further advised that Marino Law would require payment of \$20,000 to \$30,000 to act in respect of the application. Ms Halik told him they were unable to pay that amount. Mr Steele then proposed an alternative, which was to attempt to negotiate compensation for removing the caveat, whilst reserving Ms Issa's rights, and to then use the funds to carry out further investigations, principally to obtain a forensic document examiner's report.

[145] On 17 May 2018, following some earlier correspondence on the issue, Summer Lawyers sent an email to Mr Steele which relevantly stated:⁷¹

We are instructed to make the following offer in order to settle the sale of the property to facilitate the withdrawal of Ms Issa's caveat:

1. Our client will pay your client \$40,000 out of the sale proceeds of the property with the remaining money from the sale to be paid to our client;
2. Your client will hand over a release of Ms. Issa's caveat and undertake not to lodge any further caveat over the property;
3. All your clients [*sic*] rights are reserved.

[146] Later that day, Ms Issa, via Ms Halik, instructed Mr Steele to accept the Mortgagees' offer.

[147] On 18 May 2018, Summer Lawyers emailed Mr Steele to advise that the Mortgagees had instructed them to arrange for settlement to occur simultaneously with the removal of Ms Issa's caveat. They further advised they would liaise with the Purchasers' solicitor to arrange settlement the following week.

[148] On 21 May 2018, Mr Steele wrote to Ms Halik about the process for settlement of the sale of 30 Francis Street and the Supreme Court application. He advised that they would provide the release of caveat 'at settlement of the contract for the purchase and sale of the 30 Francis Street property'.⁷² He further advised that the Supreme Court application would be adjourned, and once settlement had completed, Summer Lawyers would arrange for it to be dismissed.

[149] The same day, an officer from the titles registry emailed Ms Issa in response to her earlier email of 10 May 2018. The officer advised that the titles registry was unable to provide legal advice but requested Ms Issa provide a statutory declaration detailing her allegations and her knowledge of the fraudulent Mortgage.

⁷¹ Ibid 1431 (Email from Elizabeth Mead to Mark Steele, dated 17 May 2018).

⁷² Ibid 1436 (Email from Mark Steele to Jennifer Halik, dated 21 May 2018).

- [150] Ms Issa sent an email in reply later that day in which she stated that her circumstances had changed since her last email. She further stated:⁷³

I have no choice but to remove the caveat as my lack of agreement or knowledge in this mortgage has no bearing on the indefeasible title according to the solicitor that is now acting for me.⁷⁴

- [151] On 22 May 2018, the Registrar wrote to Mr Reese, requiring information about the Mortgage and the Mortgage Transfer. Only electronic versions of those instruments had been lodged by Summer Lawyers. In particular, the Registrar sought information about the steps taken by the Mortgagees to establish the mortgagor was identical to the registered proprietor, 'Ms Hind'. The Registrar also required Summer Lawyers to provide a copy of the signed Mortgage.
- [152] That same day, the Mortgagees' application for removal of the caveat was adjourned to 5 June 2018.⁷⁵
- [153] On 31 May 2018, Summer Lawyers emailed Hughes Lawyers seeking confirmation that settlement could take place the next day, 1 June 2018, at 2.00 pm. Summer Lawyers advised, 'The solicitor for the caveator, Hind Issa, will be providing Withdrawal of Caveat No. 718652857 on settlement.'⁷⁶
- [154] Later that day, Mr Steele emailed Summer Lawyers indicating that Marino Law would be instructing an agent to attend settlement on their behalf. Mr Steele executed a General Request to record the removal of Ms Issa's caveat (the '**Caveat Removal Request**').⁷⁷
- [155] On 1 June 2018, Summer Lawyers sent a letter to Hughes Lawyers directing that a cheque for \$40,000 be made payable to Marino Law at settlement. The balance of the sale proceeds, \$1,099,017.67, was to be paid into the Summer Lawyers trust account.
- [156] Settlement of the Purchase Contract occurred later that day. The agent for Marino Law provided Hughes Lawyers, or their agent, with the Caveat Removal Request. Following settlement, the Purchasers took possession of the property.
- [157] On 7 June 2018, Summer Lawyers replied to the Registrar's letter of 22 May 2018 and provided copies of the Mortgage and the Deed of Variation.
- [158] On 11 June 2018, the Purchasers paid \$46,087.50 stamp duty on the Purchase Contract.
- [159] On 19 June 2018, Hughes Lawyers lodged the executed Caveat Removal Request and Transfer⁷⁸ for registration. Accompanying the Transfer was a declaration made on behalf of the Mortgagees, concerning the exercise of their purported power of sale under the Mortgage pursuant to s 84 of the *Property Law Act 1974* (Qld).⁷⁹

⁷³ Ibid 1438 (Email from Hind Issa to the titles registry, dated 21 May 2018).

⁷⁴ I note that Mr Steele deposes that this email does not accurately state the effect of the advice which he gave Ms Issa during the meeting on 15 May 2018: Exhibit 1 – Trial bundle, 177 [108] (Affidavit of Mark Steele, sworn 5 May 2022).

⁷⁵ Order of Mullins J, dated 22 May 2018.

⁷⁶ Exhibit 1 – Trial bundle, 1449 (Email from Summer Lawyers to Hughes Lawyers, dated 31 May 2018).

⁷⁷ Ibid 1485 (General request no 718815259).

⁷⁸ Ibid 1471–3 (Transfer no. 718815263).

⁷⁹ Ibid 1474–6 (Declaration).

- [160] On 29 June 2018, the Registrar wrote to Ms Issa, noting that since her earlier correspondence on 21 May 2018, Marino Law had lodged the Caveat Removal Request. The Registrar noted the ‘serious matters’ previously raised by Ms Issa and asked whether she wished to provide any further information.
- [161] That same day, Mr Steele emailed a copy of Mr Picken’s letter of 1 May 2018 to the titles registry.
- [162] On 3 July 2018, Ms Issa sent an email to the titles registry, reiterating her fraud complaint. She made no mention of the agreement to withdraw her caveat or that she had received \$40,000 as part of that agreement.
- [163] On 9 July 2018, the Registrar lodged the Registrar’s Caveat,⁸⁰ pursuant to s 17 of the *LTA*. The Registrar also wrote to each of the Mortgagees and Marino Law, advising them of the Registrar’s Caveat and seeking submissions or further information relevant to the circumstances surrounding the registration of the Mortgage.
- [164] On 11 July 2018, Summer Lawyers sent an email to the Registrar, asking for clarification about what further information was required.
- [165] On 12 July 2018, Marino Law wrote to the Registrar, providing information about the circumstances in which the Mortgage was apparently executed and witnessed. The letter reiterated Ms Issa’s claims that she was the victim of fraud and her signatures had been forged. Marino Law submitted that the Registrar’s Caveat should remain on the title pending determination by a Court, or agreement between the parties, as to the competing interests in the property. The letter did not mention that Ms Issa had agreed to withdraw her caveat in return for the payment of \$40,000.
- [166] On 16 July 2018, the Registrar wrote to Marino Law, requesting additional information as to the basis on which the withdrawal of Ms Issa’s caveat was sought.
- [167] That same day, the Registrar wrote to the Purchasers, advising them of the Registrar’s Caveat and enclosing a copy. The Registrar also wrote to Summer Lawyers, advising that further information was sought in relation to the verification of the mortgagor’s identity in accordance with ss 11A and 11B of the *LTA*.
- [168] On 17 July 2018, Summer Lawyers wrote to the Registrar, providing information about the identity verification procedures undertaken on behalf of the Mortgagees by Mr Picken and copies of relevant documents.
- [169] That same day, Hughes Lawyers wrote to the Registrar, asking for clarification about the further information sought in the Registrar’s letter to the Purchasers.
- [170] On 30 July 2018, the Registrar wrote to Hughes Lawyers, advising that she was looking into the circumstances surrounding the registration of the Mortgage and the Mortgagee’s exercise of their power of sale. The Registrar requested further information in respect of those matters.
- [171] On 1 August 2018, Marino Law wrote to the Registrar, explaining that Ms Issa had consented to the withdrawal of the caveat in exchange for orders dismissing the application for removal of the caveat. No mention was made of the payment of \$40,000 or the undertaking not to file any further caveat. Marino Law again submitted that the Registrar’s Caveat should remain on the title.

⁸⁰ Ibid 1503 (Caveat no. 718858716).

[172] Ms Issa subsequently commenced the present proceedings in this Court on 27 September 2018.

[173] The Registrar's Caveat remains in place. As a result, the Transfer has not been registered.

The Purchasers' evidence

[174] It is next necessary to consider the specific evidence of the Purchasers.

[175] In an affidavit sworn on 19 May 2022,⁸¹ Mr Morecroft deposed to the circumstances in which he and his wife, Jacqueline Morecroft, came to enter into the Purchase Contract.

[176] Mr Morecroft confirmed he and his wife were the successful bidders at the auction held on 25 March 2018. He deposed to paying the deposit for the purchase of 30 Francis Street soon after entry into the Purchase Contract. He further deposed to causing a sum of \$1,190,000 to be transferred to Hughes Lawyers on 28 May 2018 for the balance of the purchase price and transfer duty.

[177] Mr Morecroft noted the email sent by Summer Lawyers to Hughes Lawyers on 31 May 2018, which advised that the solicitor for the caveator would be providing the withdrawal of caveat at settlement. He further noted that on 1 June 2018, Hughes Lawyers received a letter from Summer Lawyers requesting a bank cheque for an amount of \$40,000 payable to 'Marino Law Practice Trust Account' be provided at settlement.

[178] In a subsequent affidavit, sworn 2 June 2022,⁸² Mr Morecroft stated that following receipt of the 31 May 2018 email from Summer Lawyers, he understood Ms Issa would be releasing her caveat to allow settlement to proceed and to allow him and his wife to obtain clear title.

[179] Mr Morecroft deposed to the various expenses he and his wife have incurred since they took possession of the property, totalling \$87,862.57.

[180] During cross-examination, Mr Morecroft agreed that when he signed the Purchase Contract, it had attached to it a copy of a title search for the property.⁸³ The copy of the title search was dated 9 January 2018, several months before Ms Issa's caveat was lodged and registered. Mr Morecroft agreed that he did not undertake any other title searches before signing the Purchase Contract.

[181] Mr Morecroft agreed that he first found out about the caveat lodged by Ms Issa in late April 2018, shortly before he expected to complete the Purchase Contract. He confirmed that this was also when he became aware that the Mortgagees were preparing to commence proceedings for the removal of the caveat.

[182] Mr Morecroft was shown a bundle of emails, which included emails sent to and from his email address and his wife's email address.⁸⁴ He confirmed that an email from their real estate agent, dated 26 April 2018, attaching an email from Summer Lawyers, had been received by his wife and they had discussed it. The email referred to settlement being extended 'pursuant to Clause 14(b) of the Contract pending the outcome of Supreme Court proceedings'.

⁸¹ Ibid 203–16 (Affidavit of Jess Morecroft, sworn 18 May 2022).

⁸² Ibid 204–5 (Second Affidavit of Jess Morecroft, sworn 2 June 2022).

⁸³ Exhibit 6 – REIQ Contract for Houses and Residential Land, dated 28 March 2018.

⁸⁴ Exhibit 7 – Bundle of emails and title search.

- [183] He further confirmed that an email, dated 4 May 2018, had been sent by him to Summer Lawyers. In that email, Mr Morecroft identified he and his wife as the Purchasers and asked for more information about ‘when/if this sale will be proceeding’. He further wrote, ‘...I must say we weren’t aware of the irregular and very one-sided “special conditions” terms of the contract prior to signing...’ Mr Morecroft confirmed that this statement was true and that he had not paid any attention to the special conditions before signing the Purchase Contract.
- [184] Mr Morecroft was shown a further email he sent to Summer Lawyers, dated 7 May 2018, in which he asked for the caveat details. He further stated in that email, ‘...Obviously our concern is that this caveat was not already in place prior to auction per al [*sic*] communication and title provided by the vendor....’
- [185] Mr Morecroft identified a further email from Summer Lawyers, dated 9 May 2018, which he had received. The email attached a copy of a title search, dated 17 April 2018, which noted Ms Issa’s caveat.
- [186] Mr Morecroft was shown a letter from Hughes Lawyers to Summer Lawyers, dated 9 May 2018.⁸⁵ He confirmed that the letter was sent on his instructions. The letter relevantly stated:

Our clients are concerned that the caveat was lodged on Title prior to the auction taking place, and that this issue was not disclosed to our clients prior to making the successful bid...

...

Can you please clarify why the matter was not disclosed as our clients feel they have been misrepresented to, in order to secure sale of the property, when in fact, the auction should not have proceeded, or the matter of the caveat clearly disclosed. Our clients purchased the property with the understanding that settlement would proceed in accordance with the Contract, and that no caveat was lodged over the Title...

- [187] Mr Morecroft agreed that when he received the letter from the Registrar, dated 16 July 2018, enclosing a copy of the Registrar’s Caveat, he understood that it had something to do with the Mortgage pursuant to which the Mortgagees sold the property. He agreed that he understood that the Transfer would not be registered so long as the Registrar’s Caveat remained in place. He further agreed that every expense he had since incurred on the property was incurred with the knowledge that he and his wife’s title had not been registered and would not be registered until the Registrar’s Caveat was removed.
- [188] Mr Morecroft identified an email, dated 5 September 2018, which he sent to the titles registry asking for more information about the caveat.⁸⁶ In that email, Mr Morecroft wrote:

There was previously a caveat lodged on this property by the previous owner that delayed settlement (before being defeated in the Supreme Court) so it is frustrating and worrying for us to find ourselves in a similar position post settlement, though at least we now have a place to live!

⁸⁵ Exhibit 8 – Letter from Hughes Lawyers to Summer Lawyers, dated 9 May 2018.

⁸⁶ Exhibit 1 – Trial bundle, 1660 (Email from Jess Morecroft to the Registrar, dated 5 September 2018).

- [189] Mr Morecroft agreed that as of 5 September 2018, it was his belief that there had been a Court hearing, that the Court had considered whatever claims related to the caveat and those claims had been defeated, and that an order had been made for the removal of the caveat as a consequence of the Court's ruling. He further agreed that it was his belief that the Mortgagees were then able to complete the sale because the Court had ordered the removal of the caveat.
- [190] Mr Morecroft identified an email he sent to Crown Law, dated 16 October 2018, in response to a letter he had received in which the Crown Solicitor had advised that he was acting for the Registrar in respect of the Registrar's Caveat. In his email, Mr Morecroft stated:⁸⁷

We note that a prior caveat was put on the property by the previous owner, which delayed settlement, but was removed per court order and settlement allowed to proceed. I am not aware of the details behind this original caveat but assume it made similar claims that were ultimately rejected by the court.

- [191] Mr Morecroft agreed that as at the date of this email, he was still not aware of the actual claims that were made by the previous owner and the details of the caveat she had lodged.
- [192] Although each of the Purchasers were present during the trial, only Mr Morecroft gave evidence. In those circumstances, it was submitted on behalf of Ms Issa that I would draw an inference that any evidence Mrs Morecroft might have given would not have assisted the Purchasers.⁸⁸ I accept that submission. Accordingly, I infer that any evidence that may have been given by Mrs Morecroft would be no more favourable to the Purchasers than the evidence given by Mr Morecroft concerning his knowledge of events and his state of mind at various times.

The Purchasers' submissions

- [193] Against this factual background, the case for the Purchasers is that they are entitled to have the Transfer registered and to thereby become the registered owners of 30 Francis Street. To that end, they seek the removal of the Registrar's Caveat and resist the relief sought by Ms Issa for orders that would cancel their lodged, but unregistered, Transfer.
- [194] It is to be noted that whilst the Purchasers have filed a Defence to Ms Issa's Second Further Amended Statement of Claim, they have not brought any counterclaim against her. Nevertheless, the Purchasers submit that Ms Issa has 'divested herself of title' to them.⁸⁹
- [195] The Purchasers argue that upon entry into the contract for the sale of 30 Francis Street, they acquired an equitable interest in the property. They say they are now the equitable owners. They further claim they have a separate equitable right to have the Transfer registered, pursuant to s 183 of the *LTA*. They further submit that they only acquired this right because Ms Issa provided the Caveat Removal Request. They

⁸⁷ Ibid 1672 (Email from Jess Morecroft to Crown Law, dated 16 October 2022).

⁸⁸ *Jones v Dunkel* (1959) 101 CLR 298.

⁸⁹ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 9 September 2022) 5-57:35.

contend that the Registrar must register the lodged Transfer, in accordance with s 30 of the *LTA*.⁹⁰

- [196] The Purchasers argue that the proper analysis of the situation is one of competing equitable rights. They submit that although Ms Issa is the registered owner of the property, she ‘doesn’t win just by virtue of being the registered proprietor’.⁹¹
- [197] On their argument, although Ms Issa is the registered owner, she has an equitable right to have the forged mortgage set aside and removed from the register,⁹² whereas they have an equitable right to have the lodged Transfer registered. The Purchasers say the real contest to be decided is therefore between these competing equitable rights.
- [198] The Purchasers further argue that because of her conduct, Ms Issa is estopped from now asserting against them that no power of sale had arisen under the Mortgage, enabling the Mortgagees to sell the property to the Purchasers, and that she is thereby estopped from seeking orders for cancellation of the Transfer.⁹³ The Purchasers argue that this result follows, regardless of whether the contest is analysed as one of competing equitable rights or one where Ms Issa holds the registered legal interest in the property.⁹⁴
- [199] Further, or in the alternative, the Purchasers argue that, in the event that s 187 of the *LTA* is engaged (which they deny), Ms Issa’s equitable right must be postponed to their rights as equitable owners because of her conduct in deliberately withdrawing her caveat.⁹⁵
- [200] In that respect, the Purchasers point to the following disentitling circumstances:⁹⁶
- (a) Ms Issa chose, deliberately and for consideration of \$40,000, to agree to the release of her caveat;
 - (b) the release was provided by Ms Issa, with the knowledge that it would be provided to a third-party purchaser of the property (the Purchasers);
 - (c) Ms Issa knew the identity of the Purchasers, as she had been provided with a copy of the sale contract as part of the affidavit material in the Supreme Court proceedings to remove the caveat;
 - (d) because Ms Issa knew that the Mortgagees and the Purchasers intended to act on the release, she was not permitted to stand by while the Purchasers proceeded to settlement, but was under a duty to disclose to the Purchasers that she intended to retain the property, or risk losing her interest; and

⁹⁰ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 5 [18A].

⁹¹ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 8 September 2022) 4-30:28–29.

⁹² Citing *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870, 872 and 875 (Needham J). I will proceed on the basis that Ms Issa’s right in this sense constitutes an equitable interest in the property.

⁹³ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 12 [28].

⁹⁴ Citing *Barry v Heider* (1914) 19 CLR 197, 219 (Isaacs J) (*‘Barry’*).

⁹⁵ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 13 [29(a)].

⁹⁶ *Ibid* 13 [29(a)]; MFI C – Outline of closing submissions on behalf of the Eighth and Ninth Defendants, 4–8 [44].

- (e) the removal of the caveat was an indication to the world that Ms Issa no longer sought to sustain the interest which the caveat had sought to protect, or that she no longer had an interest to protect.
- [201] The Purchasers contend that the Court ought to direct the Registrar to ‘register’⁹⁷ Ms Issa’s Caveat Removal Request and the Transfer.⁹⁸
- [202] The Purchasers further contend that, upon a finding that their interest prevails over that of Ms Issa, I would decline to make an order under s 187 of the *LTA* in favour of Ms Issa, but would instead make an order for removal of the Registrar’s Caveat under s 187(2)(e) of the *LTA*.⁹⁹ The Purchasers contend that the discretion to make such an order would follow from the necessary findings of fact I would make in their favour.

Consideration

The true nature of the ‘contest’

- [203] I do not accept the Purchasers’ primary argument that resolution of the position as between themselves and Ms Issa is, on its proper analysis, a contest between competing equities.
- [204] Ms Issa is, and at all material times was, the registered owner of the property at 30 Francis Street. She is the person entitled to the fee simple interest in the lot. Pursuant to s 184 of the *LTA*, she has an indefeasible interest. Her indefeasible interest is not impeached by the registration of the fraudulent Mortgage; nor by the subsequent creation of the Purchasers’ equitable interest in the property, following their entry into the Purchase Contract; nor by the executed and lodged, but unregistered, Transfer.
- [205] Whilst Ms Issa does seek declaratory relief in respect of the fraudulent mortgage, the primary relief she seeks in respect of her interest in the property at 30 Francis Street is an order under s 187 of the *LTA* for the cancellation of various instruments. That order is sought on the basis that the s 185(1A) exception to indefeasibility applies in respect of the Mortgagees’ interest in the property. Ms Issa’s claim in that respect is not a claim in equity to set aside the Mortgage. Rather, it is a claim to be determined according to the statutory rules concerning indefeasibility of interests, and exceptions to indefeasibility of interests, under the *LTA*.
- [206] The ‘contest’ as between Ms Issa and the Purchasers is thus between Ms Issa’s indefeasible legal title and whatever equitable right or interest the Purchasers may have.
- [207] In that respect, it is pertinent to note that the Purchasers do not claim that any exception to s 184(1) applies in respect of Ms Issa’s indefeasible interest. They do not, and cannot, point to any fraud on the part of Ms Issa pursuant to s 184(3) of the *LTA*. They expressly disavow reliance on any ‘in personam exception’ under s 185(1)(a) of the *LTA*.¹⁰⁰ No other exceptions arise for consideration.

⁹⁷ Caveats removal requests are not ‘registered’ under the *LTA*. It is perhaps more apt to say that the Purchasers seek a direction that the Registrar action the Caveat Removal Request and remove Ms Issa’s caveat.

⁹⁸ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 13 [29(b)].

⁹⁹ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 9 September 2022) 5-57:41–5-58:7.

¹⁰⁰ *Ibid* 5-57:27–35.

- [208] Accordingly, in my view, there is no basis to conclude that Ms Issa's indefeasible legal interest should be postponed to the equitable interest of the Purchasers. She is entitled to the relief she claims pursuant to s 187 of the *LTA* in the form of an order directing the Registrar to cancel the Transfer.
- [209] Much of the argument advanced on behalf of the Purchasers sought to draw support from cases dealing with competing equitable interests. In my opinion, the argument in that respect was misdirected and failed to grapple with the true nature of Ms Issa's interest. The conclusion I have reached disposes of the 'competing interests' issue.
- [210] However, even if the matter is considered as one of competing equities, I consider Ms Issa would have the better claim in any event for the reasons that follow.

The Purchasers' equitable rights

- [211] I accept that upon entry into the Purchase Contract, the Purchasers acquired an equitable interest in 30 Francis Street.¹⁰¹ However, I reject the notion that the execution of the Transfer and its delivery to the Purchasers created a new, independent equitable interest in favour of the Purchasers. Had the Transfer been registered, Ms Issa's legal interest in the property would have vested in the Purchasers.¹⁰² Upon registration of the Transfer, the Purchasers would have obtained the benefit of indefeasibility of that interest under s 184 of the *LTA*.
- [212] However, that did not occur.
- [213] In the absence of registration, the signing and lodgement of the Transfer did not create or transfer any interest to the Purchasers. That is the effect of s 181 of the *LTA*, which provides:

181 Interest in a lot not transferred or created until registration

An instrument does not transfer or create an interest in a lot at law until it is registered.

- [214] Notwithstanding the terms of s 181 of the *LTA*, it is well established that equitable rights and interests are recognized under the *LTA*.¹⁰³
- [215] As stated in *Chan v Cresdon Pty Ltd*,¹⁰⁴ in the context of an equivalent provision under the *Real Property Act 1861* (Qld), the predecessor to the *LTA*:

In any event, s. 43 of the Act presents an insuperable obstacle to the respondent's success. The section provides, in relation to land under the Act, that, until registration, no instrument of transfer shall be effectual to pass an estate or interest in the land. Notwithstanding this provision, it has been said from time to time that unregistered instruments may confer equitable estates and interests: see *Boyd*, at pp 81-82; *York House*, at pp 435-436; *Progressive Mailing House*, at pp 26-27. These statements need to be read in conjunction with the

¹⁰¹ *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 135, 330–1 [47]–[48] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

¹⁰² Being the effect of registration of an instrument of transfer after the exercise of a mortgagee's power of sale under a mortgage under s 79 of the *LTA*.

¹⁰³ *Barry* (n 94) 208 (Griffith CJ, Barton J agreeing at 211), 216 (Isaacs J); *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, 256–7 (Mason CJ, Brennan, Deane and McHugh JJ) ('*Chan*'); *Ashton v Hunt* [1999] 1 Qd R 571, 574 [11]–[13] (Thomas JA, Ambrose J agreeing at 576 [23], Cullinane J agreeing at 579 [45]) ('*Ashton*').

¹⁰⁴ *Chan* (n 103) 256–7 Mason CJ, Brennan, Deane and McHugh JJ) (citations omitted).

remarks of Isaacs J. in *Barry v. Heider* (1914) 19 CLR 197. His Honour, in the context of s.41 of the *Real Property Act 1900* (NSW), the counterpart of s. 43 of the Act, said (at p 216):

‘(S)ec.41, in denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules of equity, is an estate or interest in the land. Until that instrument is executed, sec.41 cannot affect the matter, and if the instrument is executed it is plain its inefficacy until registered – that is, until statutory completion as an instrument of title – cannot cut down or merge the pre-existing right which led to its execution.’

The point made in this passage is that, though the unregistered instrument is itself ineffective to create a legal or equitable estate or interest in the land, before registration, the section does not avoid contracts or render them inoperative. So an antecedent agreement will be effective, in accordance with the principles of equity, to bring into existence an equitable estate or interest in the land. But it is that antecedent agreement, evidenced by the unregistered instrument, not the instrument itself, which creates the equitable estate or interest. In this way no violence is done to the statutory command in s. 43.

- [216] *Chan* was followed in *Ashton v Hunt* (*‘Ashton’*), where the Court, in considering an unregistered lease, stated:¹⁰⁵

The combined effect of ss 71 and 181 of the *Land Title Act* seems to be that an unregistered instrument fails to transfer an interest at law, but the instrument is not rendered invalid merely because of lack of registration. One immediately notes the use of the double negative in ‘not invalid merely because...’. What validity might this section confer upon an unregistered lease that it did not already possess? One possible answer is that suggested by the appellants, namely that it has validity between the immediate parties but that it fails to obtain any of the benefits of indefeasibility. The other answer is that it retains the same limited effect as that recognised for such a document in *Chan*. It will be remembered that *Chan* did not hold the document to be void or totally ineffective. It remains the document which will become valid for all purposes if and when registered. It is also the source of equitable rights and is a reference source for the ascertainment of the conditions of the common law tenancy that usually exists up until the time of registration.

- [217] I do not consider that s 183 of the *LTA* provides the Purchasers with any separate, independent equitable right.

¹⁰⁵ *Ashton* (n 103) [1999] 1 Qd R 571, 574 [13] (Thomas JA, Ambrose J agreeing at 576 [23], Cullinane J agreeing at 579 [45]).

[218] Section 183 provides:

183 Right to have interest registered

A person to whom an interest is to be transferred or in whom an interest has been created has a right to have the instrument transferring or creating the interest registered if—

- (a) the instrument has been executed; and
- (b) the person lodges the instrument and any documents required by the registrar to effect registration of the instrument; and
- (c) the person has otherwise complied with this Act in relation to the registration of the instrument.

[219] The section provides a statutory right to have a transfer instrument registered. It does not operate to provide any greater claim or priority over another party where a dispute as to priority of equitable interests arises. Section 183 recognises equitable interests, but it must be read together with s 181 of the *LTA*. Accordingly, the respective priorities of competing equitable interests will be determined by the application of ordinary equitable principles, according to the facts, nature and circumstances of the antecedent agreements, arrangements or dealings that created or gave rise to such interests.

[220] Although the Purchasers have a statutory right under s 183 of the *LTA* to have the Transfer registered, the enforcement or exercise of that right is necessarily subject to the Registrar's Caveat. Similarly, the duty or obligation on the part of the Registrar to register the instrument, pursuant to s 30 of the *LTA*, is not necessarily absolute. Where the instrument sought to be registered is illegal or otherwise tainted by illegality, or where its registration might deprive a person of lawful rights of interest in land or assist in implementing an unlawful act or transaction, the Registrar may be justified in declining to register the instrument.¹⁰⁶ In such a case, the Registrar may instead lodge a caveat in accordance with s 17(2)(e)(ii) of the *LTA*. That is precisely what was done by the Registrar in this case. In my view, the Registrar was entirely justified in taking that course.

[221] I do not accept the Purchasers' submission, by reference to *Barry* and *Breskvar* that the right under s 183 of the *LTA* to have an interest registered is, according to accepted rules of equity, an estate or interest in the land or an equitable interest.¹⁰⁷ In my view, those cases are not authority for such a proposition.

[222] In *Barry*, the registered proprietor, Barry, executed a transfer which purported to transfer his land to Schmidt in consideration of a sum of £1,200. The transfer acknowledged receipt by Barry of that sum, when in fact the money had not been paid. Schmidt then obtained a loan of £800 from Heider, secured by a mortgage over the land the subject of the transfer he had received from Barry. Schmidt subsequently obtained a further loan of £400 from Gale, again secured by a mortgage over the same land. Neither of the mortgages, nor the transfer from Barry, were registered.

¹⁰⁶ *Beames v Leader* [2000] 1 Qd R 347, 354–5 [27] (McMurdo P, Thomas JA and Shepherdson J), quoting *Beames v Leader* [1998] QSC 44, 21 (Muir J).

¹⁰⁷ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 8 September 2022) 4-28:36–4-30:19.

- [223] The substantial point dealt with by the High Court was whether the transfer was inoperative for any purpose until registration. The relevant Torrens system legislation to be considered was the *Real Property Act 1900* (NSW). Section 41 of that Act was similar in effect to the present s 181 of the *LTA*, whereby no interest or estate in land passed until registration of the relevant instrument. Barry contended that an unregistered instrument was inoperative to create any right with respect to the land itself.
- [224] Griffith CJ rejected Barry's contention. In doing so, his Honour undertook an analysis of the provisions of the Act, which he considered were indicative of the Act's recognition of equitable claims and interests. By way of further support for his view, Griffith CJ also referred to former s 48 of the *Real Property Act 1877* (Qld), which provided that until registration, an instrument purporting to pass an estate or interest in or security upon land 'shall until registered be deemed to confer upon the persons intended to take under such instrument...a right or claim to the registration of such estate interest or security'. His Honour observed that this provision, and other similar provisions in other jurisdictions, affirmed the existing state of the law.
- [225] The Chief Justice ultimately concluded:¹⁰⁸

In my opinion equitable claims and interests in land are recognized by the Real Property Acts.

It follows that the transfer of 19th October, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognized by the law. I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest.

It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt had such an assignable interest.

- [226] In a separate judgment to the same effect, Isaacs J relevantly stated:¹⁰⁹

...The *Land Transfer Act*¹¹⁰ does not touch the form of contracts. A proprietor may contract as he pleases, and his obligation to fulfil the contract will depend on ordinary principles and rules of law and equity, except as expressly or by necessary implication modified by the Act. Sec. 43, for instance, makes provision with respect to the case of a *bona fide* purchaser without notice, and the section says 'any rule of law or equity to the contrary notwithstanding.' Consequently, sec. 41, in denying effect to an instrument until registration, does not touch whatever rights are behind it. **Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules of equity, is an estate or interest in the land.** Until that instrument is executed, sec. 41 cannot affect the matter, and if the instrument is executed it is plain its inefficacy until

¹⁰⁸ Ibid 208 (Barton J agreeing at 211).

¹⁰⁹ Ibid 216 (emphasis added).

¹¹⁰ Isaacs J's reference to the '*Land Transfer Act*' here is a reference to the *Real Property Act* and other similar statutes then operative in Australasia.

registered—that is, until statutory completion as an instrument of title—cannot cut down or merge the pre-existing right which led to its execution.

- [227] The Purchasers rely on the emphasised portion of the judgment of Isaacs J in support of their contention as to the effect of s 183.
- [228] In my view, the Purchasers' submission misapprehends the import of Isaac J's judgment. His Honour was not referring to a separate equitable right or interest created by any legislative provision. Rather, his Honour was speaking of the right to have an instrument executed and registered according to applicable rules of equity that would arise from the contractual agreement between the parties.
- [229] In *Breskvar*, the Breskvars, the registered proprietors of an estate in fee simple under the *Real Property Acts, 1861–1963* (Qld), executed a transfer and gave it, along with the title deeds to their land, to Petrie, as security for a loan. The transfer deliberately did not include the name of any transferee. It was intended that Petrie would simply retain the incomplete transfer as security until the loan was repaid.
- [230] Without the knowledge or permission of the Breskvars, Petrie inserted the name of his grandson, Wall, as transferee and caused the transfer to be registered. Acting on Wall's behalf, Petrie then entered into a contract to sell the land to Alban Pty Ltd ('**Alban**'). The Breskvars discovered what had occurred and lodged a caveat before the transfer from Wall to Alban was lodged for registration. Alban had bought the land relying upon the details recorded in the register, showing Wall as the registered proprietor.
- [231] Section 48 of the *Real Property Act 1877* (Qld), the comparable statutory provision in terms and effect to s 183 of the current *LTA*, provided:

48 Unregistered instrument to confer claim to registration.

Every instrument signed by a proprietor or by others claiming through or under him purporting to pass an estate or interest in or security upon land for the registration of which provision is made by this Act shall until registered be deemed to confer upon the person intended to take under such instrument or other person claiming through or under him a right or claim to the registration of such estate interest or security...

- [232] The Court was required to consider which party had the better claim to title, the Breskvars as the former registered proprietors who had been divested by the fraudulent actions of Petrie, or Alban, as a *bona fide* purchaser for value without notice of the Breskvars' claim. Alban was found to have the better equity because the Breskvars had provided the incomplete transfer that enabled Petrie to perpetrate the fraud.
- [233] Separate judgments were given by each of Barwick CJ,¹¹¹ McTiernan J, Menzies J, Walsh J and Gibbs J.

¹¹¹ Windeyer J agreeing and adding some additional observations at 399, and Owen J agreeing at 400.

[234] In his judgment, Barwick CJ made the following often-cited statement:¹¹²

The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void...

[235] Barwick CJ considered the Breskvars' claim was an equitable claim, whether regarded as a mere equity or an equitable interest in the land. His Honour considered the interest of Alban was an equitable interest in land.¹¹³

[236] With respect to s 48 of the *Real Property Act 1877* (Qld), Barwick CJ stated:¹¹⁴

I do not think myself that this provision adds anything significant to the position of the third respondent. Without that section his presentation of the memorandum of transfer with the duplicate certificate of title, which I assume he obtained on settlement of his purchase, would have entitled him to registration, subject of course to the effect of the appellants' caveat. So far as concerns an equitable interest in the land and competition with the interest of the appellants, the third respondent would, in my opinion, be in as strong a position without that section as it is with it. There is thus a competition between the respective interests of the appellants and of the third respondent to be resolved on equitable principles.

[237] McTiernan J similarly considered s 48 to be a recognition of equitable interests in land.¹¹⁵

[238] Menzies J also characterised the Breskvars' interest as an equitable interest.¹¹⁶ However, his Honour placed significance on the operation of s 48 as a statutory right, relevantly stating:¹¹⁷

...What Alban Pty. Ltd. holds, however, is a transfer from the registered proprietor, albeit a registered proprietor with a defeasible title, and it is necessary to determine what rights it has solely as such transferee.

Whatever may be the position in other cases, it seems to me that in this case that question is resolved by a particular enactment which is not to be found generally in state legislation establishing the Torrens system. This enactment is s. 48 of The Real Property Act of 1877...

...

¹¹² *Breskvar* 385–6.

¹¹³ *Ibid* 387–8.

¹¹⁴ *Ibid* 388.

¹¹⁵ *Ibid* 393.

¹¹⁶ *Ibid* 398.

¹¹⁷ *Ibid* 398–9.

Wall, as I have already decided, was ‘a proprietor’ and by virtue of the section, therefore, Alban Pty. Ltd. has a right or claim to the registration of the estate which the transfer purports to pass.

- [239] Walsh J similarly reasoned that s 48 provided a statutory right. After setting out the section, his Honour stated:¹¹⁸

That section is still in force. In my opinion, it operated in the present case to confer upon Alban a right or claim to the registration of the estate in fee simple described in the transfer executed by Wall. I am of opinion that that right is superior to the rights upon which the appellants rely in their claim to have the title restored to them. Against a right given by the statute to Alban they cannot set up successfully their equitable right based upon the fraud practised upon them by Petrie and Wall but not by Alban. But even if the provisions of s. 48 were not part of the law by which this case is to be governed, I should be of opinion that the equitable right derived by Alban from the contract made by it in good faith with Wall must prevail, upon the application of the principles established by the authorities to which I have referred to the facts admitted or proved at the trial, against the claim of the appellants.

- [240] It seems that Menzies J and Walsh J considered the statutory right to registration of Alban was superior to the equitable right of the Breskvars. None of the other members of the Court shared that view. However, Walsh J still considered that, even absent such a statutory right, Alban’s equitable right would prevail over that of the Breskvars.

- [241] Finally, in a short, separate judgment, Gibbs J stated:¹¹⁹

When Wall became registered in fact he became vested with the legal title to the land although his title was not immune from the adverse claim of the appellants, who had the right as against him to be restored as registered proprietors. I am prepared to assume in favour of the appellants that after Wall's registration they continued to have an equitable interest in the land, rather than a mere equity to set the transfer aside... However Alban Pty. Ltd., which purchased the land from Wall in good faith and for value, and was given a memorandum of transfer in registrable form signed by Wall, also acquired an equitable interest in the land and the right to the registration of that interest (see s. 48 of *The Real Property Act of 1877* (Q.) and *Barry v. Heider*)...

- [242] It is apparent from the above excerpt that Gibbs J considered the equitable interest acquired by Alban arose from its contractual agreement with Wall and not from s 48 of the *Real Property Act 1877* (Qld), but that s 48 provided a statutory right to have the transfer registered.

- [243] In my view, aside from the judgments of Menzies J and Walsh J, none of the other judgments of the Court in *Breskvar* support the Purchasers’ submission that s 183 of the *LTA* creates a separate, independent equitable right or interest in an estate. On

¹¹⁸ Ibid 411.

¹¹⁹ Ibid 413.

the contrary, they confirm my view that s 183 of the *LTA* only provides for a statutory right of registration of an instrument.

- [244] In my opinion, the authorities cited by the Purchasers do not establish the proposition that s 183 creates a separate, independent equitable right. Accordingly, in my view, any consideration of ‘competing priorities’ is to be determined on the basis that the Purchasers’ equitable interest in the property at 30 Francis Street arose from their entry into the Purchase Contract.

The Purchasers’ case

- [245] Having considered the nature of the Purchasers’ equitable interest, it is necessary to next say something further about the doctrinal bases upon which the case for the Purchasers is pleaded and propounded and to refer further to the authorities the Purchasers rely upon.
- [246] The case for the Purchasers in respect of the asserted priority of their interest appears to be advanced on three related bases.
- [247] *First*, the Purchasers assert a case of estoppel against Ms Issa.¹²⁰ The Purchasers plead that by lodging her caveat on 23 March 2018, which contained the grounds of her claim, Ms Issa asserted the Mortgage was a fraud, that the purported Mortgage did not secure any debts owed by her, and that the Mortgagees therefore did not have a power of sale pursuant to the Mortgage (**‘Assertion of Fraud’**).¹²¹ The Purchasers claim that by her conduct in subsequently withdrawing her caveat before settlement (**‘First Representation’**)¹²² and taking the benefit of the \$40,000 paid at settlement (**‘Second Representation’**),¹²³ she represented that she no longer relied upon, and would no longer make, her Assertion of Fraud.
- [248] The Purchasers then claim that they, relying upon each of the First and Second Representations, proceeded with settlement, went into possession of the property and subsequently lodged the Transfer and the Caveat Removal Request for registration.¹²⁴ The Purchasers further claim that it would be unconscionable for Ms Issa to resile from her representations as they will suffer detriment if she is permitted to do so.¹²⁵
- [249] It is in those circumstances that the Purchasers say Ms Issa is now estopped from making the Assertion of Fraud to claim that the Mortgagees had no power of sale under the Mortgage, and that she is thereby estopped from seeking the cancellation of the lodged Transfer.¹²⁶
- [250] The Purchasers also raised an allied argument, relying upon the decision in *Klement v Pencoal* (**‘Klement’**),¹²⁷ that Ms Issa had a duty to warn the Purchasers that she still maintained her interest in 30 Francis Street and that her failure to do so is a further reason why she is estopped from asserting otherwise.

¹²⁰ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 11–13 [21]–[28A].

¹²¹ Ibid 2 [4].

¹²² Ibid 11 [21].

¹²³ Ibid 11 [24].

¹²⁴ Ibid 12 [26].

¹²⁵ Ibid 12 [27]–[28].

¹²⁶ Ibid 12 [28].

¹²⁷ [2000] QCA 152, 7–9 [19]–[25].

- [251] The Purchasers further argue that this case is ‘on all fours’ with *Barry* and therefore Ms Issa is estopped, regardless of whether her interest is considered a legal interest or an equitable interest.¹²⁸ The Purchasers submit that an equitable interest can defeat a prior legal interest if the holder of the legal interest has misled the person dealing with the property that they were entitled to acquire that interest.¹²⁹ In that respect, the Purchasers cite Issacs J’s endorsement in *Barry* of the following statement of principle by Lord Herschell in *London Joint Stock Bank v Simmons*:¹³⁰

The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner...

- [252] As I understand it, the Purchasers’ case in short is that Ms Issa had, by her conduct, ‘misled’ them into believing that the Mortgagees had the power to sell 30 Francis Street to them.
- [253] *Further*, or in the alternative, the Purchasers advance a case that Ms Issa is ‘bound by the natural consequences of her acts’ in ‘arming’ them with the Caveat Removal Request, as the Purchasers would naturally seek to obtain the benefit of that document by lodging it so that the Transfer could be registered.¹³¹
- [254] This aspect of the Purchasers’ case is premised upon *Abigail v Lapin* (*‘Abigail’*).¹³² In that case, the Judicial Committee of the Privy Council considered an appeal from the High Court where the respondents, the Lapins, had transferred certain land to Heavener as security for a debt. The transfer expressed that it was made in consideration of a payment of money to the Lapins. The Lapins did not lodge a caveat in respect of their interest. After the transfer was registered, without the knowledge or consent of the Lapins, Heavener executed a mortgage in favour of the appellant, Abigail, as security for a loan made by him to her. Abigail had no notice that the transfer executed by the Lapins was only to be by way of security. The mortgage was not registered. At issue were the competing equities of the Lapins and Abigail.
- [255] The Judicial Committee held that Abigail’s equitable mortgage took priority over the Lapins’ equitable right to redeem. In delivering judgment for the Judicial Committee, Lord Wright endorsed the following statement from the dissenting joint judgment of Gavan Duffy and Starke JJ in the High Court:¹³³

In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute

¹²⁸ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 9 September 2022) 5-90:26-8.

¹²⁹ MFI C – Outline of closing submissions on behalf of the Eighth and Ninth Defendants, 5 [37(p)].

¹³⁰ *Barry* 219, quoting *London Joint Stock Bank v Simmons* [1892] AC 201, 215.

¹³¹ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 12-13 [28A].

¹³² (1934) 51 CLR 58.

¹³³ *Ibid* 64, quoting *Lapin v Abigail* (1930) 44 CLR 166, 198.

transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of Abigail to the extent allowed by the Supreme Court.

[256] Lord Wright later went on to state:¹³⁴

Apart from priority in time, the test for ascertaining which encumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim; in the present case the respondents on the one hand enabled the Heavener to represent themselves as legal owners in fee simple, while on the other hand it cannot be said that Abigail did or omitted to do anything which he should have done in lending the money on the security, though he might, by registering the mortgage, have secured the legal title. . . .

[257] Although the actual representation to Abigail was made by Heavener, Lord Wright observed:¹³⁵

It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed... But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is, in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often as here because that party has vested in him a legal estate or has given him the *indicia* of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the appellants to succeed in this appeal.

[258] *Finally*, under the heading of 'Discretion', the further or alternative basis for the Purchasers' case is that, in the event that s 187 of the *LTA* is engaged (which they deny), any right that Ms Issa may have in equity to set aside the Mortgage must be postponed to their rights as equitable owners.¹³⁶ The Purchasers then plead a series of asserted facts relating to Ms Issa's conduct in deliberately providing her Caveat Removal Request, in consideration for \$40,000, in circumstances where she is said to have known that request would be provided to the Purchasers, but where she did not disclose to them that she intended to challenge the validity of the Mortgage.¹³⁷

[259] In the course of submissions, counsel for the Purchasers addressed the pleadings and characterised the various related bases of the Purchasers' case in this way:¹³⁸

...there's a distinction in the pleading between estoppel and a general discretion and equity. In truth, the High Court authorities seem to say

¹³⁴ Ibid 68–9.

¹³⁵ Ibid 71 (emphasis in original).

¹³⁶ Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 13 [29].

¹³⁷ Ibid.

¹³⁸ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 8 September 2022) 4-16:10–13.

there really is no distinction, that it's really just an assessment as to who should prevail and – in an overall sense, having – holding the better equity.

- [260] As I understand the argument and the way the Purchasers' case was put, aside from whether the case is 'on all fours' with *Barry* such that a legal interest might be defeated by a later equitable interest, the issues of estoppel or whether Ms Issa is bound by the 'natural consequences' of her conduct are simply circumstances to consider as part of the wider analysis of which party has the better equity.
- [261] This approach accords with various observations made by the High Court in *Heid v Reliance Finance Corporation Pty Ltd* ('*Heid*').¹³⁹
- [262] In *Heid*, Gibbs CJ, after considering various authorities, including *Abigail* and *Rimmer v Webster*,¹⁴⁰ concluded:¹⁴¹

The decisions in such cases...may be based, alternatively, on the principle that a person who hands over title deeds to an agent with authority to deal with the property in a restricted manner cannot rely on the restrictions as against the third party who had no notice of them, and on the doctrine of estoppel. The former principle is said to have its origins in equity, and has been distinguished from estoppel..., but it seems to me that it may be regarded as a particular form of estoppel. However, either principle will determine the present case, and it is sufficient to deal with the question whether the ordinary rules of estoppel prevent the appellant from asserting his equitable interest against the respondents.

- [263] The Chief Justice further considered that the 'natural consequences' principle expressed in *Abigai* was not necessarily a concept distinct from estoppel. On the issue of estoppel, and its application to the circumstances of the case at hand, his Honour stated:¹⁴²

The essential elements of an estoppel by representation, summarily stated, are that there must have been a representation (by words or conduct or, if there was a duty to speak or act, by silence or inaction) upon the faith of which the representee has acted to his detriment. No direct representation in the present case was made by the appellant to Reliance Finance but, as Lord Wright explained in *Abigail v. Lapin*, that is immaterial. The act of the appellant in allowing Gibby to have the certificate of title and the memorandum of transfer which acknowledged receipt of the purchase price armed Gibby's employer with the means of dealing with the land as absolute legal and equitable owner; in other words it armed Connell Investments 'with the power of going into the world under false colours': *Dixon v. Muckleston* (1872) LR 8 ChApp 155, at p 160. When in these circumstances Reliance Finance acted to its detriment on the assumption, to which the appellant's conduct had contributed, that no adverse equitable interest existed, the appellant is estopped from setting up his equitable interest. The result' may be explained in point

¹³⁹ (1983) 154 CLR 326.

¹⁴⁰ [1902] 2 Ch 163, 173 (Farwell J).

¹⁴¹ *Heid* 335.

¹⁴² *Heid* 335–6 (citations omitted).

of principle by saying (as was said in *Lapin v. Abigail* (1930) 44 CLR, at p 198) that the appellant is bound by the natural consequences of his acts, although I would prefer to say, in the words of Griffith C.J. in *Barry v. Heider* (1914) 19 CLR 197, at p 208, that ‘the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice’, that Connell Investments had an absolute interest.

[264] In their joint judgment, Mason and Deane JJ commenced by observing:¹⁴³

Where the merits are equal, the general principle applicable to competing equitable interests is summed up in the maxim *qui prior est tempore potior est jure* – priority in time of creation gives the better equity. But where the merits are unequal and favour the later interest, as for instance where the owner of the later equitable interest is led by conduct on the part of the owner of the earlier interest to acquire the later interest in the belief or on the supposition that the earlier interest did not then exist, priority will be accorded to the later interest.

A common illustration of conduct on the part of the owner of an equity which postpones his interest is the arming of a third person with the indicia of title, such as the delivery of title deeds and an instrument of transfer of the property containing or accompanied by an acknowledgement that the third party has paid the consideration for it in full. Generally speaking in this situation a person who acquires an interest from the third party for value without notice of the prior interest takes in priority. To use the words of Lord Selborne L.C. in *Dixon v. Muckleston* (1872) LR 8 Ch App 155, at p 160, words which have often been repeated in the cases to which we have referred, the owner of the first equity is said to have ‘armed’ the third party ‘with the power of going into the world under false colours’.

The theoretical basis for granting priority, in such circumstances, to the later interest has been the subject of debate. Some have found the basis in the doctrine of estoppel; others have identified a more general principle that a preference should be given to what is the better equity on an examination of the circumstances, especially the conduct of the owner of the first equity...

[265] After further consideration of the authorities and the difficulties in attempting to reconcile the different concepts within one overarching equitable doctrine, their Honours stated:¹⁴⁴

For our part we consider it preferable to avoid the contortions and convolutions associated with basing the postponement of the first to the second equity exclusively on the doctrine of estoppel and to accept a more general and flexible principle that preference should be given to what is the better equity in an examination of the relevant circumstances. It will always be necessary to characterize the conduct of the holder of the earlier interest in order to determine whether, in all the circumstances, that conduct is such that, in fairness and in justice, the earlier interest should be postponed to the later interest...

¹⁴³ Ibid 339 (citations omitted).

¹⁴⁴ Ibid 341 (citations omitted).

To say that the question involves general considerations of fairness and justice acknowledges that, in whatever form the relevant test be stated, the overriding question is ‘. . . whose is the better equity, bearing in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the first or prior owner has enabled such a representation to be made...’ Thus elements of both negligence and estoppel will often be found in the statements of general principle.

[266] Having regard to the way the Purchasers put their case, and on the basis of the foregoing statements of principle, it seems to me that the proper approach to the Purchasers’ case is not to disaggregate its component parts for individual consideration, but to instead consider each as circumstances relevant to the question of which party has the better equity.

[267] In determining which party has the better equity, it is necessary to consider all the circumstances of the case. The traditional approach to determining priority between competing equitable interests was that, where the merits are equal, the earlier in time prevails over the later.¹⁴⁵ However, as Kitto J stated in *Latec Investments Ltd v Hotel Terrigal Pty Ltd*:¹⁴⁶

...In all cases where a claim to enforce an equitable interest in property is opposed on the ground that after the interest is said to have arisen a third party innocently acquired an equitable interest in the same property, the problem, if the facts relied upon as having given rise to the interests be established, is to determine where the better equity lies. If the merits are equal, priority in time of creation is considered to give the better equity. This is the true meaning of the maxim *qui prior est tempore potior est jure*: *Rice v. Rice* (1853) 2 Drew 73, at p 78 (61 ER 646, at p 648). But where the merits are unequal, as for instance where conduct on the part of the owner of the earlier interest has led the other to acquire his interest on the supposition that the earlier did not exist, the maxim may be displaced and priority accorded to the later interest...

[268] The final point to note with respect to the Purchasers’ case as to the contended priority of their interest is a belated argument raised in closing submissions that Ms Issa’s conduct in withdrawing her caveat ‘may have constituted an irrevocable election’.¹⁴⁷ As I understand this aspect of the case, the Purchasers claim that by ‘electing’ to withdraw her caveat, Ms Issa ‘elected’ to relinquish her interest in 30 Francis Street and chose instead to pursue a claim against the Mortgagees.

Who has the better equity?

[269] As outlined above, the equitable interest in the property at 30 Francis Street acquired by the Purchasers arose when they entered into the Purchase Contract with the Mortgagees. In contrast, Ms Issa’s right to set aside the fraudulent Mortgage arose earlier in time. Whilst this does not necessarily determine the relative priority of the respective interests of the parties, it is a factor that forms part of the overall circumstances.

¹⁴⁵ *Rice v Rice* (1853) 2 Drew 73.

¹⁴⁶ (1965) 113 CLR 265, 276 (emphasis in original) (citations omitted).

¹⁴⁷ MFI C – Outline of closing submissions on behalf of the Eighth and Ninth Defendants, 8 [45].

- [270] Ms Issa took steps to protect her interest and put other persons on notice by lodging her caveat. Ms Issa caused the caveat to be lodged before the auction of 30 Francis Street.
- [271] At the time the Purchasers acquired their equitable interest, Ms Issa's caveat had been lodged and it was recorded on the register. Being recorded on the register, the caveat operated as a 'notice to all the world' of her interest.¹⁴⁸ It would have been apparent to anyone who searched the register.
- [272] The Purchasers did not, however, conduct a search of the register before entering into the Purchase Contract. Instead, they relied upon a copy of a dated title search attached to the contract provided by the Mortgagees, which did not show Ms Issa's caveat. The Purchasers were unaware of the caveat and simply assumed the Mortgagees were able to transfer the legal interest in the property to them, free from any encumbrance or other interest, by entering into the sale contract. This assumption, which later proved to be false, was made because of the conduct of the Mortgagees and their own failure to take a prudent step before bidding at the auction and entering into the Purchase Contract.
- [273] It simply cannot be said that any act, omission or representation by Ms Issa induced the Purchasers to enter into the Purchase Contract. Further, any later conduct on the part of Ms Issa could not have had any bearing on any assumptions made by the Purchasers at the time they acquired their equitable interest. At this point in the sequence of events, Ms Issa's interest would clearly have priority.
- [274] However, the Purchasers' case extends beyond a consideration of competing interests at the moment they contracted to purchase the property; they also point to subsequent 'disentitling conduct' on the part of Ms Issa as the basis for their better equity.
- [275] Ms Issa contends that any later conduct cannot be considered as the inquiry is restricted to conduct that occurred up to the time the Purchasers' interest was acquired. I do not accept that submission. It is contrary to authority.¹⁴⁹ The concept of disentitling conduct in this context is not necessarily confined to acts contributing to the creation or acquisition of a later equitable interest.¹⁵⁰ Later conduct by either party forms part of the circumstances that may be relevant to determining who has the better equity.
- [276] Even so, I do not consider Ms Issa's subsequent conduct in agreeing to withdraw her caveat and causing the Caveat Removal Request to be provided to the Purchasers' solicitors at settlement amounts to unmeritorious conduct of such a kind that her prior interest ought to be postponed. In my opinion, Ms Issa's interest is to be preferred to the interest of the Purchasers, regardless of how the Purchasers' case is premised.

¹⁴⁸ *Butler v Fairclough* (1917) 23 CLR 78, 91 (Griffith CJ); *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, 554 (Barwick CJ).

¹⁴⁹ *Clark v Raymor (Brisbane) Pty Ltd (No 2)* [1982] Qd R 790, 797 (Thomas J, Campbell CJ agreeing at 790 and Andrews SPJ agreeing at 791), quoted with approval in *IWC Industries Pty Ltd v Sergienko* (2021) 20 BPR 41,785, 41, 805 [73] (Gleeson JA, Bathurst CJ agreeing at 41,794 [1], Ward JA agreeing at 41,794 [2]).

¹⁵⁰ *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd* (2017) 18 BPR 36,683, 36,724–728 [228]–[253] (Ward JA, McColl JA agreeing at 36,686 [1], Gleeson JA agreeing at 36,752 [379]).

- [277] I will deal first with the Purchasers' estoppel claim. Aside from the difficulties created by the Purchasers' case being somewhat imprecisely expressed and failing to clearly identify the nature or species of estoppel that they contend arises,¹⁵¹ in my opinion, this aspect of the Purchasers' case simply cannot be established. There are various reasons why this is so.
- [278] *First*, Ms Issa's actions in agreeing to withdraw the caveat and causing the Purchasers to be provided with the Caveat Removal Request do not amount to a representation that she no longer maintained the Assertion of Fraud. Any such representation would need to be clear and unambiguous.¹⁵² I do not consider that this is established. Further, to the extent that her conduct in agreeing to withdraw the caveat might suggest otherwise, it is pertinent to note that although the Purchasers became aware of the existence of Ms Issa's caveat shortly before the initial settlement date, they were never aware of the grounds of Ms Issa's claim at any time before settlement. Moreover, there is no evidence that they were aware of the basis upon which Ms Issa agreed to withdraw the caveat in consideration of payment of \$40,000 by the Mortgagees. Accordingly, Ms Issa's conduct could not have conveyed either of the pleaded First or Second Representations to the Purchasers.
- [279] *Second*, for the same reasons, it cannot be said that the Purchasers relied on either of these representations by Ms Issa when they proceeded to settlement. Rather, the Purchasers relied upon representations made by the Mortgagees and their own mistaken belief that Ms Issa's caveat had been 'defeated' and removed by an order of the Court. On that assumption, they proceeded to settlement on an understanding that there would be no impediment to completion. Their assumption was not one induced or caused by Ms Issa's conduct. Indeed, they were not even aware at the time of settlement that Ms Issa had voluntarily agreed to withdraw the caveat. Although Mr Morecroft was aware that Ms Issa would be providing the Caveat Removal Request at settlement, his understanding was that this was due to the Court having determined the matter.
- [280] *Third*, contrary to the Purchasers' assertion, there is no basis to find that Ms Issa knew or ought to have known that the Purchasers would rely upon either or both of the First and Second Representations.¹⁵³
- [281] *Fourth*, for the same reasons, it cannot be said that the Purchasers have suffered any detriment caused by representations made by Ms Issa. Any detriment suffered by the Purchasers in proceeding to settlement arises from the conduct of the Mortgagees, who held a defeasible interest but who nevertheless represented they held a valid and clear title and purported to exercise a power of sale accordingly. It is also to be noted that any expenses incurred in respect of the property after 16 July 2018 were incurred with the knowledge of the Registrar's Caveat.

¹⁵¹ The pleadings suggest the case is one of estoppel by representation. The written and oral submissions for the Purchasers did not provide any further clarity and did not attempt to identify or address in any detail the elements of the estoppel that were required to be established or considered. The difficulties with such an approach were noted in *DHJPM Pty Ltd v Blackthorn Resources Limited* (2011) 83 NSWLR 728, 739 [44] (Meagher JA, Macfarlan JA agreeing at 730 [1]).

¹⁵² *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1, 15 [35] (French CJ, Kiefel and Bell JJ).

¹⁵³ Cf. Defence of the Eighth and Ninth Defendants to the Second Further Amended Statement of Claim, filed 8 August 2022, 11 [22], 12 [25].

- [282] *Finally*, I do not consider it to be unconscionable for Ms Issa to assert in these proceedings that the Mortgage was a fraud and that the Mortgagees were not permitted to exercise a power of sale in respect of the property. She did not deal with the Purchasers at any stage. She gave them no assurance, whether directly or indirectly, that she would not act to assert her rights. She is the victim of a fraud perpetrated by her son and compounded by wholly inadequate identity verification processes undertaken by the Mortgagees, contrary to law. She has consistently complained of these matters and has maintained her claimed interest in 30 Francis Street. Despite the Mortgagees being aware of Ms Issa's complaint of fraud and of their own failure to take reasonable steps to verify that she had in fact executed the Mortgage, the Mortgagees persisted with the auction, sale and settlement and did not disclose any such matters to the Purchasers.
- [283] Further, contrary to the pleaded case, because I do not find Ms Issa made either the First or Second Representation, I do not consider Ms Issa is now attempting to resile from them.
- [284] I should also add that I reject the submission made on behalf of the Purchasers that the present case was 'on all fours' with *Barry*. In that case, the signed transfer provided by Barry operated as a representation that Schmidt had an assignable interest, and Barry was therefore estopped from asserting his interest. The present case is very different. Ms Issa's conduct did not constitute either of the pleaded representations. She did not provide a transfer. Instead, she agreed to withdraw a caveat in circumstances where she reserved 'all her rights'. Further, she only lodged the caveat to protect her interest after she became aware the Mortgagees were about to sell her home in a purported exercise of a power of sale under a fraudulent mortgage. She did not mislead the Purchasers into believing they were entitled to acquire the legal interest in the property; that was done by the Mortgagees.
- [285] For similar reasons, I do not accept that Ms Issa's interest ought to be postponed to that of the Purchasers because the natural consequence of 'arming' them with the Caveat Removal Request would be that they would seek to register the Transfer and thereby become the registered owners of the property with an indefeasible interest. The situation here is quite unlike that in *Abigail*. The executed Caveat Removal Request did not 'arm' the Purchasers with an instrument that enabled them to deal with 30 Francis Street. The instrument that would enable them to do that was the executed Transfer. The provision of the Caveat Removal Request did not provide the Purchasers with the power to go into the world as the absolute owners of the property. If the caveat had been removed pursuant to the Caveat Removal Request, and the Purchasers' Transfer had been registered, then the Purchasers would have become the absolute owners of the property, with indefeasible title. That did not occur.
- [286] Finally, I do not consider that, in all the circumstances, the interest of Ms Issa should be postponed to that of the Purchasers as the Purchasers have the better equity. As I have already concluded, this supposed 'contest' is artificial. The real contest is not between competing equitable interests in the property but rather between Ms Issa's legal interest as the registered proprietor of an interest in fee simple and the Purchasers' equitable interest. The interest of the Purchasers simply cannot 'trump' the interest of Ms Issa.
- [287] When Ms Issa discovered the fraud, she immediately took steps to protect her interest, including by lodging a caveat. Although she withdrew the caveat, thereby facilitating the settlement of the Purchase Contract, her conduct does not amount to

disentitling conduct in my view. Ms Issa was clearly pressured by the Mortgagees and their lawyers to withdraw the caveat. She was faced with the prospect of costly legal proceedings brought by the Mortgagees to have the caveat removed, which she could not afford to defend and which she had been advised, rightly or wrongly, that she may not be able to successfully defend. Whilst she did agree to withdrawal of the caveat in consideration of payment of \$40,000 from the Mortgagees from the sale proceeds, that was done on the express basis that she reserved ‘all her rights’. She continued to maintain her claim of fraud.

- [288] I do not consider that Ms Issa was under any duty or obligation to disclose to the Purchasers that she intended to seek to retain her property and, by failing to do so, she risked losing her interest.¹⁵⁴ The present case is entirely different to *Klement*.¹⁵⁵ That case involved a claim by one of two business partners, Klement, that the other, Lindner, had forged his signature in order to transfer a mining lease and other property held by them as tenants in common to Pencoal, who in turn transferred the property to another party, South Blackwater Coal Limited (**‘South Blackwater’**). Klement claimed that South Blackwater held one half of the interest it had acquired in the property on trust for his benefit, on the basis that because of the forgery of his signature there had been no effective transfer of his interest to either Pencoal or subsequently to South Blackwater.
- [289] Klement’s claim was rejected at first instance and again on appeal. Although there was no question that Klement’s signature had been forged by Lindner, the case turned upon whether Lindner had been acting as Klement’s agent when he engaged in the relevant transactions. The relationship between the two men was described by the trial judge as one marked by ‘fluid informality’ and that aspects of it were ‘strange’ and even ‘bizarre’. Klement had previously executed a Power of Attorney, granting Lindner authority to negotiate any business pertaining to their joint interests in the subject property. Shortly before Lindner forged Klement’s signature on the transfers, Klement revoked the Power of Attorney and informed Lindner accordingly. Notwithstanding that his authority had been terminated, Lindner proceeded with the transactions. Klement became aware of this, and either knew or must have suspected that Lindner had forged his signature, yet he took no steps to protect his interest or notify any other party of the possibility of forgery or the revocation of Lindner’s authority.
- [290] In those circumstances, the trial judge found that Klement had held out Lindner as his agent to conduct the entire transaction on his behalf. Although Klement did not authorise Lindner to forge his signature, his authority extended to producing relevant documents purporting to have been executed by the vendors in performance of their obligations. Consequently, the trial judge found that Klement was estopped from denying the validity of his signature on the transfers and that his deliberate failure to disavow the forgery for more than three years, despite knowledge of it, amounted to ratification of its effectiveness. The trial judge further found that Klement had been duty bound to warn Pencoal (and South Blackwater) of the forgery, but that he had failed to do so.
- [291] On appeal, the Court of Appeal confirmed that in the circumstances, Klement became obliged to inform Pencoal when he became aware of the forgery if he wished to subsequently assert that his signature had been forged. Similarly, the

¹⁵⁴ *Klement* 7–9 [19]–[25].

¹⁵⁵ *Ibid.*

Court held that Klement was obliged to notify any other party that he knew was proceeding as if Lindner had authority to act on his behalf that Lindner's authority had been terminated. By failing to do so, he was, as the trial judge had found, estopped from raising the issue of forgery and denying Lindner's authority to act on his behalf.

- [292] In the present case, the Mortgagees were not acting as agents for Ms Issa, nor were they clothed with any authority to act on her behalf. Ms Issa was not under any duty or obligation to inform the Purchasers that she maintained the Mortgage had been procured by fraud and her signature had been forged.
- [293] The Purchasers acquired their interest later in time. They did so in circumstances where they failed to conduct their own title search before entering into the Purchase Contract. This is not a case where it can be said that no step was omitted by them by which they could have ascertained the existence of Ms Issa's prior interest.¹⁵⁶ They relied simply upon the dated and inaccurate title search provided by the Mortgagees and the fact that the Mortgagees were purporting to exercise a legitimate power of sale under the Mortgage. A search of the title before entering into the contract for sale is an inquiry that a reasonably prudent person would be expected to have made in the circumstances, particularly where they were aware that the sale was being undertaken pursuant to the purported exercise of a mortgagee's power of sale. In those circumstances, the Purchasers may be taken to have had constructive notice of the caveat and Ms Issa's prior interest at the time they entered into the Purchase Contract.¹⁵⁷
- [294] Further, although the Purchasers subsequently came to have actual knowledge of Ms Issa's caveat, they were never aware of the grounds of her claim at any stage before settlement. They took no steps, or insufficient steps, to find out the basis for the caveat. Indeed, according to the evidence of Mr Morecroft, even after receiving the correspondence from Crown Law in October 2018, the Purchasers were still unaware of the basis for Ms Issa's caveat. Whilst they are now aware of Ms Issa's allegations of fraud, they nevertheless press for registration of a transfer instrument obtained as a result of a patently fraudulent Mortgage and the unscrupulous conduct of the Mortgagees, who purported to exercise a power of sale in circumstances where they did not take reasonable steps to verify the identity of the mortgagor as identical to the registered owner and where they had been put on notice of Ms Issa's claim of fraud.
- [295] Whilst it may be accepted as a general principle that a withdrawal of a caveat indicates that the caveator no longer seeks to sustain the interest which the caveat had sought to protect,¹⁵⁸ in my view that does not assist the Purchasers in this case. The Caveat Removal Request was provided at the request of the Mortgagees and on the basis that Ms Issa reserved all her rights. Further, this is not a case where the

¹⁵⁶ Cf *Barnes v James* (1902) 27 VLR 749, 752 (à Beckett J).

¹⁵⁷ *Roberts Gray Pty Ltd v Brunner* [2021] VSC 76, 45–6 [161] (Daly AsJ), citing *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 195 (Lord Browne-Wilkinson, Lord Templeman agreeing at 185, Lord Lowry agreeing at 185, Lord Slynn agreeing at 199, Lord Woolf agreeing at 199); *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266, 287–9 (McPherson JA), consistent with the position under s 346(1)(a) of the *Property Law Act 1974* (Qld).

¹⁵⁸ *Elderly Citizens Homes of SA Inc v Balnaves* (1998) 72 SASR 210, 227 (DeBelle J); *Performance Capital Mortgage Pty Ltd v Motive Finance and Leasing Pty Ltd* (2010) 15 BPR 29,267, 29,272 [35]–[36], 29,273 [38] (Windeyer AJ); *Barlin Investments Pty Ltd v Westpac Banking Corporation* (2012) 16 BPR 30,671, 30,679–80 [32] (Ball J); *Chan v Liu* [2020] VSCA 28, 17–19 [65]–[69] (Beach, Kyrou and Kaye JJA).

Purchasers acted in the belief that the caveat had been removed by the registered proprietor because she no longer sought to sustain her interest in the property. Rather, the Purchasers mistakenly believed that the merits of Ms Issa's caveat had already been considered by the Court and 'defeated', resulting in an order of the Court for its removal. They proceeded to settlement on this basis.

- [296] Having regard to all the relevant circumstances, in my opinion, Ms Issa's conduct is not such that, in fairness and justice, her interest should be postponed to that of the Purchasers.
- [297] Finally, in my opinion, the Purchasers' case on election must be rejected.
- [298] Irrespective of the fact that no such case was pleaded by the Purchasers when it ought to have been,¹⁵⁹ the Purchasers' contention is factually and legally flawed.
- [299] An election is 'an intentional act, done with knowledge, whereby a person abandons a right by acting in a manner inconsistent with that right'.¹⁶⁰ The Purchasers here do not clearly identify the inconsistent rights between which Ms Issa is said to have chosen. The Purchasers seem to contend that by withdrawing her caveat, Ms Issa elected not to seek to set aside the sale.¹⁶¹
- [300] She did no such thing. Lodging a caveat does not create or enlarge rights.¹⁶² Axiomatically, withdrawing a caveat does not constitute an election between rights.
- [301] Further, Ms Issa did not abandon any right she had to seek relief against the Mortgagees in respect of the fraudulent mortgage or their purported exercise of a power of sale. Indeed, she expressly reserved 'all her rights'. It can hardly be said that her conduct amounted to an irrevocable election between inconsistent rights that were available to her.
- [302] The statements made by the Court in *Chan v Liu* which the Purchasers cite do not establish any principle that would support the Purchasers' argument in the circumstances of this case.¹⁶³ The observations of the Victorian Court of Appeal in that case were made in respect of an interlocutory appeal against a decision of a judge sitting in the Practice Court to refuse an application to set aside a caveat. In that context, the Court observed that it was strongly arguable that the respondent had elected to pursue a claim for damages for breach of contract rather than a remedy of specific performance. However, the Court also noted earlier in their judgment that, as the application for removal of the caveat was in the nature of an interlocutory injunction and not a final determination of substantive issues, it was neither appropriate nor necessary to determine conclusively whether, on the evidence, there was a binding election by the respondent which would preclude him from seeking specific performance of the contract of sale.¹⁶⁴
- [303] Irrespective of the merits of the argument advanced by the Purchasers with respect to the supposed priority of their equitable rights or interests, I do not consider the

¹⁵⁹ In accordance with r 150(1)(s) of the *Uniform Civil Procedure Rules 1999* (Qld) ('UCPR'), a waiver is a matter that must be specifically pleaded.

¹⁶⁰ *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 588 [56] (Gummow, Hayne and Kiefel JJ).

¹⁶¹ Transcript of Proceedings, *Issa v Owens* (Supreme Court of Queensland, Crowley J, 8 September 2022) 4-39:29-40; MFI C – Outline of closing submissions on Behalf of the Eighth and Ninth Defendants, 8 [45].

¹⁶² *Butler v Fairclough* (1917) 23 CLR 78, 84 (Griffith CJ).

¹⁶³ [2020] VSCA 28, 17-19 [65]-[67] (Beach, Kyrou and Kaye JJA).

¹⁶⁴ *Ibid* [63] (Beach, Kyrou and Kaye JJA).

Purchasers are entitled to an order under s 187(2)(e) of the *LTA* for removal of the Registrar's Caveat. In the absence of an established basis to impugn Ms Issa's indefeasible interest, there is simply no 'discretion' to make an order of the kind sought by the Purchasers.

[304] Section 187 of the *LTA* provides:

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.

[305] Section 187 is a remedial provision, pursuant to which the Court may, in an exercise of discretion, make the order it considers just where one of the stipulated exceptions to indefeasibility has been established. The purpose of the provision is to enable the Court to make orders that are necessary to rectify the recording of the affected party's registered interest on the register.

[306] In *Commonwealth Bank of Australia v Perrin*,¹⁶⁵ McMurdo J considered the nature of the discretionary power conferred by s 187, relevantly concluding:¹⁶⁶

[158] Section 187 provides a remedy, by way of an order of the Court, directing the registrar to affect the state of the register. The purpose of this power is to facilitate the rectification of the register so that it will correspond with the relevant rights and interests of affected parties. So in the case where indefeasibility is lost through the operation of s 185(1)(g) (which is where the description of a lot wrongly includes land of another registered proprietor), s 187 permits the rectification of the register by a direction that one or more of the things within subsection (2) be done. But it does not empower the Court to alter the respective legal entitlements of the two landowners.

[159] Thus the power to make 'the order it considers just' does not empower the Court to override existing entitlements and obligations and, in particular, to affect the interests of a registered proprietor (in this case the defendant) by encumbering her title in a way for which there is no legal basis.

¹⁶⁵ [2011] Q ConvR ¶¶54-765, 63,715–16 [158]–[159].

¹⁶⁶ Ibid.

Rather it is a power which is to be exercised only in accordance with the respective legal positions of the parties which will be affected by the order...

- [307] Section 187 cannot simply be invoked to make an order in favour of the Purchasers (and to decline to make an order in favour of Ms Issa) giving effect to what the Purchasers contend are competing equitable rights. To do so would impermissibly deny and deprive Ms Issa of her indefeasible interest in the property at 30 Francis Street. In any event, I do not consider the Purchasers have established any basis to postpone Ms Issa's interest to theirs.

The Purchasers' case against the Original Mortgagees

- [308] As I have concluded that Ms Issa is entitled to the principal relief she seeks, it is next necessary to consider the Purchasers' third-party claim against the Original Mortgagees.
- [309] The primary relief claimed by the Purchasers against the Original Mortgagees is damages for breach of contract. Alternatively, they seek an order that the Original Mortgagees pay them the sum of \$1,265,000 for monies had and received, being the purchase price paid by the Purchasers under the Purchase Contract.
- [310] The Original Mortgagees have not filed a defence to the Purchasers' third-party claim, and they have not appeared at trial. Having regard to the evidence adduced at trial, I am satisfied the Purchasers have established an entitlement to judgment against the Original Mortgagees in respect of their claim for damages for breach of contract.¹⁶⁷
- [311] There is no doubt the Original Mortgagees breached their contract with the Purchasers. The fraudulent Mortgage was void and of no effect. Therefore, the Original Mortgagees breached their warranty under cl 7.4 of the Purchase Contract that they would be capable of completing the contract. They had no entitlement to enter into the contract for the sale of 30 Francis Street and no power to sell or transfer the property in the purported exercise of a power of sale under cl 18(a) of the special conditions to the Purchase Contract.
- [312] As a result, the Transfer cannot be registered, the contract cannot be completed and the Purchasers are unable to obtain the legal interest in the property.
- [313] The Purchasers, therefore, will suffer loss as a result of the Original Mortgagees' breach of contract. Accordingly, they are entitled to damages that will, in so far as money can do it, place them in the same situation they would have been in had the contract been able to be completed.¹⁶⁸
- [314] The Purchasers claim they have suffered the following loss and damage as a consequence of the Original Mortgagees' breach of the Purchase Contract:
- (a) the sum of \$1,265,000 paid under the Purchase Contract;
 - (b) the sum of \$7,389.00 being funds expended improving the property;
 - (c) the sum of \$46,087.50 being stamp duty paid on transfer bearing number 7188815263;
 - (d) the sum of \$4,249.00 being registration fees;

¹⁶⁷ In accordance with r 476(1) of the *UCPR*.

¹⁶⁸ *Robinson v Harman* (1848) 154 ER 363, 365 (Parke B).

- (e) the sum of \$1,126.00 being legal fees for the conveyance; and
- (f) their legal costs and expenses incurred in relation to these proceedings as a consequence of the invalid Mortgage.¹⁶⁹

[315] In his evidence, Mr Morecroft gave slightly different figures for some of these amounts, namely:

- (a) \$1,667.82 for legal fees and disbursements for the conveyance;
- (b) \$3,887.00 for registration fees;
- (c) \$9,798.08 for maintenance and improvement.

[316] I will proceed on the basis that the figures given in evidence are the accurate amounts.

[317] The general rule is that damages for breach of contract are assessed as at the date of the breach, on the basis that the loss or damage occurred at that time.¹⁷⁰ However, a departure from the general rule may be appropriate where it is necessary to properly compensate the innocent party.¹⁷¹ In my view, it would be unjust to adopt the general rule in the circumstances of this case.

[318] The purchase price paid by the Purchasers more than four years ago is not a just and appropriate measure of the loss the Purchasers will suffer as a result of the resolution of these proceedings. Although they were unable to register the Transfer because of the Registrar's Caveat, the Purchasers have been in possession of the property since the date of settlement. The value of the property, and of the Purchasers' interest, has also increased. Whilst the Original Mortgagees did not file a defence to the Purchasers' third-party claim against them, I note the Mortgagees did file a defence to Ms Issa's claim, in which they denied the Mortgage was a fraud and maintained they had taken reasonable steps to verify the identity of the mortgagor. Ms Issa had to commence and pursue proceedings to vindicate her rights and interest in the property. The Purchasers have had to await the outcome of these proceedings to know whether they are entitled to register their interest. Because Ms Issa is entitled to succeed in her claim, the Purchasers will lose their interest in a property that is now valued at \$2,700,000.¹⁷² In my opinion, that is the just and appropriate measure of damages payable by the Original Mortgagees to compensate the Purchasers for the loss of that interest because of the Original Mortgagees' breach of contract.

[319] In addition, I am satisfied that the amounts paid by the Purchasers for stamp duty, legal costs and disbursements and registration fees are each losses sustained by the Purchasers because of the Original Mortgagees' breach of contract and the Purchasers are entitled to damages to compensate them for these amounts. I am not satisfied that it is appropriate to award damages for the Purchasers' legal costs and expenses incurred in relation to these proceedings. No amount in that respect was identified in evidence. Further, any such amount is likely to be covered, at least in part, by any costs order that may be made.

¹⁶⁹ Third-Party Statement of Claim against the First to Sixth Defendants, dated 26 August 2019, 7 [20].

¹⁷⁰ *Johnson v Perez* (1988) 166 CLR 351, 355 (Mason CJ).

¹⁷¹ *El Ali v Tritton* (2019) 19 BPR 39,447, 39,457–461 [42]–[55] (Payne JA, Macfarlan JA agreeing at 39,449 [1], Leeming JA agreeing at 39,449 [2]).

¹⁷² Exhibit 1 – Trial bundle, 2024–70 (Valuation report of Ben Windsor, dated 6 June 2022).

[320] Accordingly, I assess the damages payable by the Original Mortgagees as \$2,751,666.32.

[321] I do not consider it appropriate to make an order under s 58 of the *Civil Proceedings Act 2011* (Qld) for interest to be paid on this amount as I have assessed damages according to the current value of the property.

Should the State pay compensation?

[322] As I have found in favour of Ms Issa and rejected the Purchasers' case in respect of their claim for priority and registration of the Transfer, the next issue to consider is whether the State is liable to pay compensation to either party pursuant to the relevant provisions of the *LTA*.

[323] Section 188 of the *LTA* provides:

188 Compensation for deprivation of lot or interest in lot

- (1) This section applies if a person (the claimant) is deprived of a lot, or an interest in a lot, because of—
 - (a) the fraud of another person; or
 - (b) the incorrect creation of an indefeasible title in the name of another person; or
 - (c) incorrect registration; or
 - (d) an error in an indefeasible title or in the freehold land register; or
 - (e) tampering with the freehold land register; or
 - (f) loss, destruction or improper use of a document deposited or lodged at the land registry or held by the land registry for safe custody; or
 - (g) an omission, mistake, breach of duty, negligence or misfeasance—
 - (i) of or by the registrar or a public service employee of the department performing a function or carrying out a duty under this Act; or
 - (ii) of or by the titles registry operator or an employee of the operator in relation to the performance of a titles registry function under the *Queensland Future Fund (Titles Registry) Act 2021*; or
 - (h) the exercise by the registrar of a power in relation to an application or dealing with which the person had no connection.
- (2) The claimant is entitled to compensation from the State for the deprivation.

[324] Section 188A provides:

188A Compensation for loss or damage

- (1) This section applies if a person (the claimant) suffers loss or damage because of—
 - (a) the incorrect creation of an indefeasible title in the name of another person; or
 - (b) incorrect registration; or
 - (c) an error in an indefeasible title or in the freehold land register; or
 - (d) reliance on the incorrect state of the freehold land register; or
 - (e) loss, destruction or improper use of a document deposited or lodged at the land registry or held by the land registry for safe custody; or
 - (f) omission, mistake, breach of duty, negligence or misfeasance—
 - (i) of or by the registrar or a public service employee of the department performing a function or carrying out a duty under this Act; or
 - (ii) of or by the titles registry operator or an employee of the operator in relation to the performance of a titles registry function under the *Queensland Future Fund (Titles Registry) Act 2021*; or
 - (g) the exercise by the registrar of a power in relation to an application or dealing with which the person had no connection.
- (2) The claimant is entitled to compensation from the State for the loss or damage.
- (3) Despite anything in subsection (1) or (2), the claimant is not entitled to compensation under this section for loss or damage caused by the incorrectness of a register kept by the registrar if the registrar may correct the register under section 15.
- (4) Subsection (3) does not limit the claimant's rights to compensation otherwise than under subsections (1) and (2).

[325] Section 188B provides:

188B Order by Supreme Court about deprivation, loss or damage

- (1) For section 188 or 188A, a claimant may apply to the Supreme Court for an order—
 - (a) for compensation to be paid by the State; or

- (b) directing the registrar to take stated action.
- (2) The court may make the order it considers just.
- (3) Without limiting subsection (2), the court may by order direct the registrar to—
 - (a) cancel or correct an indefeasible title or other particulars in the freehold land register; or
 - (b) create a new indefeasible title; or
 - (c) issue a new instrument; or
 - (d) do anything else.
- (4) The court may join any other person it considers appropriate in a proceeding under this section.

Ms Issa's compensation claim

[326] I will deal first with Ms Issa's claim.

[327] Because I have not found that she is to be deprived of her interest in the property at 30 Francis Street, it is not necessary to consider Ms Issa's claim for compensation under s 188 of the *LTA*.

[328] Ms Issa nevertheless pursues a claim for compensation, pursuant to s 188A and 188B of the *LTA*, for the loss and damage she allegedly suffered in respect of her legal costs and disbursements of this proceeding which,¹⁷³ as of 5 May 2022, totalled approximately \$650,000 (inclusive of GST).¹⁷⁴

[329] The pleaded claim is based on the 'incorrect registration of the Mortgage' and, further or alternatively, the 'incorrect registration of the Transfer of Mortgage'.¹⁷⁵ However, in her closing submissions, Ms Issa's entitlement to compensation was said to arise from the 'incorrect creation of an indefeasible title in the name of the Mortgagees' or the 'incorrect registration of the Mortgage'.¹⁷⁶ In my view, Ms Issa should be confined to the pleaded case. The stated alternative basis for compensation, referable to s 188A(1)(a) of the *LTA*, should have been pleaded by Ms Issa had she wished to pursue it.¹⁷⁷

The State's submissions

[330] The State denies it is liable to compensate Ms Issa.¹⁷⁸ It raises three points in response to Ms Issa's claim.

[331] *First*, it emphasises that Ms Issa's pleaded claim under s 188A is premised upon 'incorrect registration'. It submits that the distinction in the *LTA* between 'the fraud of another person'¹⁷⁹ and 'incorrect registration'¹⁸⁰ evinces a legislative intention

¹⁷³ Second Further Amended Statement of Claim, filed 7 July 2022, 8 [22]–[23]; MFI D – Plaintiff's closing submissions, 35 [208].

¹⁷⁴ Exhibit 1 – Trial bundle, 183 (Affidavit of Mark Steele, sworn 5 May 2022, 19 [144]).

¹⁷⁵ Second Further Amended Statement of Claim, filed 7 July 2022, 8 [22(b)]–[22(c)].

¹⁷⁶ MFI D – Plaintiff's closing submissions, 35 [208].

¹⁷⁷ *UCRP* r 149.

¹⁷⁸ Amended Defence on Behalf of the Eleventh Defendant, filed 24 November 2021, 13–14[22].

¹⁷⁹ Which is a ground of compensation under s 188, where a claimant is deprived of a lot or of an interest in a lot, but not under s 188A, where the claimant suffers loss or damage.

¹⁸⁰ Which is a ground of compensation under both ss 188 and 188A.

that loss and damage occasioned by the fraud of another person is distinct from, and does not come within the ambit of, ‘incorrect registration’.

[332] On the facts established here, the State submits that there was no ‘incorrect registration’ of the Mortgage and the Transfer as, on their face, they were correct and entitled to be registered in accordance with ss 28, 30 and 153 of the *LTA*. Instead, the State contends it is apparent that the ‘true operative cause’ of Ms Issa’s claimed loss and damage is the fraudulent conduct of Mr Karbotli.¹⁸¹ Consequently, it says no compensation is payable under ss 188A and 188B.

[333] *Second*, the State relies upon s 189 of the *LTA*, which relevantly provides:

189 Matters for which there is no entitlement to compensation

(1) A person is not entitled to compensation from the State for deprivation, loss or damage—

...

(b) if the person, a person acting as agent for the person, or an indemnified legal practitioner acting or purporting to act for the person, caused or substantially contributed to the deprivation, loss or damage by fraud, neglect or wilful default, including, for example, failure to take reasonable steps in response to a notice that the registrar intended to create a new indefeasible title for the relevant lot...

...

(2) In this section—

...

indemnified legal practitioner means a legal practitioner covered by indemnity insurance (however described) under the *Legal Profession Act 2007* or a law of another jurisdiction that corresponds to the provisions about indemnity insurance under that Act.

[334] The State says that Ms Issa is not entitled to compensation by virtue of two matters arising under s 189(1)(b) which are said to have caused or substantially contributed to Ms Issa’s loss or damage. The first matter is Ms Issa’s own conduct in removing her caveat. The second matter is Mr Picken’s conduct in falsely attesting to having witnessed Ms Issa’s signatures. The State argues Mr Picken was negligent and engaged in that conduct as an ‘indemnified legal practitioner’ purporting to act for Ms Issa.

[335] *Third*, the State submits that in the event it is liable to pay any compensation, the amount of compensation should be reduced to take into account an amount of \$256,179.32 provided by the Mortgagees to discharge Ms Issa’s NAB mortgage in respect of the property and the \$40,000 Ms Issa received for agreeing to remove her caveat.

¹⁸¹ MFI B – Submissions on behalf of the State and Registrar, 18 [76].

Consideration of Ms Issa's compensation claim

- [336] I am satisfied that a plaintiff's costs of litigation may constitute compensable 'loss or damage' for the purposes of s 188A of the *LTA*. That conclusion has been accepted under equivalent legislative provisions in New South Wales in *Chandra v Perpetual Trustees Victoria Ltd* ('*Chandra*').¹⁸² I further note the State does not make any submission to the contrary with respect to the meaning of 'loss or damage' in s 188A(1).
- [337] As to the merits of the claim, however, I agree with the first matter raised by the State. In my opinion, the proper construction of the phrase 'incorrect registration' within s 188A(1)(b) of the *LTA* does not encompass a circumstance where a person has suffered loss or damage because of 'the fraud of another person'. In my view, the proper construction of the phrase 'incorrect registration' within s 188A(1)(b) is limited to the erroneous registration of instruments. I do not accept that it extends to the correct registration of a fraudulently procured instrument.
- [338] In my opinion, these conclusions follow when the plain terms of ss 188(1) and 188A(1) are considered and contrasted. Both sections stipulate a circumstance of 'incorrect registration', but the circumstance of 'the fraud of another person' only appears in s 188(1)(a). I consider this to be a deliberate omission, evincing a legislative intention to restrict the circumstances in which the State may be liable to pay compensation for loss and damage suffered by a person adversely affected by the operation of the Torrens title system created and regulated by the *LTA*.
- [339] In my view, the legislative history of the provisions further demonstrates why this is the proper construction of s 188A(1)(b). When the *LTA* first commenced, the relevant provision for entitlement to compensation was s 173, which stated:

173 Entitlement to compensation

A person is entitled to be indemnified by the State if the person is deprived of an interest in a lot or suffers loss or damage because of—

- (a) the fraud of another person; or
- (b) the incorrect creation of an indefeasible title in the name of another person; or
- (c) incorrect registration; or
- (d) an error in an indefeasible title or in the freehold land register; or
- (e) tampering with the freehold land register; or
- (f) reliance on the incorrect state of the freehold land register; or
- (g) loss, destruction or improper use of a document deposited or lodged at the land registry or held by the land registry for safe custody; or
- (h) an error in a search by the Registrar or a member of the land registry staff carried out at someone else's request; or

¹⁸² (2007) 13 BPR 25,259, 25,260–1 [5] (Bryson AJ).

- (i) omission, mistake, breach of duty, negligence or misfeasance of or by the Registrar or a member of the staff in the land registry; or
- (j) the exercise by the Registrar of a power in relation to an application or dealing with which the person had no connection.

[340] The original wording of the section provided for a single compendious basis for entitlement to compensation for a person who was either ‘deprived of an interest in a lot’ or who ‘suffers loss or damage’.

[341] Section 173 was later renumbered as s 188.¹⁸³ Section 188 remained as the only compensation entitlement provision within the *LTA* until 1997, when the *Body Corporate and Community Management Act 1997* (Qld) amended s 188 and introduced s 188A.¹⁸⁴ The amendments to the *LTA* separated the single compendious provision into two, with s 188 dealing with compensation for a person ‘deprived of a lot or an interest in a lot’, and s 188A dealing with compensation for ‘loss or damage’. That formulation continues to be the current position under the *LTA*.

[342] Of these amendments, the Explanatory Note to the Body Corporate and Community Management Bill 1997 relevantly stated:¹⁸⁵

The amendments to the provision have divided the existing section to better clarify the rights of claimants. Section 188 provides instances where a person may claim compensation from the State.

Clause 188A limits a person’s right to claim compensation for the instances referred to in the clause if the loss or damage is caused by an incorrectness in the land title register and the incorrectness is capable of correction by the registrar under section 15.

[343] At the time, s 15 the *LTA* relevantly provided:

15 Registrar may correct registers

- (1) The registrar may correct any register kept by the registrar if the registrar is satisfied that—
 - (a) the register is incorrect; and
 - (b) the correction will not prejudice the rights of the holder of an interest recorded in the register.
- (2) The registrar’s power to correct a register includes power to correct a particular in the register or an instrument forming part of the register.
- (3) If a register is corrected, the registrar must record in the register—
 - (a) the state of the register before the correction; and
 - (b) the time, date and circumstances of the correction.

¹⁸³ *Land Act 1994* (Qld) s 526, sch 4.

¹⁸⁴ *Body Corporate and Community Management Act 1997* (Qld) sch 3.

¹⁸⁵ Explanatory Note, Body Corporate and Community Management Bill 1997 (Qld) 62.

- (4) A register corrected by the registrar under this section has the same effect as if the relevant error had not been made.
- (5) For subsection (1)(b), the rights of the holder of an interest recorded in the register are not prejudiced if the holder acquired or has dealt with the interest with actual or constructive knowledge that the register was incorrect and how it was incorrect.

...

[344] In my view, the legislative history confirms s 188A was introduced to limit the State's exposure to pay compensation for 'loss or damage'. In pursuit of that aim, s 188A(1) deliberately omitted 'the fraud of another person' as a basis for entitlement to compensation from the State. Accordingly, the phrase 'incorrect registration' in s 188A(1)(b) does not encompass 'the fraud of another person'.

[345] Although Ms Issa relied upon the decision and reasoning of Bryson AJ in *Chandra*, in my view, that case does not support Ms Issa's claim. *Chandra* also concerned the registration of a fraudulent mortgage, but the claim for compensation there was under a legislative provision that is materially different to s 188A(1)(b), namely s 129(1)(a) of the *Real Property Act 1900* (NSW), which permitted compensation for loss or damage suffered as a result of 'any act or omission of the Registrar-General in the execution or performance of his or her functions or duties under this Act...'. It is also worth noting that in *Chandra*, the Registrar-General did not contest the claimed entitlement to compensation.

[346] In assessing the claim in *Chandra*, Bryson AJ described the basis for entitlement to compensation in the following way:¹⁸⁶

- [5] Subject to possible questions affecting quantum, the plaintiffs' costs of the litigation, after giving credit for costs otherwise recovered, are within the meaning of s 129(1) loss or damage which they suffered as a result of the operation of the Act in respect of their land, arising from an act or omission of the registrar General as referred to in s 129(1)(a). The registration on the title register for their house of a forged mortgage and the attempt to enforce it imposed on them the practical necessity of proceeding, with all available speed, to claim judicial remedies...

...

- [11] ...In my view ss 129(1) and 129(2) operate in a complementary way. Subsection (1) is inclusive and its provisions particularly para (a) serve the purpose of protecting persons adversely affected by the operation of the Torrens system; and fault or failure by the Registrar General is not a necessary part of an act or omission which falls within para 1(a). Subsection (2) operates differently; it complements subs (1) in that in the stated cases it excludes compensation which otherwise would fall within an entitlement under subs (1). Although there are

¹⁸⁶ Ibid 25,260 [5], 25,262 [11].

references to ‘any act or omission’ both in subs (1)(a) and in subs (2)(a) consideration of context and purpose shows that the reference in subs (2)(a) is not to any act or omission at all of the person suffering damage; such a reading would go far towards depriving the provision of compensation of effect, and would produce some absurd results. The reference must be limited to any act or omission which is in some way a fault, a failure or is otherwise shortcoming in a way which makes it an appropriate ground for limiting the extent of compensation. In some way this is fault-related.

[347] It is plain from the foregoing that the relevant New South Wales provision considered in *Chandra* was enlivened simply because the Registrar-General had registered the fraudulent mortgage.¹⁸⁷ In my view, that is not the position under s 188A(1)(b) of the *LTA*. Under s 188A(1)(b), the loss or damage must be because of an ‘incorrect registration’. The plain words of the statute require a claimant to establish something ‘incorrect’ about the fact or process of registration of an instrument. That has not been established in this case.

[348] Consequently, I do not consider Ms Issa has an entitlement to be paid compensation by the State. It is therefore not necessary to consider the other bases upon which the State sought to resist Ms Issa’s claim, nor the State’s third-party claims against Mr Karbotli and Mr Picken in respect of any compensation that may be payable by the State to Ms Issa.

The Purchasers’ compensation claim

[349] I turn now to consider the Purchasers’ claim for compensation. The Purchasers make a primary claim for compensation under s 188(1)(a) of the *LTA* for deprivation of their equitable interest in the property because of the ‘fraud of another person’.¹⁸⁸

[350] The Purchasers also make a separate claim under s 188A(1)(b) of the *LTA* for their legal costs and expenses of these proceedings, as loss or damage suffered as a result of the ‘incorrect registration of the Mortgage’ and, further and alternatively, the ‘incorrect registration of the Transfer of Mortgage’.¹⁸⁹ This separate claim is made on a similar basis to the claim made by Ms Issa under s 188A(1)(b). For the reasons I have set out above, I do not consider the Purchasers have any entitlement to claim such compensation either.

[351] Accordingly, the only claim to be considered is the claim made pursuant to s 188(1)(a).

The State’s submissions

[352] The State denies any liability to pay compensation to the Purchasers.

[353] The State contends that the Purchasers have not been deprived of an interest in land as contemplated by s 188.¹⁹⁰ The State submits that on its proper construction, s 188 does not extend to an entitlement to compensation beyond ‘registered interests’.¹⁹¹

¹⁸⁷ Ibid.

¹⁸⁸ Third Party Statement of Claim against the Eleventh Defendant (State of Queensland), filed 26 August 2019, 3 [3], 7–8 [19]–[21].

¹⁸⁹ Ibid 3 [3], 8 [22]–[24].

¹⁹⁰ MFI B – Submissions on behalf of the State and Registrar, 20 [85].

- [354] The State further submits this conclusion is borne out by the meaning of the word ‘lot’ as used in s 188, read together with ss 28, 37 and 181.¹⁹² The State argues that if the intention of the *LTA* had been to compensate for the loss of interests in land which had not ever been registered, then s 188 would refer to an ‘interest in land’ or ‘land’ rather than a ‘lot’ or ‘interest in a lot’.¹⁹³
- [355] The State submits that even if it is wrong and the Purchasers were deprived of an interest in land, no compensation would be payable because the equitable interest of the Purchasers is of no value.¹⁹⁴ The State argues that the measure of any compensation payable can be no more than the value of the interest that has been lost. The State submits that the Purchasers have an equitable right to enforce the Purchase Contract against the Mortgagees by requiring specific performance. However, because the Mortgagees do not have an indefeasible interest by reason of s 185(1A), the Purchasers will not be able to obtain specific performance of the contract. Accordingly, their right is worth nothing.
- [356] Finally, in the event the State is ordered to pay any compensation, it seeks declarations that it is entitled to be subrogated to the rights of the Purchasers against the First Third Party and the Twelfth Defendant/Second Third Party under s 190 of the *LTA*.

Consideration of the Purchasers’ compensation claim

- [357] I reject the State’s submissions concerning the construction of s 188. In my opinion, it is clear that s 188 does extend to provide for compensation for equitable interests.
- [358] In my view, the provisions of the *LTA* cited by the State do not support the argument it advances with respect to the proper construction of s 188. It is, of course, the case that s 37 provides that an indefeasible title for a lot is created on the recording of the particulars of the lot in the freehold land register, s 28 prescribes the particulars the Registrar must record in the freehold land register, and s 181 provides that an instrument does not transfer or create an interest in a lot ‘at law’ until it is registered. However, none of those provisions say anything about equitable interests.
- [359] As already traversed earlier in these reasons, it is well established that although the *LTA* creates a system of registration of title and confers indefeasibility upon registered interests, it also recognises equitable interests. The question for consideration here is whether the phrase ‘interest in a lot’ in s 188 incorporates an ‘equitable interest’ or only means a ‘registered interest’.
- [360] In my opinion, when the definition of ‘lot’ in sch 2 of the *LTA* is read together with the definitions of ‘interest’, ‘estate’ and ‘land’ in sch 1 of the *ALA*, it is clear that an ‘interest in a lot’ under the *LTA* may include an equitable interest.
- [361] I consider the decision in *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (**‘Diemasters’**) also supports the Purchasers’ argument with respect to entitlement to compensation.¹⁹⁵ In that case, the plaintiff companies provided a loan to another

¹⁹¹ Ibid.

¹⁹² Ibid 21 [88]–[89].

¹⁹³ Ibid 21 [89].

¹⁹⁴ Ibid 22 [92].

¹⁹⁵ (2001) 52 NSWLR 572.

company, Meadowcorp Pty Ltd (**'Meadowcorp'**), on the security of a property owned by Meadowcorp. The sole director of Meadowcorp subsequently discharged the mortgage by means of stolen and forged bank cheques. Meadowbank then sold the property to Chelliah and Jain. The plaintiff companies lodged a caveat before the discharge of the mortgage and transfer were lodged for registration.

- [362] In the proceedings before Windeyer J, the plaintiff companies sought to uphold their interests as unpaid mortgagees against the interest of the purchasers, Chelliah and Jain. Jain sought compensation from the Torrens Assurance Fund under s 129(1)(e) of the *Real Property Act 1900* (NSW), which relevantly provided:

129 Circumstances in which compensation payable

- (1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:

...

- (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud...

...

- [363] The term 'land' was defined in s 3 of the Act to mean '[l]and...of every kind and description or any estate or interest therein...'.

- [364] Windeyer J considered Jain's compensation claim could not succeed because he and Chelliah were joint tenants and Chelliah had been aware of and a party to the fraud. Nevertheless, his Honour went on to consider that matter on the basis that Jain was not affected by his co-owner's fraud. Thereafter, in comments that were strictly *obiter* but which nonetheless referred to relevant authority, Windeyer J observed that under a former legislative provision, it had been clearly established that an interest in land included an unregistered interest, and his Honour concluded the same would apply to s 129.¹⁹⁶ His Honour further noted that 'deprivation' could extend to being outranked in priority to other interests.¹⁹⁷

- [365] Although the statements made by Windeyer J dealt with different legislative provisions, those provisions were not materially different to s 188 of the *LTA*, having regard to the various definitions in the *LTA* and *AIA* that I referred to above. I consider the decision in *Diemasters* bolsters my conclusion that s 188 of the *LTA* is to be construed in a way that extends to equitable interests.¹⁹⁸

- [366] With respect to the merits of the Purchasers' claim, I am satisfied that there was 'fraud of another person' in respect of the procuring of the Mortgage. However, it is still, of course, necessary to establish a causal connection between that circumstance and the Purchasers being deprived of their equitable interest. So much is apparent from the use of the words 'deprived of' and 'because of' in s 188(1). The Purchasers must establish that they were deprived of their interest *because of* the fraud procured and perpetrated by Mr Karbotli.

¹⁹⁶ Ibid 583 [31].

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

- [367] The relevant test for causation in this context is the common sense test identified in *March v E & MH Stramare Pty Ltd*.¹⁹⁹ Applying that test here, I am satisfied that the Purchasers have, as a matter of common sense, been deprived of their equitable interest in a lot because of the fraud of another.²⁰⁰ I am satisfied that the conduct of each of Mr Karbotli, Mr Picken and the Mortgagees may be said to have caused or contributed to the loss suffered by the Purchasers. However, I consider the fraud committed by Mr Karbotli to be the origin of that loss. Although the other parties were not complicit in Mr Karbotli's fraud, I do not consider their subsequent conduct severed the chain of causation. Because of the fraudulent Mortgage, the Mortgagees were able to register their interest and subsequently exercise a purported power of sale under the Mortgage, and the Purchasers thereby acquired their equitable interest in the property upon entering into the Purchase Contract. That is all now to be undone because of the original fraud. Accordingly, the Purchasers are, in my view, entitled to be compensated by the State.
- [368] That then brings me to the question of the quantum of the compensation to be paid.
- [369] I do not accept the argument advanced by the State that the Purchasers' equitable interest is of no value. It is correct to say that the Purchasers cannot now obtain specific performance of the contract. However, it seems to me that the State's argument ignores the fact that the root cause of the Purchasers being deprived of their interest is the fraud by Mr Karbotli. His fraud was the 'true and operative cause' of the Purchasers' ultimately being deprived of their interest. While the Original Mortgagees and the Mortgagees failed to comply with ss 11A and 11B of the *LTA*, they were only able to register the Mortgage and the Mortgage Transfer instruments because of the fraud perpetrated by Mr Karbotli in the first place.
- [370] In my view, the proper measure of the compensation payable is that which would put the Purchasers in the same position, as far as money can do it, as if they had not been deprived of their interest because of the fraud.²⁰¹ As the orders I will make will result in the Purchasers being deprived of their interest upon judgment being given, in my opinion, the appropriate amount of compensation would be the current value of the property, rather than the value of the property when they acquired their interest. According to the valuation report in evidence before me,²⁰² that amount is \$2,700,000.
- [371] There remains one final unresolved issue with respect to the Purchasers' entitlement to be paid compensation by the State. As I have already determined that the Purchasers are also entitled to judgment against the Original Mortgagees and payment by them damages for breach of contract, a question arises with respect to whether they should also receive compensation from the State. It obviously cannot be the case that the Purchasers may 'double dip' and recover both amounts.
- [372] Unfortunately, this issue was not addressed in submissions at the trial.
- [373] Noting that under s 188B(2) of the *LTA* the Court 'may make any order it considers just', it may be the case that this issue can be appropriately addressed by the

¹⁹⁹ (1991) 171 CLR 506; *Chandra* (n 182) 25,263–4 [16]–[19] (Bryson AJ).

²⁰⁰ I also note the concession in MFI B – Submissions on behalf of the State and Registrar, 23 [97] that any loss suffered by the Purchasers was 'not caused by the registration being "incorrect" but rather by the conduct of the Mortgagees and in a more distance sense the fraud perpetrated against the Plaintiff'.

²⁰¹ *Registrar of Titles v Spencer* (1909) 9 CLR 641, 653 (O'Connor J); *Registrar-General v Behn* (1981) 148 CLR 562, 568 (Gibbs CJ, Mason J agreeing at 569).

²⁰² Exhibit 1 – Trial bundle, 2024–70 (Valuation report of Ben Windsor, dated 6 June 2022).

wording of the order I make for payment of compensation. For example, the order might be expressed in terms that the State is to pay compensation to the Purchasers only if the Purchasers do not receive payment of the full amount of assessed damages for breach of contract from the Original Mortgagees. On the other hand, the State may well be prepared to pay the full amount of compensation and therefore a contingent order would be unnecessary.

[374] I will hear the parties further as to the terms of the order that is to be made.

The State's right of subrogation

[375] It is next necessary to consider the State's rights of subrogation under s 190 of the *LTA*.

[376] Section 190 of the *LTA* provides:

190 State's right of subrogation

- (1) On payment of any compensation under section 188 or 188A, the State is subrogated to the rights of the claimant against any other person, in relation to the deprivation, loss or damage under the section.
- (2) If the State, in exercising its rights under subsection (1), receives an amount that is more than the amount it paid to the claimant, the State must pay the difference to the claimant after deduction of the State's costs.

[377] The State filed third-party claims against Mr Karbotli and Mr Picken, by which it seeks to be subrogated to the rights of Ms Issa against each of them in the event that the State is ordered to pay any compensation to Ms Issa. Because I have concluded that Ms Issa is not entitled to any such payments of compensation, these claims are redundant.

[378] However, because I have concluded that the Purchasers are entitled to be paid compensation by the State, s 190 would appear to enable the State to exercise any rights of the Purchasers, against any other person, in relation to being deprived of their interest in the property at 30 Francis Street. That would include any rights they may have against the Original Mortgagees, the First to Sixth Defendants.

[379] It may well be therefore that, upon the State's payment of any compensation to the Purchasers, the State would be subrogated to the rights of the Purchasers as against the Original Mortgagees. That might include the State exercising any rights of the Purchasers to pursue and recover from the Original Mortgagees the judgment debt payable by them for damages for breach of the Purchase Contract.

[380] Again, none of these matters were the subject of any submissions made at trial.

[381] I also again note that the State has not filed any claim seeking declarations or other relief against the Original Mortgagees, Mr Karbotli or Mr Picken in the event that it is ordered to pay compensation to the Purchasers.

[382] Accordingly, it is not necessary or appropriate that I make any declarations or orders in favour of the State as sought by its third-party claims, or as against the Original Mortgagees.

Mr Picken's negligence

- [383] The final aspect of Ms Issa's claim to consider is her claim against Mr Picken for damages for negligence.
- [384] Although Ms Issa pleaded such a claim, it was specifically predicated on the basis that the State's defence to Ms Issa's compensation claim, by reason of s 189(1)(b) of the *LTA*, would be upheld. That is, that no compensation would be payable because the relevant deprivation, loss or damage suffered by Ms Issa would be found to have been caused, or substantially contributed to, by the neglect of Mr Picken, an indemnified legal practitioner purporting to act on behalf of Ms Issa. It was in this context that the State, by its third-party claim against Mr Picken, required all questions relating to Mr Picken's allegedly negligent conduct vis-à-vis Ms Issa to also be determined in its case against Mr Picken.
- [385] As I have not upheld the State's defence of Ms Issa's compensation claim on this basis, it is unnecessary to further consider Ms Issa's claim against Mr Picken for damages for negligence.

Conclusion

- [386] In summary, I find that Ms Issa was the victim of fraud. Her signature was forged on various mortgages and associated documents without her knowledge or approval. In particular, I find that the Mortgage in respect of her home at 30 Francis Street was not executed by her and that it was procured by fraud. I find that the Mortgage is therefore null and void.
- [387] Similarly, I find that Ms Issa did not execute the Schedule or the Deed of Variation associated with the Mortgage. Her signatures on those documents were forged.
- [388] I find that Ms Issa's son, Mr James Karbotli, perpetrated the fraud that led to the fraudulent Mortgage in respect of 30 Francis Street and that he, or others associated with him, forged Ms Issa's signatures on the Mortgage and associated documents.
- [389] I find that Mr Stephen Picken, a former solicitor acting for Mr Karbotli, falsely claimed to have witnessed Ms Issa sign the Mortgage and various other mortgages and associated documents. Although I do not find he was complicit, in doing so, he enabled the Original Mortgagees to obtain and register the fraudulent Mortgage.
- [390] I further find that the Original Mortgagees failed to take reasonable steps to verify the identity of the mortgagor as being identical to the registered owner of 30 Francis Street, Ms Issa. As a result, they registered the fraudulently obtained Mortgage.
- [391] Similarly, the Mortgagees failed to take reasonable steps to verify the identity of the mortgagor as being identical to the registered owner when the Mortgage Transfer was lodged for registration.
- [392] Although the Mortgage and Mortgage Transfer were each registered, I find that neither the Original Mortgagees nor the Mortgagees obtained the benefit of indefeasibility of their interest because of their failure to take reasonable steps to verify the identity of the mortgagor.
- [393] I find that the Mortgagees had no right to exercise a mortgagee's power of sale in respect of 30 Francis Street when they entered into the Purchase Contract with the Purchasers, and I find that they had no right to transfer the property. They breached the Purchase Contract and are consequently liable to the Purchasers for damages.

- [394] I find that the Purchasers obtained an equitable interest in 30 Francis Street when they entered into the Purchase Contract. However, as the executed Transfer has not been registered, they do not hold the legal interest in the property and have not obtained an indefeasible interest.
- [395] In those circumstances, Ms Issa was, and is, the registered owner of the property at 30 Francis Street. She retains her indefeasible legal interest in an estate in fee simple. Accordingly, there is no question of competing equities to be resolved as between Ms Issa and the Purchasers. Nevertheless, even if there was, I am not satisfied there is any proper basis, nor that it would be just and fair in all the circumstances, to postpone Ms Issa's interest to the interest of the Purchasers.
- [396] I find that neither Ms Issa nor the Purchasers are entitled to compensation from the State under s 188A(1) of the *LTA* for their legal costs and disbursements. However, I find that the State is liable under s 188(1) of the *LTA* to compensate the Purchasers as they have been deprived of their equitable interest in the property at 30 Francis Street because of the fraud of another person.
- [397] As the premises for the State's third-party claims against Mr Karbotli and Mr Picken do not arise, it is unnecessary to further consider and decide those claims. Similarly, as the basis for Ms Issa's negligence claim against Mr Picken is not enlivened, it is unnecessary to further consider and determine that claim.
- [398] As the First to Seventh Defendants have not appeared at trial, it will be appropriate to dismiss their counterclaim pursuant to r 476(2) of the *UCPR*.

Orders

- [399] Accordingly, I make the following orders:
1. In respect of the mortgage bearing dealing number 718076402, I declare:
 - (a) the mortgage was procured by the fraud of another person;
 - (b) the mortgage is null and void;
 - (c) the First to Sixth Defendants failed to take reasonable steps to verify the identity of the mortgagor before registering the mortgage, as required by s 11A(2) of the *Land Title Act 1994* (Qld); and
 - (d) the First to Seventh Defendants were not entitled to exercise a power of sale under the mortgage in respect of the property located at 30 Francis Street, Mermaid Waters.
 2. In respect of the transfer of mortgage bearing dealing number 718410563, I declare:
 - (a) the First to Seventh Defendants failed to take reasonable steps to verify the identity of the mortgagor before registering the transfer of mortgage, as required by s 11B(2) of the *Land Title Act 1994* (Qld); and
 - (b) the transfer is void and of no effect.
 3. Pursuant to s 187 of the *Land Title Act 1994* (Qld), I direct the registrar of titles to cancel the instruments bearing dealing numbers:
 - (a) 718076402 (mortgage);
 - (b) 718410563 (transfer of mortgage);

- (c) 718763578 (correction of name);
- (d) 718815263 (unregistered transfer); and
- (e) 718858716 (Registrar's caveat).

4. In respect of the property at 42 Barak Street, Bulleen, Victoria:
 - (a) I declare the First to Seventh Defendants do not have any interest in the property; and
 - (b) pursuant to s 90(3) of the *Transfer of Land Act 1958* (Vic), I direct the registrar of titles to remove the caveat bearing dealing number AQ638142L within 14 days.
5. The Plaintiff's claim for payment of compensation by the Eleventh Defendant pursuant to s 188A(1) of the *Land Title Act 1994* (Qld) is dismissed.
6. The First to Seventh Defendants' counterclaim against the Plaintiff is dismissed.
7. Judgment for the Eighth and Ninth Defendants against the First to Sixth Defendants in the sum of \$2,751,666.32 for damages for breach of contract.
8. The Eleventh Defendant's third-party claims against each of the First Third Party and the Second Third Party/Twelfth Defendant are dismissed.

[400] I will hear the parties as to costs and any further orders required.