IN THE SUPREME COURT OF NEW ZEALAND **SC 31/2007**
[2008] NZSC 20

BETWEEN	**DOLLARS & SENSE FINANCE LIMITED APPELLANT**
AND	**REREKOHU NATHAN RESPONDENT**

HEARING: 22 NOVEMBER 2007

COURT: ELIAS CJ, BLANCHARD, TIPPING, MCGRATH AND ANDERSON JJ

COUNSEL: W G C TEMPLETON FOR APPELLANT
J L FOSTER FOR RESPONDENT

JUDGMENT: 8 APRIL 2008

JUDGMENT OF THE COURT

The appeal is dismissed with costs to the respondent of $15,000 together with reasonable disbursements to be fixed, if necessary, by the Registrar.

REASONS

(Given by Blanchard J)

Introduction

[1] Dollars & Sense Finance Ltd (D & S), an Auckland-based finance company, agreed to lend Rodney Nathan $245,000 to assist him to purchase shares in a business. One of D & S's conditions of loan was that Rodney's parents should provide security for Rodney's liability to repay that loan by executing a memorandum of mortgage to D & S over the parents' jointly owned residential property at Kerikeri. The Auckland solicitor for D & S, Mr Thomas, arranged

delivery to Rodney in Whangarei of a package containing the documents for Mr and Mrs Nathan to sign. Mr Thomas seems to have believed at that time that both of them lived in Kerikeri. In fact, they had been separated for many years and Mrs Nathan lived in Gisborne. Rodney procured his father's signature on the documents, including the mortgage, but, knowing that his mother, the respondent Rerekohu Nathan, was unlikely to agree to give the mortgage, he forged her signature.

[2] Rodney sent the documents, executed but unwitnessed, back to Mr Thomas. Mr Thomas returned them to Rodney for the witnessing to be done. Rodney arranged for a female friend to sign the documents as witness (or at least in the case of Mrs Nathan, an apparent witness) and in that condition Mr Thomas received the documentation again along with the duplicate certificate of title which Rodney, at the request of Mr Thomas, had uplifted from his father. Mr Thomas, who was at all relevant times unaware of the forgery, made no investigation of the circumstances of the "witnessing". He proceeded to register the memorandum of mortgage under the Land Transfer Act 1952 and the net proceeds of the loan were disbursed.

[3] When the business failed and Rodney did not meet his repayment obligations, D & S sought to exercise its power of sale. Mr and Mrs Nathan resisted. Mr Nathan alleged that he had been the victim of undue influence or unconscionable conduct which infected the claim of D & S. However, Mr Nathan died before the matter came to trial and his interest in the property was extinguished in favour of Mrs Nathan by way of survivorship.[1] Any need to continue to maintain his defences thus ceased without the questions he raised concerning the conduct of Rodney and D & S ever being determined.

[4] As relevant to this appeal, Mrs Nathan's separate defence to the attempt by D & S to enforce the mortgage is that Rodney forged her signature, which is now common ground; that he did so in the course of an agency for D & S; and that, accordingly, under the fraud exception to the indefeasibility provisions of the Land

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1 *Wright v Gibbons* (1949) 78 CLR 313 at p 328 and Hinde, McMorland & Sim, *Land Law in New Zealand*, (looseleaf), para [13.005].

Transfer Act, D & S's title as mortgagee is defeasible and the mortgage should be removed from the register.

The fraud exception

[5] The relevant portions of ss 62 and 63 provide as follows:

> **62 Estate of registered proprietor paramount**
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> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, … the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, *except in case of fraud*, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever [except in three situations of no present relevance].
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> **63 Registered proprietor protected against ejectment**
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> (1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered, *except in* any of the following cases, that is to say:
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> (a) The case of a mortgagee as against a mortgagor in default:
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> …
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> (c) *The case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud*, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:
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> …
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> (2) In any case other than as aforesaid, the production of the register or of a certified copy thereof shall be held in every Court of law or equity to be an absolute bar and estoppel to any such action against the registered proprietor or lessee of the land the subject of the action, any rule of law or equity to the contrary notwithstanding.
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> [Emphasis added]

[6] It is accepted for D & S that Rodney's forgery is for the purposes of these sections a species of fraud[2] and that if Rodney was acting in the course of an agency for D & S when he committed the forgery, his fraud in doing so must be treated as the fraud of D & S regardless of the absence of any knowledge of the fraud by D & S or its solicitor. That concession was properly made. The position is as stated in *Frazer v Walker*[3] where the opinion of the Privy Council referred to the words which we have italicised in the sections and said that the "uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent".[4] Lord Wilberforce cited the Judicial Committee's earlier decision in *Assets Co Ltd v Mere Roihi*[5] in which Lord Lindley, for the Board, after famously declaring that by fraud under the Land Transfer Act is meant "actual fraud, i.e, dishonesty of some sort", went on to say that "the fraud which must be proved in order to invalidate the title of a registered purchaser … must be brought home to the person whose registered title is impeached or to his agents".

[7] The forgery in this case has obviously been brought home to Rodney. But was Rodney expressly or impliedly appointed to act as the agent of D & S in its intended transaction with Mrs Nathan? And, if so, was Rodney's fraud committed in the course of that agency for D & S?

An agency and its scope

[8] The first question which this Court must address is whether expressly or by implication D & S utilised Rodney's services as its agent to procure execution of the loan documentation, including the mortgage. Did D & S make it Rodney's task to obtain execution, thereby creating an agency and prescribing its scope? Did D & S, to adapt the words of Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*,[6] entrust to Rodney the function of representing it in its transaction with the parents so that the

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2 It was said in *Assets Co Ltd v Mere Roihi* [1905] AC 176 at p 211 that forgery is "more than fraud" but it has since been treated as a species of fraud in relation to the indefeasibility sections.
3 [1967] NZLR 1069.
4 At p 1075.
5 [1905] AC 176 at p 210.
6 (1931) 46 CLR 41 at pp 48 – 49.

service to be performed by Rodney consisted of standing in the place of D & S (or of its solicitor) and assuming to act in its right and not in an independent capacity?

[9] We are engaged here in considering the existence and scope of an agency under which Rodney had actual authority,[7] either express or implied, to obtain execution of the documents. Because D & S did not have any dealings with Mrs Nathan it cannot be said that there was any representation by it to her of an authority for Rodney to act in relation to her as D & S's agent and of course there can be no question of her having detrimentally relied upon any such representation. D & S therefore cannot be liable for anything done by Rodney on the basis of any apparent or ostensible authority to represent D & S in the transaction, as might have been arguable in respect of his dealings with his father over the mortgage.

[10] So did D & S make Rodney its agent to obtain his mother's signature? To answer that question it is necessary to give a fuller account of the circumstances in which the forgery occurred. The events occurred in 1996. The business in which Rodney wished to acquire a shareholding was the operation of the Settlers Tavern in Whangarei. That business was owned by Setz Holdings Ltd (Setz) in which Rodney already had 10% of the shares. The largest shareholder was Madison Investments Ltd (50%) whose interests in Setz were represented by Mr Peter Harris. The other shareholder in Setz was Mr Bruce Bryant (40%).

[11] It was arranged that Mr Bryant would sell 75% of his shares in Setz to Rodney and the remainder to Madison. Rodney needed to raise $245,000 for this purpose.[8] Mr Harris introduced Rodney to a principal of D & S and arranged for it to be Rodney's financier.

[12] D & S instructed Mr Thomas to act for it. It is agreed that he did not act for Rodney in this or any other transaction. Mr Thomas seems to have known nothing

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7 Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (express authority) or is regarded by the law as having given him because of the interpretation put by the law on the relationship and dealings of the two parties (implied authority): *Bowstead & Reynolds on Agency* (18th ed, 2006), para [3-003].

8 It seems that in the end only $210,000 was needed because the price was reduced and that, despite what appeared in the documentation, only a net amount of $210,000 was applied by way of loan to Rodney, with the balance of $35,000 which D & S had transmitted to Mr Thomas being held for D & S in Mr Thomas's trust account.

about the circumstances of the parents other than what he was able to glean about the nature and value of their Kerikeri property from a valuer's report. At no stage did he or anyone from D & S have any direct communication with Mr and Mrs Nathan or seek to do so. He prepared the loan and mortgage documentation and gave it to Mr Harris in a package which Mr Harris took to Whangarei and delivered to Rodney. Amongst the documents which Rodney received, without any covering letter and without any express instructions or advice from Mr Thomas or Mr Harris, were the two copies of the memorandum of mortgage (nothing turns on its particular form or content), an initial disclosure under the Credit Contracts Act 1981 and a two paragraph "Statement by Covenantors":

> We choose not to be independently advised regarding the documents described in Schedule A below. We know that Dollars & Sense Finance Limited expects that we should first receive independent legal advice on this matter and independently of Rodney Nathan and Dollars & Sense Finance Limited, but we have elected not to do so despite advice to the contrary.
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> The Mortgage and the Loan Agreement with Dollars & Sense Finance Limited and Rodney Nathan is freely and voluntarily given with our informed consent, understanding of the contents of it, and of the circumstances under which the liabilities therein contained have been undertaken. We accept full responsibility for our election, even though confidentiality requirements and conflicts of interest may mean that the the parties to the transaction may be unable to disclose to us the full knowledge possessed by them regarding the borrowing transaction and our liability thereunder.

It is clear that no advice of the kinds referred to in the first paragraph had been given to either of the parents by or on behalf of D & S before Rodney received the documents from Mr Harris.

[13] A few days later Rodney sent the documents back to Mr Thomas. They had been signed (or, in the case of Mrs Nathan, apparently signed) but they had not been witnessed, as was essential in the case of the mortgage if it were to be registered.

[14] Mr Thomas was concerned about the absence of witnessing and also realised that he would need the duplicate certificate of title and information about the insurance covering the house. After communicating with Mr Harris about these matters and expressing to him concern that somebody might later allege that "the securities were completed under duress or improperly or were otherwise deficient",

Mr Thomas returned the documents to Rodney at the Settlers Tavern, where Rodney worked, this time with a covering letter.

[15] In that letter Mr Thomas pointed out the need for witnessing of all the signatures and said that he needed the title and the details of insurance on the property. His letter was entirely silent about how these matters should be attended to, save for recommending that "you see a solicitor to ensure that these documents are completed properly".

[16] About a fortnight later Rodney sent the documents back to Mr Thomas along with the title[9] and insurance details. This time the name, occupation (registered nurse) and address (Rodney's residential address)[10] of a witness had been written in the appropriate position in relation to each of the signatories.

[17] The advance of the loan moneys then proceeded and Mr Thomas took steps to register the mortgage.

[18] On the subject of agency, Winkelmann J referred to what she called a significant body of case law[11] in which it has been held that, where a lender delegates to a third party the task of obtaining signatures to loan or security documentation, that third party is the lender's agent for that purpose.[12] She distinguished the present case from the decision of the Court of Appeal in *Contractors Bonding Ltd v Snee*[13] where it was held that there had been no entrusting of Mrs Snee's son with the obtaining of signatures. She was alert to the criticism of the agency analysis in cases of this kind made by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien*[14] but, she said, even he had not doubted that in certain circumstances it may be correct to characterise the borrower as acting for some purposes as the lender's agent.

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9 He had obtained it from his father who had been keeping it in the house.

10 It does not appear from the evidence that Mr Thomas knew it was Rodney's address and thus that the witness was living with Rodney.

11 *Turnbull & Co v Duval* [1902] AC 429; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233; and especially *Kings North Trust Ltd v Bell* [1986] 1 WLR 119 at pp 123 – 124 per Dillon LJ.

12 *Nathan v Dollars & Sense Ltd* [2006] 1 NZLR 490 at para [49] and following.

13 [1992] 2 NZLR 157. One of the documents in *Contractors Bonding* (a case of alleged undue influence by the son) had been signed by Mrs Snee in the presence of her solicitor.

14 [1994] 1 AC 180 at pp 193 – 194.

[19] In this case, Winkelmann J concluded that Rodney had undertaken significant tasks for the lender at its request, going well beyond obtaining his parents' signatures:[15]

> The tasks he was asked to perform were directed at perfecting the lender's security (obtaining the title and policy document), fulfilling statutory duties of the lender (initial disclosure), and forestalling potential later challenges to enforceability (by obtaining the Statement by Covenantors). I am therefore satisfied that Mr Nathan was acting as the lender's agent in relation to these matters.

[20] The majority in the Court of Appeal[16] considered that it was not only open to Winkelmann J to make that finding but, for the reasons given by her and by William Young P, who dissented but not on this ground, it was the only available conclusion. The President recognised that it was insufficient in itself to create an agency that Mr Thomas had arranged for the documents to be provided to Rodney so that he could pass them on to his parents for signature, but he was prepared to accept that there was a sense ("albeit a little artificial") in which Rodney might be regarded as the agent of D & S, and he concluded that it was open to Winkelmann J to hold that Rodney was acting as its agent for the purpose of securing the signatures of his parents to the mortgage. He referred to the following matters as supporting that view:[17]

> (a) It was left to Rodney to ensure that disclosure was made.
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> (b) It was left to Rodney to obtain his parents' signatures to the "statement by covenantors".
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> (c) It was left to Rodney to obtain his parents' signatures to the loan contracts.
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> (d) When he sent the documents back incorrectly witnessed they were returned to him for the purpose of ensuring that they were correctly witnessed.
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> (e) Rodney was asked to obtain the title and insurance details.
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> (f) By this time, it was quite obvious to Mr Thomas that Mr and Mrs Nathan were not using solicitors. Dollars & Sense had no direct dealings with Rodney's parents, despite them being the borrowers. Accordingly, Dollars & Sense must be taken to have realised that the

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15 At para [71].

16 *Nathan v Dollars & Sense Ltd* [2007] 2 NZLR 747 (Glazebrook and Robertson JJ, William Young P dissenting).

17 At para [49].

> only person they would be dealing with over execution of the documents was Rodney.

[21] In giving the reasons of the majority, Glazebrook J said that they were most influenced by what must have been envisaged as Rodney's role with regard to the Statement by Covenantors. As no one from D & S had contacted the parents directly, it must have been expected that Rodney would inform them why they should seek independent advice and that he would undertake the task of explaining the documents to them.[18]

[22] The majority also rejected an argument that Mr Thomas, himself an agent of D & S, had no power to appoint Rodney as a sub-agent. There was nothing in the evidence to suggest that D & S had expressly prohibited the delegation of functions by Mr Thomas. Nor would that have been sensible. Mr Thomas was in Auckland. It would have been quite routine, for example, for him to arrange with a Kerikeri solicitor to deal with the Nathans or their solicitor on matters relating to the execution of the documents.[19]

[23] In this Court Mr Templeton, for D & S, mounted a vigorous attack on these conclusions. He contended that Rodney was throughout acting entirely in his own interests and could not be taken to have also been acting in any respect on behalf of D & S. He drew attention to the post-*O'Brien* comment of Stuart-Smith LJ in *Royal Bank of Scotland plc v Etridge (No 2)*[20] that the Court doubted that it will ever be possible to treat a husband as the creditor's agent where he or his company is the principal debtor. Counsel said that to do so would be inconsistent with established banking practices where banks avoid personal contact with sureties and utilise intermediaries instead. He also submitted that Mr Thomas's attitude towards independent legal advice negated any implied actual authority on the part of Rodney which might nevertheless have existed. According to counsel, it had been understood by Mr Thomas that Rodney would take the documents to lawyers so they could arrange signature by the parents. When Mr Thomas had seen the absence of witnessing he had recommended that a solicitor be consulted. Mr Templeton also

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18 At paras [82] – [83].
19 At para [85].
20 [1998] 4 All ER 705 at para [28] (CA).

said that there was no basis for the majority's "expectation" that Rodney would have given the necessary advice to his parents. It made no sense for Mr Thomas to have drafted a document with the specific purpose of allaying concerns over consent and then to have engaged as an agent precisely the person who might exert undue influence or misrepresent the position.

[24] It was certainly in Rodney's interests to obtain his parents' signatures so that he could get his hands on the loan money. That was his main, if not his sole, objective. In order to achieve that objective, it was necessary for his parents to sign the mortgage. He was therefore acting in his own interests in arranging signature. But this does not preclude the conclusion that he was also to act on behalf of D & S in obtaining signature of the relevant documents.[21] Without that execution D & S could not become registered proprietor.

[25] With one minor reservation, we have found the reasons given by Winkelmann J and the members of the Court of Appeal on this aspect of the case entirely convincing. It may be that it is unsound practice for financiers to leave it to borrowers to organise the signatures of guarantors, with the borrowers in so doing fulfilling the role of agents for the financiers. It is to be hoped that the practice has now become rare for it is fraught with potential peril for the financier and the financier's solicitor. It will in a particular case be very much a question of factual assessment and judgment whether the borrower has indeed acted as an agent for the lender to obtain signature or has merely acted as the conduit for the delivery of the documents. But to say that it is never possible for the borrowers to act as agent, as was suggested by the Court of Appeal in *Etridge*, is to fail to appreciate the realities of cases like the present. It may also be that it was very unwise of Mr Thomas to risk the possibility of fraud, undue influence or misrepresentation by leaving the task of obtaining the parents' signatures to Rodney but that is exactly what he did. He never at any stage insisted that the parents get separate legal advice. He made no attempt to communicate directly with them. All his communications went via Rodney. He left it to Rodney to make the necessary disclosure to the parents by D & S under the Credit Contracts Act, including obtaining their signatures on the

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[21] The existence of a principal/agent relationship is not dependent upon the existence of any contract between them: *Bowstead & Reynolds*, paras [1-006] and [6-026].

acknowledgement of the disclosure. His acceptance that Rodney's role could involve the obtaining of the signatures on the various documents is confirmed by what he did after he received the unwitnessed documents. He sent them back to Rodney. Mr Thomas may have been hoping, even at that late stage, that Rodney would steer his parents to a solicitor for independent advice and, subject thereto, for the completion of the signature process. But the Statement by Covenantors document had already betrayed his acceptance that in all likelihood this would not happen and that it would be Rodney who organised signature. The letter returning the documents for witnessing recommended that Rodney obtain legal advice. It said nothing about legal advice for the parents when it must have appeared that Rodney had already arranged for their signatures himself and that his parents would be unlikely to be seeing a solicitor before witnessing was completed.

[26] In view of this engagement of Rodney by D & S, through Mr Thomas, to get the mortgage signed and then witnessed, it would be artificial and commercially unrealistic to take the view that there was no relevant element of agency in what Rodney did. Any doubt about Mr Thomas's acceptance of Rodney's role was removed when the documents came back witnessed by a lay person, no objection was taken, the advance was made and the mortgage was presented for registration. If it were necessary to determine the point, we would be inclined to the view that, at the very least, this acceptance amounted to a ratification by Mr Thomas of Rodney's authority to arrange execution of the documents.

[27] The reservation we mentioned earlier concerning the judgments below is that we would not be minded to read quite as much into the Statement by Covenantors as did the majority of the Court of Appeal. It may be going too far to take from the Statement by Covenantors that Rodney would be expected to give the advice and to make the explanations referred to. But that qualification in no way detracts from the overall conclusion of the Courts below, the reasons for which are admirably given by the High Court and by William Young P in the passages quoted in paras [19] and [20] above, that Rodney was entrusted with the task, on behalf of D & S, of obtaining the signatures. He was D & S's agent for that purpose. D & S implicitly authorised him to represent it in its dealings with his parents concerning their signature of the documents.

[28] The argument that Mr Thomas, himself an agent, had no power to create a sub-agency,[22] was renewed before us but has no weight, for the reasons given by the Court of Appeal majority. By instructing an Auckland solicitor when documents were likely to be signed in Northland D & S implicitly agreed to the appointment of a sub-agent. We add that there was no evidence concerning ordinary practices of solicitors in this respect.

Was the forgery committed within the agency?

[29] We have concluded that Rodney was the agent of D & S and that the scope of his agency, the task he was to perform for D & S, was to obtain the signatures of his parents on the documentation with appropriate witnessing. It is then necessary to ask whether the forgery of his mother's signature was an act done within the scope of that agency, for if it was not, it cannot be regarded as having been done for D & S and D & S does not bear responsibility for it.

[30] The scope of the task that an agent is appointed to perform must be determined in a commercially realistic way according to the circumstances, especially when there is no general agency and the agent therefore has a limited function. It may matter how that task is framed when the Court is considering whether the agent's conduct was within its scope. It is possible to define the task which Rodney was asked to perform on behalf of D & S with different degrees of specificity. It could be said that he was charged with procuring a registrable mortgage. A narrower formulation would be to say that he was charged with getting his parents' signatures, as we have concluded. In this case nothing would turn on that difference.

[31] No one suggests of course that D & S actually authorised the particular forgery or any forgery or fraudulent act at all. But it does not follow from that fact alone that the forgery was beyond the scope of the agency. In this respect, as we

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[22] A validly appointed sub-agent becomes the agent of the principal for the purposes for which the appointment of the sub-agent is made: *De Bussche v Alt* (1878) 8 Ch D 286 at pp 310 – 311 (CA).

will show, William Young P's reliance[23] on the first instance decisions in *Schultz v Corwill Properties Pty Ltd*[24] and *Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd*[25] is misplaced.

[32] Atiyah has pointed out in his seminal treatise on *Vicarious Liability in the Law of Torts* [26] that there are two stages of enquiry: first, what acts has the principal authorised and, secondly, is the agent's act so connected with those acts that it can be regarded as a mode of performing them?[27] It is, Atiyah said, essential to keep these two stages of the enquiry distinct.

[33] In *Credit Lyonnais Bank Netherland NV v Export Credits Guarantee Department* Lord Woolf MR, delivering a judgment in which the other Law Lords concurred, stated the principle on which vicarious liability for the wrong of a servant or agent depends:[28]

> It is that the wrong of the servant or agent for which the master or principal is liable is one committed in the case of a servant in the course of his employment, and in the case of an agent in the course of his authority. It is fundamental to the whole approach to vicarious liability that an employer or principal should not be liable for acts of the servant or agent which are not performed within this limitation. In many cases particularly cases of fraud, the question arises as to whether the particular conduct complained of is an unauthorised mode of performing what the servant or agent is engaged to do.

As will be seen, the formulation of "unauthorised mode of performing", first articulated by Sir John Salmond,[29] is an awkward fit in a situation of the kind we are considering and has been, in that context, restated in recent decisions of the House of Lords.

[34] At Atiyah's first stage, the acts which D & S authorised were the obtaining of the signatures and the uplifting of the duplicate certificate of title and the obtaining of the insurance details. We are now considering the second stage: whether

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23 At paras [53] – [60].
24 [1969] 2 NSWR 576.
25 [1992] 1 NZLR 463.
26 (1967), p 178.
27 Atiyah expressed these questions in terms of master and servant but he had made it clear earlier (at p 100) that the vicarious liability of a principal for an agent's torts is of the same nature as liability for servants.
28 [2000] 1 AC 486 at p 494.
29 *Law of Torts*, (1st ed, p1907), p 83.

Rodney's act of forgery was an unauthorised mode of performing one of those acts or, as it is better put, an act sufficiently connected with an authorised act that it can be treated as a mode of performing it and therefore done within the agency.

[35] Two propositions must be borne in mind. The first is that an act can have the necessary "close connection"[30] even though it is of a criminal character and indeed is done with fraudulent intent by the agent. The second is that a fraudulent act impacting on a third party may vis-à-vis the third party be seen as done within the scope of an agency even if done exclusively for the benefit of the agent, and a fortiori may be seen as an act within the agency if it is done for the benefit of the principal as well as for the benefit of the agent. As between principal and agent of course the principal will be entitled to impeach the agent's conduct and say that what the agent did was unauthorised, but that does not affect the principal's liability to the third party for the agent's acts.

[36] As regards the first proposition**,** the leading English case in modern times on intentional tortious conduct by an employee or agent is *Lister v Hesley Hall Ltd*.[31] In *Lister*, a boarding school was held vicariously liable for the sexual abuse of children in a dormitory at night by the warden of the school. The fact that the warden had committed deliberate criminal acts on the children which the school would never have actually authorised did not prevent the school from being held liable. Much emphasis was placed on the connection between the warden's responsibility for looking after the children in the boarding environment and the abuse he committed. The sexual abuse that occurred was a risk inherent in the enterprise of running a boarding school. Therefore, it was fair that the school should bear responsibility when that risk materialised.

[37] It is observed in *Lister* that Sir John Salmond's test for determining whether an act is in the course of employment (whether it was a wrongful and unauthorised mode of doing an act authorised by the employer) is not happily expressed when applied to cases of intentional or fraudulent wrongdoing; that sexually assaulting a boy is not really an improper mode of looking after him. But, as Lord Millett said

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30 *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.
31 [2002] 1 AC 215.

in the subsequent House of Lords decision in *Dubai Aluminium Co Ltd v Salaam*,[32] if regard is paid to the closeness of the connection between the wrongdoing and the class of acts which the wrongdoer was employed to perform, and to the underlying rationale of vicarious liability (a loss distribution device based on grounds of social and economic policy by which liability is imposed for all those torts which can fairly be regarded as reasonably incidental risks to the type of business being carried on),[33] "there is no relevant distinction to be made between performing an act in an improper manner and performing it for an improper purpose or by an improper means". The *Dubai* case focused on whether fraudulent conduct by a partner was in the course of the partnership business and therefore within the scope of the partner's agency for the other partners.[34] *Dubai* illustrates that the principles relating to vicarious liability in circumstances of agencies not involving employment are "indistinguishable" from those applying where an employment relationship is under consideration.[35]

[38] In *Dubai*, Lord Millett referred to *Hamlyn v John Houston & Co*.[36] In *Hamlyn*, a firm was held liable for the actions of one of its partners in obtaining confidential information about a competitor's business by means of a bribe. The Court of Appeal held that if it was within the scope of the partner's authority to obtain information by legitimate means, then for the purpose of vicarious liability of the firm it was within the scope of his authority to obtain it by illegitimate means. Lord Millett commented that in *Hamlyn* the partner had acted for the benefit of the firm, but it would not have necessarily made a difference had he acted for his own benefit. On the other hand, his Lordship recognised that, even where someone is doing work of a kind he was employed to do, he may step outside the limits of his

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32 [2003] 2 AC 366 at para [124].

33 At para [107], citing Atiyah, p 171.

34 The case concerns a partnership statute but, as is the case with the Partnership Act 1908, it was substantially a codification of the pre-existing rules of equity and common law: *Lindley & Banks on Partnership* (18th ed, 2002), paras [1.04] – [1.06].

35 *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] 1 WLR 2158 at pp 2163-4. There can be no suggestion that Rodney was acting as an independent contractor. It is therefore unnecessary to consider whether, if at all, a person who engages the services of an independent contractor can be rendered liable for torts committed by the contractor by treating the contractor as a species of agent: see Luke McCarthy, *Vicarious Liability in the Agency Context* [2004] QUTLJJ 268, p 283 discussing the dissenting judgment of McHugh J in *Scott v Davis* (2000) 204 CLR 333.

36 [1903] 1 KB 81 (CA).

employment.[37] That may be more likely to have occurred, it seems to us, when the agency in question is for a particular and limited purpose, rather than pursuant to an ongoing relationship such as employment or partnership.

[39] It is worth remarking, also, that although the question of whether the principal was liable for an agent's conduct is often addressed by asking whether that conduct fell within the scope or course of the agent's authority, this methodology has the capacity to suggest that the conduct of the agent for which a third party seeks to make the principal liable must have been authorised in some way by the principal. That, as we have seen, is not the case, but the concept of authority can unconsciously influence the inquiry in an unhelpful way. The more precise formulation is whether the conduct of the agent fell within the scope of the task which the agent was engaged to perform.

[40] In order to determine that question, the Court must concentrate on the nature of the tasks to be performed on behalf of the principal and on how the use of the agent for that purpose has created risk for the third party. Without a sufficiently close connection between the task for which an agent was engaged and the unlawful action of that agent, so that the wrong can be seen as a materialisation of the risk inherent in the task, it will be neither fair nor proper to impose vicarious (strict) liability on a principal who has not necessarily been guilty of any personal negligence and so would not be directly liable to the claimant. Strict liability of this kind is exceptional and is not to be imposed unless fully justified by these considerations. Certainly, just the opportunity to commit the wrongful act or the existence of some merely incidental connection will not suffice.

[41] We come now to our second proposition, that a fraudulent act may be done within the scope of an agency, even if done exclusively for the benefit of the agent (and even more so when it is done for the benefit of the principal as well as for the benefit of the agent). The leading authority is *Lloyd v Grace, Smith & Co*[38] in which a firm of solicitors was held liable for frauds covertly committed against a

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[37] The example given was of a valuer whose negligent reports done when he was moonlighting were found not to have been done in the course of his employment: *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462.

[38] [1912] AC 716.

client by their managing clerk for his own benefit entirely. The firm had gained nothing from the frauds. The House of Lords rejected the argument that a principal was not liable for the fraud of his agent unless committed for the benefit of the principal. The case has often been understood to be an authority on apparent or ostensible agency, as Mr Templeton submitted it should be regarded, and indeed there are passages in the speeches which might support that view. But the better view, we think, is that their Lordships were in this respect not drawing any distinction between actual and apparent authority. The managing clerk plainly had actual authority to conduct business of the kind he conducted for the plaintiff and in the course of which he defrauded her. Lord Macnaghten proceeded on the basis of what he described as a clear finding of the trial Judge that the fraud "was committed in the course of Sandles' employment and not beyond the scope of his agency".[39] In the course of his reasons he endorsed the remark of Wilde B in *Udell v Atherton*[40] that "unless the fraud itself falls within the actual or implied authority of the agent, it is not necessarily the fraud of the principal". And Lord Shaw of Dunfermline concluded his reasons by referring to the finding "that the fraud was committed in the course of, and within the scope of, the duties with which the defendants had entrusted Sandles as their managing clerk". In those circumstances, he said, they stood answerable in law for their agent's misconduct.[41]

[42] Mr Templeton drew attention to a difficult paragraph in *Bowstead & Reynolds on Agency*[42] supporting the proposition that: "Unless otherwise agreed, authority to act as an agent includes only authority to act for the principal". The first three words ("unless otherwise agreed") tend to suggest that what is in contemplation in this proposition is the position between principal and agent, not as between principal and third party, where different considerations apply. But the commentary nonetheless appears to be directed at the latter. The editors retreat in the latest edition from the statement which appeared in earlier editions that an act of an agent

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39 At p 730.
40 (1861) 7 H & N 172 at p 180; 158 ER 437 at p 441.
41 At p 742.
42 (18th ed, 2006), para [3-009].

within the scope of "actual or apparent authority" does not cease to bind the principal merely because the agent was acting fraudulently and in furtherance of his own interests. The editors now say that that statement applies only to apparent authority. Evidently, however, the retreat is not intended to be total as in the same paragraph it is accepted that the previous statement, extending to actual authority, "may be correct in the abstract".[43] Perhaps what is really being said is that the recognition of apparent authority during the last century has in practical terms almost entirely removed the need for it to extend beyond apparent to actual authority where a third party has been affected by the fraud of an alleged agent. But, because of the protection given to registered proprietors under the Torrens system even in respect of forgeries, the earlier formulation in *Bowstead* was preferable. It must also be said, however, that the whole matter appears to require some reconsideration in light of *Lister* and cases following from that important decision which *Bowstead* mentions only briefly.[44] In *Lister*, for example, the finding that the school was liable could hardly have depended on any appearance that the warden had authority to commit criminal acts on the pupils. Liability was, rather, imposed for policy reasons because of the close connection between what was authorised and what occurred, which could be seen as the materialisation of the risk created by the principal.

[43] Winkelmann J, having found that there was an agency, did not proceed to inquire whether the forgery was an act done within it. Instead she considered whether the knowledge of Rodney concerning his own fraud should be imputed to D & S. As we will shortly explain, this is not the right question in a case of this kind. The Judge was apparently diverted by an argument from D & S that knowledge of fraud by an agent is not to be imputed to the principal where the principal is the victim of the fraud. Cases such as *Schultz and Cricklewood* have been decided in favour of the mortgagee on that basis. But, in any event, as Winkelmann J pointed out, Professor Watts has argued persuasively that there is no such "fraud exception" to the imputation of knowledge.[45] He refutes the notion that an exception is appropriate because the fraudster could never have been expected to

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43 Referring to dicta of Millett J in *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978 at p 984.

44 At para [8-178].

45 "Imputed Knowledge in Agency Law: Excising the Fraud Exception" (2001) 117 LQR 300.

reveal to the principal his knowledge that he was defrauding the principal. That must be correct for it is almost equally unlikely that the fraudster would have revealed a fraud on someone else for which, in the circumstances of the agency, the principal would nevertheless bear responsibility, as was the case in *Lloyd v Grace, Smith*. And so we would respectfully agree with Professor Watts. Liability for a fraud committed in the course of an agency does not depend upon the attribution of legal fault or moral blame to the principal. A legitimate advantage of using an agent may be that the principal does not need to inform itself about what is done on its behalf, but that ignorance should not be able to be used as a shield against liability to a third party.

[44] However, in cases of the present kind, that analysis is unnecessary for there is a much more fundamental reason for denying a "fraud exception". It is that the liability of the principal is not dependent on imputation of the knowledge of the agent to the principal but arises because the agent has done an act, namely the fraud, for which the principal is vicariously responsible. The rationale of such liability is found as long ago as 1701 in the brisk observation of Holt CJ in a case involving deceit by an agent, that "it is more reason that he, that puts a trust and confidence in the deceiver, should be a loser, than a stranger".[46] Simon Fisher comments in *Agency Law*:[47]

> Since the essence of agency law is the representation of the principal by the agent, it seems that vicarious liability is one mechanism that functions as a loss allocation rule within agency law in particular and tort law in general. Vicarious liability works upstream in an attempt to find the prime cause for why an agent acted for another person. So long as the agent acted within his or her actual or apparent authority, then, all other things being equal, the principal has an imposed liability that is justified by the very act of placing the agent in a position where the agent could represent the principal. The control device used by the courts in this sphere centres upon the *actual or apparent authority* of the agent. [Emphasis in original]

We would qualify this passage by saying that what must be shown is a close connection with what was authorised. That is what allows the agent's act to be treated as being within the scope of the agency.

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46 *Hern v Nichols* (1701) 1 Salk 289; 90 ER 1154.
47 (2000), p 197.

[45] In the great majority of cases involving fraud the proper analysis of the situation will be that it is the act, not the knowledge, of the agent which is the critical element. This element was paid insufficient regard in *Cricklewood* where the liability of the nominee company should, we believe, have been examined in light of Quigley's fraudulent acts as its agent rather than in light of his knowledge of his own acts, which is distinctly artificial. In our view, therefore, the majority of the Court of Appeal in the present case were correct when they proceeded on the basis that liability should be based not on knowledge but on the act of forgery[48] and in declining to follow *Cricklewood* and also *Schultz*. As the majority said, those decisions are not consistent with *Assets Co*,[49] nor with *Ex parte Batham*,[50] a decision of our Court of Appeal to which reference will be made later.

[46] The majority was also dismissive, correctly as we have already observed, of the notion that fraud takes an agent outside the scope of the agency except where there is actual authority to commit a fraud. They considered that was taking too narrow a view of an agent's task. They said it was Rodney's task to obtain execution of registrable documents and that obtaining execution, even by forgery, was within the scope of that task.[51] This is the crucial issue. The majority stated their conclusion in this way:[52]

> The critical fact is that the fraud took place to achieve the very thing that Rodney was asked to do as agent by Dollars & Sense, that is to obtain a registrable mortgage. We thus consider that he was acting within his actual authority … .

We have already acknowledged that an agent may be more likely to step outside the scope of an agency which is for a particular and limited purpose (as Rodney's agency was) than where the agency arises in the course of an ongoing relationship between the parties, such as a partnership. That must be carefully borne in mind in considering whether the forgery can be regarded as committed within the agency. However, as the Court of Appeal majority recognised, the signing of the documents

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48 At para [102].
49 At para [97].
50 (1888) 6 NZLR 342.
51 At para [103].
52 At para [107].

was central to this agency and that is what, in relation to his mother, Rodney took it upon himself to do, albeit in a criminal manner. It could fairly be said that, despite that centrality, forging a signature was exactly what D & S did not want Rodney to do to fulfil the task entrusted to him. But cases like *Lister v Hesley Hall* have demonstrated that an act can be within the scope of an agency even when it is the antithesis of what the principal really wanted. The true test is whether the tortious act has a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialisation of the risk inherent in that task. If that is so, what the agent did can fairly be treated as an improper mode of fulfilling the allocated task, as it was in the case of the partner in *Hamlyn* who obtained information by resorting to a bribe.

[47] The present case bears some similarity to *Ex parte Batham* in which the New Zealand Court of Appeal had no difficulty at all in determining that a mortgage which had been forged by the agent of an (innocent) mortgagee should be removed from the register. The forger, Hall, was a land broker in a firm whose services as an agent had been engaged by McKeown in connection with his purchase of a mortgage from some trustees for whom Hall was also acting. McKeown expected Hall to get the transfer of the mortgage signed and registered. Hall fraudulently procured one mortgagee to sign by misrepresenting the nature of the document and forged the co-trustee's signature. He then registered the transfer. The Registrar sought an order that the mortgage be delivered up in order that the endorsement of the memorial of transfer could be cancelled on the ground that the registration was procured by fraud. The Court of Appeal so ordered. It said that Hall was McKeown's agent to prepare a transfer and to procure its due execution and registration. Because Hall, while so acting, procured the registration by fraud, the Registrar was entitled to the order sought. Although the Court of Appeal did refer to Hall's awareness of his own forgery at the time of registration and to his having acted as McKeown's agent in the matter of the registration and his misrepresentation to the Registrar, we cannot accept the distinction drawn by William Young P in his dissenting reasons in the present case between the forgery and the fraudulent registration. The agency to obtain the signatures and register the transfer cannot sensibly be seen as not engaged upon while the forgery was being made but then operating when the product of the fraud was presented for registration. In the

particular case such an analysis would presumably have had to distinguish between procuring one signature by misrepresentation (within agency) and forging the other (not within). The same uncomfortable distinction might have had to have been made in the present case if Mr Nathan Senior's defence had gone to trial and his assertion of unconscionability had been made out.

[48] The tenor of *Lister v Hesley Hall*, the Canadian authorities referred to by the Law Lords[53] and cases which have followed[54] is that someone who creates an agency in which there is a risk of improper behaviour by an agent (or, as in this case, by someone entrusted with a sub-agency) should expect to bear responsibility where that risk eventuates and loss is thereby caused by the agent to a third party. The nature of that risk and the extent of the liability will depend upon the nature and scope of the agency. In this case, even without the benefit of hindsight, a moment's reflection exposes the risk of a borrower's being tempted to mislead his guarantors or to exercise undue influence over them or, at the worst, to forge their signatures. Forgery was a peril which was avoidable if Mr Thomas had not put Rodney in a position where it was left to him to obtain the necessary signatures. It is not therefore at all unreasonable for Rodney's forgery to be regarded as an act done in the course of the agency. All the more so is this reasonable where it can be said that D & S was in fact benefiting from the fraud.[55] Obviously, the forgery played a material part in enabling D & S to become registered as mortgagee.[56] By registering the forged document it obtained the status of legal mortgagee. It is seeking to retain that advantage by means of retaining its registration and exercising a power of sale under the mortgage. Where a third party is affected by the agent's forgery a principal should not be allowed to deny the agency in order to take the benefit of the registration of the forged document. Lord Macnaghten, in a passage in *Lloyd v Grace, Smith*[57] quoted by Winkelmann J in her judgment,[58] said that the principal should not be able to escape liability for the actions of his agent because "by taking

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53 *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

54 For example, *S v Attorney-General* [2003] 3 NZLR 450 (CA).

55 In his dissenting reasons, the President erred, in our opinion, in saying that Rodney's fraud was "primarily against D & S" (at para [57]). It was just as much against his mother, who can be said to have been the subject of the forgery and who gained no benefit whatsoever from the transaction. Both she and D & S were its victims.

56 If that were not so, the fraud would be an irrelevancy, even if D & S had known of it.

57 [1912] AC 716 at p 738.

58 At para [82].

the benefit he has adopted the act of the agent [and] cannot approbate and reprobate". Accordingly, for the purpose of the fraud exception to ss 62 and 63 of the Land Transfer Act, the fraud by its agent must be regarded as the fraud of D & S whose title as mortgagee is therefore not indefeasible.

[49] It was suggested for the appellant that to make a principal liable for an undetected fraud of its agent in relation to a document which has been innocently registered by the principal is contrary to the policy of the Torrens system and that, if liability of this nature is imposed, it will preclude financiers and others from relying on the register and force them to take precautions which heretofore have not been necessary. Such criticisms have no substance. As the Privy Council recognised in *Assets Co* and in *Frazer v Walker*, a registered proprietor has always been responsible for the fraud of its agent in relation to a document presented for registration by or on behalf of the principal. It is entitled to rely on the state of the register prior to its own registration but it cannot rely on a fraudulent act for which it is vicariously responsible and but for which it would not have obtained registration. In the words of Professor Watts, reflecting on agency and the Torrens system, "[t]he odds against the plaintiff are stacked too high if purchasers can use agents to do the work of acquisition but then disavow their proven dishonesty".[59] As to the practices of financiers, which have of course responded since the events in this case in 1996 to decisions of the House of Lords such as *O'Brien* and *Etridge*[60] (and *Wilkinson v ASB Bank Ltd*[61] in this country), all it is necessary to say is that what occurred in this case, where the borrower was left to get the guarantors' signatures, with no direct communication to them of the need to take legal advice, is quite contrary to normal practices. If the practices recommended in those cases are followed there is little danger of an allegation of agency of the kind established in this case being successfully made.

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59 "Imputed Knowledge in Agency Law – Knowledge Acquired Outside Mandate" [2005] NZ Law Rev 307, p 334.

60 *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773.

61 [1998] 1 NZLR 674 (CA).

Result

[50] For these reasons, we conclude that the forgery was committed in the course of Rodney's agency for D & S. It follows that Rodney's fraud renders D & S's registration as mortgagee vulnerable. It does not have an indefeasible title to the mortgage. The Court of Appeal was therefore correct to dismiss the appeal against the order for removal of the mortgage from the register made by Winkelmann J. This appeal must be dismissed and the appellant ordered to pay the respondent's costs in this Court at $15,000 together with reasonable disbursements to be fixed, if necessary, by the Registrar.

The in personam claim

[51] Because of a misunderstanding about the hearing dates we were unable to hear counsel on the third ground of appeal relating to Mrs Nathan's in personam claim against D & S. We indicated that we would, if necessary, resume the hearing for that purpose. Obviously that is now unnecessary as Mrs Nathan has succeeded in sustaining removal of the mortgage from the register. We record that we have not formed any view on the correctness of the Court of Appeal majority's conclusion that an in personam claim was made out, or of William Young P's rejection of it.

Solicitors:
Blackwells, Auckland for Appellant
Brian Ellis, Auckland for Respondent