

BETWEEN

DOLLARS & SENSE
LIMITED

Appellant

AND

REREKOHU NATHAN

Respondent

Hearing 22 November 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel W G C Templeton for appellant
J L Foster for respondent

CIVIL APPEAL

10.00am

Templeton May it please the Court, I appear for the appellant. At counsel's table Mr Hare.

Elias CJ Thank you, yes thank you Mr Templeton.

Foster Yes may it please the Court, counsel's name is Miss Foster and I appear for the respondent.

Elias CJ Thank You Miss Foster. Yes Mr Templeton.

Templeton As the Court pleases. In this appeal I intend to address the total of 20 flaws and issues in the majority's reasoning which together

demonstrate the majority's conclusions are unsound. To touch upon the submissions

Elias CJ Wouldn't one do Mr Templeton?

Templeton Sorry Ma'am?

Elias CJ Is there one that would do?

Templeton I would like to think so. They broadly divide into five points in relation to the first ground. Eight points in relation to the second ground and seven points in relation to the third. Now on the first ground, the first two points are essentially interpretation matters where in the paras.82 and 83 of the majority judgment they said they were most influenced, which is the language they used, in their finding of agency from the interpretation of the Statement of Covenantors. Now that document is at page 272 of volume 2, and I'd like to take you to it immediately.

Tipping J Is there a volume1? I presume there's a presume 1 of the

Templeton Yes there should be volume 1 and volume 2

Tipping J Yes well I seem to be missing volume 1 unfortunately. It just simply hasn't come over. Could you Madam Registrar get hold of my, oh you've got a substitute copy, because I had some notes on it but never mind. Thank you.

Blanchard J That's not it.

Elias CJ Oh it's volume 1 of the case, sorry.

Tipping J Of the case, yes, I'm sorry Mr Templeton I'm just in a mild disarray.

Templeton It's alright Sir. The particular document I'm looking at is in volume 2.

Tipping J Yes but I need it, thank you.

Templeton Now at para.82 the majority said

Elias CJ Sorry what page?

Templeton Sorry, I'm going back Their Honours' judgment at para.82 of the majority judgment.

Elias CJ Oh yes.

Anderson J Page 33.

Templeton They use the expression that they at the end of 82 and it's also in 83, that is must have been expected by draftsman of the document of the Statement of Covenantors, that Rodney would have first of all informed his parents why they should seek independent legal advice and secondly in 83, that it was expected that Rodney would have undertaken the task, that is the task of explaining the documents in the circumstances of liabilities and would have answered any questions on the documents or the transaction. Now my first two points of these. The pre-supposing – I'm sorry, there are four points altogether within the first two. The first of the four is that the pre-supposing that the parents had been informed by Rodney prior to signing, and there I just draw attention to the fact on the fourth line of para.82, the phrase 'prior to signing the statements' is mentioned, and I say this passage overlooks that right from the outset Rodney had been told that he and his parents should have independent legal advice and he was told that my Mr Thomas and Mr Harris and the particular concession of admission by Rodney to that effect is recorded in the written submissions of the appellant, if I can just simply draw your attention to that at para.18.1, and the written submissions on page 12. 'Did Thomas or Harris tell you apart from the letter you have been directed to that you should see a lawyer?' 'They may have yes'. 'Did they tell you or your parents to see lawyers?' 'I'm not sure, they may have'. Now the point is this was also repeated by Mr Harris as I referred to in para.18.2 of the submission and therefore the assumption by the majority that the parents were informed by Rodney as to why they should legal advice is equally likely, equally likely to have been discussed with the parents some significant time earlier. Not in the context of any agency, because he gets the loan offer in late May of 1996; the documents are delivered in July, mid-July '96, and in the interim period of nearly two months Rodney, is told that he must get legal advice, so the point is the discussion as to why the parents should be told to seek a lawyer could have occurred well before any context of agency.

Anderson J Well why would the lender still be expecting then in July that they would get legal advice?

Templeton Because the language of the Statement of Covenantors is that we know that Dollars & Sense expects we should receive independent legal advice. That discussion on the assumption it had come from Rodney, could well have taken place in my submission well before the documents arrived. What para.82 of the majority's judgment is based on is the discussion took place just prior to signing the statement. Now if the documents hadn't arrived

Tipping J Why do you say just prior to?

Templeton Well okay, I'll extract the word 'just', but certainly the point is

Elias CJ But you're saying that the discussion was prior to signing the Statement, you're just saying it was well before.

Templeton Correct, I'm saying the assumption that the discussion took place at the time just before – well they removed the word 'just', but certainly prior to signing, could have

Tipping J But you have to put in the word 'just' to get any mileage out of your point don't you, otherwise you're contradicting yourself?

Templeton With respect no, because we're talking about the context of agency. The discussion with the parents in say late May, early June, could well have occurred long before the documents had arrived, because the agency question, issue rather, is framed in the way was he the agent for the purposes of procuring their signature?

Tipping J Yes.

Templeton The question of signature didn't even arise until the documents arrived. Now the evidence shows it's equally likely the discussion with the parents as I said before could have occurred in that timeframe, because we know Rodney was told by Thomas and Harris to see a lawyer. That's repeated by Harris, and Rodney says he's going off to see his own lawyers the first reaction. So what that shows is that the discussion about the lawyers and the question of legal advice could have occurred equally likely way before the context in the agency vis a vis the documents.

McGrath J But only respect of Rodney, not in respect of his parents?

Templeton Well the evidence shows he was told about both, that both he and the parents should get legal advice. He concedes that may have occurred. The evidence from Harris and Thomas was that yes they had told him. Now in my

McGrath J This document is concerned solely with the parents isn't it as Covenantors?

Templeton Yes correct, but the point being is that we're talking about the context of agency here and him, Rodney, being the agent of the lender saying yes you must get legal advice. I'm saying hang on, the evidence equally points to the fact that any discussion about legal advice could have occurred long before the question of

McGrath J But the impression I had was that the references to Rodney needing to get legal advice related to his own involvement in the transaction.

Templeton And there's reference to the fact he concedes it may have been possible for the parents. He was told about the parents as well. So what we have is a situation where he may well have discussed it with his parents

but in the context of a son to the parents, and maybe in the context of the borrower, but not in the context of agency because agency never arose until the documents arrived. So if the majority are going to make a finding on the balance of probabilities that clearly as a key part of their rationale is that Rodney was the agent for the purpose of explaining legal advice, in my submission is the evidence is equivocal.

Tipping J Well whether he was the agent for that purpose, what I'm focusing on at the moment is whether he was an agent for the purpose of getting their signatures.

Templeton Yes.

Tipping J That's the crunch point isn't it?

Templeton It's the key point, and that as an agent can only arise once the documents are there because there they're talking about it in a vacuum. If there was any discussion that Rodney may have had with his parents was long before the documents arrived. They don't know what the documents entail, not even Rodney does. Because the loan offer is accepted at the end of May '96.

McGrath J The expectation of what Mr Nathan Junior would be doing could be satisfied from his prior conduct before the documents arrived. I mean certainly the documents arriving is a significant point in relation to the agency that the expectations of what the agency have to achieve might have been satisfied by his prior actions. It was over to him really to decide whether he had done it and what he still had to do.

Templeton That might be true but it is equally likely in my submission that that discussion on the question of advice had taken place as I've said before, before the documents arrived. They never arrived until some six weeks or so later.

Elias CJ I'm struggling to understand, I'm sorry it's probably my fault, why this is a matter that you place any reliance on because I would have thought that the Court of Appeal were simply saying from the form of the statement supplied by Dollars & Sense, they are relying on the person who takes the documents to the parents to draw their attention to this. I mean it's not a question of fact as to what they were told, that's all taken hypothetical in the context isn't it?

Templeton It's a question of expectation.

Elias CJ Yes.

Templeton That's what the majority relied on. They were saying that the expectation drawn out of this document was that Rodney must have been the only person who would have told them about the need for legal advice, that's true, but the point that they've missed is that the

discussion about legal advice having occurring long before the question of document/agency arose.

Blanchard J I don't really see the relevance of that. It seems to me that the agency here, assuming for the moment that it was some kind of agency because we haven't heard your other arguments, was either to get the parents to a lawyer who would act independently and advise them and take the signatures, or in default of that, if for any reason the parents weren't going to go to a lawyer, to get the signatures.

Templeton Yes that's correct.

Elias CJ And they acknowledge

Blanchard J Well that's it.

Templeton But with respect not quite because the statement on which the majority rely upon only materialises at the time of signing.

Blanchard J Yes but you don't even need to get to the statement to get to the point I've got to.

Tipping J I just find it very artificial this argument. This wasn't really the lynchpin of it as far as I'm concerned.

Templeton In terms of finding of agency?

Tipping J Yes, I would have thought that okay maybe the Court of Appeal majority did place a bit too much on it, so what. I would have thought there's agency available for all sorts of other strands.

Templeton Well certainly the Court of Appeal, the majority, places they said themselves, they were most influenced by the interpretations taken out of this particular Statement of Covenantors, and they give two reasons why they are 'most influenced' and that is the question of legal advice and the second point which I'm coming to, the question of the expectation again, that is the assumption again, that Rodney would have been the person who would have explained the question of liabilities to the parents. Now if that was the most important factor in which the majority were relying upon, what else is there, and the answer to that is that well we have a suggestion that Rodney goes and gets the title when asked and that is not in the question as an agent but as a borrower. There's the question of as what the learned President said, he said that by the time Mr Thomas wrote the letter of 24 July, it was obvious the only person that he Mr Thomas was dealing with was Rodney. Well that's wrong with respect because the letter in the last sentence says 'go see a lawyer', and a lawyer could have been seen, so it's not obvious at all that in terms of looking at the evidence of agency, there's a clear unequivocal smoking gun that says that clearly is agency.

Tipping J But didn't Mr Thomas, this is a sub-agency really, acting on behalf of the Financier, Dollars & Sense, say to Rodney go and get your parents signatures in effect?

Templeton No.

Tipping J Why is that not

Templeton There's no evidence of that at all.

Tipping J Well, but in effect, I don't mean he literally said those words, but in effect that's what he was charging him with doing.

Templeton Well the sequence of legal advice falls into about seven pointers. First Rodney says he's going to see his only lawyer; second he later says he may not and Harris said you need to go and see your lawyer, and I'm sorry before that Thomas and Harris are saying go to see your lawyer, then Rodney says yes I'm going to see my lawyer. He then says I may not bother and Harris says no you should. That's passed on to Thomas and Thomas has then made the uncertainty about the lawyer so he prepares this document of Statement of Covenantors.

Elias CJ There's the package that was given to Rodney to take to his parents. Is there a covering letter?

Templeton No, nothing

Elias CJ No.

Templeton What happened was

Elias CJ Yes but just a moment. There's no covering letter; there's no communication from Dollars & Sense to the parents; there is simply an acknowledgement that we know what Dollars & Sense suggests here. I don't see that the Court of Appeal is astray at all in saying that it's drafted in a manner that pre-supposes that they had been informed of Dollars & Sense expectations.

Templeton Well with respect that overlooks the sequence of events as to what's happened. From the outset there is the statement made that Rodney's going off to see the lawyer. That's confirmed. He's told, he's advised to do that etc, then there's the question of he may not bother, so Thomas, as a matter of caution, does the Statement of Covenantors. Harris then takes the document up and delivers it without a comment, without any covering letter to Rodney for him to deal with, and the evidence that Harris has told him the day of delivery that he, Rodney, is going off to see his lawyer the following day. Now Rodney we know from the evidence is a self-confessed liar and thief and was obviously deceiving Harris. The documents then come back for the

first time some two weeks or so later signed by all the parties but unwitnessed. Thomas says hello, no lawyer. He does a memo to Harris – what shall we do? We know what then is done is that a letter is sent by Thomas back to Rodney saying go see a lawyer to complete these documents properly.

- Anderson J I don't understand why Mr Thomas didn't write to the parents.
- Templeton That's another issue, but it doesn't effect the question of the expectation in Dollars & Sense at the time. They thought
- Elias CJ But hang on, this has all started on the basis that you're taking issue with the statement of fact made by the Court of Appeal. I don't see that it's wrong at all.
- Templeton Well with respect it's not a statement of fact. The Court of Appeal made an interpretation, have taken two interpretations out of this document the Statement of Covenantors, a legal interpretation. The legal interpretation being that it must have been expected given the language in these two paragraphs.
- Elias CJ Well that's not a legal interpretation, that's an inference of fact and there's no covering letter; there's no communication directly from Dollars & Sense to the Covenantors. It seems to me a fair inference on the material that the Court of Appeal has, but I still don't see that it's material for the reasons that have been raised by Justice Blanchard. That's your first point is it?
- Templeton That's the first point. And the first of four points on this point and at the risk of labouring the point, the second point I make, and the Court may not be attracted to this, but I'm going to raise it all the same. In the first paragraph of the Statement of Covenantors it emphasises the need that the parents should receive independent legal advice, independent of both Rodney Nathan and Dollars & Sense. Now if the drafter was intending Rodney to act as agent for Dollars & Sense
- Elias CJ Sorry, what are you referring to here, what page?
- Templeton The Statement of Covenantors on page 272. The document which the Court of Appeal relied upon.
- Elias CJ Yes.
- Anderson J As to refusal to obtain independent advice?
- Templeton Yes. Now the first four lines of that document talks about expecting the parents to receive legal advice independent of both Rodney and Dollars & Sense. My simple point is that if Rodney was acting as agent for Dollars & Sense, there is no need for Rodney to have independent legal advice separate from Dollars & Sense, and the

parents did not need separate advice independent of Rodney, because if he was the agent for the appellant there's no need for him to be separately advised. He's acting as agent for Dollars & Sense, so what I'm saying is that the draftsman

- Blanchard J Well he needs to be separately advised in relation to his own interests.
- Templeton Yes but I'm saying if as the majority think that this document has the expectation running through it that Rodney must have been the agent for Dollars & Sense, the language of the first paragraph is in contradiction to that.
- Tipping J It's an extremely fine point Mr Templeton upon which to hang an essential sort of robust conclusion
- Templeton Well it may be a fine point, but the reality is that the majority hung their hat on it.
- Tipping J Well I agree with the Chief Justice. You're ascribing too much to the majority. They're just drawing an inference that these people must have known before signing that this was the expectation. I can't see much wrong with that.
- Templeton Except I'm saying that the intent of this document looked at objectively doesn't give rise to an expectation at all because the intent of the document says plainly Rodney is not in the capacity as an agent. They don't need him as an agent, point one. Point two, that's not what the draftsman intended.
- Anderson J What I think you might have to do, and this time looking at page 77 of the case, is just say why Justice Winkelmann got it wrong. She's made the findings of fact. She's given four reasons for finding agency.
- Templeton Well I'll come back to that if I may.
- Anderson J But when it suits you though. I think you can't avoid that at some stage.
- Templeton Yes, I just want to deal with the rest of this Statement of Covenantors and that is the second paragraph.
- Elias CJ Well is the submission on this that on its face because it refers to the desirability of getting advice independent of Rodney Nathan, it's indicative that Rodney Nathan is not an agent? Is that
- Templeton Correct, correct.
- Elias CJ That's the point, yes.

- Templeton Turning to the second paragraph, again it's referred to the expectation by the majority that Rodney would have been in a position to answer all questions, all questions on the document and that this made him an agent. Well again the assumption or the interpretation out of the second paragraph made him an agent. There are two points about that. First is that the rationale to that second paragraph is this that Rodney, or rather that it was intended to allay concerns over consent and misrepresentation, and the simple point is that it would make no sense to engage his agent, precisely the person who may represent that position. It would not have been in the lender's interest to have his agent the main borrower because the purpose and intent I say again of that second paragraph
- Elias CJ I'm terribly sorry, when you're talking about the second paragraph, are you referring to the second paragraph as a statement?
- Templeton Of Covenantors, sorry Ma'am, yes, on page 272. So just to summarise that point, it's directed to allay concerns over consent and misrepresentation, and in my simply point it makes no sense to engage as agent precisely the person who may have represented that position. So again from the draftsman's point of view there's no way he would have been intending that Rodney would be acting as the agent. The second point allied to that is that the limitation on disclosure
- Elias CJ I'm sorry, I really am being very slow today, but this paragraph you say the paragraph is inconsistent with agency, but what in particular are you referring in the paragraph?
- Templeton Well there are two points about it Ma'am. The first point was that it's directed towards the purpose of allaying concerns over consent and misrepresentation. In my submission it makes no sense at all to engage as agent precisely the person who may have misrepresented that position, so I'm saying again from the draftsman's point of view, Mr Thomas, at the time he drafted it, he would not have been intending at all Rodney to have been the agent of the letter.
- Anderson J Well here I have the misfortune to think in quite simple terms and it seems to me we have here a security solely for the benefit of the lender, and it needs to be signed by someone and the lender's solicitor says to Rodney get it signed, otherwise there's no sense in giving it to him, and that seems to me to be clear evidence of agency.
- Templeton But with respect Sir
- Anderson J It's for the benefit of the lender.
- Templeton In respect the position is not as simple as that. There was the expectation so far as the lender was concerned that Rodney was going off to see his lawyer.

Blanchard J But they weren't insisting on that.

Templeton No.

Blanchard J So there had to be a fall-back position where the signatures would be obtained in some way.

Templeton They had been urging that and Rodney had been saying yes, that's what I'm going to do, and then the signal comes up he may not go to a lawyer so what Thomas does is prepare this document to cover that uncertainty, or as the words he used in his evidence 'that eventuality'. So it's not a situation where they are totally blind to the position at all. They just say go Rodney, go and sign these documents. It's against the background where they think legal advice has been obtained. That's what they're told.

Blanchard J Well they may think that but they clearly contemplate the possibility it won't be and later on when they know it hasn't been they effectively ratify what's been done.

Templeton Yes, but the point here at the moment, and I'm only dealing with the Court of Appeal's most major factor as to why there was agency, is their interpretation out of this document, and I'm saying first of all hello it doesn't make sense to have an agent for the rationale what the majority say and the second reason why I say it doesn't make sense is that if you look at the last four lines, and in my submission this is significant, it limits disclosure because of conflicts of interest and confidentiality, but we know that in my submission that that statement recognises the long-established legal principle that lenders had no legal need to explain to the sureties all aspects of the loan except in unusual factors. Now here there's no need for the lender to have had Rodney as agent explaining all of the documents because the document itself recognises as a surety there's no obligation for the lender to do that.

Blanchard J But we're concerned with the signature, not the inclination.

Templeton We are, but at the moment were concerned with the explanation because they say that was the expectation of this document.

Blanchard J Well at most what these arguments might establish is that the Court of Appeal perhaps placed too much weight on the Statement by Covenantors, but it does seem to me that it's at least very arguable that the indicia of agency comes from the general circumstances rather than from the particular details of the document.

Templeton Well I accept that I want to move to that, but in my submission at this point is saying the relation so far as the Court of Appeal's assumption or legal conclusion that this document gives rise to agency. In my submission there are four good points why that's wrong. If we turn now to the other issues referred to by the trial Judge

Tipping J Well I'm quite attracted to 69(a) Mr Templeton. I have to give you fair notice of that. That seems to me to sum up the essence of what was going on.

Templeton Well with respect

Tipping J Page 77. The trial Judge's finding, para.69(a), because that seems to me to be the key to it.

Templeton Well the difficulty in my submission of 69(a), and the Court may well say no it's too late, is it has the word 'asked' at the end of the first line. There's no evidence of asking at all.

Tipping J I think she's not using the word literally, I think she's just saying this was the effect of what was going on.

Templeton Well that may be true, but the language which has been used, if Your Honour's correct, the word 'asked' is not literal. Fine, but

Tipping J No, that is her assessment of what's she's heard.

Anderson J We've "got" for "ask".

Templeton Well I accept that, well more to the point The Learned President used the word 'left', not asked, not got, it was left to Rodney to do certain things, then describes them. And what he places the most reliance upon in his own language was the fact that the time Thomas sent the document back the second time to be witnessed, he said it was obvious, is the word he used, that Thomas would have been dealing with Rodney. My answer to that is that no, if you look at the letter and I'll take you to the letter in a minute.

Elias CJ Sorry, before you elaborate on that, is there any problem if we take this as meaning left to Rodney? I don't understand the point about the word.

Templeton Well if I can go to what the learned President say that may be

Elias CJ Sorry, can we just deal with 69(a) and what's wrong with that? You said that you've objection on the basis that there's no evidence of any asking and you've said that the President talked about it being left to Rodney.

Templeton I used the words

Elias CJ Is it material?

Templeton Yes it is, in my submission it is very much so because if you're looking at the true test of what agency is, and Lord Browne-Wilkinson said 'the

agency must be, sorry the agent must be acting in a real sense, a real sense of procuring the signatures’, and I’ll come on to that in a minute.

Elias CJ Well if it’s left to

Templeton Now left is not acting in a real sense in my submission. Asking is, if there was a literal asking.

Tipping J Well that is the Judge’s assessment of what in context occurred. She isn’t saying that Mr Thomas literally, she says through its agents Mr Thomas and Mr Harris. It’s the cumulative effect of all that happened the Judge has rendered is asked. There’s no one individual who says I hereby ask.

Templeton In fact there was no asking because I go back to the sequence of what I said before as to what happened.

Tipping J Well are you saying

Elias CJ Well even if it was left to him to procure the signatures, why is that not enough?

Templeton Well the presence of it was not enough except for one fact which was detailed in para.49(f) of his judgment which

Blanchard J Sorry, which judgment?

Templeton The Learned President’s judgment on page 21 of the case.

Tipping J Yes well that’s just a statement of an inference drawn from all the circumstances.

Templeton Yes well if I can just go back to what he does say at 49(a) ‘ it was left to Rodney to ensure disclosure; it was left to Rodney to obtain the signature of the Covenantors; it was left to Rodney to obtain the section of the loan documents’ and it comes down to 49(f) ‘by this time it was quite obvious to Thomas that Mr and Mrs Nathan were not using solicitors. Dollars & Sense had no direct dealings; accordingly Dollars & Sense must be taken to have realised that the only person they will be dealing with over execution of the documents was Rodney’. Now with respect that statement is wrong when you look at Thomas’s letter.

Anderson J It’s undoubtedly the case that they expected and arranged for Rodney to obtain signatures somehow, whether it was directly or through a lawyer

Templeton They didn’t arrange

Anderson J Well why did they give him the documents?

Templeton Because he was the borrower. He said he was going off to his lawyer. They gave him the documents because (a) he wanted the loan; he was instrumental in organising; (b) he said he was going off to his lawyer, and then there's some question that he may not, so Harris's who's his co-director takes them up there and delivers the sealed envelope, and says at the time of receipt, Rodney says, I'm going off to see my lawyer the following day but doesn't; instead takes them out to his father; they sign them and it was forged. So the point is there's no asking; there's no specific positive act of agency in this case.

Elias CJ Well I had thought that you were contrasting the finding made by the trial Judge in 69(a) and when I asked you what was wrong with that if you substituted the word 'left', you took us back to the President and then you say that you don't agree with the President either, so what's the point you're making Mr Templeton?

Templeton Well I'm saying in the context of this agency question, the President places great reliance

Elias CJ I'd like you to tell us what your submission is on this because I'm getting confused between the references you're giving us?

Templeton Well my submission on this question of agency is that there's no acting in a real sense, which is the language of Lord Browne-Wilkinson, that Rodney was the agent for procuring the signatures of the parents. When you look at the chronological sequence of the facts and what occurred

Elias CJ Sorry, I'm just taking a note of it. There's no acting in a real sense to procure the signatures.

Templeton Of Rodney acting as agent for the lender in procuring the signatures of the parents.

McGrath J Is what you're really saying that on the authority of *O'Brien*, Lord Browne-Wilkinson's speech, this is not an agency?

Templeton Correct, and that was confirmed in part in the *Pitt* decision which she gave on the same day. The words 'real sense' I think is actually used in *Pitt*, not so much in *O'Brien*, but they were delivered on the same day. But Your Honour's question is exactly correct. You look then as to, and I'm coming on to that next, if you look at the

McGrath J You're coming on to *O'Brien*?

Templeton Yes.

McGrath J Good.

Templeton If you look at the

Elias CJ There's no direct dealings between Dollars & Sense and the Covenantors?

Templeton Correct.

Elias CJ Well what's the link?

Templeton There's no direct link.

Elias CJ There's no link.

Templeton There's no link, but that Rodney says they're going off to see a lawyer. They accept it at face value. He then deceives them and lets them down.

Elias CJ Well how does he let them down? What were they expecting him to do?

Templeton Going to do exactly what he said he was going to do, he was going to take them to his lawyer. He said that before the documents went up there and Harris says he said it again at the time of receipt. Now, there's also to be fair, what he says to Harris in the interim, I may not go to a lawyer, so Thomas out of caution does the Statement of Covenantors.

Tipping J If he'd gone and actually got the mother's signature, no one would have blinked an eyelid about agency.

Templeton We wouldn't be here today.

Tipping J No I know, but the point is simply this, he's done badly what he was commissioned to do.

Templeton Thomas or Rodney?

Tipping J Rodney. Rodney was commissioned to get his mother's signature. What he's done is he's done it fraudulently instead of doing it properly.

Templeton That's on the assumption that he was agent. My submission

Tipping J That's what I'm putting, that this Lord Browne-Wilkinson in a real sense, I'm inclined to think that that goes against you rather than for you. I mean we've got to be sort of commercially realistic about what was going on here Mr Templeton. We're not sort of construing a will here.

Templeton Indeed we're not, but can I look at then as to what the legal climate was in England at this time?

- McGrath J I'm sorry but I think you had better take us to *O'Brien* at some stage because the impression I have of *O'Brien* is that Lord Browne-Wilkinson was firmly of the view that the lender did have an authority to inform sureties of what being a surety was about and it was in that context that he was making his statements about whether in the real sense that there was an agency.
- Templeton That's true but that was because he had discredited and he said the concept of agency is highly artificial. The reason why he said just that, because he put down the question of agency. I may take you to that
- McGrath J I think you had better take us to the case so we can see what similarity appears.
- Templeton What I want to take you to first which summarises that is in volume 3, which is *Etridge No.2*, which is under tab 40 which is the Court of Appeal decision of *Etridge* before it reached the House of Lords and I want to take you to page 717, which is the judgment of Lord Justice Stewart Smith.
- Elias CJ Sorry what's the tab?
- Templeton Sorry Ma'am?
- Foster 40.
- Templeton 717 at tab 40. On page 717 Lord Justice Stewart Smith is talking about *O'Brien's* case and under the heading 'the position as between the complainant third party' coming down to the sixth line, the quote is 'the basis on which the transaction set aside was who was not himself guilty of impropriety was obscure. Two principal theories competed for supremacy. One was based an agency, the other on notice'. It then talks about the husband acting for agent and then he goes three lines down 'as Lord Browne-Wilkinson pointed out in *O'Brien*, "the supposed agency is highly artificial. In most cases the reality of the relationship is if the creditor stipulates for security and in order to raise the necessary finance, the principal debtor seeks to procure the support of the surety. In doing so he is acting on his own account and not as agent of the creditor". And earlier on before the reference to Lord Browne-Wilkinson which I just mentioned, just after line (e), he says "the theory is now almost totally discredited". Now if that was the thinking in England in 1998 that is that the agency theory was almost totally discredited, then it needs something very strong to make a finding of agency, and we come down then to line (g) of the last paragraph 28 "since *O'Brien's* case the doctrine of notice has gained the upper hand. Although there may be cases where without artificiality the husband can properly be treated as acting as agent or the bank in procuring the wife to give security, such cases will be very rare".

- Tipping J But there's a conceptual difference from procuring to give security and procuring her signature in pursuance of that agreement.
- Templeton I think in *O'Brien* itself Lord Browne-Wilkinson didn't necessarily draw that distinction.
- Tipping J Well I'm suggesting to you there is.
- Templeton Well certainly here
- Blanchard J Well he wouldn't have because it wasn't a forgery.
- Templeton True, but here we are talking about the concept in this particular passage of agency, and what I'm saying is two things. One, it's almost totally discredited says Lord Stewart Smith, or Justice Stewart Smith. Two, that the cases when it would apply is highly artificial – the reasoning of it is highly artificial
- Tipping J I agree with this as I said in *Wilkinson* but I don't agree that you can extrapolate from this that there is no agency in the present circumstances.
- Templeton Well can I just go to the last part of this passage at sub.paragraph (g). They say "such cases would be very rare, and we doubt whether it will ever be possible to treat him as the creditor's agent where he or his company is the principal debtor". Now
- Tipping J Yes, they clearly prefer the notice theory.
- Templeton Correct, but be that as it may, what they're saying in terms of the concept of agency it's a dead duck. Now why then should it be alive and well in this case when there's no express request by the lender for Rodney to be the agent. And all the majority do is they hang their hat on a Statement of Covenantors, and we've gone through that. We then look at the rest of the evidence. There's nothing there except the mere delivery of the envelope and
- McGrath J Well look you're hammering the lower Courts' subsequent view of *O'Brien*, no doubt which it is a short expression phrase, something that can help you, but no doubt you're going to take us back to *O'Brien* so we can see the context, including the context of English practice, in this area in which this particular observation was made and which includes as I understand it, a series of arrangements to ensure that either a solicitor, not acting for the bank, but acting for the wife, and the wife's interest will certify certain advice has been given, or at least that the bank, the lender, will notify the surety directly of the arrangements.
- Templeton Yes, yes

- McGrath J So I really don't find this sort of encapsulation particularly helpful and we're taking a while to get to *O'Brien*.
- Templeton Except that with respect we're talking about two different concepts here. This case is all about the concept of agency. *O'Brien* was all about the question of undue influence and whether constructive notice should apply to the lender by virtue.
- McGrath J By an agent.
- Templeton Not as agent, it's nothing to do with agent at all. A constructive notice position is an entirely different issue because agency doesn't arise, because *O'Brien*, *Etridge* and also Lord Nicholls in *Etridge* No.2 said no to agency, it doesn't arise. It's a dead duck. What they say instead is constructive notice applies in the context albeit of undue influence, and therefore they say steps should be taken by the lender to do certain things to minimise the risk, not make inquiry, but to minimise the risk before the buyer signs up. Now that's the difference and with respect what's been overlooked here is that agency is a dead animal except in the most rare
- Elias CJ Well if agency
- Templeton Says the English case law.
- Blanchard J Agency may be a rare animal in relation to procuring agreement but as Justice Tipping says it's a different thing when you're talking about the mechanics of signature.
- Elias CJ Yes.
- Tipping J Yes and that's the key distinction, and the historical basis of this, Mr Templeton, was agency was a common law doctrine; undue influence is an equitable doctrine; and the equitable doctrine of constructive notice was found to be more satisfactory in the end, a la *O'Brien* and Lord Nicholls contribution to this, than trying to impose what was a rather artificial common law concept of agency. That's the way historically but I don't see it as having any bearing on our present issue.
- Templeton Except that here these cases are saying in this particular passage, and indeed Lord Nicholls in *Etridge* in the House of Lords, agency doesn't apply.
- Anderson J Where there is an equitable remedy sought.
- Templeton Sorry.
- Anderson J Where there is an equitable remedy sought.

Templeton Yes, yes.

Blanchard J But they weren't addressing the mechanics because it didn't arise there.

Templeton I accept that.

Blanchard J There was nothing wrong with the signature.

Templeton I accept that, but the issue is if you then give any weight, and I accept that entirely, and that's the context of what happens, but what they're saying though where in vis a vis a lender and in the last three lines of sub.para.(g) in page 171 – 'we doubt whether it will ever be possible to treat that as the creditor's agent where he or his company is the principal debtor'. Now that's a very broad statement.

Elias CJ Well yes exactly, it's a very broad statement but it's made in a particular context and you can't talk about agency generally, you have to talk about the scope of the agency, and the agency we are talking about here is agency to obtain a signature. The agency that was being talked about in *Etridge* and *O'Brien* was agency to advise on entering into the improvident agreement or whatever.

Templeton With respect I'm not quite sure about that. I think the context of *O'Brien* and *Etridge* was that getting the wife to come into to agree to being the surety and to sign I think that's one and the same, I don't think there's a subtle distinction. In fact that it doesn't make sense for it to be distinction. All I'm saying at this point is that in terms of the finding of agency, (a), the evidence is very slim in terms of that; (b), that if the majority are hanging their hat on a Statement of Covenantors, there are difficulties with that, and (c), the historical weight of legal authorities certainly in the UK, on the concept of agency where a surety is involved, is also against the findings. Now having said that, if this Court takes the view there's essentially a factual determination as opposed to a legal determination, then I'm stuck with it. My submission is that on the first ground there's no clear, positive, overt evidence that shows that Rodney was asked to be the agent of the lender for the purposes of procuring the signatures.

Tipping J So really you're saying the finding of fact by Justice Winkelmann was not soundly based?

Templeton Correct.

Tipping J Because if it is soundly based that's the end of it isn't it?

Templeton Yes that's correct, but what happens that we have in the Court of Appeal the majority moving away from that entirely from both judgments and the majority relying on the Statement of Covenantor, not much else, and so far as the minority are concerned, relying on the fact as The Learned President said, there was some artificiality, he even

says that 'I'm prepared to accept there's a sense albeit a little artificial in which Rodney might, not was', as in par.49 on page 21 of the case 'there was a sense, albeit a little artificial in which Rodney might, not was, regard as Dollars & Sense' and he then refers to the leaving, the question of things being left to Rodney to do certain things and in para.(f), 49(f), that it must have been obvious to Thomas that the only person they're dealing with was Rodney, but with respect that's wrong. We look at the letter of 24 July.

Blanchard J What letter?

Templeton The letter on page 254. This was the letter that The Learned President was referring to in his para.49(f), and I placed reliance on the last sentence and the second to last sentence.

Blanchard J Well it's clear from that last sentence that Mr Thomas understood that his solicitor hadn't been involved up to this point.

Templeton Yes as I took you through the sequence before, when the documents come back the first time, signed but unwitnessed, he then sends a memo to Harris and says – which I'll take you through, which was the proceeding page at page 253 'The documents have been returned but none of the witnesses have been signed, nor was title provided. Given that neither Rodney or his parents had sought legal advice, I am concerned this is settled properly, blah, blah, blah, and the documents be fully and unequivocally enforceable and your thoughts will be appreciated.' On that same day, 24 July, Thomas then sends the letter emphasising the third last paragraph that 'the witnessing provisions be completed in relation to your signatures, your father's signatures and your mother's signatures. I really do recommend that you see a solicitor to ensure these documents are completed properly'. Now my simple point is that until the documents come back the second time two weeks later, it's only at that point does Thomas know for sure no lawyer has been involved.

Tipping J I wondered if I could put to you another dimension of this letter. Would it not be rather artificial to hold that whereas by this letter he wrongly was expressly tasked to use that word with the task of getting the witnesses, yet he wasn't expressly tasked with the task of getting the signatures. It seems a very odd conclusion. I mean you can't argue can you that he was not expressly asked to get the witnesses?

Templeton No I do take issue with that because the last sentence go to a lawyer to have

Tipping J Recommend.

Templeton 'To ensure these documents are completed properly'.

Blanchard J Recommend.

Templeton I really do recommend. Now

Tipping J But when they didn't go to a lawyer they ratified.

Blanchard J Yes.

Tipping J They needn't have acted on it.

Templeton What Rodney?

Tipping J Yes, they could have said this isn't good enough, we want solicitors to witness.

Templeton Well there's no obligation for the solicitors

Tipping J I know there isn't but that's the implication from the last line that he should get a solicitor to do this.

Templeton Correct, but my point in the context of this construction of agency, in para.49(f) of The Learned President's judgment, he says it was quite obvious by this time to Mr Thomas that the Nathans were not using lawyers and therefore Dollars & Sense must have been taken to realise that the only person they'd been dealing with over execution of the documents was Rodney. That's when they come back the first time. I'm say with respect, no, because a lawyer could have been in response to this letter and it wasn't until the documents came back the second time, now witnessed, signed and witnessed, did Thomas know for sure no lawyer had been seen.

Tipping J Were they re-signed or were the documents just witnessed?

Templeton Just witnessed. And he says in his evidence

Anderson J I mean as soon as he got the documents back improperly executed, he knew a lawyer hadn't been involved.

Templeton That's what on page 253 that's what he says. He says given that neither Rod nor his parents have sought legal advice, because after that point there was the possibility they had, he then says I am concerned about the problem. He then writes the letter on the same day stressing the need, in page 254, to go to see a lawyer.

Anderson J I would have thought a prudent solicitor would say to his own client, don't advance the money unless a lawyer is involved, there's so much scope for undue influence in this type of case.

Templeton Well certainly on the authority of *Massey* which is Lord Justice Steyn in 1995 in England. All he says was that all that was required in his

view in the context of that case was that they simply urged to go to see a lawyer. Not insist.

Anderson J Well New Zealand's not England and the New Zealand community may have different norms from the city.

Templeton And standards may have moved on since 1996 I accept that to what we know today, but we're looking at this case as it was in 1996.

Anderson J Lord Denning was dealing with this type of case back in the 60s and 70s when he spoke about bluebell time.

Templeton Well that may have been true but the reality is in my submissions the case law in 1996 both in New Zealand and the UK was a pretty lot restricted to what it was subsequently as noted in *Wilkinson* in later decisions. I'm saying in 1996, to answer Your Honour's point, go off to see a lawyer clearly and some sort of pre-condition, that didn't develop until *Etridge*.

Anderson J Sorry, I've diverted you with an irrelevancy.

Templeton You have slightly. Coming back to this letter of 24 July 1996 and the relevance of it in relation to 49(f) of the President's judgment.

Tipping J I'm not really with great respect to the President too fussed about the President's view of this letter, I'm more fussed about my own view of it.

Elias CJ Although you have on the point that you're addressing us on, you have concurrent findings of the fact against you and you are trying to persuade us that the view wasn't opened to the trial Judge and to the Court of Appeal, that they take of the agency to obtain the signature. You then have your other arguments as to whether the forgery comes within the scope of it.

Templeton Yes I'll come on to that in a minute, but Ma'am if I may just come back to this point. The reason why I am submitting, and it's not just a factual matter, why this question of agency is in doubt, we have (1), the law that says the concept of agency is artificial, highly artificial in these circumstances; (2), we have a moving ground of factor rationale to justify it. The trial Judge says this; the majority in the Court of Appeal say no, they move away from that and rely on the Statement of Covenants.

Elias CJ Well they don't, they say for the reasons given by the trial Judge and indeed we'd go even further and say there was no other available interpretation.

Templeton But they quote 'most influence' is the words they use. They're most influenced in their finding based on the interpretation out of the

Statement of Covenantors. They give very little credence to the other matters, and then we move to the learned President and he finds and lies it on something altogether different again. In particular the fact of that Thomas thought that they were never dealing with a lawyer. So we have a shifting ground.

Elias CJ Well it's not shifting because the majority also say they're relying on reasons given by the President. But they are agreed.

Templeton Well I know the majority with respect Ma'am to say that My Learned President begrudgingly accepts it might have been opened to the trial Judge.

Tipping J The trial Judge said the documents were despatched to him on two occasions to obtain execution. Now you have to satisfy us don't you that that finding was just not either open or it doesn't lead to the legal consequence ascribed to the fact.

Templeton The documents clearly were despatched on two occasions to him but as *Snee* said

Tipping J To obtain execution.

Templeton Yes.

Tipping J Well why in law does that not amount to an agency to obtain execution?

Templeton Well in *Contractors Bonding v Snee*, Justice Richardson as he then was says something a lot more, something more has to be, in order to justify agency, needed than just the mere despatch of the documents and the something more in this case that they're trying to hang their hat on is the fact of the suggestion of the Statement of Covenantors, the question of getting the title, being asked to get the title. The suggestion that somehow he was assisting on disclosure, and indeed I think it's common ground that the mere delivery of documents is not sufficient to constitute the intermediary, an agent. There needs to be something a lot more was the language used by I think in *Contractors Bonding v Snee*, and there's something more in this case than simply mere dispatching.

Anderson J It's an agent for what purposes. I mean the courier who takes the goods from A to B is an agent for that purpose.

Templeton Yes well even *Contractors Bonding v Snee*, I think they actually sent the documents to the solicitor acting for the agent or disabled mother. The point is that there's something more. In this case they hang the hat on the Statement of Covenantors, and we've dealt with that. They hang their hat on the fact that he was asked to get the title.

Anderson J They say in the last sentence of para.81 of the Court of Appeal majority's decision, they say 'it was not only open to Justice Winkelmann to make that finding but for the reasons given by her and William Young, the President, it was the only available conclusion', so they adopt both her reasons and the President's reasons.

Templeton But they then go on to say they're most influenced by the Statement of Covenantors.

Anderson J But that's an additional, that's an additional.

Templeton Well true, but the

Anderson J They still adopt the reasons of the others.

Templeton In terms of the majority judgment they spend most time in paras.82 and 83 on that issue. It's not the earlier items.

Anderson J Well they don't need to reiterate the reasons that have already been expressed by the other Judges seeing they've adopted them.

Templeton Possibly. All I'm saying in behalf of the appellant is that the evidence in terms of there's something more of agency in this case, rests primarily on an interpretation of the Statement of Covenantors. It rests primarily on the fact of the items mentioned by Justice Winkelmann that somehow he was asked to get the title, and in my submission that does not deal with the fact that in terms of the letter of July '96, that was to ask his capacity as a borrower, not as agent. The same would apply in relation to disclosure and they're the four things relied upon. It's the asking him to obtain in para.69(a) on page 77 of the trial Judge's judgment.

Tipping J The *Contractors Bonding v Snee* which your reference to caused me to look at it Mr Templeton, and I think the page referred to as 172, was a case where the issue ostensible authority, not actual authority. Am I right in that because here of course there's no suggestion of ostensible authority? Because here of course there's no suggestion of ostensible authority, it said that there was actual authority given him to procure

Templeton In our case?

Tipping J In our present case, yes.

Templeton Yes, yes.

Tipping J And it may be that it was in that context that the remark about despatch of documents not being enough should be interpreted. I'm reading at 172 at line 10 in the judgment of Justice Richardson.

Templeton I think it's the judgment of Justice Gault in that case that deals with that.

Tipping J Well it would have been made in the context then of a case of alleged ostensible authority which of course raises different issues.

Templeton It does.

Tipping J It would be a question of representation being made and so forth, so perhaps this is catching you a bit on the hop but I think if we're going to rely on *Contractors Bonding* we'll need to have a pretty close look at it as to the context.

Templeton If you look at the headnote of *Snee* if I might draw attention to that on page 158, at the end of the last three or four lines of the first holding, it says 'the mere fact that the document is sent to the debtor for execution by himself and his guarantor is not of itself sufficient'.

Tipping J For what?

Templeton For the finding of agency.

Tipping J But isn't this part of the head note? It starts at 15, 'in cases not amounting to agency, the question is whether the circumstances are such, and then the question of notice and so forth', so I don't know that it's entirely correct to say that in a case where express authority is claimed, that the question of handing over of the package is a question for what purpose you hand over the packet of documents surely.

Templeton If I could draw your attention to page 175, which is Justice Gault's judgment, line 18 to 24.

Tipping J 175?

Templeton Page 175 of *Snee*.

Blanchard J Unfortunately my copy doesn't have this.

Tipping J It's apparently omitted from our copies.

Templeton Well I'm sorry. If I may read it out?

Tipping J Justice Gault at 175.

Templeton Says at line 17, 'in commercial transactions in particular where a creditor requires guarantees and other securities as a condition of advances or other assistance to a borrower, more is required than merely the sending of documents to constitute the person who secures signatures, the agent of the creditor, the general principles of agency apply. There must be an appointment or a holding out. Whether there

is agency in a particular case will be determined on the evidence’, end of quote.

Elias CJ It’s a matter of fact.

Tipping J Yes.

Templeton Correct, but he’s saying except for something more is required than just the mere sending of the documents, and in fairness to the trial Judge and in fairness to the majority in their search to find there’s something more, they relied upon the Statement of Covenantors.

Blanchard J What would Mr Thomas have understood when the documents came back the second time with the witnessing completed?

Templeton He said in his evidence that he was ‘not concerned’ and proceeded then to settlement, and his honest belief

Blanchard J Yes but what was his understanding? I’m not interested in whether he was concerned or not. He should have been, but

Templeton Well the finding of fact was that he wasn’t concerned. It was never doubted that he had an honest belief on that. There was no adverse credibility of finding against him.

Blanchard J But he must have understood at that point that no solicitor had been involved.

Templeton Correct, at that point.

Blanchard J Yes, so the job of getting the verification of the signatures had been done by Rodney?

Templeton No, the job had been done, had been signed by this witness

Blanchard J No, no, Rodney had obtained the witnessing.

Templeton Well indirectly because the letter of 24 July

Blanchard J Of a forged signature.

Templeton He didn’t know it was a forged signature. In the letter of the 24 July he says I really do recommend you go and see a solicitor to enable completion. The letter goes off; the documents go back to Rodney. Rodney doesn’t go to a solicitor following the recommendation. He then takes his girlfriend, or the girlfriend goes down and he was taken the original or so Mr Thomas thought and witnesses the documents, and two weeks later the documents come back. Thomas has heard in the interim that Mrs Nathan was somewhere on holiday in Gisborne and when it was put to him the very point that you’ve raised, he said

that he had no concerns about it. He assumed the girlfriend had been taken with Rodney down there. He hadn't asked Rodney necessarily to do the witnessing except he said go to a lawyer, I recommend you go to a lawyer

Blanchard J But he understood that it was Rodney who had organised it. He must have done.

Templeton No, no, the documents

Blanchard J The girlfriend wasn't going to go down to Gisborne by herself.

Templeton Yes but the sequence of events is that the documents come back up unwitnessed the first time. Thomas sees no lawyer involved; is concerned; he then says we need these following things to be done and at the end of his letter says I really do recommend you see a lawyer to enable proper completion. Two weeks later the documents come back witnessed, albeit by the same person who's not a lawyer. When asked did he have any concerns, no he said, no concerns, and that finding as a matter of fact was not challenged in terms of any

Blanchard J You're not addressing the point I'm making. The point I'm making is that it must have been perfectly obvious that no lawyer had been involved and that Rodney had organised the witnessing.

Templeton When the documents came back the second time?

Blanchard J Yes.

Templeton Yes.

Blanchard J And he accepted that.

Templeton He did.

Blanchard J Ratified it?

Templeton No he accepted that the documents had come back what he thought was properly witnessed, because there was no obligation in law at that time, given the policy

Blanchard J Never mind whether the documents were properly witnessed, what we're concerned about is the scope of any agency.

Templeton Correct.

Blanchard J And it seems to me from that that there's a ratification of an agency to obtain the witnessing of the signatures.

Templeton Well it's more of an acceptance by default as to what the position was when the documents came back the second time because up until then he's been urging that they go and see a lawyer. They don't, they come back witnessed by a lay person. He accepts that execution because it's in accordance with the law.

Blanchard J But clearly Rodney has organised that.

Templeton Yes, but that's not the express request that he was asked to do. He was told to

Blanchard J He was told effectively you've got to get witnessing to these signatures, including your own - recommend you see a solicitor.

Templeton Correct, so Thomas

Blanchard J But Dollars & Sense through its solicitor were prepared to accept in the end a situation where no solicitor had been involved and it was all done by Rodney.

Templeton For the very reason there was no legal requirement for execution by a solicitor. He had concerns that it was done correctly. He tells him to see a solicitor. Two weeks later they come back witnessed by a lay person which is in accordance with the law at that time.

Tipping J He was authorised to get it executed and witnessed. He did it badly, but he was still within the scope of his authority, whether by retrospect of gratification or by advance authority, surely Mr Templeton, I mean

Templeton Is this Mr Thomas or Rodney?

Tipping J No, Rodney.

Templeton Oh right.

Tipping J Thomas authorised him to go and get it fixed. The fact that you do something that you were instructed or authorised to do badly doesn't take you outside the scope of your authority.

Templeton Well it wasn't so much badly, leaving aside the question of forgery, the forgery had taken place at that stage, he says go to a solicitor to enable proper completion.

Blanchard J He said he hoped he'd go to a solicitor.

Templeton Well he urged him to go to a solicitor.

Blanchard J Yes, if he'd said you must go to a solicitor it might have made all the difference, but

Templeton Well it would have.

Tipping J No I don't think it would if you'd ratified not going to a solicitor after the event, I think he would have

Blanchard J Well that's possibly true.

Tipping J Yes.

Blanchard J Which makes this an even weaker case.

Templeton In terms of your proposition that he had, ratified was the word you used, witnessing by a lay person, that presupposes the

Blanchard J It's not the ratifying the witnessing by a lay person, it's ratifying the fact that no solicitor was involved in the process.

Templeton Yes and nor was there an obligation at law on him at that stage and terms of the case

Blanchard J No there wasn't, but it's a question of what he understood Rodney's role must have been.

Templeton Well with respect the answer to that question is that Rodney's role was the borrower, the main borrower, and the documents have come back signed and un-witnessed after being urged to see a lawyer and being told a lawyer was involved. They come back so they're sent back again for proper witnessing with the urging to go and see a lawyer again.

Anderson J Rodney's not a signatory to the mortgage is he?

Templeton No.

Anderson J And that is the security solely for the benefit of the lender.

Tipping J Rodney wanted the money; Dollars & Sense wanted the security.

Templeton There was also security over loan over the shares.

Tipping J Yes, they want primary security that's over the land obviously. The shares proved pretty worthless.

Templeton Well not at the time

Tipping J No, well maybe not, but you see there were different interests involved.

Templeton Well not entirely, the same interests, they wanted the loan documentation signed; they wanted the loan documentation over the shares; they wanted the mortgage over the land. They are all expressed

three security requirements, but if we can go back to Mr Justice Blanchard's question, it's not so much a ratification, the documents came back signed by a lay person in accordance with the law. His response to that in evidence, that is Thomas's response when it was put to him, was that he was not concerned finally. That was not challenged in a factual finding by the trial Judge in any way

- Tipping J This isn't an issue
- Blanchard J I don't understand that point.
- Tipping J It's not an issue of his good faith. It's got nothing to do with that. This is a completely separate point.
- Templeton Your Honour I accept that. It's a question as I understand the question whether Thomas was in somehow
- Blanchard J It's a question of what he accepted, not whether he was concerned about what he accepted.
- Templeton But if we are going to construe this issue in the context of agency, he accepted when the documents came back but at the time he tells Rodney to go and get them witnessed is not as an agent at all, it's as a borrower, go and see a lawyer to get your signatures witnessed properly. They then come back the second time, witnessed, so at the time of the request with respect your premise hinges on the fact that Rodney was told as an agent to go and get them witnessed properly, but that's not what the letter says. The letter says go and see a lawyer. Plainly agency was not part and parcel of the concept at all so far as that letter of 24 July was concerned.
- Blanchard J Well it's only cast in terms of a recommendation.
- Templeton Well there's no suggestion with respect of agency anywhere else in that letter.
- Blanchard J Well what it's saying is effectively get the signatures. I recommend you do this via a solicitor.
- Templeton For proper completion are the words he uses. That's not you, Rodney as an agent go and get proper completion, it's go to see a solicitor for proper completion.
- Blanchard J Well yes but the burden of the letter is that the signatures have got to be completed by witnessing. They've got to be verified by witnessing. There's a recommendation to see a solicitor but no more than that. So it can be done without a solicitor.
- Templeton Well the word 'completed' in my respectful submission of the last line

- Blanchard J Well you could complete the documents without a solicitor. The Land Transfer Act as you pointed out doesn't require the involvement of a solicitor.
- Templeton But if we're construing this letter as somehow some sort of agency evidence from Thomas to Rodney with respect, it doesn't do it. That letter says you must get your signatures witnessed properly, I really do recommend you go and see a lawyer. It's not saying it's over to you Rodney to do what you like, it's the emphasis on seeing a lawyer which in my submission negates any assumption of agency. Can I pass on to the fourth point of the first ground – that's the question of implied authority. That is Thomas's ability to delegate his functions as a solicitor, and I draw your attention first of all to *Bowstead & Reynolds* under tab 19.4 of volume 1. It relates to Article 34 under the heading *Sub-Agency*. 19 itself should consist of photocopies of relevant pages of *Bowstead & Reynolds* and 19.4 is on the fourth page through, and under the heading *when an agent may delegate authority*, it records the fact 'an agent may not delegate his authority except with the express or implied authority', and then it talks about when the authority of a principal may be implied. In my first submission a careful reading of para.2(a) to 2(e) inclusive show that none of those situations applied in this case.
- Anderson J Are you saying that Mr Thomas couldn't get a clerk to arrange for the signatures?
- Templeton An employed clerk, yes. The lay borrower, no. And if we go over the page to the commentary on page 19.5, under the heading *general rule of no delegation*, it refers to the Latin maxim and says in the third line 'the maxim is founded on the confidential nature of the contract of; whenever authority is coupled with a discretion or confidence it must be exercised by the agent in person' and talks about the reasons for that being fairly obvious. And tucked away the examples are solicitors on the fourth line from the bottom.
- Anderson J So what's the alternative? In this case Mr Thomas himself had to go and get the signatures or what?
- Templeton Well Mr Thomas thought they were going off to a lawyer and got misled.
- Elias CJ Isn't this a ministerial act?
- Templeton With respect, no, this is the signing, this entails an action of a confidential nature. The signing up of the parties to the transaction which crucially depends upon the confidence in the person being appointed, that is Mr Thomas, it would not include - there's no confidence of Rodney the main borrower going ahead and carrying out the ministerial action of

- Anderson J I don't know with respect how you can advance this argument because Dollars & Sense has ratified what was done. It's asserting it, it's not denying it, it's asserting it.
- Templeton Well there's a sub-question in that is whether they can ratify an action which there is no authority to delegate in the first place.
- Blanchard J Of course you can.
- Anderson J But you want the mortgage to stay and it's implicit in that that you're saying we ratify the way in which it was executed.
- Templeton Well my starting point in traditional terms if you're going to sub-delegate to someone it has to fall within the classic examples noted by Professor Reynolds. That coupled with that is the fact of what I think Justice Tipping said in their decision I cited that you look at the scope of the retainer, and the scope of the retainer here, and that is what can be 'fairly and reasonably inferred' which I think were the words of Justice Tipping.
- Anderson J Normally arguments about the scope of authority is where the principal is trying to avoid the consequences of the agent's activities, such as the negligent driver, but it's much more difficult to apply it to a situation when the principal is trying to take the benefit of what the agent has done.
- Templeton That's a different issue. Prior to that we reached that point you were looking at whether the agent maybe Thomas the solicitor had the authority and the ability to appoint Rodney, the main borrower.
- Anderson J Well Dollars & Sense isn't eschewing the mortgage now is it? They're saying we're not bound by anything in the mortgage. They're saying we want the benefit of the mortgage and they can't claim the benefit without ratifying the way in which the benefit was obtained.
- Templeton We don't have to go there. The mortgage is registered. We're lying on the registration, the act of registration under the document.
- Anderson J There's a fraud exception.
- Templeton No, not the fraud exception, I'll come to that in a minute, but we're relying on registration, we don't rely on the forgery, we don't rely on the execution, and the question of registration is another argument altogether which we'll come to, but it's not a ratification at all and there's good reasons why and I'll explain that shortly.
- McGrath J Mr Templeton, I'm sorry I'm interrupting, obviously Dollars & Sense would not expect Mr Thomas personally to be witnessing every surety executed document that they had. Now would they have had an agency

to send the documents off to a solicitor in Gisborne if they'd happened to know the one covenant was there?

Templeton Yes.

McGrath J They would.

Templeton Yes they would because that's the practice of New Zealand solicitors, I think that's a given.

McGrath J But why would they not have an authority to allow the principal debtor in particular circumstances to do that?

Templeton I think for two reasons. One is that going back to what I said before about what Justice Tipping said in the *Gilbert* case I think it was, that the scope of a solicitor's retainer in New Zealand normally is construed as to what would fairly and reasonably be required within the normal confines of what the lawyer was asked to do. Second, what the lawyer was asked to do in this case was in terms of his instruction 'to make sure everything was in order'. Now that was the instruction by Mr Bowden to Mr Thomas, and therefore to make sure in accordance with his instruction, that is the scope of the retainer, was to make sure everything was in order does not imply an authority go off to the main borrower, a lay person, to table proper execution of the documents. That's nonsense with respect. The instruction from the client to the lawyer in order to get 'to make sure everything is in order' does not include fairly and reasonably the appointing of the main borrower as the lender's agent for the purposes of signing. I mean that's I would have thought

McGrath J Would it be fair to say that there would be authority to get the main borrower to arrange execution of documents but not as a sub-agent, is that what you're saying?

Templeton It would be a fair assumption to say that the main borrower says that's what he said he was going to do, going off to his lawyer to get them signed, not for him, the main borrower, to be the lender's agent for the purposes of execution. That would not fit within the scope of the retainer at all nor the express instruction by the client in this particular case, so if in fact the borrower was to be the lender's agent, in my submission that would require express authority, express evidence to that effect.

Blanchard J Come back to Justice Anderson's point. If there was no authority in Mr Thomas to appoint a sub-agent then you're able to repudiate what the sub-agent has done, but having taken advantage of it and register the document, surely in order to repudiate you've got to remove the document from the register.

Templeton That depends on the premise that Rodney was the agent. I'm saying no, the documents were sent to him as borrower, not as agent, so the ratification issue doesn't even arise because Thomas plainly had no authority to instruct the borrower as the agent of the lender, in terms of common sense, in terms of the instruction, in terms of what could be reasonably inferred within his retainer, so it's sent to Nathan as the borrower, the main borrower, not as agent, and that's the difference. To go back to Chief Justice Elias's question 'is it a ministerial thing', 'no', there's no evidence as to the practice of solicitors in this situation. There's nothing tendered at all that solicitors in New Zealand regularly as a ministerial action send the documents off to the main borrower for signing. There was nothing tendered by the plaintiff to that effect at all. So in my submission this question of the implied authority by the solicitor to delegate his authority, the vis a vis signing, in accordance with his express instructions, shows that Rodney was not the agent.

Anderson J Well either Mr Thomas was authorised to get Nathan to arrange the signatures or he wasn't. It's self-evident.

Templeton Sorry Sir.

Anderson J Either Mr Thomas was authorised to use Nathan to get the signatures or he wasn't – one or the other.

Templeton Mr Thomas was authorised to send the documents to the borrower because the borrower said he was going off to his lawyer.

Anderson J If in fact Mr Thomas appointed, as a neutral as a word I can find, Nathan as his agent, either he had authority to do that or he didn't.

Templeton If Thomas expressly authorised Rodney to be the agent and

Anderson J That's the assumption.

Templeton And was contrary to Bowden's instructions, and then they accept the documents back, that's a ratification, yes and I accept that, and all Bowden has is a right of action against Thomas.

Anderson J So it gets back to the question was Nathan the agent?

Templeton Correct.

Anderson J Because whether he was authorised or not authorised doesn't really matter now because if he wasn't it's been ratified.

Templeton Correct, that's correct, whether he was the agent that I'm saying in terms of the ratification issue, that's a red herring with respect because we were relying on registration, nothing else.

Anderson J Well that's an interesting question that we'll come to no doubt.

Templeton We will.

Anderson J Instant indefeasibility.

Tipping J So none of this matters if you're instantly indefeasible?

Templeton I wouldn't say none of this matters but certainly as a generalisation, yes.

Anderson J Well there is no fraud that can be sheeted home to you, you've got indefeasibility.

Templeton Sorry?

Anderson J If there's no fraud that can be sheeted home to Dollars & Sense, you're right

Templeton Yes, yes.

Anderson J This whole case is whether there is fraud, which can be sheeted home.

Templeton Yes, yes.

Anderson J That's what the whole case is about. You don't get indefeasibility if the fraud is attributable to your client.

Tipping J And if you haven't been guilty of fraud you don't need immediate indefeasibility.

Templeton Correct. I'm just looking at this question of ratification that's been handed me, article 16 of Professor Reynold's book. That unfortunately isn't part of the bundle, and it does say this if I may quote article 16 under the heading *knowledge necessary for ratification* 'in order that a person may be held to ratify an act done without his authority, it is necessary that at the time of ratification he should have full knowledge of all the material circumstances in which the act was done'. Now here the ratification is the registration acceptance back - Thomas nor Bowden knew of the forgery.

Tipping J You're not going to ratify a forgery are you?

Templeton No of course not, but I'm saying

Blanchard J He didn't have to understand that there was a forgery, he simply had to understand that Rodney had organised it all and there hadn't been a solicitor involved.

Templeton He should have full knowledge of all the material circumstances in which the act was done.

Blanchard J Well the material circumstances were that there was no solicitor involved and that Rodney must have been the organiser.

Templeton That comes back as I said before without going over the ground, as to what was Thomas's intention at the time he sent the documents off, not as agent in my position, but as borrower, because he's told to go and see a lawyer.

Tipping J Can we look forward to the Land Transfer Act after morning tea Mr Templeton?

Templeton Is this an appropriate place to adjourn.

Elias CJ Yes we'll take the adjournment thank you.

11.31am Court adjourned

11.49am Court resumed

Elias CJ Yes thank you Mr Templeton.

Templeton Ma'am. Turning if I may to the second ground, as a matter of general principle, there are two means by which a principal was held responsible for the activities of its agent. First, as the Court will know by attributing the agent's actions to the principal, or second by imputing the agent's knowledge to the principal, and on the first the question of whether the act may be attributed essentially depends upon whether it was within the scope of the agent's authority. The question of whether the agent's knowledge as distinct from the act may be imputed essentially depends on whether knowledge was acquired during the course of that agency, and of course as a sub-question of that, the question the fraud exception to this imputation principle applies.

Tipping J Does the fraud exception apply to both attributing act and attributing knowledge?

Templeton No.

Tipping J No.

Templeton No, and I'm coming to that.

Blanchard J So does that mean that if the act of forgery was within an agency, assuming there was an agency, it is attributed to the principal and that's it?

Templeton If it is within the scope which is the key issue.

Blanchard J Yes.

Templeton Of the agency; agent's authority, within the scope of the agent's authority.

Blanchard J Yes.

Templeton Now the present case, the respondent at para.34 of her submissions, and indeed the majority's decision at para.102 claim that liability in this case is based on Rodney's actions alone in forging the signature being attributed to the appellant. Liability is not claimed on imputed knowledge, and therefore on that basis the existence or otherwise of the fraud exception becomes not crucial except in relation to one instance which I'll come to later and that is whether the knowledge was acquired during the course of the agency.

Tipping J Here the distinction is somewhat artificial isn't it because the knowledge you get of the forgery is derived from the fact that you were the forger?

Templeton Yes and that's the one exception I'm talking about where that knowledge was acquired before the agency arose, but I'm saying the prime focus in this

Elias CJ An intention.

Templeton Sorry Ma'am?

Elias CJ An intention to forge do you mean, or

Templeton No, well the decision to forge was made before the agency arose which I'll come to and that's the one exception where knowledge really becomes relevant in this case. The prime focus by virtue of what the majority have said, and indeed what the respondent's submission say, is on the actions, not the imputed knowledge.

Tipping J But if the knowledge is within the scope

Templeton Yes.

Tipping J That's it isn't it?

Templeton Yes.

Tipping J But isn't that what's said against you?

Templeton Yes by the majority.

Tipping J And by the respondent.

Templeton Yes, that's the argument.

Tipping J Yes, so that's the sole issue?

Templeton That's the primary issue

Tipping J Well prime.

Templeton Same for that one I mentioned I signalled about whether the decision to forge was, ie, the knowledge

Anderson J The knowledge has got nothing to do with it, it's what was done. It was forged and it was uttered. Now the ideas of imputed knowledge are not really relevant to issues of vicarious liability.

Templeton It's got nothing to do with vicarious liability with respect. We're talking about whether the scope

Anderson J I think it's got everything to do with it.

Templeton We're talking about two things primarily in this appeal. First is the scope of the agency where the acts of Rodney were within the scope or were not. The second

Anderson J Right if principle is liable for the acts of an agent done within the scope of the agency.

Templeton And allied to that is the second question which is whether when Rodney decides to forge did he make that decision within the scope of the agency during the currency of the agency or had he made it earlier.

Blanchard J Well it doesn't matter whether he might have thought about it and decided to do it beforehand, it's a question of what he did during the agency.

Templeton With respect it's more subtle than that as you'll see from the authorities that I'm coming to. Now, turning to the first question, that is whether the attribution of the act of Rodney and whether that act of forgery was carried out within the scope, the starting point as noted in the submission is article 23 of *Bowstead v Reynolds* which is under tab 19.1, if I can take you there. At tab 19.1 records Article 23 which is headed *no authority to act other than for principal's benefit*, and that's plain from the language it's used, it is supported, if I can go over the page to 19.2, under the third line, 'as regards implied authority, this proposition is self-evident from the nature of the agency and from the duties of loyalty which that entails'. And you will see from the footnote, sorry back on the, my apologies, not the footnote, in the submission the question of the duty of loyalty is referred to in the written submission which is the decision of Chief Justice Griffiths in

the *Lysaght* decision over at page 23, sorry para.23, page 18 of the written submission. If I can just take you there as a matter of convenience. In para.23 of the written submission there recorded is the statement of Chief Justice Griffiths in the High Court of Australia ‘as regards implied authority, this proposition is self-evidence from the nature of agency and the duties of loyalty which that entails. It’s never been disputed that an agent who is not acting for his principal but for his own benefit is acting beyond the scope of his authority’. And of course The Learned President thought that was plain in his dissent.

Anderson J I’m looking at that 19.3 and the last paragraph before the heading *illustration* which says ‘the result of this reasoning is that the transaction is as regards to principal, void’ and I come back to this difficulty of seeing how you can refute what the agent has done at the same time as you’re trying to take the benefit of it.

Templeton Well the question of benefit I’m going to address next, or whether there was a benefit.

Elias CJ Well you’ve got the title.

Templeton The benefit here is nothing given by Rodney, it’s by the act of registration, but whilst you’re on that page, if I could draw attention to the fact in 19.3 in the third line from the top ‘the fact that the agent acts for improper motives raises a question of degree’. And coming down in that same paragraph to the sixth line ‘but if the very acting is contrary to the principal’s interests, it cannot be regarded as authorised unless expressly’ it has been punched out by the binding there. But I checked that the word ‘it’ should be there. It should be ‘it cannot be regarded as authorised’. Now earlier, back on page 19.2, there’s reference to the proposition, if I can draw your attention to 19.2 in the first paragraph, ten lines down, there’s a quote ‘an act of an agent within the scope of his actual or apparent authority does not cease to bind the principal merely because the agent was acting fraudulently and in furtherance of his own interest’. Now the rest of the commentary on that page is saying that that proposition only applies to apparent authority. It’s been not accepted as applying to actual authority, and indeed if we come to the last three lines of that page, the last sentence reads ‘to modern eyes the case referring to the decision of *Hambro v Burnand* ‘should be based on apparent authority to the third party, he was acting in the ordinary course of business, it would have been odd to ask for evidence of this authority’. Now the point being here, this proposition in Article 23 apply, and indeed that passage on the tenth line of the first paragraph, only applies to apparent authority. The word ‘actual’ has been dropped out and if you go then to Article 74 of *Reynolds*, which is under tab 19.7, the exact language of Article 74 is the same as that referred to in 19.2 save only the word ‘actual’ is missing, been omitted, so the act of agent within the scope of his apparent authority does not cease to bind the principle really because he was acting fraudulently. So far as actual authority is concerned, that

proposition does not apply, and that's the interesting thing that Professor Reynolds has deleted or removed the word 'actual' as for the reasons he mentioned in 19.2, so when we have the new formation of Article 74, it only applies to apparent authority, not actual authority, and in this case that is a very crucial difference for the reasons I'm coming to.

Tipping J What is the distinction that Mr Justice Millett as he then was was making at the middle of page 112? I don't know what it is in your numbering, 19.2, where he made this distinction between 'want of authority' and 'abuse of authority'.

Templeton When I read the case some time ago, I checked and it's not in the bundle unfortunately, it was as Professor says, it was more confined as he said at the beginning of the last paragraph at 19.2, he considered it with respect that it only applied in the abstract. It has very limited application as regards to actual authority, so the debate by Professor Reynolds in the rest of that paragraph relate to, and it's an insurance case it would appear, and from memory that's correct, more relating to a power of authority not actual, and that's reinforced as I said before, and you got to what Article 74 now says which is on tab 19.8, sorry my apologies, 19.

Tipping J 7.

Templeton 7. The proposition which was talked about half-down that first commentary in 19.2 'only applies to apparent authority' – a significant difference.

Tipping J Well in the text under comment the word 'actual' is present in the fourth line, as well as 'apparent'.

Templeton Sorry what page Sir?

Tipping J 19.7.

Templeton But then it goes on

Tipping J But how does one reconcile the

Templeton Well then it comes down to 12345, the seventh line, the sentence 'furthermore the fact that an agent is acting in furtherance of his own interests may negative actual authority'.

Tipping J May negativise?

Templeton Yes.

- Tipping J But this with great respect is rather, at least at first reading, rather hard to reconcile. It seems to be an absolute proposition in the heading and then very much less absolute propositions in the text.
- Templeton Well part of the rationale perhaps is to why there's the difference between 'actual' and 'apparent' is, and Professor Reynolds of course says it's a question of degree but does say that the very acting is contrary to the principal's interests and it cannot be regarded as authorised at least expressly. And that's where we come into *Grace Smith*. In the submission I
- Tipping J But tantalisingly the very last sentence on 19.7, which is our very case, so it is left tantalising hanging in mid air.
- Templeton It is.
- Elias CJ What does it say?
- Templeton I think it's in the previous page which is out of sequence. No, hang on, no, actually I've got a note here to myself, it doesn't apply it says but for as the person's who's document forger. It doesn't cover the position, and if I read it out to you – 'as regards forgery, a forgerer may profess not to act for but as the person whose document he forges and a counterfeit document in itself may be ineffective', so the sentence is not really our case at all.
- Anderson J In *Ex parte Batham* reliance is placed on the elementary principle that you can't take advantage of your own wrong, and I'm just reading from the judgment, 'the case doesn't depend on the principle of constructive notice but upon the principle that a man cannot take any benefit under a false or fraudulent misrepresentation made by his agent, even although he may have been no party to the representation'. So the authorities that you are pointing us to are apt to our situation where the principal or alleged principal is trying to avoid the consequences of what the agent's done, but here your client is trying to take advantage of them, not avoid them.
- Templeton *Ex parte Batham* was another point I'm coming to and there's good reasons why I think this Court should not follow *Ex parte Batham*.
- Anderson J That will be interesting. It's remained unscathed for 120 years, a one-page judgment that says it all.
- Templeton Well we will see.
- Elias CJ Mr Templeton, just following on from that exchange, I'm getting a little concerned about the time because I'm very keen that the respondent should have a fair crack of the whip, so can you just explain to us where you're going with the argument? Which points you want to address?

Templeton Well I think Ma'am I will probably be, at the way we're going, most of today, not all, but

Blanchard J And when are we going to resume?

Templeton I thought tomorrow was set aside as a – the message I had from the Court was that tomorrow was a back up day.

Blanchard J No, well first I've heard of it.

Tipping J Me too.

Templeton That was the message that both my learned friend and I received.

Tipping J From who?

Templeton From the Court.

Tipping J Well the Court is a disembodied entity.

Foster It was when the fixture was changed from tomorrow to today the message came back was so that tomorrow could be kept in reserve. That was the email but whoever set the fixture.

Elias CJ I see.

Foster I can't recall the name.

Elias CJ Well members of the Court had preceded Mr Templeton on the basis that the basis that the fixture was a one-day fixture and we will be in some difficulties if it goes into tomorrow, and we have of course read your submissions and on some of the

Templeton I know and I'm only speaking to the key points

Elias CJ Yes Exactly, but

Templeton But there is a bit to cover, notwithstanding that I will try and move as rapidly as I may but I don't want to

Blanchard J I don't think this is something that should be hurried because it's obviously pretty subtle. I wonder whether we should effectively sever off the in personam argument, because that in itself is obviously pretty complex and perhaps leave that for another day if we get to it?

Templeton Yes, well I'm comfortable with that but I can speak to that issue comparatively quickly by emphasising two or three passages and two or three cases. It will take maybe ten minutes.

- Tipping J Oh no, no, no, absolutely not. Unjust enrichment in personam of claims under the Land Transfer Act is really heavy stuff.
- Templeton It is.
- Tipping J I wouldn't want to be sitting here and hearing you for ten minutes on it Mr Templeton.
- Elias CJ It is a point we don't necessarily reach, so there may be some sense in leaving that point and asking you to confine yourself to the other points and we'll hear the respondent on those points and then we'll see how we go.
- Templeton I'm happy with that Ma'am.
- Elias CJ Thank you.
- Templeton Well moving on and coming to this question of the actual authority. I drew attention in the submission to Viscount Maughan test in *Bradford Building Society v Borders*, and that's recorded at the foot of page 18 of my submissions and he suggested a legal test which I have talking on the attribution of the agent's act, he says at the foot of page 18 of the written submissions 'whether the act is within the scope of the agent's authority should be tested, if he has a permanent employment, be reference to the ordinary duties of that employment, which he clearly cannot extend by a fraudulent act. If it's an agency authorising a special act, the agent will not bind the principal to the extent beyond that which is reasonably to be inferred from the nature of that special employment and the duties incident to it'. So the question then becomes what are the duties incident to it, and in that regard I would go back to this fiduciary duty of loyalty which is stated in Article 43 which is in the supplementary bundle here under tab 4. Article 43 refers to the agent's fiduciary duties, 'an agent owes to his principal fiduciary duties (the obligation of loyalty)'. Now that's the same obligation of loyalty that Chief Justice Griffiths referred to in the *Lysaght* decision which I mentioned earlier at the top of page 18 of the written submission. So if Rodney in terms of his authority has a principal core fiduciary duty of loyalty and as Viscount Maughan says his scope is confined to the nature of that special employment and the duties incident to it – if he acts in breach of that duty of loyalty, then he's acting outside the scope of the agency which is what Chief Justice Griffiths noted in the passage cited at the top of page 18.
- Blanchard J Would that mean that *Lloyd v Grace Smith* is incorrectly decided?
- Templeton No, because *Lloyd v Grace Smith*, for the reasons is a case of apparent authority, not actual authority, and in *Lloyd v Grace Smith* it involved a representation which is what *Lloyd v Grace Smith* was very much dependent upon and I'll take you to that shortly. It's a case of apparent authority, not actual authority. They were certainly dealing with

- Blanchard J** Well didn't Rodney have both actual and apparent authority to get the signatures.
- Templeton No, there's no representation given by the principal that he had apparent authority, none at all. Nor was any argument or finding to that effect, nor evidence.
- Elias CJ I rather took, and I'm sorry it is quite difficult and we have jumped through it, but I had rather taken from the first extract from *Bowstead* where it said to modern eyes this would seem to be, not actual, apparent authority and these are the third parties which is of course what we're talking about here. Whether really what was being suggested, but I did read it very fast, was that really apparent authority has overtaken the need for actual authority in many of these cases. Is that
- Templeton No, with respect Ma'am
- Elias CJ Well you're maintaining a rigid distinction between the two.
- Templeton Yes, yes, and indeed what Professor Reynolds does
- Elias CJ Well in some cases it may be necessary, but when you're talking about the effect on third parties, is it not apparent authority that's the critical
- Templeton It is correct that in some instances they do overlap, no question, but there's also instances where one case is plainly a case of actual authority; one case is plainly apparent authority, and *Grace Smith* particularly was very much a case of apparent authority for the reasons which I'll take you through shortly.
- Tipping J But apparent authority traditionally extended actual authority.
- Elias CJ Yes, that's the point I was trying to make.
- Templeton Yes and it depends as the Court knows on a representation by the principal granting
- Tipping J Or the principal's agent.
- Templeton If authorised. The point here is there's no finding of representation by the principal or his agent suggesting apparent authority. The case has never been argued on that basis at all. There's been no suggestion in any of the judgments, the trial judgment or both the Court of Appeal judgments of apparent authority, and the reason in part is because we look at *Grace Smith* – it's a classic case where the employed senior conveyancing clerk who manages that firm holds himself out to the client that he had that authority to do what he was doing.

Tipping J No it's not he, it's his principal who holds him out.

Templeton Yes the firm, the law firm.

Tipping J Yes, yes.

Templeton So *Grace Smith* is a case on its own for the reasons I'll come to. You can't have a self-authorising agent

Tipping J No.

Templeton Which is what Rodney is.

Tipping J Well I'm not sure about that.

Templeton Well at best.

Tipping J I would have thought that it was open to arguing that there was an apparent authority here in that Rodney was clothed with authority by Dollars & Sense through Thomas to gain their signatures.

Templeton Well what's the representation

Tipping J But interestingly it is not a case really – there is a different concept isn't there between one's duty as an agent to one's principal, which if you're fraudulent obviously, you've breached that duty, as against what a third party is entitled to rely on as binding and the Land Transfer Act simply says except in the case of fraud, and I'm not sure that these esoteric points about agency are necessarily to be translated holus bolus except in the case of fraud.

Templeton I'm not suggesting that at all, but except I make this one esoteric point and that is there's no representation here to the respondent because Rodney never spoke to this mother.

Tipping J This is a fair point that it's hard to see a representation by or on behalf of Dollars & Sense to Mrs Nathan.

Templeton Exactly, so there's no reliance upon apparent authority or ostensible authority because Mrs Nathan simply was never approached.

Tipping J But it seems rather artificial that she's got to rely on apparent authority against someone who's actually forged her signature.

Templeton Do you mean she's got to rely on her actual authority?

Tipping J Sorry, rely on any form of authority.

Templeton Well in my submission apparent authority is not relevant to this case

Elias CJ Nor is reliance.

Templeton Sorry?

Elias CJ Nor is reliance.

Templeton Correct, it's purely to do with whether the act of Rodney's forgery is properly attributed to Dollars & Sense. Pure and simple, except for that one situation which I'll come to shortly.

Anderson J Well even *Grace Smith's* authority for the proposition that you're liable for the acts of your agent whether he was authorised or held out as authorised. So actual or ostensible authority binds you to the fraud but more significantly is this dictum of Lord MacNaughten drawing a distinction between a principal who receives the benefit of the fraud and whether he doesn't.

Templeton Yes.

Anderson J And the only difference in my opinion between the case where the principal receives the benefit of the fraud and the case where he does not is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency. In the former case, which is this case, he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent.

Templeton Yes well can I deal with that now. This question of benefit

Anderson J He cannot approbate and reprobate.

Templeton Exactly, well let me deal with that. It comes back to relying on the register because the majority

Elias CJ There's no benefit because you benefit through the register and the Act?

Templeton Correct.

Elias CJ I see.

Templeton In essence. Now at para.107 and 108 the majority say no that's too narrow a view and disagreed with The Learned President and said that it's more broader than that, but I will take you

Blanchard J You never get onto the register unless you've taken advantage of the document.

Templeton Well can I

- Blanchard J Title doesn't pass, legal title doesn't pass until you register.
- Templeton Correct, but even as was said by
- Blanchard J But if you've never presented the document you never get registered.
- Templeton But as Your Honour said in *Duncan v McDonald*, in a forged case, and the document may be an underlying nullity, once it's registered then the title passes notwithstanding the forgery and in fact the power of enforcement to sell
- Blanchard J You've still taken advantage of the document even if it was a nullity.
- Templeton Can I just take you through this. There's three parties I want to briefly draw your attention to. The first is the *Commonwealth* decision which is in the supplementary list under tab 3 at pages 341 and 342. 341 from the last ten lines and I'll just quote, which goes over the page to 342. 'The State registration is something more than non-deference's rights. It confers title. It sometimes confers a better title than the transferor possessed. It provides as the Privy Council said of *Gibbs v Messer* that everyone who purchased a bona fide value from a registered provider and entered into the deed should acquire an indefeasible title'. And it continues on 'if the State in doing this deprives another of any interest, it compensates him and for this purpose provides an assurance fund. It is therefore quite different' – this is on page 342 – 'it is therefore different from a transaction dependent for which result merely on the agreement and acts of the parties themselves. It is not the parties who effectively transfer the land but it is the State that does so and in certain cases more fully than the party could'.
- Anderson J There's no doubt that if fraud can't be attributed to your client, it has an indefeasible title - that's elementary – but there's a fraud exception, so the crucial issue is whether the fraud of Mr Nathan is attributable to your client, and if it is you come within the fraud exception to indefeasibility, and if it isn't you're indefeasible, simple as that.
- Templeton Well the crucial issue in my issue with respect comes back to whether Rodney, in terms of Article 23, in terms of the actual Act, acted for solely the benefit of the principal or whether the principal as you raised yourself has somehow got a benefit. Now
- Anderson J Because he got the document and presented it and got registered.
- Templeton Yes, but relying on the register as we can see the title or the ability to enforce the mortgage comes solely from the act of registration. It's nothing to do with the forgery; nothing to do with the document necessarily
- Blanchard J But the act of registration doesn't take place in a vacuum. It takes place because somebody gives the State a document.

Templeton Well can I just draw you to what the

Elias CJ And the passages that you've cited say it sometimes confers a better title and there's the other reference later on that you read out which indicates also the exception. So it really doesn't advance you to take us to this statement of principle.

Templeton Except there's a passage in *Farah Construction* in the High Court of Australia this year that says 'that registration doesn't appear at all

Blanchard J That is *Farah* is in volume 3 at the beginning of the bundle at tab 31 and in para.

Tipping J Oh we know about this case.

Templeton 193.

Tipping J From a wholly different context. This was on appeal from the Court of Appeal of New South Wales and Their Honours in the High Court weren't very impressed with the Court of Appeal in New South Wales. Is this the one Mr Templeton?

Templeton Yes Your Honour that's an understatement. The passage I'm drawing attention to para.193, about half-way down it refers to initially in the judgment of Tadgell J, the Appeal Judge in *Macquarie Bank*, which it adopts, but I want to emphasise this passage which is recorded in para.193 which is the last main paragraph of 193, ten lines up from the bottom, I mean eight lines. The sentence starting 'it is to be distinctly understood'. 'It is distinctly understood that until a forged instrument of mortgage is registered, the mortgagee receives nothing. Before the registration the instrument is a nullity. As Street J pointed out in *Mayer v Coe*, the proprietary rights of a registered mortgagee of the Torrens title land derive from the fact of registration and not from an event antecedent thereto'. Now following on from that

Tipping J Which judgment are we in here, who's judgment is this that you are referring to?

Templeton This is the main judgment of the Court.

Tipping J Right, thank you.

Templeton I'll come back to this passage, well I won't be coming back to it if we're not going to deal

Elias CJ What is significant in this passage?

Templeton Well the emphasis in that passage that the mortgagee before registration receives nothing. That registration does not depend upon

an event antecedent thereto. The fact that instrument may be forged it's a nullity. The only benefit that can arise in this case is the power to enforce the mortgage – the mortgagee sale. That does not come from the forged instrument; it does not come from the nullity of the document; it comes from the registration which the Court in *Duncan v McDonald* emphasised in two or three passages.

Blanchard J Well I wrote the judgment in *Duncan v McDonald* and quite frankly Mr Templeton I think that this argument is hopeless, quite hopeless. Somebody presents the document; it may be a nullity; it may be worthless, but they know and they present it that it won't be worthless after registration, so they're using the document and I don't mean that in a forgery uttering sense. I'm not attributing knowledge to your clients, but their act of presenting the registration is a reliance on the document for whatever it's worth.

Templeton If I can come back to the basics in the beginning. The starting point of this issue is Article 23 talks about the agent only being able to act in the principal's benefit. If the suggestion here that the benefit to the principal is the fact that they have had the power of sale which indeed I think the majority seem to rely upon in para.108. They say that the benefits to Dollars & Sense is that they're relying upon the act of forgery in order to obtain the benefit and I think that's in para.108, at the end of it, the last sentence. 'In exercising the power of sale Dollars & Sense is relying upon the covenant of the mortgage document and is thus in a very real sense relying on Rodney's forgery'. Now what I have been endeavouring to point out in the *Commonwealth* decision, from the *Farah* passage, from *Macquarie Bank* and indeed in *Duncan v McDonald* itself, and I will take you to perhaps what His Honour said in *Duncan v McDonald*, 'they are not, that is Dollars & Sense relying upon Rodney's forgery at all, they were relying upon the fact of registration'.

Anderson J But registration conferred the legal interest under the mortgage. The benefit they obtained was the legal estate represented by the mortgage.

Blanchard J It's the combination of the document and the registration. The registration is of the document.

Templeton Yes but as *Farah* pointed out and Your Honour pointed out in *Duncan & McDonald*, that a forged document is a nullity and until it is registered, the power of sale

Blanchard J That's why I said there's a combination.

Templeton Well none of the three judgments I referred to rely expressly in that way.

Blanchard J Well they may not have been called upon to address this argument.

- Templeton Well not put this way perhaps. What we have in terms of those three authorities I've drawn your attention to from the High Court in 1980 and the High Court this year, and indeed *Duncan v McDonald* itself, all place emphasis on the fact that prior to registration the forged instrument is a nullity. There's nothing given to the mortgagee at all. The power of sale is only able to be exercised by virtue of the fact of registration which the State provides. The State does that, not the parties, and that's the key difference here and in my submission that's the fallacy in the last sentence of para.108. It's got nothing to do with the parties. The three authorities I've cited to you show it is the State which provides the fact of registration and passes title, grants the power of enforcement and enables the power of enforcement to be exercised rather. So until registration the mortgage was nothing. It was a nullity. There's no benefit. The benefit comes from the fact of registration as taken by and shown by the later decisions of *Schultz* and *Cricklewood*.
- Tipping J And what precisely, just forgive me for having dropped a stitch I think Mr Templeton, what precisely do you make from all this?
- Templeton That in terms of the argument in answer to Justice Anderson's question about the issue of benefit
- Elias CJ There's no approbation and reprobation and all of that sort of thing.
- Templeton Yes approbation, the reliance on the register. What the majority was saying that reliance on the register enabled them expressly to, or rather reliance on the act of forgery, Rodney's act, enabled them to register and to exercise
- Tipping J So they're not taking the benefit of because it's only the State that gives them the benefit, not the transferor?
- Templeton Correct, not the act of forgery because
- Anderson J That's like saying because the Bank gives you money you haven't received it.
- Templeton Because as said in *Duncan v McDonald* and said in *Farah* and said in the *Commonwealth*, it's the State that grants the benefit, not the parties.
- Tipping J The State gives you the benefit, not the transferor, hence no approbation, is that
- Templeton Correct, correct, and indeed Your Honour may recall that Justice Schultz, sorry Justice Street in *Shultz*, made this very point.
- Anderson J The registration of the dealing that presumptively confers in the feasibility subject

Templeton Well if I can take you to

Elias CJ Is there anything really more to be said about this argument? I mean I think we understand your argument on it.

Tipping J I do now.

Elias CJ Is there anything more to be said?

Templeton If I could take you to what Justice Street did say in *Schultz* if I may. Page 584, it looks to be at line 48 left-hand column, last paragraph. He says, I quote, ‘before leaving this particular aspect I should state that there’s no room when assailing the title of a registered proprietor for applying the rule that the man is considered to be vicariously responsible for a fraud’ and it comes to further down, half-way that passage, six lines up from the bottom, ‘but there the efficacy of a registered titled is in issue, it’s the state of the register which is all important. It cannot be said of a registered proprietor who relies simply on the face of the register that he is thereby adopting a fraud for which he would not otherwise be liable on the part of his agent tainting the transaction leading to him becoming registered. This would travel far beyond the limits marked out by the Privy Council in *Assets Co v Mere Roihi*. ‘A registered proprietor’, page 585, ‘a registered proprietor relies simply upon the state of the register and not upon the validity or otherwise of the transaction which led to the register being in that state. If, in that transaction, fraud or knowledge of it is brought home to him or his agents, the state of the register will not avail him, otherwise it will’. Which is my point with respect that answers the question of benefit, and followed in *Cricklewood*. I’d like to now deal with *Ex Parte Batham*.

Elias CJ Where do we find this?

Templeton *Ex Parte Batham* is under tab 11, volume 1.

Elias CJ Thank you.

Templeton There are four or five points I’d like to make in relation to *Ex Parte Batham*. The first is that it is effectively a judgment of first instance, not a Court of Appeal judgment in the normal traditional sense and if you look at on page 343, the last two lines that refers to the case being initially argued before Johnston J, but His Honour through illness was unable to give judgment and the case was subsequently removed into the Court of Appeal. So what we’re dealing with is a case that hasn’t had first instant consideration and is not the traditional Court of Appeal judgment. The second point is was an action brought by the Registrar and it appears to have been based on s.69 of the 1885 Act, and in the supplementary list under tab 6 I have a copy of that section which is on careful reading virtually the same as our current s.81 of the new Act, and of course s.81 relates to the Registrar’s powers and in the Court of

Appeal judgment under appeal, both judgments says the s.81 powers are essentially administrative and do not permit impeachment of the title under s.62 and that's referred to in paras.35 and 36 of the dissent and in paras.156 to 158 of the majority judgment.

Elias CJ It may be administrative on the part of the Registrar, and the Court of Appeal did say it would be odd to find the Registrar making findings about fraud, but if there was a finding of the Court the Registrar surely under this provision could be satisfied and could act to rectify the Registrar.

Templeton Except that the Learned President drew attention to the fact that *Ex Parte* was decided before the principles of indefeasibility were truly settled, so what we have here is a decision of 1888 under our current version of s.81 which has been construed by the Court of Appeal in this case as being nothing more than an administrative-type provision not giving the right to challenge the indefeasibility of title or questions of fraud, and of course in fairness to the Court in 1888, indefeasibility was hardly settled at the point in the way we know today, but we clearly have is the section we relied upon, s.69, is considered today not to give rise to that power. So the question then how does this decision get interpreted in the light today, in the light of our s.81 is interpreted today, which is a limited administrative registrar power.

Elias CJ Well you didn't in fact answer the question that I was trying to put to you which was that it may be an administrative power, but could it not be used following determination by a Court that registration had been fraudulently procured, because then the Registrar would have a basis for being satisfied that it had been wrongfully obtained.

Templeton I think that's right and I think that's how s.81 would be applied today, but

Elias CJ So I'm saying is it a total answer to say it's an administrative provision?

Templeton No it's not a total answer, it's not a total answer, I'm not putting it in that light. I think the real answer is the next two points

McGrath J Well not only is not a total answer, I mean it actually doesn't bear on the general propositions in the case in any event, it was just the route the Court came to which may no longer be a valid route today.

Templeton Correct, but it influences the thinking of Justice Williams and that's the point. When it comes to looking at his judgment, it influences his thinking as to what he thought he could do. Which is my third point. The decision of Justice Williams was heavily influenced by the fact that *Hall*, that's the villain, was employed by the innocent party as a land broker. Now the villain, Hall, had the specific duty to prepare and register the transfer and it was that registration aspect, the procurement

of the registration which was done fraudulently, that heavily influenced Justice Williams when you read his judgment. So it was a situation more confined to its facts and not so much the general proposition that it's been standing for being the respondent's, and the majority consider it stands for today. It's a decision when read in the light of the facts of first instance, judgment in effect construed against the background of an old section which doesn't have much currency today, influenced very much in part by the specific duty of the employed land broker to procure registration.

- Elias CJ Well what was the purpose of the forgery here but to
- Templeton In this case?
- Elias CJ But to procure a registration.
- Templeton Well in my submissions there's a big difference between when you go to an employ, you engage a land broker specifically and that land broker who you know has the job of executing the documents and procuring registration and he does that specifically, I suppose the answer to the question is that falls within the classic scope of authority of Hall, because he was the persons who had the specialised expertise to do the documentation to procure the registration so far as the innocent party was concerned.
- Elias CJ Well that wouldn't mean that s.81 has a very limited scope. It's only those who are actually obtaining the registration, the mechanics of registration that it would
- Templeton Yes, there's a difference between *Batham* in that sense and this case because Hall in *Batham* was the man to do the registration. He was the guy who you went to and paid the money to do it. That doesn't apply here at all in our case and indeed The Learned President at para.58, he thought the decision was essentially one involving actions within the scope of the authority because of that employed duty of the procurement of registration, and that the procurement of registration was the critical act which heavily influenced *Batham*. The other brief point I make in relation to *Batham* was that it was the fraudulent representation made to the Registrar, not the innocent party, because the Registrar who took the proceedings, so it's a slightly different wrong in a forgery per se, so arguably in that sense *Ex Parte Batham* is not directly in point. Turning if I may briefly to *Grace Smith*. *Grace Smith* was essentially as I said before a decision of apparent authority for the reasons given in my submission at para.26. Also note if I can take you through to Professor Reynolds in *Bowstead*, he cites *Grace Smith* as an apparent authority, that is under tab 12, my apologies,
- Blanchard J Just before you do that, the statement that *Grace Smith* is an apparent authority case, is that directly addressed in that case?

- Templeton Yes it is, in two passages, and I'll take you to *Grace Smith* which is under tab 12 of volume 1. There are two parts particularly that talk about apparent authority
- Blanchard J I you just give us the references, that will be sufficient.
- Templeton First of all Lord Shaw makes it very clear and plain at page 740 at the last five lines of the first paragraph, quote 'but when the authority does ostensibly include within its scope transactions of a particular character, then quoad a third party dealing in good faith with such an agent, the apparent authority is as it is well settled, equivalent to the real authority and binds the principal'. Again on page 738, Lord MacNaghten, quote 'when Mrs Lloyd puts herself in the, and this is the third paragraph on page 738, the fourth line, 'when Mrs Lloyd puts herself in the hands of the firm how was she to know what the exact position of Sandles was. Mr Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he was one of the firm'. So it is
- Blanchard J Well he was wasn't he?
- Templeton Yes, but to do with apparent authority, and *Bowstead & Reynolds* cite *Grace Smith* as an example of apparent authority under tab 19.
- Tipping J I don't think any of Their Lordships, and I've been looking at this case quite closely, are suggesting that there is a material difference here between apparent and actual authority.
- Blanchard J He obviously had actual authority to handle transactions of the character that were normally handled by solicitors' clerks.
- Templeton Yes, but it is thought that he also had the representation, which is the key point that was given to the client at the time she came in, and *Reynolds* cites it as
- Blanchard J But that would only be, there would be a huge degree of overlap there between actual and apparent authority.
- Templeton But the reasoning of Their Lordships and you read them in *Grace Smith*, they fix on two things. One that the managing clerk was the employed person having senior responsibility and holding himself out to the client to do these things. So no.1, it's very much in the employee/employer master context. No.2, it's what he the villain, the clerk, the managing clerk, held himself to the client that he authority for. Hence the reason why it's cited in *Bowstead* and Article 74 is an authority for apparent authority.
- Tipping J It is a case of both actual and apparent authority.

- Templeton It probably is but
- Tipping J That I think is where the confusion arises, that most cases of actual authority will also be cases of apparent authority.
- Templeton Not most, but certainly some.
- Tipping J Well I don't want to prolong this by inviting you to look carefully at all the speeches in *Lloyd v Grace Smith*, but quite frankly I think the distinction you're basing on it is unsound and with respect if *Bowstead* places that sort of distinction I'm not sure that I'd be convinced.
- Templeton Well the reality is
- Tipping J You've just plucked two references at random to somewhat gratuitous references I would have thought to apparent authority though the burden of the case is on actual authority, and what they did in *Grace Smith* was to get rid of that strange doctrine that derived from that earlier case that the fraud had to be for the benefit of the employer because he was responsible for it.
- Templeton I accept that but my respectful submission is that *Grace Smith* needs to be read very much in its context. The context was very much influenced in the way Their Lordships approached the case, particularly because of the emphasis throughout in about five or six passages to the fact that the managing clerk as in his employee's capacity had the specific duty to do what he was doing, or held himself out to do, and then forged along the way. Well not forged, he actually transferred the documents over, so it's very much influenced in the context of (a) an employee/employer position; (b), the emphasis in terms of the way its been construed by the text is an apparent authority case. Interestingly it's not cited.
- Tipping J I wonder if you've had the occasion Mr Templeton, probably not, to consider a judgment in which Justice McGrath and I were involved in in the Court of Appeal called *Giltrap* and somebody or other
- Templeton I had a brief look at that and my reading of that was with respect was that the reason why you found the person, the agent responsible there because I think the Court expressed the view because of the senior level of authority that the CEO had in that case. There's a big difference between that case with respect and the facts of this case.
- Tipping J Well with the greatest of respect that is a rather superficial view of the reasoning and the principle surely is the same, that if it's within the scope of what you're generally engaged to do, the principal can't disavow you simply because you've committed a crime or a fraud or anything else. It's got nothing to do with whether it will also fit under apparent authority.

- Templeton Except the context in my submission very much influences in which head you put it under
- Tipping J Well I find this a very strange submissions. It seems counter-intuitive to me that you can be responsible under the doctrine of apparent authority but not if there is actual authority and you're within the scope of it.
- Templeton I'm not saying that with actual authority the agent's left off the hook. All I'm saying is if it's an apparent authority case, the rationale as to why the principal perhaps should be bound, as noted in Article 74, is because of the representation made by the principal holding out the agent to have that right in power and in my submission therefore the readiness of the Court defined liability is more understandable because of that representation by the principal, giving apparent authority to that person in that particular position. I'm saying that doesn't apply here. There's a distinction between that because this is an actual authority case with a slightly lower not so much threshold but certainly there's no representation by the principal.
- Tipping J I would have thought the true rule ought to be that you are liable if you clothe your agent with actual authority, for anything done within the scope of that actual authority, because he's acting as if he were you and otherwise it would be as they said in *Lloyd v Grace Smith* an encouragement to get people to act through agents.
- Templeton Well it's rather interesting that *Ex Parte Batham*, which is the same point, has not been cited by any other authority or case until this case came up.
- Tipping J Well I'm only prolonging this because it seems to me to be an extremely important issue and are there any authorities case law as opposed to *Bowstead* drawing this distinction that you now invite us to take?
- Templeton No, except if I may make this point in terms of the actual authority, or the clothing as you say the agent was given in an actual authority case. The reality here is that Rodney was asked if he's an agent to procure the signatures, the valid signatures on the documents. By forging is the very opposite of what he's asked to do, hence is the case as *Bowstead & Reynolds* show, it's outside the scope of the authority. The key issue here
- Tipping J That's a different point isn't it?
- Templeton The key issue here is what is the scope of Rodney's authority
- Tipping J Yes, yes.
- Templeton And here he forges, which is the direct opposite of what he has

- Tipping J I'm sorry Mr Templeton, we're sliding into a different point that your arguing that even if it is within his actual authority
- Templeton No I'm saying the duty of loyalty which is the starting point is a fiduciary duty to act loyally to the principal, and he's asked to get the signatures, means to be within the scope of his authority he must act properly and lawfully. Get valid signatures, not to forge. If he forges he goes outside, i.e., the old authority, in the character of a different person, so he's no longer the character of the agent which is
- Tipping J So all the dicta that they provided you're within the circle you bind the principal even if you do something tortious or criminal?
- Templeton Yes, if you're within the circle.
- Tipping J If you're within the circle.
- Templeton That's the key issue, and the question here for this Court is is the act of forging, that is the very antithesis of what he's been asked to do, within the circle or outside the circle. Chief Justice Griffiths in *Lysaght* says he's not.
- Tipping J This is your essential reason for not attributing this fraud to Dollars & Sense as I understand it, this is the key point in your argument is it?
- Templeton That's the key first point. I want to come to a key second point if I may very quickly?
- Tipping J Yes.
- Templeton That is, which I signalled in the submission, that is where he made the decision – that is Rodney – to forge well before any agency arose. The evidence shows that he was desperate to buy
- Tipping J But he did it. If he did it within the authority he did it. Surely it's
- Templeton If he did it within the authority, but in construing that issue whether he did it within the authority, the case law say in *Jessop Properties* I think in Justice Hardie Boys, the authority.
- Tipping J The fact that he starts ruminating on the possibility of committing fraud as some ulterior time Mr Templeton, what on earth has that got to do with it?
- Templeton Well it is really relevant because it comes to the question of determining the scope of the authority. If he comes into an agency having already pre-determined a long time ago he's going to forge and that he has to forge, and I can take you to the evidence that says and shows that Rodney knew his mother would never sign a mortgage in a

million years. She would never put the property at risk. That's what he says in evidence. In December 1995 to buy the tavern with his mates and gets the valuation report. That falls over. He then says, quote in his own language 'I'm desperate to get into the tavern' having failed earlier on. The deal comes up with Bryant; he then gets the offer of finance in May. He says the decision, in his own language in his affidavit and I can take you there if necessary,

- Tipping J No, no, no, you're really guiding this particular lily.
- Templeton Well with respect the evidence makes it plain
- Tipping J That he was ruminating.
- Templeton No, no.
- Blanchard J Let's accept that, let's accept that and get to the point.
- Templeton The decision to forge was made because (a) he knew he was desperate to get into the tavern which he had been trying to for a long time; (b) he knew his mother would never sign the documents. My point is simply this is that the decision to forge was made long before any question of the agency or the scope thereof
- Tipping J Yes I think I've got that point, but what does that matter? Can you please explain as shortly and as simply as possible why that matters?
- Templeton Firstly, it doesn't fall within the scope of the authority, and secondly it is in breach of his duty of loyalty to the principal
- Tipping J Of course it is.
- Blanchard J Well it would have been a breach of his duty of loyalty if he'd made up his mind to do the forgery in the middle of the agency.
- Templeton Well that the question of his decision went to forge is not within the confines of the agency. He brings it into the agency.
- Blanchard J It's not his decision we're concerned with, it's his act.
- Templeton Yes.
- Elias CJ It's not a temporal thing
- Anderson J It's not his forehead, its his
- Templeton Except the point that I would simply make here is that what removes us from the normal classic is the agent authorise situation is that he comes into the agency having made the pre-determined view to forge. Now you may say well that doesn't matter, but it does in a sense that it helps

to determine the scope of what his authority was. His authority was to go and obtain the signatures, not to forge the signature, because he comes in carrying that pre-determined view.

Blanchard J So what?

Elias CJ I think

Templeton Well so what is that the authorities, Professor Reynolds for one suggests that in the English authorities it doesn't, and I can take you there if you want, suggests that is a really relevant factor.

Blanchard J You may have to.

Templeton Well if I may just briefly do it if I may

McGrath J Mr Templeton just very quickly, Article 74, is there only one reference you're noting in *Bowstead to Lloyd v Grace* with?

Templeton No I think there are two other reference to it as well

McGrath J In the footnotes.

Templeton In the footnotes.

McGrath J I'm sure we can find those.

Templeton Going to this question of knowledge being brought to the agency. They do say it's a vexed and difficult question, it's not simple at all, and

Blanchard J We're not in the area of knowledge, we're in the area of act.

Templeton No we're in the area with respect of defining what the scope of the authority was, and

Blanchard J Perhaps you'd better go to the cases because at the moment the argument seems very strange.

Templeton It appears the problem has

Blanchard J It may be that I'm just not understanding what you are trying to put forward and the cases will clarify it.

Templeton The commentary in Article 95, which deals with knowledge acquired through an agent

Tipping J Where do we find that please?

Templeton Tab 19.8 under the commentary

- Blanchard J This is all about knowledge?
- Templeton All about knowledge. You come down to the sixth or seventh line under the *Introduction*, at the end of that seventh line ‘first is knowledge acquired outside the agency attributed to the principal. The English view tends to utilise the notion of the agent’s authority and say no, but then seek to create exceptions which prove extremely difficult to formulate’, and it goes on to refer to the Restatement, third position, which suggests it might provide it as material to the agent’s duties to the principal. It then talks about the exceptions, and my simple point is this, it’s not a situation with the greatest of respect where it is irrelevant. It is very relevant. If he brings, if he’s acquired this knowledge to forge outside the agency, the English authority view says it is not binding on the principal but
- Tipping J That is the knowledge of someone else’s forgery I would have thought, it’s nothing to do with when you are the forger.
- Blanchard J You have two sets of knowledge. One set of knowledge is your knowledge about your intentions. There’s a second set and that’s about your acts, but I don’t think we’re in the area of knowledge anyway. When we
- Templeton No we’re not except for this
- Blanchard J Well why are we here in this paragraph?
- Templeton Because I’m drawing the Court’s attention to the fact that we have this unusual exceptional situation where the knowledge or the decision to forge was made long before the agency commenced. Now the authorities suggest sometimes that can be relevant and it doesn’t matter, other times it does and I think with respect this is a fact that needs to be taken into account because the decision to forge was long before any scope of authority is said to have arisen so far as the appellant is concerned.
- Elias CJ Do you want to take us to any other authority in support of that.
- Templeton No Ma’am this might be a convenient point to adjourn.
- Elias CJ Is there any other authority on this point or do you want to have a look?
- Templeton Oh on this, no.
- Elias CJ No, so we’ll be moving on to another point?
- Templeton Yes, yes.

Elias CJ Thank you. Well can you just indicate to me Mr Templeton where you want to take us after this.

Templeton After lunch?

Elias CJ Yes.

Templeton So far as this ground is concerned there were two brief points I wanted to cover in relation to, or whether the Court wants me to address them on *Schultz* and *Cricklewood*, and secondly the policy considerations which the majority referred to. I think I'd like to address you on the policy issue but maybe so far as *Schultz* and *Cricklewood* are concerned, that's taken as read.

Elias CJ Yes, thank you, yes that would be helpful. And is that the only point. The policy issue is the only one you want to develop further.

Templeton Correct.

Elias CJ Yes thank you. Right we'll take the adjournment until 2.15pm.

Court Adjourned 12.58pm

Court Resumed 2.18pm

Elias CJ Yes Mr Templeton.

Templeton Thank you Ma'am. There's just one brief point I would like to mention in relation to *Grace Smith* before I pass the last point. As the Court will be aware, the fraud in *Grace Smith* was the fraudulent act of the managing clerk in the firm in getting the clerk to effectively sign over the property to him. Lord MacNaghten, who delivered the main judgment six years earlier in another House of Lords case, that is the *Ruben* decision which is at tab 20 of volume 1 was of the clear view that forgery was in a different category of act and it did not bind or effect the principal which was a company in that case at all, and I ask the Court to turn to page 444, and the first paragraph on page 444 starting from the words 'the thing put forward'. What he says there, and I must quickly read it 'the thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it which made the impression is no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement of the document is a lie. The only real thing about it is the nature of the secretary who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way'. My submission

therefore is that these two decisions, these two House of Lords decisions are not easy to reconcile, that is *Grace Smith* and *Ruben*, given six years earlier, and the question is whether *Grace Smith* is wrong or forgery is in a special category. Because certainly Lord MacNaghten thought so in this particular case. The other alternative is that *Ruben* is wrong, but they don't reconcile easily.

Blanchard J It's certainly of course problematical in a Torrens environment once registration has taken place.

Templeton So the submission is that in terms of *Grace Smith* it could be construed again and very much in the context of what I said namely was a managing clerk in a firm having apparent authority getting the client to effectively sign over the documents here, Lord MacNaghten the forgery confers no rights or binds the company in any way.

Tipping J Wasn't there a connotation in this case that the seal had to be affixed pursuant to a resolution of the Board of Directors and therefore it was ultra vires and the indoor management rule didn't cure it? I know that's not expressly stated but I wonder whether that was sort of implicit .

Templeton Well the way that Lord MacNaghten

Tipping J Well Lord Davey seems to be particularly concerned with that dimension on the next page.

Templeton Yes he does, he does, but certainly as far as Lord MacNaghten who gave the *Grace Smith* judgment

Tipping J Well quite.

Templeton It was on a clear view of having a different view of forgery. So the question is, is it entirely a one-off *Ruben* or *Grace Smith*? How do you reconcile the two? Or is *Grace Smith* to be construed in the way I suggested it be construed, namely a decision of apparent authority given the representation by the managing clerk?

Anderson J Well *Ruben* really raises an issue of estoppel doesn't it? It's the reverse of the present situation. It's the principal trying to avoid the conduct of the agent, and not trying to rely on it, and here the company was able to avoid because it didn't ever represent that its agent had authority to do what he did.

Templeton And certainly in *Ruben* the question of estoppel was raised but the way the passage reads is very much confined to, or relates to, the question of what effects or rights the forgery per se was going to buy the company.

Anderson J I don't know whether in that case as an alternative they argued for loss in relation to the advance rather than the performance of the registration.

Templeton That's not clear.

Anderson J Because that would be a different approach to it then. It would be saying you are vicariously liable for the conduct of your agent within the scope of authority for our losses. It would be that type of argument.

Templeton That's right. Well I thought I should simply draw this passage to the Court's attention, particularly when it comes to construing the effect of *Grace Smith*. I may pass now on to the other point, that is the question of the policy issue which was raised by the majority. My submission is that there was no need for a policy justification indicated by the majority because the policy is the policy behind the Land Transfer Act itself, s.62, namely negligence is irrelevant; fraud is only that matters. And the majority tended to rely on their policy argument that because Thomas and Park failed to take precautions, but as I submitted that is irrelevant and in my submission the position's correctly summed up by The Learned President in para.57 of his judgment on page 24 and 25, and I just would like to briefly read it. He says 'in approaching the policy question whether his fraud should nonetheless be attributed to Dollars and Sense, I regard carelessness on the part of Dollars & Sense as irrelevant. If Dollars & Sense had acted more prudently but its precautions had been outflanked by Rodney, the conclusion is that Rodney as its agent had been fraudulent and would still defeat its security'. So the question of negligence is irrelevant. And he goes on to say 'a primary purpose of the Torrens system is to render unnecessary conveyancing precautions that would be required in the absence of indefeasibility of title. The costs saved by the avoidance of such precautions presumably outweigh the costs of the occasional compensation claim under s.172'. So he goes on to say 'against that background I am most reluctant to adopt an attribution approach which has the potential to erode the costs savings associated with indefeasibility'. I just pause there to add that the respondent in this case has filed a compensation claim, that's a common ground, so it's not relevant for the purpose of this appeal, but the point is here that she is not without remedy. So coming back to what The Learned President said

Anderson J Well why would she succeed on a compensation claim? She hasn't relied on the register.

Templeton It's referred to in the judgment. The language in terms of irrelevant provision under the Act suggests whenever there is a loss, if the loss arises by virtue of the indefeasibility she has a claim. And indeed that's what my learned friend has pleaded.

- Tipping J She's suffered a loss because without indefeasibility she would have been able to set aside I presume is the simple way of articulating it?
- Templeton Yes, yes, it is. So if I can just before I finish, the essential point from the policy point of view is that it's contained in the Act. The only exception is fraud. The question of Mr Thomas doing things better or not doing things better or has been said acting more prudently is irrelevant when it comes to the question of where the loss should lie or the choice should lie.
- Anderson J The general policy approach in vicarious liability cases involving an innocent injured person in the servant or agent is that the principal rather than the innocent person should carry the loss. That's the policy driving it, and it's a policy that's arguably seems to me to be outside the policy of the Torrens systems.
- Templeton Exactly.
- Anderson J It's the question of is it attributable to your client.
- Templeton Well the whole reason why the compensation provision was put in the Land Transfer Act was to guard against this very situation when through indefeasibility someone suffers loss. Now the way the majority tried to rationalise and say that the loss should be borne by the appellant, in other words, don't have a claim for compensation, because Dollars & Sense were naughty.
- Anderson J My point is that the policy driving the Torrens system is quite independent of policy considerations relating to vicarious liability.
- Templeton Yes.
- Anderson J So forgetting all about the Torrens, if liability should be attributed to your client, then the fraud is attributed to your client
- Templeton Yes.
- Anderson J And that's an exception to the indefeasibility provisions, so we really have to look at not Torrens policy issues but servant/master, principal/agent policy issues in relation to an innocent third party.
- Templeton Well I accept that but where this policy issue came from was the majority's rationale as to why they shouldn't
- Anderson J Yes, yes, I understand that.
- Templeton Unless I can assist the Court further those are my submissions.
- Tipping J There is one point I would like to raise. Is the effect of your argument that you will never get someone fraudulent in Land Transfer terms

through an agent unless the principal has expressly authorised the agent to commit the fraud?

Templeton No, no I wouldn't go so far as to say that.

Tipping J So either way you would say that isn't the case because there would only be two situations then, either the unlikely event of an express authorisation or fraud – go out and forge this for us, or through this apparent authority route?

Templeton It goes back to basics in my submissions. Either there's an applied or express authority in terms of actual authority or there is apparent authority.

Tipping J And are you saying there can never be implied actual authority to commit a wrong? What about the negligence? I don't expressly authorise my driver to commit negligent driving but I'm liable because he's acting within the scope of the authority of driving.

Templeton Well unless it's a vicarious liability situation which is slightly different.

Tipping J But where do you draw the line between – it depends on how you define the retainer as you said surely.

Templeton Well it depends on how you define the scope.

Tipping J The scope. Now if the retainer is to get the signature, just assume that, I know you say it's not like that at all, but the authority is, or the retainer is to get the signature in those terms, 'go and get your father and mother's signature please', are you saying that that would not cover a forgery?

Templeton The difference lies either doing some things badly and doing some things that are directly the opposite of what you've been asked to do and in this case we say the forgery is the antithesis of what Rodney was asked to do.

Blanchard J Would it be the antithesis if Rodney had gone to his mother and misrepresented the type of document she was signing in a fraudulent way and obtained her signature?

Templeton Well

Blanchard J Wouldn't that sort of fraud be attributed to the principal even under the Torrens system?

Templeton That sort of fraud would because of apparent authority.

Blanchard J Yes.

Templeton By virtue of the representation put to the mother, that's classically where I think

Blanchard J But exactly the same circumstances and he doesn't go to the mother, he does something even worse, he forges her signature and you say that there's no agency?

Templeton Well that's the difference between undue influence in the one hand and in forging on the other.

Blanchard J Well not necessarily undue influence, I'm talking about something fraudulent.

Tipping J Fraudulent misrepresentation.

Blanchard J Whether undue influence is fraud I doubt but I put that aside. I'm positing circumstances in which he positively and fraudulently misrepresents the character of what he's putting in front of her.

Templeton So you're talking about a situation where he goes to the mother and misleads her in a fraudulent way

Blanchard J Yes.

Templeton Gets her to sign the document and not forged

Blanchard J Yes.

Templeton And holds out to her that it's to do this that and the other. Well that's an apparent authority situation I would

Blanchard J It's an apparent authority situation but the only difference is the fact that there is an actual dealing and some reliance by her. In the current situation there's undoubtedly I would have thought the same apparent authority except that he doesn't actually deal with her so there's not one relying on that apparent authority.

Templeton Taking the last point first, there can be no apparent authority in this case whatsoever. There is no representation from the principal or from Thomas through to the mother. There's no contact with the mother. We're not talking about apparent authority which is dealt with quite differently in the case law to actual authority, and

Blanchard J But you accept that your client would be in an unhappy position if my hypothetical applied?

Templeton If Rodney had been given authority by the principal in some way to go to the mother in a slightly more clearer factual situation than we have here

- Blanchard J No, no, I'm not going that far. What I'm positing is that Rodney is given the job of getting the signatures and we're assuming for the purposes of the present stage of the argument that that is the position, and instead of going along and saying to her, Mum, in an honest way, this is the type of document, getting the signature. He misrepresents the type of document so she's fraudulently misled into signing.
- Templeton Well there's two answers to that. That difficult position is recognised by Professor Reynolds in the commentary where he says 'when the agent acts contrary to the principal's interests it becomes a question of degree' was the language he used 'as to whether it's in the scope or outside the scope'. In Your Honour's example
- Blanchard J Well it would be a fraud. It's not merely an improper purpose.
- Templeton If it comes back to apparent authority, the principal would be bound. But it's not
- Blanchard J But you say it's not bound was a forgery.
- Templeton Correct.
- Blanchard J If that's the law, the law's an ass.
- Templeton Well Professor Reynolds for what it's worth distinguishes it in between
- Elias CJ Are you saying he's
- Blanchard J No, no, what I'm saying is Professor Reynolds is not having to cope with the Torrens system. Under the system Professor Reynolds writes in forgeries don't avail anyway.
- Templeton Well that's true.
- Blanchard J So we may need to adapt the ordinary law of agency so that it's workable in a Torrens environment.
- Elias CJ And so that the fraud exception under the Land Transfer Act operates in arguably the situation where it's most needed.
- Templeton Well I suppose going back to basics, in terms of s.62, it has to be fraud. That fraud in terms of the agent is normally actual fraud, dishonesty. If Rodney goes to the mother as an agent in terms of apparent authority the principal would be bound, but *Schultz* and *Cricklewood* from memory say no, for the reasons that they give. They made that finding in both cases from memory based on the fact of actual authority. They then said, and they didn't have to, they then move on to the question of imputed knowledge which is not relevant today. But certainly the facts of both those cases where the two solicitors approach the client and get

her to sign, one in a fraud situation, and one was close to a fraud situation. It's the same situation that Your Honour has posed

Blanchard J Yes well what I'm positing is whether those cases are correct.

Templeton Well in my submission they are.

Tipping J Mr Templeton the key distinction that seems to emerge from this interesting dialogue is that if Rodney appears in front of his mother then he's capable of binding Dollars & Sense, but if he doesn't go anywhere near his mother, he's not.

Templeton Well if Rodney is deemed to be the agent and appears and represents to his mother that he's the agent by virtue of what's a representation, then in terms of apparent authority, the principal bound but not otherwise.

Blanchard J That at least gives her some chance. She mightn't believe him.

Templeton But don't forget here Rodney

Tipping J So it's counter-intuitive this in a way.

Templeton Rodney on a junket of his own goes off and doesn't go anywhere near his mother, he just simply forges. So it's a situation where there is no clear simple, easy answer, but certainly on the facts of this case, the implied actual authority was not extending to the extent of allowing the forgery that is the complete antithesis of what he was being allegedly asked to do.

Anderson J Well vicarious liability depends on conduct being within the scope, not being specifically authorised but being within the scope otherwise you could never have anyone vicariously liable. You say we don't authorise our truck drivers to drive negligently so we're not liable when they knock someone over.

Templeton Well the other question which I don't think the case has grappled with which touches upon what Justice Blanchard said, and that is what weight do you give to this core fiduciary duty of loyalty which runs through all these cases? If the fiduciary duty of loyalty on the agent was not to do anything to the detriment of the principal and he does what Your Honour indicated before in that situation, that goes to the scope of the authority.

Anderson J Because why should the innocent person carry the loss of one's own agent's default?

Templeton Well the Act covers for the position of compensation.

Anderson J No, apart from the Act. The Act's outside the question of whether it's imputable or not.

Templeton Well can I go back to

Blanchard J Mr Templeton the argument you've just – sorry I've still got the flu and I'm not thinking straight. I'll have another think. I've lost my train.

Templeton Can I just draw attention to again what was said under the Torrens system of Chief Justice Griffiths in the passage I've cited in the written submission. He says that if an agent breaches the duty of loyalty he's acting outside the scope of the authority. It's quite simple, quite plain.

Blanchard J The scope of what sort of authority – actual?

Templeton In that case it was

Blanchard J He was talking of actual authority wasn't he?

Templeton Yes he was talking actual authority.

Blanchard J Yes, well what if it's apparent authority? The duty of loyalty has got nothing much to do with that unless it's obvious to the person with whom the agent is dealing that there's something that can't be right about what's going on.

Templeton The question is if it's fundamental in an agency, whether apparent or certainly not an actual authority, the duty of loyalty is obviously of real importance. For me that was recognised in by Chief Justice Griffiths. If it is an apparent authority situation again it's the principal who's clothed the agent with that authority if ever he takes that responsibility because of the representation given by the principal, and that's the difference it seems to me is the reason why, going back to Your Honour's example, that's why the principal would be liable. He has actually held out the agent to do something in general terms in a wider way that the extent or the scope of the authority is wider than it might otherwise would be if it was an actual authority case. An actual authority case is confined specific to a task to do something within the confines of the actual authority. Apparent authority can be broader and wider. As we discussed this morning sometimes they have been one or the same things and on other occasions there can be a difference, and the example given by Justice Blanchard in my submission, that's the difference. It hinges on the representation given by the principal.

Blanchard J The character of the representation doesn't change merely because the agent doesn't go near a third party and chooses to forge the other party's signature.

Templeton But there's no representation.

- Blanchard J So you're saying that the only representation is conveyed via the agent?
- Templeton The representation has to come as we know in basic law terms from the principal initially by putting the agent
- Tipping J I think it would be quite difficult to modify apparent authority to suit these facts actually because there's literally no representation from principal to third party that the agent has got any authority at all. He just turns up.
- Templeton Well the other point of distinction I suggest is this is that in an apparent authority case there's reliance upon the representation. There's no reliance at all in an actual authority situation.
- Tipping J So you've got arguably no representation and no reliance being the two key dimensions of apparent authority. That's your case isn't it in a nutshell?
- Templeton Yes exactly, the key aspect of apparent authority is reliance.
- Tipping J But it gives one a degree of unease Mr Templeton to have this sort of situation arising and again has slipped through the net. Is your essential case that we mustn't skew the clarity of agency law because she's got her rights against the fund? I think that's really what you're saying. You're asking
- Templeton In essential terms, yes.
- Tipping J You're asking us to apply a very, and you've put in very clearly, a very straight application of agency law, and we needn't be too worried because she can go to the fund?
- Templeton Yes, and it's remarkable that in the Torrens systems which has been now running for a hundred plus years in Australia and New Zealand, this question of agency to the extent now being described by the Court has never come up. Answer, why, because of the very reason that I'm submitting is that there's no question of reliance in terms of apparent authority. In terms of the Torrens
- Tipping J This article by Professor Watts is really on a different point isn't it, it's on the imputation of knowledge ?
- Templeton Entirely.
- Tipping J It doesn't grapple with this problem at all.
- Templeton Not at all and that's another can of worms for another day. It's not relevant for here.

Tipping J Yes well it's a teaser.

Templeton It is a teaser, except if you want to go on this question that I raised this morning which is when was the decision made by Rodney to forge outside the agency? The knowledge

Blanchard J Well let's not go there.

Templeton No I'm not going to go there

Tipping J I have to tell you Mr Templeton that that seems to be one of your less persuasive points. If you're not going to win on the main I don't think you're going to win on that, in my book anyway.

Templeton I hear what you say, but as I said before the key issue here is whether

Tipping J But don't please be provoked by me into revisiting that ruminant theory.

Templeton No, I didn't intend to. In final submission I say this issue hinges very much on just what we've been talking about. Whether this is an implied actual authority situation in the confines of what that represents or an apparent authority situation. I'm saying it's not an apparent authority situation. It may be this has never been grappled with in terms of the Torrens system, but in my submission the key difference between the two, there's no representation, no reliance, and that makes the difference.

Tipping J And no express authorisation and it's not within the implied scope of action.

Templeton Well the phrase 'implied actual authority' doesn't have to be expressed.

Tipping J Yes, well that's very clear thank you.

Templeton Thank you.

Elias CJ Thank you Mr Templeton. Yes Miss Foster.

Foster May it please the Court. As I understand it we are just dealing with the issues of agency and attribution of Mr Nathan's fraud or otherwise to Dollars & Sense leaving the inpersonam of claim to some later date if necessary.

Elias CJ I think we'll see how we go and we may, depending on the view, ultimately take that we may need to hear further argument on that if we're not able to reach it today.

- Foster Thank you Ma'am. Now the question of Rodney Nathan's agency in my submission was fairly clearly dealt with by both Justice Winkelmann in the High Court and by both decisions in the Court of Appeal, the majority obviously stronger than the minority on this point, but it is a question of fact as Your Honours have pointed out that essentially before the trial Judge.
- Tipping J I'm not sure it's actually my view anyway. It's not a question purely of fact. I don't think it's one of those primary factors because I think the question if the correct legal approach overlays the factual determination.
- Foster I think that's correct Your Honour but the factual elements that led up to Their Honours decisions that Rodney Nathan was the agent were clearly spelt out throughout
- Tipping J The facts on which the conclusion was based are not in dispute. It's the illegal conclusion you draw from those facts that is in dispute.
- Foster Yes that's correct and in terms of their needs to be something more than the delivery of the documents. I think we need to look carefully at what the cases that say that say and it's not just delivery, it's where there is delivery to be for execution by (b) and (c), that is not of itself enough. The something more is that the (b) is entrusted with the getting of the execution by (c) as well, so where it is purely a 'this is the steps that have to be taken', you've got to start with somebody and that doesn't make that somebody the agent, and I think we're probably all agreed on that, but where that person that gets the documents to start with is intended to go to the other parties and see to their execution is entrusted with that role, then they are the agent, and even more so where there are other things that they need to do for the party, the principal.
- Elias CJ Can you say that this isn't if you strip it down to the elemental that it isn't a case of delivery to (b) for execution by (b) and (c)?
- Foster I think you can because I mean there was no covering letter so we're not assisted by that. I don't think that helped the principal, the alleged principal in saying they weren't my agent because I didn't give them a letter telling them what to do. I think we have to look at the degree of documentation that they got; the fact that it included things like disclosure under the Credit Contracts Act. Who did Dollars & Sense think was going to do disclosure, if not Rodney? Who needs disclosure to be done – Dollars & Sense. Then there's the Statement of Covenantors and the discussions that you've had with my learned friend about that. It's only necessary, that whole document is only necessary in the event that they are not seeing solicitors. They're not getting legal advice from anyone else so who else could be conveying Dollars & Sense view to the parents, nobody but Rodney. It wasn't anticipated that Rodney would execute the documents and then send

them for example to a solicitor. All of the cases where it has been found that the person that got the documents wasn't the agent is where there was an involvement of solicitors or the documents were intercepted by the alleged agent, not a situation like this where the sole purpose, well not the sole purpose because obviously he had to sign them as well, but a significant portion of the purpose was that he would then go and get those extra signatures.

Tipping J Well he could have signed them on the spot in the sense but the real mission was to go, I would have thought, was to go and get the parents' signature because I mean he could have easily attended the solicitor's office or anything – Thomas's office.

Foster Well Thomas was in Auckland and he was in Whangarei

Tipping J Yes but he had to go through

Foster But Harris took them to him. He could have signed them and given them straight back to Harris to deliver back to Auckland, certainly.

Tipping J And wasn't he asked to get the title, at least in the second letter?

Foster Well at least in the second letter, so how that request was said to have been conveyed in the first place, one is left unclear because if Harris didn't ask him to get it

Tipping J Well he had no interest in the title. Dollars & Sense were the only party who had an interest in the title and they entrusted to him the getting of the title.

Foster That's correct.

Tipping J Now if you can sever if you like the getting of the title from the getting of the signatures, well that's all getting very rarefied.

Foster I would accept that, yes. So there are a number of steps, a number of things that he was entrusted to do and in my submission there was the element of trusting him to do it and the protestations that there were recommendations to get legal advice etc really doesn't assist because at the end of the day they knew that he hadn't and that advice was principally directed to him not to his parents. They didn't insist on it and can one really say I want you to be my agent to do this but I would prefer you get somebody else to do it but when they don't they just carry on anyway, and that's really what it is here. They seem to want a bob each way. They're prepared to accept it without a solicitor; they prepare a document specifically on the basis that there might not be a solicitor and then they know there isn't one, so the fact that they made that recommendation to Rodney in my submission doesn't avail them at all. There is in the agency area also the added complication of the documents going back a second time specifically for the witnessing of

the signature with no advice on how to do it; nothing to suggest that the person should have been there in the first place, and I would take Your Honours to the case on appeal to the transcript of the cross-examination of Mr Thomas on this point. It starts at page 238, that's in volume 2 and at line 18 'when you returned those documents to Mr Nathan with the addition of a witness – that should be 'for the addition of a witness' your covering letter doesn't give him instructions; it doesn't suggest that the witness needs to be someone who actually saw the people sign; it doesn't say that, but the word witness is self-evident I think. It doesn't say that the person should be someone who knows the people. No that letter doesn't say that, no. And you got the documents back with all of the signatures purportedly witnessed by the same person, one Angela Ford? That's right. And that must have concerned you knowing Mrs Nathan was in the East Cape area as you have said, Mr Thomas Nathan in Kerikeri and the witness is providing a Whangarei address? No it didn't concern me. So you thought it was just convenient that this person had been with Mrs Nathan when she had signed some weeks earlier, with Mr Nathan when he had signed some weeks earlier, and with Rodney Nathan when he had signed some weeks earlier? I guess my assumption was Rodney Nathan had taken her to both his father and his mother when the signatures were obtained. If he had known of the need for a person to witness their signatures wouldn't that have been done in the first place? I can't get into his mind'.

Tipping J What is all this supporting Miss Foster? I'm not entirely with you where this leads.

Foster I took Your Honours to that aspect of the transcript because of His Honour's questions about what Mr Thomas thought when the documents came back with the same witness

Tipping J I think His Honour in effect disavowed whether that really had much to do with it. Do you submit it has something to do with this and if so what?

Foster Well in terms of the agency and whether there is something more, in addition to the entrusting the first time, there is the entrusting without any instructions or any questions or anything the second time.

Tipping J So the lack of instruction is the key point is it?

Foster That as evidencing that they were just trusting him to get on and do it.

Tipping J Right.

Foster My learned friend submitted that the question of agency by the principal debtor in relation to his dealings with sureties is effectively dead. In my submission that's clearly not the case and should not be the case, particularly in a Torrens system environment, but even

looking at the cases such as *Barclays Bank v O'Brien*, that said as a legal analysis notice works better. It doesn't say they can't ever be an agent and acknowledges in fact that that can be the case, and where we are in a Torrens environment where in *Assets Co v Mere Roihi*, it was accepted that the fraud needs to be the fraud of the registered proprietor or its agent, and that has never been questioned. The question of agency must be alive in this context. Equally where it is the principal debtor or anyone else and it will always depend on the facts of a particular case is what Dollars & Sense and their agents in the context of Mr Harris and Mr Thomas did sufficient to constitute Rodney Nathan their agent. So it's not dead in my submission and it's vital that it be maintained in a Torrens environment where the fraud of an agent is one of the very few exceptions to indefeasibility. My learned friend at one point made a submission that it would make no sense to make the principal debtor be agent. I would agree and it should be discouraged but it doesn't mean that they are not the agent in this case and holding them accountable for the actions that they took in respect of Rodney Nathan and in respect of this case will discourage others from this type of behaviour, and in my submission that doesn't detract from the desire or the intent of the Torrens system to make it easier for purchasers and to protect the convenience and the risk in that regard, because the steps that they would need to take to avoid making somebody an agent are the steps that most financiers would take anyway. They are the steps that *Barclays* say should be taken to avoid the imputation of notice. The submission is not that they need to be doing anything more than what they ought to be doing now for different legal reasons, so it is not impacting on the convenience or cost-effectiveness or anything else of the Torrens system.

McGrath J Miss Foster I notice that observation in the *O'Brien v Barclay's Bank* case that you mention. Does that provide though any basis for distinguishing the general comments of Lord Browne-Wilkinson in relation to the fiction of this being an agency situation?

Foster Well he describes the agency as being artificial, but subsequently the concept of notice in this same area is described as being artificial and I think that's the reality that one has to accept, it may be artificial, and that is why my learned friend's arguments that it would make sense for them to do this and why would they draft the document like that when it wouldn't achieve what they wanted to achieve etc. In my submission that doesn't matter, what matters is what they actually did and what they, at least by implication, asked Rodney to do. If that is enough to get over that hurdle.

McGrath J I appreciate that you've put the emphasis so far on the special steps, the special distinguishing actions in this case but what I'm really wondering is whether there was anything in the English context given that Lord Browne-Wilkinson did refer to I think policy statements by *Barclay's Bank and others* as to the importance of informing the surety direct of what the nature of the obligation she was taking on were. Is

there anything in the English situation on which the *O'Brien* depends that makes it distinguishable from our situation, apart from those special facts you refer to?

Foster No there's nothing other than the absence for the most part of the Torrens system type impact on it.

McGrath J Alright, thank you.

Foster So forgery itself would never be an issue there.

McGrath J That's fine, thank you. Once it is accepted that Rodney Nathan was the agent of Dollars & Sense, the question in terms of whether it is imputed to Dollars & Sense, or his actions, sorry, are attributed to Dollars & Sense relates solely to the question of the scope of his authority in this case, but that doesn't mean the word by word or absence thereof express instructions that he was or was not given. It is a question of what he was asked to do, not how he was asked to do it. No one in the misrepresentation or undue influence cases would suggest that the wayward husbands or employers or wives or children were instructed to go and misrepresent the position to the respective parties.

Tipping J Or exert influence.

Foster Or exert undue influence, precisely, and in my submission the question, the fact that it was forgery does not alter what he was asked to do, which is at its barest, to get the documents executed. The fact that he did it by forgery rather than undue influence or misrepresentation is the how and in talking about the scope we must focus on the what and in my submission that is where the Court went wrong in the *Schultz* decision and I don't endeavour to distinguish it, I simply say it is wrong. Likewise *Cricklewood*, to the extent that it simply follows the *Schultz*' decision rather than in *Batham*. It is just wrong.

Tipping J That the issue could turn on how you formulate the task so you're shifting the ground from scope to task because task determines the what. If it had been 'go and get Mrs Nathan's signature' instead of 'go and get the documents signed' would that alter your very interesting and succinct what how dichotomy?

Foster Well it wouldn't really because it's more to say her signature, well there is a signature purporting to be her signature there; there is a signature on this document, so I get Your Honour's point and it is a situation where the way you pose the question can determine the answer and that's what happened in *Schultz*. Could it be – I haven't got it opened in front of me, but words to the effect 'could it be said that he was instructed to do this by fraud'? Well anyone is going to say no when the question is put by with fraud or with forgery or whatever there, but

- Tipping J But if you couch it in ‘get this signed’ as opposed to ‘get Mrs Nathan’s signature’, you could have the result turning on that difference.
- Foster I accept that but in this instance we have no express evidence of what was told because there is no evidence of the words. They say the documents were simply taken up in a sealed envelope; there is no evidence of what Mr Harris specifically said when he handed them over. There’s evidence there was a discussion about whether they were or weren’t seeing a lawyer.
- Anderson J It depends on the degree of abstraction you posit the task and it could be said here that the scope of his agency was to deal with the documents for the purposes of signature – as wide as that.
- Foster I accept that exactly but I think Justice Tipping’s point is that the what and how dichotomy doesn’t work when you get it right down to something as specific as ‘get Mrs Nathan’s signature’.
- Tipping J Well I think it’s actually a very good conceptual tool but I was just exploring with you how rigorous it might be as a general touchstone if you like.
- Foster Yes, and I have never taken it quite down to that but I would say that if was to be an argument then there would need to be evidence of being that specific and then maybe that would be a difference, but as a matter of, in fact no I take that back, because forging is still a ‘how’ and so maybe he hasn’t achieved the what because it isn’t her signature but they don’t know that but the ‘how’ is still forgery.
- Tipping J Well in this same context of the Land Transfer problems, the Privy Council in *Gibbs v Messer* seemed to be quite astute to make that distinction between a real person who’s signature was forged and a wholly fictitious person. Now I’m sliding a bit my analogy here, but it would worry me if the thing was all going to turn on such fine points. Is there any way through this that somehow avoids, or is it essential because of the fineness if you like of some of these agency issues to let it turn on these fine points?
- Foster Well at its broadest point I would suggest that the responsibility should lie with the person that could have prevented what happened - where there is one that could clearly prevent it and one that could not.
- Tipping J Have you given any thought to the fact that when they said an Assets Company registered proprietor or agent against the statute simply saying ‘except in the case of fraud’ in that very broad sense, and the Privy Council said it’s been narrowed by judicial administration to strict agency, have you given any thought to the possibility that there may be a further way of looking at it that doesn’t tie you to strict agency? I’m not suggesting there necessarily is, I just would wonder if

you've seen anything that has engaged on that and it may be destabilising to take it away from strict agency because no one would quite know where you were going to begin and end, but

Anderson J Well the authorities show that it has to be fraud that's attributable to the registered proprietor.

Tipping J You've got to get it back to the registered proprietor, but is there any other tool of doing that other than through agency but is not going to involve such precision?

Foster Well not without

Tipping J I suspect not.

Foster Not without falling foul of the inability to put constructive notice and those types of things back to the registered proprietor, given the prohibitions on that. It really does need to be something that via the agent falls on the registered proprietor. I think if we hadn't gone with the immediate indefeasibility in *Fraser v Walker* it would be different because you would have the ability to look at the underlying transaction in a wider sense and the impact of the registration of documents, but with immediate indefeasibility I would find it difficult to see unless any of the other exceptions apply that in terms of the fraud one that it could be anything other than an agent.

Tipping J Well I'm not necessarily disagreeing with you, I just

McGrath J Miss Foster can I just make sure that I understand the way you draw this contrast in looking at the scope of authority?

Foster Yes.

McGrath J If you think if the area of this authority was in a circle and you're really saying don't let that radius get any shorter than it should be having regard to realistically what it was that the lender wanted done by Rodney in all the circumstances, are you really saying that there is a risk that you will reduce the scope or the area within the circle by reducing the radius if you focus too much on how the role that was attributed was achieved. You've got to focus far more realistically on what it was that was intended to be done either by the lender.

Foster Yes, but it's *Lloyd v Grace Smith* that puts that quite well - what is the task that they are set to do, what is the end they are asked to achieve and that is the executed document and in this case the executed document that can be registered which is why it was sent back to him a second time because it couldn't be registered without the witnesses.

McGrath J If you look at that in a broad realistic way that sets the scope of the authority?

Foster Yes.

McGrath J That's fine, thank you.

Tipping J Well that gets it as actual authority if you're right doesn't it? It was within the scope of his actual authority on this analysis? It's within the circle that's just been referred to?

Foster That's correct. I think it is not really possible to speak of an apparent agency or anything of that nature in this circumstance. To suggest that there is a different outcome as my learned friend did earlier where Rodney fronts up or not, in my submission can't stand because he's not going to be an apparent agent because he went there and said something. The representations must come from the principal so the situation will be the same whether in going there as the agent he does misrepresentation, fraudulent misrepresentation, undue influence or if having failed he forges the signature and in my submission there should be no distinction. If he has appointed the agent

Tipping J The only distinction between those two scenarios is not on the representation side but on the reliance side. If he fronts up she might be able to claim reliance on him. In each situation there's no representation.

Foster But it can't be reliance on a misrepresentation that hasn't been made. She's got no representation from Dollars & Sense if he just fronts up.

Tipping J Sorry you're quite right. It's reliance on the representation isn't it, it's not the reliance on what he actually says at the time – I slipped, you're quite right.

Foster So I think my learned friend and I are in agreement that it cannot be an apparent agency here, and as assertive as an actual agency, the scope of which is determined by the express instructions and what can generally be implied into that. Now that doesn't mean you have to try and imply in that he could forge the signature. For the reasons I've said before in my submission that's the 'how' and we're looking at what it is that they were asking him to do.

Tipping J It does seem odd doesn't it you can have actual authority to commit a forgery?

Anderson J Knowing you'd have actual authority to do something which you then do in a particular way.

Tipping J Well.

Anderson J If you have authority to drive the truck, to drive it negligently, but the boss is still liable.

- Tipping J Yes I fully feel the weight of that point and I'm not necessarily signalling I'm against you at all Miss Foster, I'm just sort of thinking aloud
- Foster Well the strongest, or one of the strongest comparisons other than *Re Batham* and *Schultz* that went the other way would be the *Kings North* decision which was a fraudulent misrepresentation. No one would suggest that they had actual authority to make a fraudulent misrepresentation.
- Tipping J Is there anything in *Giltrap*? I don't want to hammer a drum that may have a very hollow sound, but is there anything in there that we should take, not necessarily supports anyone, but we should take notice of as being beware of if you like, even if it's wrong?
- Foster I have through regret Sir that if I've looked at it, it hasn't been recently, so I'm not able to assist.
- Tipping J No, no, that's alright. That's alright, that's fine.
- Blanchard J Is the *Kings North* an actual agency case or an apparent agency case?
- Foster 'The creditors' solicitors prepared the documents and sent them to the solicitor acting for the company and the husband asking that they attend to execution and as their agents on completion the solicitor left the documents with the husband after he had signed them for him to arrange his wife's signature'. And at page 125, 'on the general law of principal and agent the principal, the creditor, however personally innocent who instructs an agent, the husband, to achieve a particular end, the signing of the document by the wife is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier by the agent and not corrected', and then a bit further on 'on either view the plaintiffs acted at their peril and are saddled with responsibility for the way in which the first defendant in fact procured the execution of the mortgage by the second defendant'. So in my submission that's being regarded as an actual agent situation as it refer to who instructs an agent, so it's not talking about how it might have appeared to the guarantor.
- Tipping J Now this *Kings North* case which I have to regret to say I haven't read, is it in the papers here.
- Foster Yes Your Honour it's under tab 3 in the respondent's cases.
- Anderson J Not many of these cases deal with forgeries do they? They're mainly sort of undue influence or misrepresentation.

Foster And the next point I was going to come to with the final comments by my learned friend in drawing a distinction with the *Ruben* and *Lloyd v Grace Smith Co* case. Forgery is a nullity I think we're all agreed. If it wasn't for the Land Transfer Act Mrs Nathan would not be here. It cannot bind her. That's all that *Ruben* is saying. The forgery albeit by the agent doesn't bind the principle, but this is not the forgery by an agent of the principal signature, this case that we're talking about is a forgery by the agent of a third party's signature, not of its principal's signature, and the *Ruben* decision was in fact discussed in the *Lloyd v Grace Smith* case and it was discussed by Lord MacNaghten, and in relation to the issue of whether it needed to be for the benefit of the principal or not, he simply said it's wrong, he doesn't accept that *Ruben* was correct to suggest that it had to be for the benefit of the principal.

Tipping J It seems to me Miss Foster, and I wonder if you agree, that unless *Lloyd v Grace Smith* can be analysed as an apparent authority case as Mr Templeton suggested, it's a very powerful authority in your favour.

Foster It is a very strong authority in my favour Sir and I do not accept that it is limited to cases of apparent authority. There has been suggestions that it's limited to employment cases and I would also dispute that that is the case by reference to the authorities that were quoted in *Lloyd v Grace Smith* which were not themselves in employment cases, or certainly were not all employment cases. The managing clerk was the agent of the firm of solicitors that cannot be questioned. There was no one else in the firm that dealt with the client, so I'm not sure what representation, or from whom other than having them in the office, it is said would be apparent

Tipping J Well that can be a hold out. I mean it doesn't have to be an oral representation, it can be a physical holding out, so I don't think we can dismiss the apparent authority suggestion quite on that basis.

Foster But he was an employee. He was an agent.

Tipping J And he was being held out by the firm. He wasn't a partner. There was only one partner in the firm wasn't there? He was being held out by the partner as competent to deal with matters on behalf of the firm, so he may have had both actual and apparent authority and I think this is where the complexity could arise, but my reading of it is that Their Lordships proceeded more on actual than apparent.

Foster Well I would endorse that. I think you can selectively pick pieces out of the case, but in my submission there is also a distinction between, particularly as the law has evolved, so I think we need to be careful with references in the *Lloyd v Grace Smith* case to apparent authority and what exactly is meant by that because the managing clerk was an actual agent. There is no question of that. One then needs to look at the scope of their authority and that could be either expressed or

implied, and in my submission some of the references to apparent in that case are more to the scope of the authority to whether it was within the ostensible authority if you like of that actual agent, rather than any issue of the type of agency. So there is a difference in being an actual agent or an apparent agent and being an actual agent with apparent authority, and *Lloyd v Grace Smith* may well be, and is I would suggest, a case of an actual agent with apparent authority, but not a case of an apparent agent.

Tipping J Well treated as. It could have perhaps have been treated under more modern doctrine but I don't think it was being treated as the modern equivalent of ostensible authority as it was called in those days. I think it was being treated that he had actual authority and the scope of it was to some extent governed by the appearances that he had been clothed with.

Foster That is the point I'm trying to make Sir, yes. In relation to the approbate and reprobate and benefit argument and the quotations that my learned friend read from *Schultz*, which as I've said, I submit is wrong in finding that there was never authority to commit a forgery, however in terms of this issue, the quotation refers to for which he would not otherwise be liable, and in my submission while the concept of indefeasibility impacts obviously, it's separate. You have to have a consideration first of whether they are the agent; what is the scope; what did they do, and if on that analysis, putting aside the pre-Land Transfer Act, the forgery would be a complete nullity, but if otherwise on that analysis they would be responsible, they can't then register and say but now we're not because we're just relying on the register. Someone who comes to it free of notice, free of fraud, and asserts the register is not then adopting the acts that have gone up to that, but that doesn't mean that a principal who relies on a document and register it isn't adopting the acts that led up to that document when they handed over for registration. So if a normal principal and agent theory they would be liable for the actions. They remain liable for the actions once it's registered and in my submission that's the point of the reference in *Assets Co v Mere Roihi* to all their agents. If an agent is never going to be able to bind the principal, what was the point of that reference in *Assets Co v Mere Roihi*? One must first do the principal and agency analysis.

Tipping J Mr Templeton's argument as I recorded it was that the State gives you the benefit of the indefeasible title, not the transferor, hence no approbation. Now I think what you've said is a partial addressing of that, but not a whole addressing of that. Do you want to, I think I have the note fairly accurate.

Foster Indeed you do. The state of the legislation

Tipping J I'm not foreshadowing, I'm captured by this argument, yet I think if you can directly address it it would be helpful.

- Foster In my submission there's a difference in the approbation of getting the document from the agent and registering it or subsequently looking at a title and then somehow being attributed with the fraudulent actions that got it there. They could not be registered if they did not have the signed and witnessed document, however that came about, so both steps, both elements, the registration and the document are needed in order for them to be where they are and if in the getting of the document they are a principal liable for the agent's fraud, or they can only get there because of the agent's fraud, then in my submission they are taking the benefit of that when they register it and then when because of that registration they assert the title.
- Tipping J But if they had nothing before registration – I'm being the devil's advocate – if they had nothing before registration and it was the fact of registration that gave them everything, how can they be said to be approbating and reprobating? That's the argument. You answer it do you by saying they didn't have the opportunity of registering if you like, had it not been for
- Foster Clearly they wouldn't have had the opportunity and when they did that, asserting that they knew of the forgery, but they knew of Rodney's actions
- Tipping J They were happy to take the "benefit" of Rodney's services.
- Foster Indeed.
- Tipping J For good or ill and on registration they're saying it was for good so they can't as it were disavow what he did at the same time as trying to get the ultimate benefit.
- Foster That's my submission Sir, yes?
- Tipping J Yes.
- Foster So the authorities that I principally rely on in attributing the fraud to Dollars & Sense is *Re Batham*. I don't accept my learned friend's submissions as to the reasons that that should be limited. It might be that the legal principle is clearly stated in his seemingly unchallenged *Cricklewood* simply didn't look at it and followed *Schultz*. In my submission as I've said *Cricklewood and Schultz* are wrong on that point. The other authorities being *Lloyd v Grace Smith* which we have discussed, and *Kings North*. Unless there is anything else I can assist Your Honours with.
- Elias CJ We'll take a short adjournment of a few minutes.

3.33pm Court adjourned

3.40pm Court resumed

Elias CJ Yes Mr Templeton we'd like to hear you in reply on the argument that's been addressed to us.

Templeton I hope to be brief. This question which was being debated just before the adjournment, that is the question which my learned friend raised of how and why, or the distinction between the two, in my submission is dangerous.

Tipping J It was what and how, it was, yes, not how and why.

McGrath J We know why.

Templeton We do indeed, we do indeed.

Tipping J Ours is not to reason why.

Templeton The first point I make is that Professor Reynolds in *Bowstead*, which I drew attention to before in Article 23, says it's a question of degree always and the difficulty in terms of what falls from the scope and what is outside the scope when it's a fraud, not to the benefit of the principal.

Anderson J It's somewhat policy driven too isn't it?

Templeton To some extent, but Your Honour raised the question of the truck driver. The truck driver was authorised to go and drive the truck and the principal is still bound if he drives the truck negligently, but the principal's not bound if this agent drives the truck to go and rob a bank. That's criminal.

Anderson J I know, that's a common example, that's why it's not the same in every case

Templeton But that simple but interesting example that when the truck driver goes to use the vehicle for a criminal act that's plainly outside the scope of the authority of what he may have and this is the same situation here

Tipping J But he's authorised to drive, not to rob a bank.

Templeton Exactly, he's authorised to drive, and Rodney was authorised on the assumption as an authority to go and get the signatures. He was not authorised to forge which is the

Blanchard J What about the school teacher in that House of Lords case only a few years ago, the name of which I can't remember?

Tipping J Lister.

Blanchard J Who was authorised to look after the little boys in the boarding house but proceeded to commit acts on them. The distinction was drawn by the House of Lords in that case between his position where his acts were regarded as being the acts of the principal and the position in a hypothetical of the groundsman who wasn't involved in looking after the boys at night in the boarding house but went in and did the same things that the school teacher had done to them.

Templeton Isn't that a case if I remember it correctly more influenced by the fact of vicarious liability given the fact that it was an act of an employee?

Blanchard J Well

Templeton And that seems to have muddied the water in this area because

Elias CJ Is it so very different?

Blanchard J I've never understood the difference between vicarious liability in relation to an employee and an agency.

Templeton Well is there vicarious liability for an agency? Plainly there's vicarious liability for an employee, which is what that case

Tipping J Only if he's acting within the scope.

Templeton For the employee, yes.

Tipping J Yes, it's the same point.

Templeton But it's the same example that we were using before about the truck driver. The principal's not bound for the truck driver to go out and commit a criminal act using the truck.

Anderson J That's why I suggest that it's to some extent policy-driven in particular types of cases and the case law shows that when someone in the course of agency is entrusted with documents for the purpose of obtaining signatures, then obtaining them wrongly is attributable to the principal.

Templeton Well there's a difference between doing something which is in the manner of it being done wrong as opposed to doing something which is the direct opposite of what he's been asked to do. If there had been a misrepresentation by Rodney, which is the example given before, that arguably may well still be within the scope of the authority, but if he's doing something the total opposite of which he's been asked to do, that is forging. He doesn't even get to the mother, he simply forges, represents her signature on the mortgage. That is entirely outside the scope of his authority. He's

- Anderson J Well for my part I understand the argument and the answer is not entirely obviously logical because there are policy aspects of particular types of cases that determine whether some act will be held to be within or outside the scope of authority.
- Templeton I think that's right.
- Anderson J Generally speaking.
- Templeton I think that's right. It's not a situation of absoluteness, it's not black and white. The second point Your Honour mentioned whether the *Giltrap* decision is helpful, whether there's anything in there. I stand to be corrected but I think that case relied upon the older version of Article 74 which referred to the phrase of actual and apparent authority being run together and since then – and Your Honour actually cited I think that particular article – I think it's been amended in the latest edition.
- Tipping J I'm often out of date Mr Templeton.
- Templeton I would never suggest that.
- Tipping J No, but that's helpful, thank you, obviously that must bear on it.
- Templeton And the third point is coming back to *Grace Smith* and this attention on it not being a case of apparent authority. There was a passage at page 738 which I think I may have drawn the Court's attention to this morning. *Grace Smith* being tab 12 in volume 1. Page 738 is still part of Lord MacNaghten's speech, and on the third paragraph he says in the second line 'I must say that it would be absolutely shocking to my mind if Mr Smith were not held liable for the fraud of his agent in the present case. When Mrs Lloyd put herself in the hands of the firm how was she to know what the exact position of Sandles was? Mr Smith carries on the business under a style or firm which implies that unnamed persons are or may be included in its members. He speaks as if he one of the firm'. Now that in my submission is plainly a situation of apparent authority. That's the rationale for Lord MacNaghten's view that the principal should be bound and liable.
- Tipping J Well the only basis for modern apparent authority here would be that there was a representation by the get-up, no express representation by the principal of the firm but the whole thing was so constructed to make him look as though he had authority. But there's no real discussion of that here.
- Templeton No there's not, there's not, but
- Tipping J I don't think Their Lordships thought it was necessary because he was beyond doubt an actual agent.

- Templeton The interesting phrase it says there is ‘Mr Smith carries on the business under a style or firm which implies that unnamed persons are, or may be, included in its members’, so it’s a classic case of a representation given by the firm, and in my submission
- Tipping J This is Lord MacNaghten speaking as though it were from the gut rather than the head. He says ‘so much for the authorities it would be absolutely shocking’.
- Templeton Well the gut is also repeated of Lord Shaw over the page on page 740 in the passage I drew your attention early this morning. He speaks with the same mind.
- Blanchard J Can I draw your attention to page 742, at the end of Lord Shaw’s judgment where he says ‘it’s been clearly found 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’. That sounds like actual agency.
- Templeton Well it sounds like it but yet if you go back to what Lord Shaw said
- Blanchard J Well that is Lord Shaw.
- Templeton Sorry, well if you go to Lord Shaw in page 740.
- Blanchard J Well isn’t he much clearer on page 742?
- Templeton He may be but he uses the language of apparent authority in page 740. He says ‘when the authority does ostensibly include within its scope transactions of a particular character, then quoad a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal’. So he’s talking perhaps there on both.
- Tipping J I think he’s analysing it under both heads actually, and saying it’s a case of both, which was rather my inclination, but you don’t need to get to apparent authority if you’ve got actual. He was clearly an agent wasn’t he? The only issue was what was within the scope of that agency and although you could analyse it. He certainly wasn’t given the appearance of being able to forge, he was given the appearance, the same appearance as was his actual authority, to deal with clients
- Templeton Are you talking about *Grace Smith*
- Tipping J Yes.
- Templeton Yes.
- Blanchard J And on page 741 Lord Shaw says about half-way down ‘on the assumption that a person deals with an agent in good faith and that the

conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That in my opinion is not the law'.

Templeton Well the other point of distinction is that *Grace Smith* is not a forgery case. It's a case influenced by, plainly as we've said before, the actions of the employed managing clerk, who simply transfers the or influences the client to transfer the property to himself.

McGrath J That's the case in which Justice Young distinguished the case was it?

Templeton Yes he had two or three reasons why, that was one of them. But I go back to Justice Anderson's question about policy and the point I'd also like to take a wee bit further is that if attribution, and the situation we're talking about, is a question of policy, the overriding policy in my submission is to uphold indefeasibility. That's a greater policy question and to allow the party offended to claim compensation because that's what the Act specially provides for. That's why the compensation provision is there, so

Anderson J If it weren't a Torrens case and it would be attributed, why should it be different just because it's a Torrens case? The issue was attribution.

Templeton You say if it's not a Torrens case?

Anderson J If it weren't.

Templeton Yes, so it's not a Torrens case. Well there are two parts to that answer. (a) this is a Torrens case and it has a specialised policy in terms of what the Act talks about. If it's not a Torrens case, and we're talking about purely simple agency principles, then we come back with a situation of whether the fraud is an apparent authority or whether it's caught within

Anderson J But just on policy you were saying because it's Torrens that should be a disincentive to attribute

Templeton Yes, because the Act itself provides for that.

Anderson J I understand why you say that but a counter-argument is that it might be an encouragement to use shonky agents if you're going to get the benefit of indefeasibility.

Templeton Well in *Schultz* and *Cricklewood* they refused to attribute, and that was a Torrens case, so plainly there's a distinction seen by those Judges in those cases that the Torrens systems takes it a wee bit out of the realm of the normal agency principles, and then if it's a normal agency principal situation, it comes back to this distinction we've talked about between an apparent authority case and an actual authority case, and

the difference there is this question of representation and the question there is reliance on that representation.

Anderson J Well one of the policy considerations is who should properly bear the economic loss and one might be tempted to say well seeing there is a guarantee fund here don't let it be the lender. But the guarantee fund will incur a loss and that's just a loss to a different entity.

Templeton Yes but in terms of the Torrens system that's the whole point of indefeasibility. Any imperfection in the title prior to the leading of the registration, that's covered and if someone suffers loss by virtue of that, whether it be a forgery, a nullity or anything else that's the reason why the Torrens system has compensation.

Elias CJ Which is the compensation provision in?

Foster 172.

Elias CJ Thank you, yes don't take time on it, that's fine thank you. I've just been reading the Act.

Templeton Does Your Honour have a question arising out of that?

Elias CJ No, no thank you.

Tipping J I must say I think the first paragraph of Lord MacNaghten's speech is an absolute classic of setting the scene is quite an irrelevant observation Mr Templeton and I'm sorry to have

Blanchard J A bit like the plaintiff was an elderly widow who made a mistake. But come back to Lord MacNaghten's speech further on at 730. He describes the finding below and then says 'that seems to me to be a clear finding that the fraud was committed in the course of Sandle's employment and not beyond the scope of his agency'.

Templeton Yes, influenced very much one may add by the fact that Sandle, if you go up to the top of the page, the first three lines 'under that agreement the learned Judge he says found as facts that it was within the scope of Sandle's employment to advise clients who came to the firm to sell property and the best way to do it'. So it is influenced very much as I said from the outset by the employment position of managing clerk in this particular firm. That's what influence

Blanchard J But the committing of the fraud was in the scope of the agency.

Templeton By virtue of Sandle's special position.

Blanchard J And it's interesting that when he gets to the passage that you quoted from on page 738, he's already decided the case because he starts the

paragraph 'so much for the case as it stands upon the authorities', and he then is addressing a question of policy.

Templeton Yes I accept that but he's also addressing the rationale to his decision and the issue here is whether it is essentially an apparent authority decision or an actual authority decision and in my submission is if you look at the factual matrix of *Grace Smith* and what is said throughout *Grace Smith*, a lot of reliance is placed upon the managing clerk's particular position, authority and how he was held out to the clients.

Blanchard J But I thought that there was a general proposition that you were trying to rely on that actual authority doesn't extend to fraudulent acts, other than those that are actually authorised.

Templeton Initially the actual authority must be carried out in terms of what Professor Reynolds says is the duty of loyalty. The fiduciary duty of loyalty to the principal.

Blanchard J Well there wasn't much duty of loyalty in *Lloyd v Grace Smith*.

Templeton No it wasn't, it wasn't, but perhaps the reason why because it was an apparent authority case. Now an actual authority has more weight.

Blanchard J Well if you read it as an actual authority case your argument is a bit brittle.

Templeton It is but I'm not reading it as an actual authority

Tipping J Well why they were all citing such passages as Lord MacNaghten cited on 736 from Baron Wilde where the crucial sentence is about two-thirds of the way down the page 'for unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud etc', and then again from Baron Martin 'whether the representation he made was within the scope of his authority. In those passages the true principle is I think to be found'. What on earth was he doing talking about that if the case really was all about apparent or ostensible authority?

Templeton Well I think *Grace Smith* comes back to simply the proposition of determining whether the agent's action in that case, that is the employed managing clerk, was acting within the scope of his authority, purely and simply limited to that and

Tipping J Actual or implied, not ostensible.

Templeton Yes, actual or implied.

Tipping J Well how can you say it's a case on ostensible or apparent authority then?

- Templeton Well for the reasons that they've mentioned there. There's a holding out. He was put in the position of holding out to the client that he had that authority
- Tipping J I don't think a Judge as good as Lord MacNaghten would be as illusive and convoluted and imprecise as that Mr Templeton. He would have put it on apparent authority if that's what he was putting it on.
- Templeton It's really apparent that *Grace Smith* is not an authority, or to have been understood by subsequent cases as a simple proposition. If I go to what Viscount Maughan said in that *Borders* case, he referred to it as an authority and I can take the Court to that particular passage
- Tipping J And that is where?
- Templeton *Bradford v Borders* under tab 13. Tab 13 at page 211 Viscount Maughan is discussing *Lloyd v Grace Smith*, bottom of the page, the last 12, 15 lines at page 211, the sentence starting 'a corporation which must act through its agents is as responsible as any other principal for any wrongful act committed by an agent whilst acting within the scope of his employment, and not the less that the wrongful act is a fraud by the agent for his own advantage – *Lloyd v Grace Smith*'. Then he goes on 'whether the act is within the scope of the agent's authority should be tested, if he has permanent employment by reference to the ordinary duties of that employment, which he clearly cannot extend by a fraudulent act. If the agency authorising a special act', which is our case, 'the agent will not bind the principal to an extent beyond that which is reasonably to be inferred from the nature of that special employment and the duties incident to it'. The duty being the duty of fidelity and loyalty. So Viscount Maughan some 50 years or so later, not quite, 35 years later, construed *Lloyd v Grace Smith* as a case tested in a permanent employment position and helped us in the context of this case where the agent has a special Act. The Act will not bind the principal to an extent beyond that which is reasonably to be inferred from the nature of that special employment and the duties incident to it. And I emphasis the phrase 'the duties incident to it'. That is the duty of loyalty.
- Blanchard J Yes I wonder whether that really is referring to a duty of loyalty or whether it simply be the duties which it is anticipated are going to be performed in the sense of functions.
- Templeton I accept it is a little ambivalent but plainly what Lord Maughan was suggesting there it must be a lawful exercise of that scope of duty, not an authority to commit a criminal act which is what happened in this case.
- Tipping J He refers a few lines above to the ordinary duties of that employment. I think he's just picking up the word 'duties' in a shorthand way for an equivalent concept.

- Blanchard J He's talking about scope here.
- Tipping J I think it is revolutionary doctrine that you can't have any actual or implied authority to commit a fraud in the sense of not being able thereby to bind your principal.
- Templeton Well the plain interpretation in my view of what Viscount Maughan was saying was that if it's a special act, the principal should not be bound beyond what is the normal requirements.
- Tipping J That is a different proposition from what I understood and my brother Blanchard obviously understood the same thing from you, to be saying that you can never have actual or implied authority to commit a fraud.
- Templeton We've come back obviously to the nature of the particular agency act.
- Tipping J Well that's a retreat from what I understood you to be saying this morning.
- Templeton No, I'm saying that in the context of this particular case that's the position, but there must be a myriad of agency situations where the potential for the agent to act with actual authority to go beyond and commit the principal
- Tipping J Do you accept that implied authority in this context is equivalent to actual authority? In other words it is an implied incident of the actual authority conferred.
- Templeton Well the way that the Court of Appeal have described it is an implied actual authority which indeed what Lord, I think Diplock, distinguished it as, but then he says that is a position which is inferred from the nature of the particular agency, that's how you'd make the implication. It's not a broad brush, generalised assumption.
- Tipping J No, no, but it is the equivalent once it's found of actual authority isn't it?
- Templeton It is. If I could just leave you with this reminder again that Professor Reynolds has cited *Grace Smith* often as apparent authority in his interpretation, particularly in the 2006 edition of his text and the paragraph I drew attention to was para.8.605, sorry 8-0605. I have referred to that in para.26.3 of the written submission on page 20. Apart from those comments those were my replies if you please.
- Elias CJ Thank you Mr Templeton.
- Foster Sorry Ma'am, can I just draw one brief matter to Your Honours' attention and that is that *Fraser & Walker* does directly deal with the point of the relevance of the compensation provisions to indefeasibility

and says that indefeasibility must be considered separate from the compensation provisions and that's at page 1077.

Elias CJ Thank you Miss Foster. Well thank you very much counsel, it's been a very interesting and difficult case and we have been impressed by the command of the authorities that counsel have had and by the arguments we've had addressed to us so thank you. We'll take time to consider our decision. If we need to go on and deal with the further matter, we'll have to reconvene, thank you.

4.07pm Court adjourned