IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-001212
[2017] NZHC 1865

BETWEEN	ANDREW JOHN THORN Applicant
AND	UNITED STEEL LIMITED Respondent

Hearing: 17 May 2017

Appearances: A Riches for the Applicant
C R Vinnell for the Respondent

Judgment: 8 August 2017

JUDGMENT OF NATION J

---

[1] The applicant, Mr Thorn, has a half share in a residential property at 71A Shirley Road, Christchurch. It appears from the title that he acquired it in May 2016. A mortgage was registered against the title to his property on 25 November 2016. Mr Thorn is seeking an order declaring the mortgage was invalidly registered and a direction to discharge the mortgage.

[2] In 2014, Mr Thorn was a director of Thorn Engineering Limited (Thorn Engineering). On 8 October 2014, the company began obtaining steel products from United Steel Limited (United Steel). Mr Thorn was required by United Steel to complete their standard form agreement for obtaining credit. The document he signed was titled "United Steel Limited – Credit Application". Mr Thorn signed it as manager for Thorn Engineering. Mr Thorn warranted that he signed the document as a director and personally guaranteed the performance of the terms in the credit application.

[3] In terms of the guarantee, Mr Thorn undertook as a principal debtor:

> ... the payment of any and all monies now or hereafter owed by the Customer to United Steel and indemnify United Steel against non-payment by the Customer.

[4] Clause 19 of the application relevantly recorded:

> The Customer/Guarantor(s) charge(s) in favour of United Steel as security for the Customer's obligations to United Steel, all rights, title and interest ... in any property held now by the Customer / Guarantor(s) either alone or jointly with anyone or acquired by the Customer / Guarantor(s) at any time hereafter ... If the Customer / Guarantor(s) default(s) in payment of any amount owed to United Steel, the Customer / Guarantor(s) specifically authorise(s) United Steel to lodge a caveat against any such property and appoint(s) United Steel to be the Customer / Guarantor(s) Attorney for this purpose – provided that – this authority is to be taken as authority to create a mortgage charge on property if a caveat is not possible or if a mortgage charge is necessitated to protect United Steel's interests, at United Steel's discretion, in a Memorandum of Mortgage registration format of United Steel's choice.

[5] On the credit application form, Thorn Engineering said it proposed monthly purchases of $8,000 and its requested credit limit was $5,000.

[6] United Steel invoiced Thorn Engineering in September, October and November 2016. Some payments were made but, as at 16 November 2016, the amount outstanding was $28,784.20. On 22 November 2016, United Steel made claims against Thorn Engineering and Mr Thorn as guarantor.

[7] On 29 November 2016, Thorn Engineering was placed in liquidation on the application of another creditor.

[8] In an affidavit of 18 January 2017, Mr Anyon said he was the executive director of United Industries Limited and United Steel was one of the group of companies he oversaw. Mr Anyon said that, on becoming aware that Thorn Engineering was facing liquidation proceedings, "we" formed the view there was an urgent need to protect their interests, that they discovered Mr Thorn held a share in a property and decided a mortgage charge "was necessitated to protect [United Steel's] interests". He said, "we executed Authority and instruction forms" and, as a result, the mortgage was registered.

[9] Attached to Mr Anyon's affidavit was a copy of a "Private Corporate Client Authority and Instruction for an Electronic Transaction" form to the Auckland law firm Dawsons (Burswood). The document is in the form set out below:

"D"

LINZ Dealing Number: 10637755
Client Reference: United Industries (13814.44

PRIVATE CORPORATE CLIENT AUTHORITY AND INSTRUCTION FOR AN ELECTRONIC TRANSACTION

(This form is approved by the New Zealand Law Society and the Registrar-General of Land. For use by a non-publicly listed company or incorporated society, etc.)

1. TO LAW FIRM: Dawsons (Burswood)
(Firm name)

2. CLIENT:

United Steel Limited as mortgagee
Andrew John Thorn by his attorney United Steel Limited pursuant to a power of attorney incorporated in the credit agreement dated 8/10/2014
(Registered name of corporate as per Certificate of Incorporation. Referred to as 'the Client'.)

Full Names of Authorised Signatory(s):

Royal David Setchfield

Authorised Signatory A
Ragavan Rengachariar

Authorised Signatory B

EXHIBIT NOTE
This is the annexure marked **"D"**
referred to in the annexed affidavit of
CHARLES RICHARD ANYON
which was sworn at **Christchurch**
this 18th day of **January 2017**
before me:

Signature.....
A Solicitor of the High Court of New Zealand

Sarah Phillippa Bennett
Solicitor
Christchurch

3. TRANSACTION:

Property Address:

1/71 Shirley Road, Christchurch

Date and Nature of Base Document:

Instruments:

- Mortgage

Title Reference(s):	CB40C/969
Mortgagee Name:	United Steel Limited
Mortgagor Name:	Andrew John Thorn
Mortgage Type:	All Obligations
Memorandum Number:	2015/4328
Priority Amount $:	60,000.00 plus interest
Additional Text:	

4. AUTHORITY AND INSTRUCTION:

I confirm that:

(a) I am properly and duly authorised by law to sign this Authority on behalf of the Client;
(b) this authority is binding on the Client;
(c) this form is for the transaction noted above;
(d) I am 18 years of age or over;
(e) the Client is not subject to any statutory management order, the appointment of a receiver or liquidator, or similar;
(f) the Client has passed the necessary resolutions as required by its empowering constitution, rules or statute to authorise the transaction noted above;

(g) as required by s164A of the Land Transfer Act 1952 I irrevocably authorise and instruct you to register the instruments above as an electronic e-dealing; and

(h) I understand that by signing this form the Client is legally bound by the electronic instruments certified and registered on its behalf pursuant to this authority and instruction as if such instruments had been signed by me personally on behalf of the Client;

(i) I understand that the authorised transaction will become a matter of public record upon registration.

25.11.2016

Signature of Authorised Signatory A - **Date**

Royal David Setchfield (Director of United Steel Limited and by Andrew John Thorn by his attorney United Steel Limited

25 NOV. 2016

Signature of Authorised Signatory B - **Date**

Ragavan Rengachariar (Authorised Signatory of United Steel Limited and by Andrew John Thorn by his attorney United Steel Limited

(Note: Each Signatory named must sign personally. 'For and on behalf' is not acceptable.)

5. SIGNATORY IDENTIFICATION: *(Tick applicable ID. Person establishing identity to complete.)*

	NZ Driver Licence	Passport	NZ Firearms Licence	Other NZ government-issued photo ID
Signatory A	✓			
Signatory B	✓			

Secondary Identification details (if required): _____

(Attach copy of ID used or details (e.g passport number) where copying not practicable.)

I certify that:

(a I have witnessed the signatory(s) sign this form;

(b I have sighted the original form(s) of identity ticked above;

(c I have attached a copy of ID(s) used;

(d the photo(s), name(s) and signature(s) match the signatory(s) name(s) and identification provided.

Salma Sarik

Signature of person establishing identity **Full name of person establishing identity**

P.A To Managing Director

Occupation

09) 274 0408

Phone/Email

Auckland

Address

Notes:

1. The requirements for client identification specified in LINZS20002 Standard for verification of identity must be complied with
2. With the exception of foreign passports, only NZ government issued photo ID may be relied upon for identity verification purposes

may not be relied upon.
Where the person who is signing this form is doing so under a Power of Attorney the identification required to be established is that of the attorney.
Attach certificate of non-revocation of power of attorney if required.
The full legal name of the corporate as registered must be used.
A faxed copy of this form is acceptable (refer to NZLS e-dealing Guideline J).
The consent of prior mortgagees, lessors, etc may be necessary to avoid a breach of covenants.

CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY

We, Royal David Setchfield and Ragavan Rengachariar of Auckland HEREBY CERTIFY:

1. THAT by deed dated 8 October 2014 **Andrew John Thorn** appointed as his attorney **United Steel Limited,** a body corporate having its registered office at 293 Ti Rakau Drive, East Tamaki, and we are authorised to give this certificate on its behalf. The capacity in which we give this certificate for the attorney is as Director and Authorised Signatory.

2. THAT we have not received notice of any event revoking the power of attorney and to the best of my knowledge no such notice has been received by United Steel Limited or by any employee or agent of that body corporate.

SIGNED at Auckland this 25th day of November 2016.

Royal David Setchfield

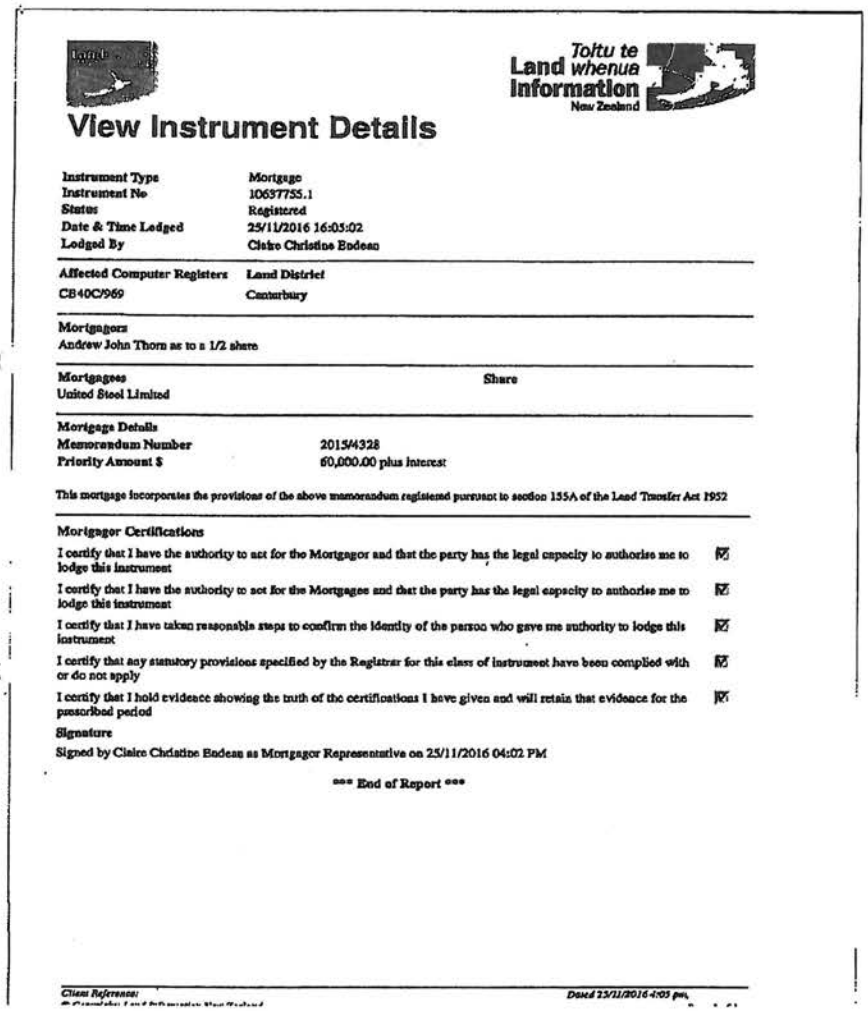
Ragavan Rengachariar

PAV02PA.NR2

[10] The document was signed by both signatories on 25 November 2016. As required in the approved form, a witness certified she had witnessed their signatures. The witness gave her name, her address as Auckland and described her occupation as PA to Managing Director. The certificate said she had witnessed the signing, had sighted a New Zealand driver licence for both signatories as proof of identity, had attached a copy of the IDs used and certified that the photos, names and signatures matched the signatories' names and identification provided. No copy of the ID was attached to the document annexed to Mr Anyon's affidavit.

[11] With the document, there was a certificate also dated 25 November 2016 signed by Mr Setchfield and Mr Rengachariar in which they said that, by deed dated 8 October 2014, Mr Thorn had appointed United Steel as his attorney and they were authorised to give this certificate on United Steel's behalf. They certified that they had not received notice of any event revoking the power of attorney in favour of United Steel.

[12] Also attached to Mr Anyon's affidavit was a screenshot of the Instrument Details from Landonline, showing that the mortgage had been lodged and certified by Claire Christine Endean. A copy of that document is set out below:



Toitu te Land whenua Information New Zealand

View Instrument Details

Instrument Type	Mortgage
Instrument No	10697755.1
Status	Registered
Date & Time Lodged	25/11/2016 16:05:02
Lodged By	Claire Christine Endean

Affected Computer Registers	**Land District**
CB40C/969	Canterbury

Mortgagors
Andrew John Thorn as to a 1/2 share

Mortgagees	**Share**
United Steel Limited	

Mortgage Details

Memorandum Number	2015/4328
Priority Amount $	60,000.00 plus interest

This mortgage incorporates the provisions of the above memorandum registered pursuant to section 155A of the Land Transfer Act 1952

Mortgagor Certifications

I certify that I have the authority to act for the Mortgagor and that the party has the legal capacity to authorise me to lodge this instrument	☑
I certify that I have the authority to act for the Mortgagee and that the party has the legal capacity to authorise me to lodge this instrument	☑
I certify that I have taken reasonable steps to confirm the identity of the person who gave me authority to lodge this instrument	☑
I certify that any statutory provisions specified by the Registrar for this class of instrument have been complied with or do not apply	☑
I certify that I hold evidence showing the truth of the certifications I have given and will retain that evidence for the prescribed period	☑

Signature
Signed by Claire Christine Endean as Mortgagor Representative on 25/11/2016 04:02 PM

*** End of Report ***

Client Reference: *Dated 25/11/2016 4:05 pm*

[13] Those documents indicated that the mortgage was in a form registered pursuant to s 155A of the Land Transfer Act 1952 under memorandum number 2015/4328. Section 155A permits memoranda setting out mortgage terms to be registered with the Registrar of Lands so that subsequently those terms can be used simply by reference to the document that has already been registered with the Registrar.

[14] Mr Vinnell, counsel for United Steel, provided that form of mortgage with his submissions. It is an Auckland District Law Society form.

[15] After the hearing, with leave, United Steel filed an affidavit sworn on 23 May 2017 by Ms Endean. She was the partner at Dawsons who had acted for United Steel. In that affidavit she said she certified and registered mortgage 10637755.1 on 25 November 2016. She said that she received a letter of instruction signed by Mr Rengachariar, of United Industries Limited on behalf of United Steel and accompanying documents including the credit application. She said that she reviewed that credit application, including its mechanism for United Steel to act as attorney. She then prepared the e-dealing and Authority and Instruction (A & I) form, with certificate of non-revocation of power of attorney attached.

[16] These documents were duly executed and returned to her. The A & I form returned to her had attached to it copies of New Zealand driver licences for Ragavan Rengachariar and Royal David Setchfield.

[17] Ms Endean said her firm retained hard and soft copies of all A & I forms and accompanying documents in separate A & I files in accordance with the requirements of the Land Transfer Act and the Land Transfer Regulations 2002, and that the firm was holding a copy of the A & I, copies of Royal David Setchfield and Ragavan Rengachariar's driver licences and a copy of the certificate of non-revocation.

[18] Consistent with Ms Endean's certification, a mortgage was registered against Mr Thorn's interest in 71A Shirley Road on 25 November 2016.

[19] The solicitors for Mr Thorn and for United Steel then corresponded over whether the mortgage had been validly registered.

The application

[20] On 12 December 2016, Mr Thorn applied for the relevant orders on grounds:

> 2. The grounds on which this Order are [sic] sought are:
>
> 2.1 the Respondent has wrongly lodged Mortgage Instrument 10637755.1 in breach of the e-dealing guidelines;
>
> 2.2 the Respondent does not have a sufficient interest in Certificate of Title CB40C/969 to support the lodgement of a Mortgage;
>
> 2.3 the Respondent's debt is limited to $5,000.00 which the Applicant has offered to pay immediately upon confirmation the Mortgage will be withdrawn;
>
> 2.4 despite opportunity to withdraw the Mortgage the Respondent has refused to do so.

[21] The application was made in reliance on High Court Rule 19.5, s 101 of the Land Transfer Act, and *Pacific Homes Ltd (in Receivership) v Consolidated Joineries Ltd*.[1]

[22] At the same time, Thorn Engineering applied for leave to commence the proceedings by way of originating application. Filed with the documents was a memorandum from counsel explaining how the proceedings involved essentially a legal issue for which the originating application procedure would be appropriate.

[23] In that memorandum, counsel referred to the judgment of Blanchard J in *Pacific Homes* and Blanchard J's statement referring to the relevant clause of the credit agreement that "the conditions were obviously not in a form capable of registration under the Land Transfer Act 1952".[2] Counsel also referred to s 101 of the Land Transfer Act, as to the information which a mortgage instrument must contain, in particular, "the stated priority limit under s 92 of the Property Law Act".

---

1 *Pacific Homes Ltd (in Receivership) v Consolidated Joineries Ltd* [1996] 2 NZLR 652.
2 At 657.

[24] On 20 January 2016, United Steel filed a notice of opposition and the affidavit of Mr Anyon. In the notice of opposition, United Steel said they were entitled to register the mortgage pursuant to clause 19 of the credit application of 8 October 2014. They also asserted that reference to a credit limit of $5,000 on the credit application was not a limit on Mr Thorn's personal guarantee.

[25] By agreement, leave was granted to proceed by way of originating application and the proceedings were set down for hearing. Both counsel filed submissions prior to the hearing.

Did clause 19 of the credit application permit registration of a mortgage?

The decision in Pacific Homes Ltd (in Receivership) v Consolidated Joineries Ltd

[26] In his initial written submissions, Mr Riches argued that clause 19 was sufficient to grant only a caveatable interest and was not capable of supporting a registered mortgage. As in his memorandum, he relied on the statement of Blanchard J in the *Pacific Homes* judgment. He also said "a fabricated priority amount was inserted in the mortgage instrument of $60,000". His submissions referred to United Steel's representatives having signed the A & I form relying on a power of attorney. He made no further submissions in relation to that.

[27] In his submissions in opposition, Mr Vinnell referred again to clause 19 of the credit application. He said the form of registered mortgage was the prevailing Auckland District Law Society form 2015/4328. He said the priority sum of $60,000 was appropriate given the level of debt. He submitted that e-dealing guidelines and the information requirements under s 101 of the Land Transfer Act were met with the A & I form (with attached certificate of non-revocation) executed by United Steel's officers.

[28] In their written submissions, both Mr Riches and Mr Vinnell referred to judgments which they considered relevant. Mr Vinnell argued the judgment in *Pacific Homes* was not authority for the proposition advanced by the applicant. Both counsel made submissions as to whether Mr Thorn's liability should be limited to $5,000.

[29] When the application came on for hearing, Mr Riches told me that I was not required to decide whether Mr Thorn's personal liability was to be limited to $5,000.

[30] Clause 19 did give United Steel a charge over any property owned by Mr Thorn at the time of the application or in the future as security for monies that might be due from Thorn Engineering to United Steel. The parties are in agreement that, in the event of any default in payment, United Steel was entitled to lodge a caveat against such a property. They differ as to whether United Steel was entitled to register a mortgage against the property.

[31] Blanchard J's judgment in *Pacific Homes* is not authority for the proposition that, with a similarly worded clause, the creditor is not able to register a memorandum of mortgage under the Land Transfer Act. As with the other reported judgments which counsel had considered relevant, the Court of Appeal in that case was concerned with whether or not the creditor was entitled to register a caveat pursuant to its right, as allowed for in an agreement, to take security over certain property.

[32] The relevant clause in that case was:[3]

> To execute in the name and on behalf of the [debtor company] all mortgages transfers assignments leases bailments deeds and assurances necessary to vest in any mortgagee purchaser lessee or bailee the whole or any part of the property hereby charged which may be mortgaged sold let or bailed and to execute all such other deeds instruments and writings in relation to the powers hereby given as may in his or their opinion be necessary or expedient and to use the common seal and name of the [debtor company] for all or any of the purposes of this Clause or in any legal proceedings.

[33] Mr Riches submitted that the Court found the wording was capable of supporting a caveat but not a registered mortgage, referring to the following passage from Blanchard J's judgment in *Pacific Homes*:[4]

> It is entirely unlikely that the parties would have intended to do business on the basis of a document which referred to the grant of a mortgage but could never be effective to confer any such security.
>
> ...

---

3 *Pacific Homes Ltd (in Receivership) v Consolidated Joineries Ltd*, above n 1, at 653.
4 At 657.

> The futurity of the provision can be seen from its context, especially the next sentence which contains a mechanism for the creation, execution and registration of a security, obviously one in registrable form, and from the expression "where products are incorporated". Another indicator is the reference to granting a registrable mortgage itself. The conditions were obviously not in a form capable of registration under the Land Transfer Act 1952. It cannot have been thought by the draftsperson that they would themselves suffice as a registrable security. When the conditions speak of the granting of a mortgage over land owned by the purchaser, Pacific Homes, it amounts to an agreement to grant a mortgage in registrable form if the contemplated circumstances arise at a later time.

[34] When Blanchard J said "the conditions were obviously not in a form capable of registration under the Land Transfer Act 1952" he was referring to the conditions as contained in the credit agreement between the parties, not the form of a mortgage that the creditor might ultimately have sought to register, pursuant to its power to do so. Indeed, in the first paragraph just quoted, Blanchard J referred to the condition of the agreement as providing "a mechanism for the creation, execution and registration of a security, obviously one in registrable form".

[35] In *Building Choices Ltd t/a PlaceMakers Riccarton v Carpe Diem Contracting Ltd (in Liquidation)* and *Philpott v NZI Bank Ltd*, courts held the clause relied on was not sufficient to give the creditor an equitable mortgage which could be supported by a caveat because, in each case, the particular clause stated that, before any right to a mortgage existed, the creditor must first request the mortgage.[5] Neither case is authority for the proposition that, where a creditor has an equitable mortgage, that right, regardless of the wording of the relevant clause, cannot entitle the creditor to register a mortgage which is in registrable form.

[36] Mr Riches referred to the judgments in *Avco Financial Services Ltd v White* and *Adams v Sun* and said they were authority only for the proposition that clauses giving creditors a charge over property as security for loans could support a caveat and did not suggest that the creditor would be entitled to register a mortgage against the property.[6] In those cases, the courts did hold that the creditors had equitable mortgages which entitled them to register caveats.

---

5 *Building Choices Ltd t/a PlaceMakers Riccarton v Carpe Diem Contracting Ltd (in Liquidation)* [2015] NZHC 1266; *Philpott v NZI Bank Ltd* (1989) 1 NZ ConvC 190,246 (CA).

6 *Avco Financial Services Ltd v White* [1977] VR 561; *Adams v Sun* [2014] NZHC 912.

[37] As in *Pacific Homes*, the Court in *Avco* held that the agreement itself was not in a form that could be registered but neither case is authority for the proposition that a clause, such as the present, can never be used by a creditor to register a mortgage which is in registrable form.

[38] A clause such as clause 19 gives a creditor a charge over land as security for monies outstanding. It gives the creditor the right to register a mortgage against that property if there is an unpaid debt. None of the authorities to which I have been referred require me to find that a creditor cannot rely on such a clause to register a mortgage. Counsel told me they had not identified any reported judgment where that issue had been dealt with but the issue was discussed fully by Chilwell J in *Equiticorp Finance Group Ltd v Smart*.[7]

[39] I would thus have declined the application on the grounds on which it was first made.

Registration by way of e-dealing pursuant to a power of attorney

[40] At the hearing, Mr Riches presented further submissions to me. In those submissions, he dealt with United Steel's acknowledgement that the A & I form and thus the instruction to register the mortgage had been executed by United Steel as attorney for Mr Thorn. He argued that, in the particular circumstances of this case, United Steel was not lawfully entitled to register such a document.

[41] In what purported to be reply submissions, Mr Riches raised a new issue as to whether United Steel could rely on an appointment as attorney under the credit application.

[42] Mr Riches argued that s 157 Land Transfer Act required the appointment of an attorney to be by deed.

[43] Section 157 provides:

157 Paper instruments to be executed

---

7 *Equiticorp Finance Group Ltd v Smart* (1989) ANZ ConvR 542 (HC).

(1) Every paper instrument for the purpose of creating, transferring, or charging any estate or interest under this Act must be executed by the registered proprietor and any party to it specified in regulations made under this Act.

(2) The regulations may prescribe the manner in which instruments to which subsection (1) applies must be executed, witnessed, or attested.

(3) Every instrument executed in accordance with this section has the same effect as a deed executed by the parties signing it.

(4) This section is subject to the provisions of section 3 of the Official Appointments and Documents Act 1919.

[44] In *Equiticorp Finance Group Ltd v Smart*, Chilwell J stated:[8]

> It is trite law that an agent cannot execute a deed so as to bind his principal unless the authority to execute it is conferred by deed … The memorandum of mortgage signed by Equiticorp as agents for Mr and Mrs Smart has the force and effect of a deed.

[45] In *Dixon v McGoverne*, Master Venning, as he then was, referred to s 157 and treated it as requiring an instrument charging any interest in land as having to be a deed so that it had to be witnessed in the manner required for a deed.[9] He held that, as this had not happened, the mortgage was not a valid document, at least for the purposes of s 157 of the Land Transfer Act. For that reason, he held the mortgage could not support a caveat and the application for removal of the caveat, lodged pursuant to that claimed interest as mortgagee, had to succeed.

[46] Section 12 of the Property Law Act 2007 states "an attorney executing a deed must be appointed by deed".

[47] Mr Riches argued that clause 19 in the credit application was not a valid deed because there had been a breach of s 9 of the Property Law Act 2007, in part because subs (7)(a) states: "A witness must not be a party to the deed". In this case, the application form was signed by Mr Thorn as manager of Thorn Engineering. In doing so, he was also signing as guarantor. His signature was witnessed by a Mr Wilson who gave his address and occupation as United Steel Christchurch Business Development Manager.

---

8 *Equiticorp Finance Group Ltd v Smart*, above n 7, at 11-12.

9 *Dixon v Laurie McGoverne Ltd* M-254/00, 8 September 2000 (HC).

[48] Mr Riches went on to submit that, because the United Steel credit application form, signed by Mr Thorn, was not a deed, United Steel was not validly appointed to be Mr Thorn's attorney for the purpose of authorising the registration of a mortgage over his land.

[49] Understandably, Mr Vinnell was taken by surprise with the challenge to the validity of the mortgage on this basis. His initial response was to suggest that s 157(3) does not stipulate that an instrument charging an interest in land must be a deed and thus executed as a deed, s 157(3) saying simply that such a document would have the "same effect as a deed executed by the parties signing it".

[50] Such an interpretation might also be consistent with s 157(1) which stipulates that instruments have to be signed by only the registered proprietor and any party to it specified in regulations made under the Act. It might have been thought that, if Parliament had considered that any instrument should be executed as if it was a deed, then it would have said so.

[51] Given the way commercial documents commonly provide a mechanism for a creditor to register a security document as attorney for the debtor, the issue raised in Mr Riches new submissions is of some commercial importance. I gave the respondent leave to file further submissions on the issue and Mr Vinnell has done so.

[52] In his further submissions, Mr Vinnell accepted that the United Steel Limited credit application form, signed by Mr Thorn, did not constitute a deed. That means the certificate of non-revocation attached to the A & I form was incorrect in that United Steel had not been appointed by deed to be the attorney of Mr Thorn. Mr Vinnell nevertheless referred to s 157. He said this section was substituted in 2002 in conjunction with the legislation providing for e-dealing and it then added the word "paper" to the heading and to subs (1).

[53] Mr Vinnell pointed out that, at the same time, ss 164A-E were added to the Land Transfer Act. I set out these sections below:

164A Certification

(1) Every instrument to which this subsection applies must contain a certification that complies with subsection (3).

(2) Subsection (1) applies to—

(a) electronic instruments; and

(b) paper instruments of a class specified for the purpose by regulations made under this Act.

(3) Certifications must specify that—

(a) the person giving the certification has authority to act for the party specified in regulations in relation to that class of instrument and that party has legal capacity to give such authority; and

(b) the person giving the certification has taken reasonable steps to confirm the identity of the person who gave the authority to act; and

(c) the instrument complies with any statutory requirements specified by the Registrar for that class of instrument; and

(d) the person giving the certification has evidence showing the truth of the certifications in paragraphs (a) to (c) and that the evidence will be retained for the period prescribed for the purpose by regulations made under this Act.

(4) Regulations made under this Act may prescribe the form of certifications under this section.

164B Who may give certification

(1) A certification under section 164A may be given only by a practitioner.

(2) The Registrar may revoke a person's right to give a certification under section 164A at any time if he or she believes on reasonable grounds that the person—

(a) has given a fraudulent certification; or

(b) has given a certification that is materially incorrect; or

(c) has failed to comply with any requirement under section 156B(2)(b), 156D(1)(b), 156H, or 164C.

(3) The Registrar must give notice as soon as possible to any person whose ability to give certifications is removed under subsection (2).

(4) The Registrar may reinstate the right of a person to give certifications if the Registrar is satisfied that the person will—

(a) give certifications that are not of the kinds referred to in subsection (2)(a) and (b); and

(b) comply with requirements under sections 156B(2)(b), 156D(1)(b), 156H, and 164C.

164C Retention of evidence and audit of certifications

(1) Any person who gives a certification must retain evidence showing the truth of the certification for the period prescribed for the purpose by regulations made under this Act.

(2) Without limiting what may be considered to show the truth of certifications, the Registrar may specify requirements that, if met, must be regarded as satisfying the obligation in subsection (1).

(3) The Registrar may require a person who has given a certification to do either or both of the following:

(a) produce to him or her the evidence referred to in subsection (1):

(b) provide a statement on oath as to—

(i) any further information required by the Registrar; or

(ii) the circumstances surrounding the preparation and electronic transmission of any instrument.

(4) Any requirement by the Registrar under subsection (3) must be complied with within 10 working days of its receipt.

164D Requirements about execution do not apply if certification given

If a certification has been given in relation to an instrument to which section 164A(1) applies, the following provisions do not apply to that instrument:

(a) section 164 (which relates to the certification of the correctness of instruments):

(b) section 157 (which relates to the execution of paper instruments):

(c) any provision in any enactment or rule of law relating to the execution, signing, witnessing, or attestation of instruments.

164E Effect of certification

(1) When an instrument certified under section 164A (other than a discharge of mortgage under section 111) is registered, the instrument has the same effect as a deed executed by the parties specified in regulations made under this Act.

(2) This section is subject to the provisions of section 3 of the Official Appointments and Documents Act 1919.

(3) When an instrument certified under section 164A is registered, the instrument must be regarded for the purposes of every enactment and rule of law as if—

(a) the instrument had been made in writing; and

(b) the instrument had been duly executed by every party specified for the purpose in regulations made under this Act.

(4) When an instrument certified under section 164A is registered, the provisions of section 25 of the Property Law Act 2007 must be regarded as having been fully satisfied.

(5) Subsection (4) is for the avoidance of doubt.

[54] Mr Vinnell submitted that s 157 does not apply to instruments created by e-dealing and it would be inconsistent with ss 164A-E for the Court to require the A & I authority or the solicitors' certificate to be in the form of a deed. Mr Vinnell submitted that the decision in *Equiticorp Finance Group Ltd v Smart* is no longer applicable because it concerned a paper memorandum of mortgage considered under s 157 as it was in 1989.

[55] In further response, Mr Riches argued that the decision in *Equiticorp* still applies because the same provision which was in s 157(3) is now set out in s 164E(1) Land Transfer Act.[10]

[56] Following the 2002 Amendment, mortgage instruments can either be paper instruments or electronic instruments. The writers of *Hinde, McMorland and Sim Land Law in New Zealand* set out the following requirements for the form and execution of electronic instruments:[11]

(1) The instrument has been prepared in an approved electronic workspace facility;

(2) The instrument is in an acceptable form;

(3) The instrument contains or is associated with a certification under s 164A of the Land Transfer Act 1952; and

(4) In respect of any matter not provided for in the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, the instrument is in order for registration under the Land Transfer Act 1952.

---

10 See [53] above.

11 *Hinde, McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [8.028].

[57] An electronic instrument is in an acceptable form only if it is in a form specified by the Registrar.[12] The specifications for an electronic mortgage instrument do not require the instrument to be a deed or to be signed by the parties to it.[13]

[58] When completed by e-dealing, the formal requirements will usually be complied with as the required fields when completing the online form are based on the Registrar's specification. Likewise, the e-dealing process requires that the practitioner give the necessary s 164A certification. In the present case, the 'Instrument Details' screenshot (see [12]) show that all of the required details have been included and that the necessary certifications have been given by Ms Endean with her electronic signature.

[59] Section 164D of the Land Transfer Act provides that, where such a certification is given, the provisions relating to the form of instruments elsewhere in the Act do not apply, including those relating to the execution, signing, witnessing and attestation of instruments.

[60] There is therefore no need for the mortgagor to sign the mortgage instrument. Under the new electronic regime the need for this has been done away with by the provision for certifications by the practitioner completing the transaction.

[61] I accept that, on an e-dealing, neither the practitioner's certificate certifying as to the various matters necessary to register the e-dealing, nor the underlying instrument to be registered nor the authority to lodge the instrument has to be in the form of a deed. Nevertheless, the A & I form for an electronic transaction, in the form approved by the New Zealand Law Society and the Registrar General of Land, is in the form of a deed. The form has to identify who is the practitioner's client who is able to authorise the proposed e-dealing and the capacity in which they can do that. In this instance, the client was United Steel Limited as mortgagee and Andrew John Thorn. The authorised signatures on that form have to be witnessed. The

---

12 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 26(1).

13 "Land Information New Zealand statutory requirements, forms of electronic instruments, and requirements for the retention of evidence" (26 September 2008) 144 *New Zealand Gazette* 3925 at 3934.

witness not only has to sign the form as a witness, providing their occupation and address as with a deed. They must go further and certify how they have confirmed the identity of the people signing the document.

[62] It is clear from s 164A that ss 164A-E apply to the practitioner's certification and the underlying instrument authorising the e-dealing as two separate documents. Whether or not s 157(3) did require any paper document being registered under the Land Transfer Act to be in the form of a deed and executed accordingly, as the Court held was necessary in *Dixon v McGoverne*, is now immaterial.[14] That is clear from s 164E.[15] Section 164E says the instrument is to have effect as if it had been made in writing and "duly executed by every party specified for the purpose in regulations made under this Act". With its reference to s 25 Property Law Act 2007, the effect of s 164E(4) is that, with certification under s 164A, the requirement for any disposition of land to "be in writing and signed by the person making the disposition" must be regarded as satisfied.

[63] It would be inconsistent with those specific provisions for the Court to hold that the s 164A certificate or the underlying instrument (the mortgage) has to be in the form of a deed. It is also difficult to see what such a requirement could achieve given the stringent obligations as to the signing and witnessing of A & I forms and certification set out in ss 164A-164E and regulations made under the Act.

[64] However, the issue raised by the applicant related not to what was required as to the s 164A certificate or the underlying instrument, in this case the mortgage. The applicant had contended that, where the registration of the mortgage has been authorised by a person or company pursuant to a power of attorney, it is the appointment of the attorney which must be by deed.

[65] For reasons just discussed, a memorandum of mortgage does not have to be executed as a deed although the legislative provisions as to e-dealing require the mortgagor to authorise the registration of that mortgage effectively in writing with their signature duly witnessed and the witness certifying as to their identity.

---

14 *Dixon v McGoverne*, above n 8.
15 See [52] above.

[66] Section 6 of the Property Law Act 2007 says:

> Anything that must or may be done by or to a person under this Act may be done by or to the person's attorney or agent if it is within the attorney's or agent's authority.

[67] This is subject to s 12 which says an attorney executing a deed must be appointed by deed. It is no doubt because of that provision that attorneys are often appointed by deed.

[68] There are at New Zealand law no general formalities for completion of an ordinary power of attorney. As such, common law principles of agency law apply. While a power of attorney does not need to be conferred by a written document, practically it will be difficult for the party relying on the power to demonstrate the content of the authority conferred if there is no written document. The giving of a power of attorney is a unilateral act: it does not depend for its validity on an acceptance by the attorney, although the act of the attorney is necessary to exercise the authority conferred by the power.[16] Provided the attorney acts within the apparent authority which is thereby created, the principal will be bound by the attorney's acts.[17]

[69] Before 2002 and statutory provision for e-dealing, where a power of attorney was being relied upon to register a land transfer document, it had been held that power of attorney had to be granted by deed.

[70] *Equiticorp Finance Group* involved an application that a caveat not lapse. With the caveat, Equiticorp claimed an interest in land by virtue of an unregistered memorandum of mortgage. The mortgage had been executed by Equiticorp pursuant to a power of attorney granted to them in two mortgages of shares. One mortgage of shares was in the form of a deed but was not attested as required for a deed because the witness to the registered proprietor's signature did not add their address and occupation. Chilwell J concluded "[h]ence the power of attorney in clause 11.1 of that document did not confer authority on Equiticorp to execute a deed, which the memorandum of mortgage effectively is". Chilwell J however held that it was

---

16 *Laws of New Zealand* Agency (online ed) at [34].
17 *Laws of New Zealand*, above n 16, at [34].

seriously arguable that the agency being in writing would authorise *Equiticorp* to execute an agreement to mortgage otherwise by deed and that the memorandum of mortgage was at least an agreement to mortgage. Chilwell J held that one of the mortgagors (Mrs Smart) had granted *Equiticorp* a power of attorney by deed in the other mortgage of shares. He held it was at least seriously arguable that this power of attorney meant the memorandum of mortgage executed by *Equiticorp* was registrable against the interest of Mrs Smart in the land in question.

[71] *Equiticorp* was thus authority for the proposition that when an attorney executed a document creating an interest over land, having the effect of a deed, that attorney had to have been appointed by deed.

[72] That was the context in which the drafters of credit agreements providing security to a lender would have been operating. Prior to the 2002 Amendment, the Land Transfer Act contained a form (Form O, Schedule 2), which could be used to appoint a power of attorney for the purpose of dealing with land. The writers of the pre-2002 edition of *Hinde, McMorland, and Sim's Land Law in New Zealand* noted that "a deed under the general law is normally used in preference to Form O".[18] The writers of *Goodall and Brookfield's Conveyancing Precedents* said, further, that for Land Transfer purposes:[19]

> … a power of attorney is generally made by a deed poll (though a power of attorney clause may be embodied in a deed inter partes). It is therefore to be executed with the formalities of ss 4 and 5 of the Property Law Act 1952 as is any deed.

[73] Clearly, there was an expectation that, where used for Land Transfer Act purposes, a power of attorney would be created by deed (or by the standard form which was, in effect, a deed). This is also borne out by the cases. Counsel have not directed me to, and I cannot find, any cases where a power of attorney, created in a credit agreement for the purpose of providing security to a lender by empowering the lender to deal with the debtor's interests in land, has not been created by deed. For example, in *CFC Commercial Finance Ltd v Australian Guarantee Corporation*

---

18 *Hinde, McMorland and Sim Land Law in New Zealand* (Butterworths, Wellington, 2009) at [2.175].

19 F M Brookfield (ed) *Goodall and Brookfield's Conveyancing Precedents* (4th ed, Butterorths, Wellington, 1980) at

(NZ) Ltd, the power of attorney empowering the creditor to register/perfect the mortgage was contained in a clause of the security agreement itself, which was executed as a deed.[20]

[74] The issue for me is whether that requirement changed through the introduction of e-dealing. I have not received any evidence on the point. The certificate of non-revocation of attorney attached to United Steel's A & I form was in the standard form contained in Schedule 1 of the Property Law Act. Thus it refers to United Steel as having been appointed as attorney "by deed". It must be inferred that the solicitors prepared that document on the assumption the appointment of United Steel as attorney would have been by deed.

[75] The previous rationale for requiring the appointment of the attorney to be by deed was that the document to be registered would have the effect of a deed. There is still that deemed effect of an instrument registered by e-dealing through s 164E(1).

[76] There is no express statutory provision stating that an authority to register sufficient to satisfy the requirements for certification under s 164A has the effect of a deed. Also, as Mr Vinnell pointed out, there is no statutory provision for execution of an A & I form but, in practice, s 164A makes it inevitable that an A & I form will have to be completed to enable registration through e-dealing. Once an A & I form is executed, it will have the effect of a deed. When a deed has been executed and delivered, its parties are bound by its terms notwithstanding a lack of consideration. Generally, parties will be estopped from arguing, with reference to other evidence, that the deed does not express their intention, or from denying an unambiguous representation of material fact contained in the deed.[21]

[77] To be a deed, a document does not need to refer to itself as a deed.[22] Therefore, such an authority will in all important respects be in the form of a deed. The authority will be in writing, executed and witnessed with the witness providing their address and occupation.

---

20 *CFC Commercial Finance Ltd v Australian Guarantee Corporation (NZ) Ltd* (1994) ANZ ConvR 98 (HC).

21 *Laws of New Zealand* Interpretation of deeds and other documents (online ed) at [17].

22 *Laws of New Zealand* Interpretation of deeds and other documents (online ed) at [2].

[78] I thus consider that the authority for the registration of a mortgage by way of e-dealing is a document having the effect of a deed in the same way as applies to the underlying instrument which is being registered. I do not consider that it can be inferred from ss 164A to 164E that, with the introduction of e-dealing, Parliament intended to change what had been accepted as the previous requirement for powers of attorney to be by deed where they were being relied upon to register a land transfer document.

[79] Accordingly, United Steel could authorise the electronic registration of a mortgage over Mr Thorn's interest in 71A Shirley Road, Christchurch only if it had been appointed as his attorney by deed. The certificate attached to the A & I form, signed by Mr Setchfield and Mr Rengachariar, was incorrect in saying that United Steel had been appointed as attorney by deed. I thus find that the memorandum of mortgage was invalidly registered. Through counsel, Mr Thorn however accepts that United Steel would have been entitled to register a caveat.

[80] On that basis, the applicant is entitled to a declaration that it was not entitled to register mortgage 10637755.1 against CTCB4OC/969.

[81] For the respondent, Mr Vinnell argued that there remains a fundamental problem with the application in that it essentially involves a determination under s 81 Land Transfer Act. That permits the Registrar to cancel the registration of a document where registration has been made in error. It is however for the Registrar to be satisfied of that error. In this instance, the Registrar has not been served as a party to the application. This judgment may however be sufficient to have the Registrar take the remedial action which the applicant seeks.

Compliance with e-dealing guidelines

[82] Mr Riches also referred to s 151 Land Transfer Act and submitted there was no valid mortgage because United Steel had failed to comply with e-dealing guidelines in that no power of attorney or copies of driver licences proving identity had been retained by the practitioner with the A & I form.

[83] Section 151 Land Transfer Act states:

> **151 Power of attorney to be deposited with Registrar**
>
> Every power of attorney intended to be used under this Act, or a duplicate or attested copy thereof, verified to the satisfaction of the Registrar, shall be deposited with the Registrar in manner provided by regulations under this Act, but for the purposes of this Act it shall not be necessary to register any power of attorney.

[84] Mr Riches argued that, pursuant to s 151, the power of attorney relied on had to be deposited with the Registrar or at least be attached to the A & I form which had been retained by the solicitors dealing with LINZ. He referred to 8.49 of the Property Transactions and E-Dealing Practice Guidelines. It states: "If the power of attorney has not been deposited with LINZ, then a copy of this document must be attached to the A & I".

[85] Mr Riches suggested that no power of attorney had been attached to the A & I form. He suggested this meant the A & I form was invalid. He also submitted that, although there had been a reference in the A & I form to identity being verified through driver licences, a copy of the driver licences had not been attached to the A & I form as required by the guidelines. On that basis also, he suggested the registration of the mortgage was invalid.

[86] I accept from Claire Endean's affidavit that copies of the New Zealand driver licences used in identifying signatures were retained by the solicitors with the A & I form. Although Ms Endean said she was sent a copy of the credit application incorporating the power of attorney, she did not say that her firm was holding that document with the A & Is and accompanying documents in accordance with the requirements of the Land Transfer Act and the Land Transfer Regulations 2002.

[87] Mr Vinnell argued the Property Transactions and e-dealing Practice Guidelines are not regulations but simply "best practice" guidelines. Consistent with that, information from the Registrar General on the LINZ website merely states that power of attorney *should* be held on file with the A & I. He said even the use and retention of an A & I form is not essential, it is just best practice.

[88] I accept that the Guidelines do not have legislative force. In *Bos International (Australia) Ltd v Murphy*, Associate Judge Bell said "[t]he e-dealing guidelines are simply guidelines, not rules".[23] This must be correct as there is nothing in the primary legislation or in the Land Transfer Regulations 2002 which delegates any regulatory function to the Law Society. The introduction to the Guidelines states that the e-dealing section of the Guidelines is "endorsed by the Registrar General of Land for *recommendation* to lawyers using Landonline". Clearly, they are merely recommendations and, while a failure to follow them may evidence a failing in a practitioner's professional responsibility, they do not go to the validity of the transaction. In addition, there is here no prejudice to the applicant arising out of the failure to follow best practice.

[89] However, it is not merely the recommendations as to best practice which are relevant. Section 164A requires the practitioner giving the appropriate certification to have evidence showing the truth of the certifications in ss 164A(3)(a), (b) and (c) and to retain that for the period prescribed for the purpose by regulations made under the Act. The A & I form, with the appropriate power of attorney attached to it when relevant, is a best practice method of a practitioner satisfying the obligations set out in s 164A(3)(d).

[90] Nevertheless, I accept the submission of Mr Vinnell that these objections go to form, not substance. Even if there was a breach of any rules relating to certification or registration, such a breach would not necessarily mean there was an underlying invalidity in the instrument which was to be registered or an unauthorised registration of a document affecting an interest in land under the Land Transfer Act. At worst, it would amount to a breach of a solicitor's duties when certifying and registering documents.

[91] In this case, the solicitors had been sent, and in accordance with their obligations to retain files under the Lawyers and Conveyancers Act 2006, would have retained the credit application form which included the power of attorney which was being relied upon when the A & I form was completed. Their failure to retain

---

[23] *Bos International (Australia) Ltd v Murphy* HC Auckland CIV-2009-404-5589, 31 March 2010 at [43].

that document separately with the other A & I documents would not provide a basis for the Court to rule that registration of the mortgage was invalid.

[92] I accordingly hold that, in the circumstances, any failure to follow or retain the recommended or required forms did not invalidate the mortgage instrument.

Inclusion of priority amount in the mortgage instrument of $60,000

[93] This priority sum was inserted under the heading "Mortgage details" in the practitioner's certificate supporting the e-dealing registration of the mortgage on 25 November 2016. Through their solicitor, United Steel was registering a mortgage in a form registered under memorandum number 20154328. There was no clause in that form of mortgage purporting to provide for it to have priority over other advances to the extent of $60,000.

[94] Presumably the solicitor included this priority sum because she considered that s 101 Land Transfer Act required the mortgage instrument to contain "the stated priority limit under s 92 of the Property Law Act 2007", if any. If that was her reason, she was mistaken because that information has to be contained in the mortgage instrument only if there is such a priority list limit, hence the words (if any) at the end of s 101(2)(e).

[95] There is no evidence that either United Steel or Mr Thorn had authorised the inclusion of this priority limit as part of the mortgage to be registered. The practitioner may have thought she had implied authority to do it, given United Steel were registering a mortgage under clause 19 of the credit application form and that clause authorised United Steel to register a memorandum of mortgage in a "format" of United Steel's choice. I doubt that it was correct of her to do so but the inclusion of that priority sum does not affect Mr Thorn's interest in the property as registered proprietor. The inclusion of that information would not provide a basis for holding registration the mortgage to have been invalid.

Conclusion

[96] Clause 19 of the credit application did not enable United Steel to take security by registering a mortgage over Mr Thorn's interest in the property at 71A Shirley Road if Thorn Engineering Limited defaulted on payments that were due to United Steel because the appointment of United Steel as attorney for Mr Thorn was not by deed. United Steel was however entitled to register a caveat pursuant to the agreement to mortgage contained in the credit application. Registration of the mortgage by way of e-dealing, as occurred here, was thus not properly authorised and valid. The applicant is entitled to a declaration in those terms.

[97] Leave is reserved to the applicant to seek further orders to give effect to that declaration and leave to join the Registrar of Lands if he considers that necessary.

[98] If there is an issue over costs, the applicant is to file a memorandum (no more than three pages) within 14 days. The respondent is to file a memorandum in response (no more than three pages) within a further 14 days. My tentative view is that each party should bear their own costs. The ground on which the applicant has succeeded was not raised with the respondent before proceedings were issued. Had it been, there may have been no need for these proceedings. The respondent may have agreed to request the Registrar to correct the title and, in place of the mortgage, register a caveat. The applicant has succeeded on a ground which was not referred to when the application was first filed and which was advanced only by way of submissions in reply. On the other hand, these proceedings have resulted from what I have held to be the respondent's invalid registration of a mortgage.

Solicitors:
Saunders & Co., Christchurch
Anthony Harper, Christchurch.