



Banking & Financial Services Law Association

**The 26th Annual Banking and Financial Services
Law and Practice Conference**

Sheraton Mirage Resort, Gold Coast

31 July -1 August 2009

**Indefeasibility and All Advances Mortgages:
Are they a thing of the past?**

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Indefeasibility and All Advances Mortgages:

Are they a thing of the past?

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Simpson
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Westpac v Clark: The Facts - 1

- Mrs Fenech owned an unencumbered land in Auckland
- A fraudster obtained a false passport in Mrs Fenech's name
- The fraudster arranged a loan to be secured against "her" property
- Standard "all obligations" mortgage and loan documentation

Westpac v Clark: The Facts - 2

- Bank instructed fraudster's lawyer to arrange execution and registration of documents
- Solicitor certified documents executed, and undertook to register mortgage "promptly"
- Drawdown → Default
- Bank had notice of fraud – notified *Land Information NZ*
- Solicitor's delayed attempt to register mortgage unsuccessful

High Court

- Bank sought summary judgment on undertaking to register “promptly”
- HC accepted that “prompt” registration:
—————→ Indefeasible mortgage
- But trial to consider:
 - lending decision/enforcement

Court of Appeal

- Short shrift to these “defences”
- But raised question “indefeasibility for what?”
- An “intriguing” academic issue comes to be decided

Documents - 1

Mortgage

- *“In consideration of the “secured money”, **you** as Mortgagor, hereby mortgage to the mortgagee all of **your** estate and interest in the land...”*

Memorandum of Mortgage

- Secured money: *“All money which **you** ... may owe to Westpac now or in the future...”*

Documents - 2

Payment:

- *“You must pay to Westpac, on time, the Secured Money. You must pay the Secured Money on demand except where **your** Loan Agreement or another Bank Document provides otherwise ...”*
- Several other references to payments or obligations under **“your”** Loan Agreement.

Accepted principles

- Registration protects the charge, but doesn't validate forged covenant to pay
- Registration gives mortgagee recourse to the land
- If a fixed sum mortgage, the advance would be secured
- Statutory compensation would be available to discharge the mortgage

Substance in the forms?

- Fixed sum/all advances both statutory forms
- Statute contemplates mortgage securing future advances
- Under both scenarios:
 - No monies advanced to “you”
 - No personal covenant owed by “you”
 - Need to go beyond registered documents to identify secured debt
- Consistent compensation regime

Supreme Court

- Unregistered covenant *could* be incorporated, but only if documents *must* be incorporated that way
- Westpac never *intended* taking security from anyone other than named mortgagor
- “You” ≠ “you”
- Strict contractual interpretation, uninfluenced by policy/scheme of Act

Solutions?

- An industry issue requiring industry response
- Drafting solutions – “bold” and “unappealing” (but so is indefeasibility?)
- Return to fixed sum mortgages? Commercial challenges
- Review identification practices and relationships with solicitors
- Statutory law reform
- Title insurance



Simpson Grierson