29th Annual Conference of the Banking and Financial Services Law Association

4-6 August 2012, Queenstown, New Zealand

Australian Case Law Update

The Honourable Justice Michael Sifris[1]

Introduction

1 Over the last year or so, Australian courts, both Federal and State have heard a number of important cases in the area of banking and finance. This paper provides an analysis of some of the more relevant cases.

A. Penalty fees

***Andrews v Australian and New Zealand Banking Group Ltd*[2]**

Facts

2 This proceeding involved a class action brought by three customers ("applicants") against ANZ. ANZ required the applicants to pay a variety of fees for overdrafts, overdrawn accounts, dishonour fees and overlimit credit card accounts ("exception fees"). The applicants sought declarations that the exception fees were penalties and therefore, void or unenforceable. In addition, the applicants sought repayment of the exception fees or damages.

Issues

3 Gordon J was required to determine whether:

a) the penalty doctrine requires a breach of contract before it is

[1] Judge, Supreme Court of Victoria. I gratefully acknowledge the assistance of my Associate, Danielle Rossitto in the research and preparation of this paper.

[2] [2011] FCA 1376.

invoked or whether it could be triggered by some other event; and

b) the exception fees were capable of being penalties.

Decision

Does the doctrine of penalties require a breach of contract before it can be invoked?

4 Gordon J conducted a detailed analysis of the history of the doctrine of penalties in common law countries and in Australia and relied on the most recent High Court decision on penalties, *Ringrow Pty Ltd v BP Australia Pty Ltd*[3] ("*Ringrow*"). In *Ringrow*, the Court held that the law of penalties has no application to a contractual provision requiring a payment on the occurrence of an event that does not constitute a breach of contract. Gordon J acknowledged that *Ringrow* was followed by the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd*[4] ("Interstar") although the trial judge held that any such distinction was artificial. The Victorian Court of Appeal, in a recent decision[5] accepted the distinction and followed *Ringrow* and the New South Wales Court of Appeal in *Interstar*.

5 The applicants contended that the law of penalties was not limited to a breach of contract. In support of this contention, the applicants sought to rely on the first instance decision of Brereton J in *Interstar*[6] where his Honour held that Integral Home Loans retained its right to Trailer commissions, notwithstanding termination of the agreement (other than for breach) and that the retention of Integral's accrued trailer commission by Intestar, based on a term of the contract that permitted the retention of such accrued commission on termination, was void as

[3] [2005] HCA 71.
[4] [2008] NSWCA 310.
[5] *Ange v First East Auction Holdings Pty Ltd* [2011] VSCA 335.
[6] [2007] NSWSC 406.

a penalty. Although the Court of Appeal reversed Brereton J's decision, the High Court granted special leave to appeal. The matter was settled out of court before the appeal was heard. Consequently, the specific issue, namely the artificiality and desirability of the distinction must await a further review by the High Court of Australia.

6 Gordon J did not accept this submission and relied on *Ringrow.* Her Honour confirmed that the rule against penalties was a narrow exception to the general principle of freedom of contract pursuant to which parties may shape their contractual relationship - and allocate risk and reward - as they see fit. Consequently, her Honour concluded that the penalty doctrine only applies to a breach of contract and not to the performance of its terms.[7]

Were the exception fees capable of constituting penalties?

7 Gordon J then examined each fee individually and held that only the late payment fees in respect of certain credit card accounts were capable of being characterised as penalties because they were payable as a direct result of a customer's breach. In other words, these fees were payable because the applicants failed to pay the amount owing under the repayment provisions of the contract. Despite finding that the late payment fees were capable of being characterized as penalties, her Honour did not find that they were penal.[8]

8 The penalty doctrine is based on two necessary conditions - contractual breach and the fee being in excess of a genuine pre-estimate of the loss or damage. Her Honour deferred consideration of the second necessary condition to a later hearing.

9 On the other hand, her Honour concluded that the honour fees, the dishonour fees, the overlimit fees and the non-payment fees were not

[7] at [73].
[8] at [224]–[353].

penalties because they were not triggered by a breach of contract.[9]

10 For example, in relation to the honour fees, Gordon J held that the contract, when properly construed, did not prohibit an overdrawing. It merely provided that the bank had no obligation to permit it. Thus, the honour fee was not triggered by breach but instead was a fee to compensate the bank for permitting the overdrawing. Without establishing a breach, a penalty cannot be imposed and the fee is enforceable.[10] A similar analysis was applied by her Honour with respect to the dishonour fees, overlimit fees and non-payment fees.[11]

11 The applicants have filed an appeal to the Full Federal Court.

Lessons

12 Until the High Court decides otherwise, there is some scope for banks and other financial institutions to draft documents in such a way that proposed fees and charges become payable under the contract and not in the event of a breach. Fees and charges payable in consequence of a breach need to be carefully calculated to ensure that they are no more than a genuine pre-estimate of the damages suffered.

B. Unenforceable Loan Agreements

***Equuscorp Pty Ltd v Haxton; Equuscorp Pty Ltd v Bassat; Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd*[12]**

Facts

13 The respondents invested in several blueberry farming schemes ("the Schemes") between 1968 and 1989 in northern New South Wales. In return, the respondent investors were given an immediate tax benefit and were promised future profits that the farming business was likely to generate. Rural Finance Pty Ltd ("Rural") provided loans to the

[9] at [143]–[222].
[10] at [175]–[189].
[11] at [195]–[222], [269]–[308], [329]–[331].
[12] [2012] HCA 7.

respondents for the purpose of acquiring interests in the schemes ("loan agreements"). Rural was part of the Johnson Group which was comprised of various companies that promoted, financed and managed the schemes.

14 In breach of s 170(1) of each State's then *Companies Code* (the applicable corporations legislation at the time), no statement or prospectus was registered when investors were offered or invited to purchase interests in the schemes.

15 The Johnson Group's blueberry farming enterprise collapsed in 1991 and receivers and managers were appointed to Rural by Equuscorp Pty Ltd ("Equuscorp"), an arms-length financier to the Johnson Group. In 1997, the loans provided by Rural to the respondents were assigned to Equuscorp pursuant to an asset sale agreement and a deed of assignment. The deed of assignment stipulated that there would be an "absolute assignment" of the debt and "all legal *and other remedies*" under the loan agreements. Equuscorp sought repayment of the loans.

Issues

16 As a consequence of the breach of s 170(1) of the *Companies Code*, the loan agreements were unenforceable. Equuscorp did not dispute the finding of illegality. Instead, it sought restitution of the funds advanced to the respondents. In relation to that claim, there were three issues for the High Court to resolve:

a) Did Rural have a restitutionary claim against the investors notwithstanding the unenforceability of the loan agreements?

b) If Rural had a restitutionary claim, was that claim capable of assignment?

c) If the action in restitution was assignable, was it validly

assigned to Equuscorp under the deed of assignment?

Decision

Was restitution available?

17 French CJ, Crennan and Kiefel JJ held that Rural, and therefore Equuscorp, had no right to recover the loan moneys under a restitutionary claim. Their Honours held that if a contractual claim was unavailable due to illegality, a restitutionary claim would only be available if policy considerations supported that equitable claim.[13] In this case, the overarching policy concern was to maintain coherence in the law and to avoid self-stultification of the law. Their Honours held that restitution should be refused if allowing it would defeat the purpose of s 170(1) of the *Companies Code*, which was aimed at protecting investors.

18 Their Honours noted that Rural was part of the Johnson Group and, therefore, was involved in the promotion of the scheme and the furtherance of the illegal purpose. Their Honours also observed that permitting recovery from the respondent investors was at odds with the object of the statutory scheme. French CJ, Crennan and Kiefel JJ therefore concluded that this was a clear case in which coherence in the law, and the avoidance of self-stultification of the statutory purpose, stripped Rural, and by extension Equuscorp, of their right to restitution of the moneys advanced to the investors under the loan agreements.[14]

19 Gummow and Bell JJ agreed that Rural was not entitled to restitution of the loan monies. Their Honours agreed that permitting an action in restitution would lead to an absurd result because such an action would defeat the purpose of s 170(1) of the *Companies Code* and would

[13] at [45].
[14] at [45].

stultify the statutory policy.[15]

20 Heydon J, in dissent, held that a claim in restitution was available to Rural despite the illegal loan agreements. His Honour stated that such a claim was available because the *Companies Code* did not expressly or impliedly prohibit the bringing of restitutionary claims even though it could have done so.[16] Heydon J also stated that the onerous sanctions imposed by the *Companies Code* for a breach of s 170(1) indicated that those sanctions were sufficient to deal with the breach. [17]

Was the restitutionary claim assignable?

21 French CJ, Crennan and Kiefel JJ held that Rural's restitutionary claim would have been assignable had the claim existed.[18] The investors argued that the restitutionary claim constituted a bare right of action and was therefore not assignable at common law.

22 Their Honours held that the claim in restitution would not have been assigned as a bare right of action if it was assigned along with contractual rights and the assignee had a genuine commercial interest in the enforcement of the claim. Equuscorp acquired the loan agreements for value and consequently, it had a legitimate commercial interest in acquiring the restitutionary rights if the contract was found to be unenforceable.[19]

23 Gummow, Bell and Heydon JJ agreed that a restitutionary claim, had it existed, would have been assignable. Their Honours held that Equuscorp's genuine commercial interest was the registered charges that it held over Rural's assets.[20]

---

[15] at [98]–[111].
[16] at [128]–[133].
[17] at [130].
[18] at [53].
[19] at [53].
[20] at [53].

Was the restitutionary claim actually assigned?

24 French CJ, Crennan and Kiefel JJ held that the deed of assignment did not actually assign restitutionary claims to Equuscorp. Their Honours observed that the language used in clause 2 of the deed of assignment, namely, that "all legal *and other remedies*" would be assigned under the loan agreements, was identical to the language used in s 199(1) of the *Property Law Act 1974* (Qld).[21] This observation led their Honours to conclude that the phrase "other remedies" in the deed of assignment should be interpreted in accordance with its meaning in the *Property Law Act 1974* (Qld). Their Honours subsequently turned to the case law on s 199(1) of the *Property Law Act 1974* (Qld) which construes 'other remedies' as merely the rights to recover or enforce the debt or chose in action that has been assigned. The phrase does not include additional causes of action, such as restitutionary claims. Thus, their Honours held that no restitutionary claim was assigned to Equuscorp.[22]

25 Gummow, Bell and Heydon JJ took the opposite view, holding that 'other remedies' in clause 2 of the deed of assignment included a claim for restitution.[23] Their Honours held that the phrase 'other remedies' warranted a broad construction because it would not have made sense for Equuscorp to pay for some but not all of the rights of Rural against the investors.

Lessons:

26 This decision has implications for financiers, purchasers and assignees of loans. The validity of loan agreements or related security and other documents should be carefully considered and assignment and related documents should be drafted very carefully.

27 It is interesting to note that in *Ovidio Carrideo Nominees Pty Ltd v The*

[21] at [64].
[22] at [60]–[66].
[23] at [75], [160]-[161].

Dog Depot Pty Ltd[24], the Victorian Court of Appeal held that, although a tenant was not liable for rent until the landlord provided a disclosure statement under the *Retail Tenancies Reform Act 1998* (Vic), having paid the rent, the landlord was entitled to retain it. The tenants claim for monies had and received or restitution for money paid as a mistake, failed. The landlord's retention of the rent was not unjust or unconscionable, particularly in circumstances when the landlord provided consideration and the tenant received the benefit.

C. Debt Recovery and Enforcement Actions

Amadio Cases

28 As with previous years, close to 40 cases have considered the principles in *Commercial Bank of Australia v Amadio* ("Amadio").[25] It will be recalled that in Amadio, the High Court of Australia held that if a person was under a special disadvantage and that special disadvantage was sufficiently evident to a bank or financier, the onus shifted to the bank or financier to demonstrate that its conduct was not unreasonable or unconscionable and that it should be permitted to retain any security or other benefit arising from the transaction. The usual way of demonstrating that the bank or financier has not exploited any special disadvantage is to require the person subject to the special disadvantage to obtain independent legal advice.

29 Some of the cases that involved banks or other financial institutions are referred to in the footnote[26] and later under this section. It goes

[24] [2006] VSCA 6.
[25] (1983) 151 CLR 447.
[26] See *Bank of Western Australia v Ellis J Enterprises Pty Ltd* [2012] NSWSC 313; *Rixon v Perpetual Trustees Victoria Ltd* [2012] NSWSC 106; *Permanent Mortgages Pty Ltd v MacFadyen* [2012] NSWSC 136; *Oliver v Commowealh Bank of Australia (No 1)* [2011] FCA 1440; *Westpac Banking Corporation v Velingos* [2011] NSWSC 607.

without saying that each case was considered and decided according to its own facts.

30 There is still no case to my knowledge where a corporate entity has successfully relied on the principles established in Amadio. Can a company be under a disability? If a director is under a disability, is this imputed to the company and is the director in breach of duty?

31 In relation to wives, the doctrine in Amadio is often used in tandem with the principles first expressed in *Yerkey v Jones*[27] and confirmed and applied by the High Court almost 60 years later in *Garcia v National Australia Bank.*[28]

32 In *Garcia*, the High Court confirmed the principles in *Yerkey v Jones*, explaining, relevantly for present purposes: [29]

> "...that to enforce [a guarantee] against her if it later emerges that she did not understand the purport and effect of the transaction of suretyship would be unconscionable (even though she is a willing party to it) if the lender took no steps itself to explain its purport and effect to her or did not reasonably believe that its purport and effect had been explained to her by a competent, independent and disinterested stranger. And what makes it unconscionable to enforce it ... is the combination of circumstances that:
>
> (a) in fact the surety did not understand the purport and effect of the transaction;
>
> (b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed);
>
> (c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that

[27] (1939) 63 CLR 649.
[28] (1998) 194 CLR 395.
[29] at [31] per Gaudron, McHugh, Gummow and Hayne JJ.

the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet

(d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her."

33 The recent case of *Bank of Western Australia v Abdul*[30] is illustrative of these principles and other principles relevant to the enforcement of securities.

34 Mrs Abdul provided a guarantee and indemnity to the bank for facilities provided to a number of companies controlled by her husband. In addition, a joint loan was provided by the bank to Mr and Mrs Abdul and the borrowed funds were on lent to various companies controlled by Mr Abdul.

35 The **first** point to note is the importance of ensuring that any certificate of indebtedness provided under the loan and/or security documents is meticulously and accurately prepared. In this case, the certificate was not a "conclusive evidence" certificate but the relevant clauses stated that a certificate would be "sufficient evidence" unless it was proved to be incorrect.

36 On the authorities,[31] Croft J accepted the certificate provided, notwithstanding the fact that the financial transactions were complex and included many companies and debts and in particular realisations and associated costs, charges and expenses of receivers and managers appointed to the various companies in the Abdul group. [32]

---

[30] [2012] VSC 222 (1 June 2012).

[31] *Dobbs v National Ban of Australasia Ltd* (1935) 53 CLR 643, *Papua New Guinea Development Bank v Manton* [1982] VR 1000, *Permanent Trustee Company Ltd v Gulf Import and Export Co* [2008] VSC 182.

[32] Care however must be taken not to include solicitor client or indemnity costs automatically and before any court order.

37 The **second** important matter to note is the allegation by the Abduls that the receivers and managers were not agents of the borrower companies but the bank, and that the bank was liable for the conduct of the receivers and managers. Misconduct as alleged in relation to the realisation process. The judgment confirms the position that reporting and communication by receivers and managers to their appointer – in this case, the bank – particularly in cases involving complex realisations, is important, particularly where the secured creditor continues to provide funding to preserve the goodwill of the business in order to maximise the proceeds of realisation.

38 At [37], his Honour stated the relevant principle as follows:

> "[37] Consequently, Bankwest is not liable for the conduct of the receivers and managers unless the defendants can establish that Bankwest so directed, interfered with, or instructed, the receivers and managers in relation to the performance of their duties as to displace the agency relationship. The answer to this question depends upon the particular facts and circumstances against which a receivership is conducted and, unsurprisingly, there is not necessarily any "bright line" which will indicate that, when crossed, the receiver becomes the agent of the mortgagee, the secured creditor. In this context, it must also be kept in mind that communications between the receiver and the mortgagee, the secured creditor, are not only quite proper in themselves, but likely to be desirable in the interests of both the mortgagor, the secured debtor, and mortgagee, the second creditor, in seeking to maximise the proceeds of realisation of secured assets."

39 His Honour did not regard the frequent interaction with the bank as constituting interference, direction and instruction by the bank so as to render the bank liable.[33]

40 The **third** important matter concerns the application of the principles in

[33] at [42]–[49].

Garcia to the joint loan. *Yerkey v Jones* and *Garcia* specifically refer to the position of the wife as surety. Here, she was a joint borrower as well as a guarantor. In relation to the guarantee, Croft J held that all of the elements identified in *Garcia* had been made out and that it would be "unconscionable for Bankwest to enforce the guarantee against [Mrs Abdul]."[34]

41 In relation to the joint loan, his Honour regarded this facility "as in substance, a contract of suretyship".[35] In *Narain v Euroasian (Pacific) Pty Ltd*[36], and *Elkofairi v Permanent Trustee Co Ltd*[37], the Courts of Appeal in both Victoria and New South Wales respectively held that the principles in Garcia only apply to contracts of suretyship. However, after carefully assessing the evidence, his Honour, preferring substance over form, held that in reality, the joint loan should be regarded and dealt with on the same basis as the guarantee.[38] In relation to the joint loan, Mrs Abdul was in substance, no less a volunteer. In any event, his Honour went on to hold that the principles in *Amadio* would, in the case of Mrs Abdul, apply to the joint loan.[39]

42 *Abdul* should be compared with the recent New South Wales decision of *Bank of Western Australia v Ellis J Enterprises Pty Ltd*[40] where the Court held that on the facts, the principles in *Amadio* and *Garcia* were not attracted. Three certificates of independent legal advice were of some assistance to the bank.

---

[34] at [82].
[35] at [89].
[36] (2009) 26 VR 38.
[37] [2002] NSWCA 413.
[38] at [83] – [90].
[39] at [92] – [103].
[40] [2012] NSWSC 313.

***Knowles v Victorian Mortgage Investments Ltd*[41]**

43 Victorian Mortgage Investments Ltd ("Victorian Mortgage Investments") sought payment of a debt of $31,696.48, predominantly representing the loan application fee for a loan that was never advanced to the illiterate plaintiff, Ms Knowles.

44 Justice Croft held that the transaction was unjust under s 76 of the National Credit Code ("NCC") and relieved Knowles of payment of the application fee.[42] In addition, his Honour found that the application fee was unconscionable under section 78 NCC on the basis that Victorian Mortgage Investments failed to demonstrate that the establishment fee, that is, the loan application fee, was a reasonable reflection of the costs incurred by it in determining the application for credit. In light of this, his Honour annulled the application fee.

45 This case also discusses the importance of compliance with the prescribed form of a business purpose declaration for the purpose of removing a loan from the scope of the NCC and that credit providers must be alert to any special limitations on the capacity of borrowers to understand and assess the viability of a proposed loan.

***Tonto Home Loan Australia Pty Ltd v Tavares*[43]**

46 In this case, the Court was required to determine whether loan agreements and mortgages entered into between Tonto (lender) and Tavares & Ors (borrowers) were unjust and could be set aside under the *Contracts Review Act 1980* (NSW). Tonto sub-contracted the process of information collection to a third party group of companies called

[41] [2011] VSC 611.
[42] at [62]–[79].
[43] [2011] NSWCA 389.

Streetwise. Streetwise engaged in fraudulent behaviour by including false information regarding the borrowers in the various loan application forms.

47 The New South Wales Supreme Court ordered that the loan agreements be set aside in their entirety because they arose from the fraudulent conduct of Streetwise as Tonto's agent.

48 On appeal, Allsop P held that Streetwise was not in fact acting as Tonto's agent on the basis of the terms of the "introduction deed" that governed the relationship between the parties.[44] Notwithstanding this finding, his Honour upheld the first instance decision that the loans were unjust because of the dishonest conduct of Streetwise in inserting untrue information in the forms and submitting them to Tonto. Further, the borrowers were entitled to relief as against the lenders because the lenders' conduct materially facilitated the ability of Streetwise to effect the frauds. These findings did not depend on the existence of any agency.

National Australia Bank Limited v Thirup and Anor[45]

49 A mortgagee sought judgment for possession of land together with judgment for a monetary sum against the mortgagors. The mortgagors argued that they did not agree to the terms of the loan and claimed fraud on the part of the mortgage broker. The mortgagors claimed that the fraud could be sheeted home to the lender. Johnson J held that any fraud on the part of the mortgage broker was not fraud on the part of the lender and summarily dismissed the proceeding.

Fast Fix Loans Pty Ltd v Samardzic[46]

---

[44] at [170]–[197].
[45] [2011] NSWSC 911.

50 The defendants entered into a deed of loan, a deed of variation of loan and a mortgage at the behest of their son. The defendants only had a vague understanding of the documents and their effect, in particular that their house was at risk if their son defaulted on the loan.

51 At first instance, Justice Hoeben decided that it must have been clear to Fast Fix Loans that, from the parents perspective, the transaction was an improvident one that they did not gain a benefit from. His Honour held that under section 9 of the *Contracts Review Act 1980* (NSW), the contract was unjust in all the circumstances.

52 On appeal, Bathurst CJ, Allsop P and Campbell JA upheld the decision of Justice Hoeben and held that section 9 required an overall evaluation of the justness of granting relief and that a finding of moral obloquy was not necessary. [47]

***Commonwealth Bank of Australia v Hamilton*[48]**

53 The Commonwealth Bank of Australia sued Hamilton for the balance owing under mortgages after a mortgagee sale. The bank also sued the Hamilton's solicitor for breach of warranty of authority relating to a fraudulent direction to draw cheques. The Court found that the home loan agreement was not valid as Hamilton's signature had been forged on a number of key documents including the loan agreement, the mortgage and the guarantee. (See Part D in relating to forged instruments.)

***Commonwealth Bank of Australia v Perrin*[49]**

---

[46] [2011] NSWCA 260.
[47] at [50].
[48] [2012] NSWSC 242.
[49] [2011] QSC 274.

54 The Commonwealth Bank of Australia entered into two loans with Mr Perrin who subsequently became bankrupt and did not repay the loans. The loans were supported by a guarantee provided by Mr Perrin's wife and a mortgage over their house. Mrs Perrin claimed that her signatures on the security documents were forged. The bank sued under the guarantee to recover the loan monies. McMurdo J held that the signatures on the bank documents were in fact forgeries and as such, the bank did not have a cause of action against Mrs Perrin.[50] (See Part D relating to forged instruments.)

Choice Constructions Pty Ltd v Janceski [No 3][51]

55 Choice Constructions Pty Ltd sought to enforce a second mortgage over the property of the defendants. The issue in the proceeding was whether the mortgage was unconscionable and therefore unenforceable. The defendants argued that they spoke little English, were illiterate and lacked business knowledge and were only advised to obtain independent legal advice by the plaintiff after the mortgage was executed.

56 Simmonds J held that the defendants had failed to make good their case that they were suffering from a special disadvantage which affected their ability to make a judgment as to their own best interests.[52]

Buccoliero v Commonwealth Bank of Australia[53]

57 This case concerns an appeal from a judgment of the Supreme Court of New South Wales where the lender was granted judgment for

[50] at [153].
[51] [2011] WASC 358.
[52] at [353].
[53] [2011] NSWCA 371.

possession of Buccoliero's property. A wife, suffering from a mental disability and of lower than average intellect, refinanced her existing mortgage with a Commonwealth Bank of Australia mortgage. The court held that the mortgage was not unjust because the bank was not on notice that the wife was vulnerable to the influence of her husband.[54] The appeal was dismissed with costs.

D. Forged Loan Agreements, Registered Mortgages and Indefeasibility of Title

58 This is an important area of law that remains unresolved. The limits of the doctrine of indefeasibility remain to be determined. The question is: *to what extent and in what circumstances can a mortgagee enforce a registered forged mortgage?*

59 Provided the fraud or forgery is not 'brought home' to the mortgagee, a registered forged mortgage is enforceable. The title is indefeasible. But what if the loan agreement has been forged. The question then is to what indebtedness does the indefeasible mortgage relate?

60 The position seems to be that, although a forged mortgage may be enforced because of the doctrine of indefeasibility that arises from registration of the instrument unless that very document – as a matter of construction – evidences or effectively incorporates a collateral loan agreement with sufficient specificity, the desired indefeasibility may not attach to the forged loan agreement. A forged loan agreement would not ordinarily be enforceable. However if it is properly part of the forged mortgage, it will be covered by indefeasibility.

61 A consistent line of New South Wales authority has held that in the case of all monies mortgages, unless the terms of any loan are incorporated with sufficient certainty and not merely by simple

[54] at [67]–[77].

reference to another document or agreement, indefeasibility will not attach to the other document with the result that nothing will be incorporated into the registered and otherwise indefeasible mortgage. The collateral loan agreement which is not registered cannot rise to become a proprietary interest. The cases are *Provident Capital Ltd v Printy,*[55] *Perpetual Trustees Victoria Limited v Tsai,*[56] *Yazgi v Permanent Custodians Ltd*[57] and *Vella v Permanent Mortgages Pty Ltd*[58], which are briefly summarised below.

Provident Capital Ltd v Printy[59]

62 Mr Printy was the registered proprietor of a property. Another person fraudulently obtained a replacement certificate of title and proceeded to use it to secure a loan that he obtained from Provident Capital. The mortgage was registered. The loan was not repaid and Provident exercised its power of sale and sold the property.

63 The plaintiff became aware of the sale and initiated proceedings seeking to recover as much of the proceeds of the sale that were apportioned to the repayment of the debt. At first instance, Studdert J held that Printy was entitled to recover the proceeds of the sale.

64 On appeal, Basten JA, with whom Tobias and McColl JJA agreed, held that the doctrine of incorporation does not apply to the construction of all money mortgages and collateral loan agreements.[60]

Perpetual Trustees Victoria Ltd v Tsai[61]

65 In this case, the plaintiff denied ever signing the loan agreement.

---

[55] [2008] NSWCA 131.
[56] [2004] NSWSC 745.
[57] [2007] NSWCA 240.
[58] [2008] NSWSC 505.
[59] [2008] NSWCA 131.
[60] at [53].
[61] [2004] NSWSC 745.

Young CJ held that the personal covenant to pay the loan monies under the registered mortgage is so connected to the registered mortgage that the personal covenant also attracts indefeasibility. His Honour did caution however, that whether indefeasibility will attach to the personal covenant to pay will largely depend on the precise wording of the covenant.[62]

***Permanent Custodians Ltd v Yazgi*[63]**

66 In this case, a husband and wife jointly owned the property. The husband signed the loan and mortgage documents however the wife's signatures were forged.

67 The issue was whether any monies owing under the loan contract or the mortgage were secured upon the wife's interest in the property.

68 Justice Beazley noted that in the memorandum, the mortgage debt was defined as monies that were owed jointly or severally. Under the loan agreement however, the monies were jointly owed.

69 In light of the inconsistencies in the loan and mortgage documentation, Beazley JA, with whom Ipp and Tobias JJA agreed, held that the wife did not owe any monies under the loan agreement because of the forgery. It flowed from this that the mortgage could not then be enforced against the wife's interest in the property.[64]

***Vella v Permanent Mortgages Pty Ltd*[65]**

70 In this case, the mortgages were forged and Vella did not receive any of the money from Permanent Mortgages Pty Ltd. The mortgages were registered and as such were indefeasible. The mortgages secured "all

---

[62] at [14].
[63] [2007] NSWCA 240.
[64] at [32]–[37].
[65] [2008] NSWSC 505.

monies" due by Vella under particular loan agreements which were also forged.

71 Young CJ held that the words of the loan agreement were not incorporated into the mortgage because the mortgage simply stated that it secured the monies owing by Vella to Permanent. His Honour stated that when you then construe the mortgage, there are no monies owing under the agreements because they were forged.[66]

Solak v Bank of Western Australia

72 *Solak v Bank of Western Australia*[67] is the most recent Victorian decision dealing with this matter.

Facts and procedural history

73 Mr Solak alleged that in 2006 an imposter fraudulently obtained a loan in his name from BankWest. The loan was secured by a registered mortgage over Mr Solak's land. The mortgage was an 'all monies mortgage'.

74 The mortgage referred to the mortgage in 'this mortgage form, the memorandum or any annexure to this mortgage is a reference to the mortgage made up of this mortgage form, this memorandum and each of those annexures'.

75 The memorandum of common provisions set out the obligations to pay and a description of what the mortgage secured and stated 'that the mortgage was given as security for payment to the bank of the amount owing and for the performance by you of all your other obligations under this mortgage.'

76 'Bank document' was defined to mean 'an agreement or arrangement

[66] at [304].
[67] *Solak v Bank of Western Australia* [2009] VSC 82.

under which you incur or owe obligations to the Bank or under which the bank has rights against you….' 'Amount owing' was defined to mean 'all money which you owe the Bank for any reason'.

77 In 2008, Mr Solak commenced a proceeding against BankWest claiming that as the loan agreement was void and of no effect, so too was the mortgage as it did not secure anything ("the First Proceeding").[68]

78 Mr Solak then commenced another proceeding against the Registrar of Titles seeking an indemnity for the losses suffered by reason of the registration of the mortgage ("the Second Proceeding").[69] The Registrar applied to have the Second Proceeding summarily dismissed on the basis of Anshun estoppel.

79 Justice Davies granted the application on the basis that, inter alia, Mr Solak's claim in the Second Proceeding against the Registrar could have been made in the First Proceeding.

80 Mr Solak appealed this decision to the Court of Appeal. The Court ordered that the Registrar's application be dismissed on the basis that Anshun estoppel was not established.[70]

The First Proceeding - *Solak v Bank of Western Australia*[71]

81 Mr Solak claimed that due to the forgery, the mortgage was void and of no effect and he sought declarations and an order securing the discharge of the mortgage registered with the Land Titles Office which appeared as an encumbrance on the title of the property. BankWest submitted that the doctrine of indefeasibility entitled it to enforce the covenant to pay notwithstanding the forgery.

---

[68] *Solak v Bank of Western Australia* [2009] VSC 82.
[69] *Solak v Registrar of Titles (No 2)* [2010] VSC 146.
[70] *Solak v Registrar of Titles* [2011] VSCA 279.
[71] [2009] VSC 82.

82 Mr Solak submitted that indefeasibility did not extend to secure obligations arising from a forged instrument where the covenant to pay was not registered or found on the title. On this basis, Mr Solak argued that the 'you' in the mortgage referred to the registered proprietor, that is, the real Mr Solak, whereas the 'you' in the memorandum of common provisions referred to the imposter. As such, as Mr Solak did not have the obligation to pay anything under the memorandum of common provisions, the obligation to pay was not indefeasible by registration of the mortgage.

83 Mr Solak accepted that indefeasibility would extend to a forged covenant to pay in the registered mortgage. It was argued however, that as the covenant to pay contained in the separate home loan contract was not incorporated into the mortgage document, it did not attract indefeasibility.

84 Justice Pagone referred to *PT Ltd v Maradona Pty Ltd*[72] where Giles J held that the personal covenant in an instrument collateral to the mortgage would not attract the protection of indefeasibility if the collateral instrument secured nothing because it was a forgery.[73]

85 Further, Justice Pagone also referred to *Provident Capital Ltd v Printy*[74] where Basten JA held that there was no relevant default in a case where mortgage repayments had not been made. In this case, the mortgage agreement did not specify the time or amounts of payments and the loan agreement was not expressly incorporated into the mortgage.[75]

86 Justice Pagone did not accept Mr Solak's interpretation of the documents. Justice Pagone decided that the loan contract came within

[72] (1992) 25 NSWLR 643.
[73] at [5].
[74] [2008] NSWCA 131.
[75] at [5].

the definition of 'Bank document' in the memorandum of common provisions of the mortgage. As such, on the proper construction of the mortgage, the covenant to pay was found in that mortgage, incorporating as it did, the memorandum of common provisions and, through the memorandum, the loan contract.[76] Pagone J stated that it would be a different situation if the collateral agreement had not been incorporated into the mortgage.[77]

Second Proceeding - *Solak v Registrar of Titles (No 2)*[78]

87 Mr Solak claimed that he was entitled to be indemnified by the Registrar under the *Transfer of Land Act 1958* (Vic), for the loss suffered through the registration of the mortgage. The Registrar claimed that if Mr Solak's signature on the mortgage was forged, it was rendered unenforceable under the *Consumer Credit Code* and consequently, there was no mortgage and Mr Solak would not have suffered any loss.

88 The Registrar also applied for summary dismissal on the claim on the basis of Anshun estoppel. The registrar submitted that it was unreasonable for Mr Solak not to have joined the Registrar in the First Proceeding and consequently, the current proceeding should be dismissed.

89 Justice Davies granted the summary dismissal application on the basis of Anshun estoppel. This decision was appealed to the Court of Appeal.

The Appeal of the Second Proceeding - *Solak v Registrar of Titles*[79]

90 On appeal, it was found that Justice Davies decision to dismiss the Second Proceeding was vitiated by an error of fact, as some weight was

---

[76] at [16].
[77] See *Provident Capital Ltd v Printy* [2008] NSWCA 131; *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24, 675.
[78] [2010] VSC 146.
[79] [2011] VSCA 279.

given to a purported appeal of the First Proceeding which had not occurred. Accordingly, the Court of Appeal considered the Registrar's application for summary dismissal.

91 To defend the action and establish that Mr Solak did not suffer loss or damage, the Registrar claimed that if the plaintiff's signature on the mortgage was forged, the mortgage was unenforceable by the *Consumer Credit Code* and further, that the mortgage did not extend to the home loan contract.

92 Chief Justice Warren had to determine whether the determination of the Second Proceeding would declare rights in respect of the same transaction that are plainly inconsistent with the outcome of the First Proceeding.

93 Her Honour stated that if the Registrar's argument that the breach of the Victorian Consumer Credit Code, that is, that the mortgage was not signed by the mortgagor, was to succeed, the doctrine of indefeasibility would be abrogated.[80] Her Honour concluded that Parliament would have made it's intention clear if indefeasibility was to be abrogated in such circumstances. Further, such a finding would be inconsistent with the decision of Justice Pagone in the First Proceeding.[81]

94 Her Honour then considered whether the failure by Mr Solak to raise the incorporation point and the Credit Code point in the First Proceeding could be considered 'neglect' under s 110(3)(a) TLA. Her Honour found that it was open to Mr Solak not to raise the Credit Code point in the First Proceeding and that he had raised and argued the Incorporation point. Her Honour decided that Mr Solak's conduct of the First Proceeding did not amount to 'neglect'.[82]

---

[80] at [39].
[81] at [45].
[82] at [52]-[59].

95 Her Honour concluded that both the Credit Code and incorporation arguments were not relevant to determining Mr Solak's loss in the Second Proceeding and therefore did not pose a risk of inconsistent judgments.[83]

96 In light of the above, Her Honour found that Anshun estoppel was not established and dismissed the Registrar's application.

97 Justices Neave and Hargrave agreed with Her Honours reasons.

98 The lessons are obvious enough. To obtain the full benefit of indefeasibility, the registered instrument must include clear and specific reference to the terms of the loan so that a forged loan document – which ordinarily would be significant – will be of little significance. It is also obvious enough that documents should be properly witnessed, if possible, by officers of the lender with the borrower and any security provider giving proper identification.

E. General

Personal Property Securities Act 2009 (Cth)

99 *Personal Property Securities Act 2009* (Cth) came into operation on 30 January 2012. The legislation has a significant effect on financiers. There have been no significant decisions yet.

Valuer's Negligence

100 Banks and financial institutions seeking to recover shortfalls based on negligent valuations should consider the case of *Valcorp Australia Pty Ltd v Angas Securities Ltd*[84]. The Full Federal Court doubled the proportion of the loss that the lenders had to bear (25% to 50%) because of their own negligence. The lenders conduct in approving loans is

[83] at [47]-[51].
[84] [2012] FCAFC 22.

likely to come under the same scrutiny as the conduct of the valuer. In this case, the lenders negligence related to its failure to make proper inquiries about the borrower's financial position prior to approving and advancing the loan monies.
