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

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Part 2 – The recent cases

Some thoughts on mortgages and covenants to pay

I take as my text the question: "Indefeasibility for what?" This now-hallowed query, first asked by Campbell J in the New South Wales Supreme Court in *Small v Tomassetti* (2001) 12 BPR 22,253, has acquired quasi-Biblical proportions. Like a catchcry challenging religious orthodoxy, it has provoked a serious re-thinking of some fundamental propositions of the Torrens religion. It the years since its annunciation, it has been echoed on many occasions. Tillich-like, it has shaken Torrens' very foundations. It has forced a genuine reconsideration of the protection that a registered mortgagee of Torrens title land may expect under a forged mortgage.

In the first part of this seminar, Justice Margaret Stone has reminded us of the general principles of indefeasibility—in particular, the principle that even a forged document, on registration, achieves immediate indefeasibility. I want to concentrate on indefeasibility and forged mortgages—especially "all advances" or "all moneys" mortgages.

The "old style" mortgage

The past few years have seen an explosion in the number of forged-mortgage cases. Had the mortgages been of the "old style", securing a fixed sum that was stated in the mortgage, then there could have been little room for argument over the effect of registration. *Frazer v Walker*, part of our Australian and New Zealand heritage, would have ensured success for the mortgagee.

By "old style", I mean a mortgage worded along the following lines:

> "I [name] (hereinafter called the Mortgagor) … in consideration of $100,000 (hereinafter called the principal sum) lent to the Mortgagor by [name] (hereinafter called the Mortgagee), the receipt whereof is hereby acknowledged, do for the purposes of securing the principal sum … hereby

> mortgage to the Mortgagee the following land …[and there follow clauses specifying matters such as interest, payment dates and payments amounts].

In this form of mortgage, the mortgage *document itself* contained the contents of the mortgagor's covenant to pay, specifying

- the amount lent; and
- the repayment obligations.

Frazer v Walker, and the spate of forged mortgage cases that soon followed on both sides of the Tasman, established unequivocally that registration of a mortgage in this form ensured indefeasibility for the mortgagee (assuming, of course, no fraud by the mortgagee). Not a single judge dissented from this line of authority (except for a slight wobble when some Victorian decisions favoured a return to deferred indefeasibility). This was even though several statements in the words I have quoted from the "old style" mortgage were clearly false: (1) the consideration of $100,000 was not lent to the Mortgagor (rather, it was paid to the forger, who had probably absconded with it); and (2) the Mortgagor did not "acknowledge receipt" (because his or her signature was forged). Nevertheless, indefeasibility rendered those statements unchallengable.

Despite the unanimous result in these cases, there was room for argument over whether registration of a forged mortgage strictly rendered indefeasible the (forged) covenant to pay. The majority of judges held (or at least assumed) that it did. But other judges, including the New Zealand Court of Appeal in *Duncan v McDonald* [1997] 3 NZLR 669, held that registration secured only the mortgagee's charge over the land, and that the personal covenant to pay operated only to measure the amount by which the land stood charged. For example, the mortgagee could not sue the (real) mortgagor in debt under the personal covenant, because that covenant was in a forged document and so did not bind the (real) mortgagor. Registration made no difference to that. Registration meant that the mortgagee could sell the land; but if the sale proceeds were insufficient to pay out the debt, the mortgagee had no recourse to the (real) mortgagor for the deficiency. These matters are discussed in an excellent

survey by Stoljar, "Mortgages, indefeasibility and personal covenants to pay" (2008) 82 ALJ 28.

All moneys mortgages

In more recent times, however, mortgages for fixed, stated sums seem to have largely disappeared from banking practice. They have been replaced by the "all moneys" mortgage. And with that change in practice has come a change in legal analysis. The courts have held, almost universally, that registration of a forged "all moneys" mortgage does not guarantee success for the mortgagee.

A recent decision in New South Wales analyses most (but not all) of the recent cases: *Perpetual Trustees Victoria Ltd v English* [2009] NSWSC 478 (Simpson J). I will not repeat that review here. In any case, as her Honour points out in *English*, much turns eventually on the terms of the particular mortgage. Instead, I will discuss the case which I think is the key to understanding the current position—*Printy's* case—and then try to draw some conclusions about the present state of the law.

Provident Capital Ltd v Printy [2008] NSWCA 131

Mr Printy owned land in outer Sydney. Unbeknowns to him, a rogue persuaded the Registrar-General to issue him (the rogue) with a certificate of title for the land. Armed with the certificate of title, the rogue then posed as Mr Printy and forged Printy's signature on two mortgages over the land. By the time Mr Printy discovered the fraud, the mortgagee had exercised its power of sale under each mortgage. Mr Printy sought to recover from the mortgagee the amounts appropriated from the sale to pay out the mortgages.

One mortgage (the first mortgage) was an "all moneys" mortgage. The other mortgage (the second mortgage) was in the "old style".

As with other "old style" mortgages, the second mortgage secured a stated sum. To be precise, that sum was not stated to in the mortgage itself, but was stated in a memorandum, and the mortgage expressly incorporated the terms of the

memorandum. The mortgagee conceded (and the trial judge clearly agreed: see [2007] NSWSC 287 at [45]) that registration of the mortgage cured the forgery. The mortgagee was entitled to retain the amount appropriated for this mortgage. This was simply *Frazer v Walker* all over again—the application of accepted principles of indefeasibility.

The position regarding the first mortgage was, however, more difficult. It also incorporated a registered memorandum. However, that memorandum did not refer to any specific sum or any specific payment obligations. Rather, it referred to obligations under "related agreements", but those related agreements were not incorporated into the memorandum. In essence, it provided that:

1. the mortgagor must pay the "secured money" as provided in any "related agreement";
2. "secured money" means all money which the mortgagor owes to the mortgagee now or in the future;
3. "related agreement" means any agreement under which the mortgagee lends money to the mortgagor.

As Basten JA noted (speaking for the Court of Appeal), since the mortgage and the memorandum had been forged, the mortgagor could not be liable to pay the moneys at common law. Any liability must turn on the effect of registration of the mortgage. And then follows the nub of the judgment (at [43-47]):

1. registration of a mortgage confers indefeasibility on the covenant to pay where the covenant to pay (that is, the amount owing and the repayment obligations) is contained in the mortgage (including a covenant contained in another document, <u>if</u> that other document is incorporated into the mortgage); but
2. registration of a mortgage does <u>not</u> confer indefeasibility on a covenant to pay contained in a document that is separate from (and not incorporated into) the mortgage.

Had the mortgagee under this first mortgage been entitled to sell the land? The mortgagee had purported to sell under section 57 of the NSW *Real Property Act* (a

provision with counterparts in all Australian jurisdictions). That section authorised a sale in either of two situations:

1. "default in the payment, in accordance with the terms of the mortgage … of [money] the payment of which is secured by the mortgage". But there was no payment in accordance with the terms of the mortgage – because the mortgage itself did not contain terms specifying the amounts of and times for payment ([2008] NSWCA 131 at [50]); or
2. "default in the observance of any covenant in the mortgage". But there was no such default, because the relevant obligation to pay was found not in the mortgage, but in the separate loan agreement, which was not incorporated into the mortgage. (Here I remind you that the memorandum *referred to* "related agreements", but did not incorporate them.)

So there you have it: the problem for the mortgagee under the forged all moneys mortgage in *Printy* was that the "related agreements" (under which moneys were advanced to the rogue, and the rogue promised to pay) were not "incorporated into the mortgage". Or as Simpson J put it in *English* at [110]:

> [In *Printy*], because the deed of loan could not be read as part of the mortgage, and was not expressly incorporated, its terms could not properly be described as "covenants, agreements or conditions expressed in the mortgage". The debt the subject of the loan was not secured by the mortgage.

The New Zealand Court of Appeal later came to the same conclusion, applying the same logic: *Westpac Banking Corp v Clark* [2008] NZCA 346. On the facts before it, the NZCA held that the (forged) loan agreement had not been incorporated into the registered mortgage. Specifically, the NZCA said, in relation to *Printy* (as decided at first instance):

> "In *Printy* (SC), [the trial judge] … accepted that it would have been open to the lender in that case to fashion the mortgage obligations so as to make the mortgagor liable not only for his own conduct but for the dishonest conduct of others over whom the mortgagor had no control. However, he considered that

> the "clearest possible expression would have been needed to achieve that effect". Such clear expression was not to be found in the subject mortgage [in this present NZ case]".

That is, the Court recognised that all moneys mortgages could be effective, even when forged, if the collateral loan agreements are incorporated into the registered mortgage.

Incorporating loan agreements into the mortgage

It seems, then, that forged all moneys mortgages can be protected by registration as much as "traditional" stated-sum mortgages, if the loan documents under which moneys are advanced are "incorporated into" the mortgage. A recent Victorian decision is an example: *Solak v Bank of Western Australia Ltd* [2009] VSC 82 (which does not seem to have been cited to Simpson J in *English*). That was also a case of a forged mortgage and forged loan agreements. The rogue had impersonated the registered proprietor (Mr Solak). However, unlike *Printy* and some of the other cases, here the judge (Pagone J) was able to hold, as a matter of construction, that the mortgage sufficiently incorporated the (forged) loan agreement. And having been incorporated, registration of the mortgage ensured the mortgagee's right to recover. The logic was:

1. the mortgage expressly incorporated a memorandum of common provisions filed at the Land Titles Office;
2. that memorandum required payment by the mortgagor (called "you") in accordance with the terms of any "Bank Document"
3. the term "Bank Document" was defined to include any document under which "you" incur obligations to the bank;
4. that the "you" referred to was the same "you" as in the memorandum;
5. that "you" was in fact the person who signed all the documents (that is, the forger, impersonating the registered proprietor); and
6. therefore, the position was the same as if the memorandum had described the registered proprietor (Mr Solak) by name.

Pagone J concluded (at [16]):

> I consider the proper construction of the mortgage[in this case] to be that the covenant to pay is found in the mortgage, incorporating, as it does, the memorandum of common provisions and, through it, the [loan contract]. Accordingly, the mortgage, albeit forged, is effective as security. This conclusion is, in my view, consistent with the authorities relied upon for Mr Solak. The contrary outcomes in each of *Printy* [and two other cases, at first instance, *Chandra* and *Tsai*] depended upon the collateral agreement not having been incorporated into the mortgages. … In the case before me the mortgage document refers to, incorporates, and intends to incorporate, the obligations in the collateral document upon the stated assumption expressed in all three agreements that the person assuming the obligation and mortgaging the property is the same.

So, Pagone J held that it is possible to incorporate into the registered mortgage all of the documents relating to the loan—including, critically, those documents that contain the covenant to pay.

Mismatch between identities of forger and mortgagee—they are not the same person

Assuming an effective incorporation into the mortgage, there seems to be another problem for mortgagees, highlighted in particular by two New South Wales decisions (*Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694 and *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505). In outline, it is this:

- as a result of the incorporation of the loan agreements, the mortgage secures all moneys advanced to the "mortgagor" or "to me" (ie, the "real" mortgagor – the registered proprietor) under the loan agreements;
- but the loan agreements are signed by the forger, not the real mortgagor, and so there is in fact no money advanced to the "mortgagor" or "to me" under them;
- therefore, the mortgage secures nothing.

Pagone J in *Solak* holds that, as a matter of construction, the mismatch between the forger and the real mortgagor can be overcome. But the NSW decisions hold, at least on the wording in the particular documents, that the mismatch is an insuperable obstacle for the mortgagee.

Overcoming the mismatch

Presumably, such a mismatch can be overcome by effective drafting. Here, as in drafting generally, it is better to be blunt than subtle. The aim is to make clear beyond argument that the mortgage intends to capture all documents that a forger might sign in relation to the property. If we were to be brutally blunt, the relevant clause in the mortgage could be drafted along the following lines:

1. This mortgage secures all moneys we advance on the security of this property, under any loan agreement to which we are a party, regardless of who signs the loan agreement and regardless of who receives the money.
2. Any such loan agreement (whether made before, at the same time as, or after the date of this mortgage) is hereby incorporated into and is to be read as part of this mortgage.

To state the obvious, such a blunt clause is unlikely to promote public confidence in lenders. Inevitably, it would be tested in court. And so I add the necessary rider that you should not rely on my suggestion or my drafting, but make your own independent assessment of the case law and the relevant statutes.

An alternative view?

Under the case law to date, the crucial point seems to be the need to incorporate the (forged) loan agreement into the forged but registered mortgage. If that is done, the mortgagee's rights may secured; if it is not done, they are not secured.

But I wonder if a wider view is possible? It would be based on the argument that (1) registration of the (forged) mortgage secures an indefeasible *charge* over the property,

but (2) the obligations the charge *secures* is a matter of evidence. Let me illustrate in two steps:

1. In an "old style" mortgage, the *statement* in the mortgage of the amount secured is only a first step to establishing *how much* is in fact secured. No mortgagee would be allowed to recover the stated sum just because the mortgage stated the sum. The mortgagee would have to call evidence as to how much was actually advanced, how much has been repaid to date, and so on; only then could a court determine how much remained owing. Those facts are necessarily established outside of the mortgage document itself.

2. Now let us consider the "all moneys" mortgage, of the kind discussed in the recent cases. Registration of the (forged) mortgage validates the mortgagee's charge. To establish the amount secured by the charge, we need to call evidence of how much was actually advanced, how much has been repaid to date, and so on. This requires evidence extrinsic to the mortgage, just as in the "old style" mortgage. In this regard, why should it matter that the amount advanced is indicated in documents that are not incorporated into the registered mortgage? It is simply a question of evidence, as in the case of the "old style" mortgage. That is, the crucial point is that the mortgage is registered; the fact that the amount secured can only be established by documents dehors the mortgage should not matter.

As I understand it, an argument to that effect was put recently to the New Zealand Supreme Court in an appeal from *Westpac v Clark* [2008] NZCA 346. The argument involves departing from the approach in *Printy* and the other *Printy*-like decisions. I will leave it to our next speaker to outline what the Supreme Court decided.

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