



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?**

Hon. Justice Margaret Stone
Federal Court of Australia
Sydney



Indefeasibility and All Advances Mortgages

Are they a thing of the past?

Part 1 – The problem and the principles

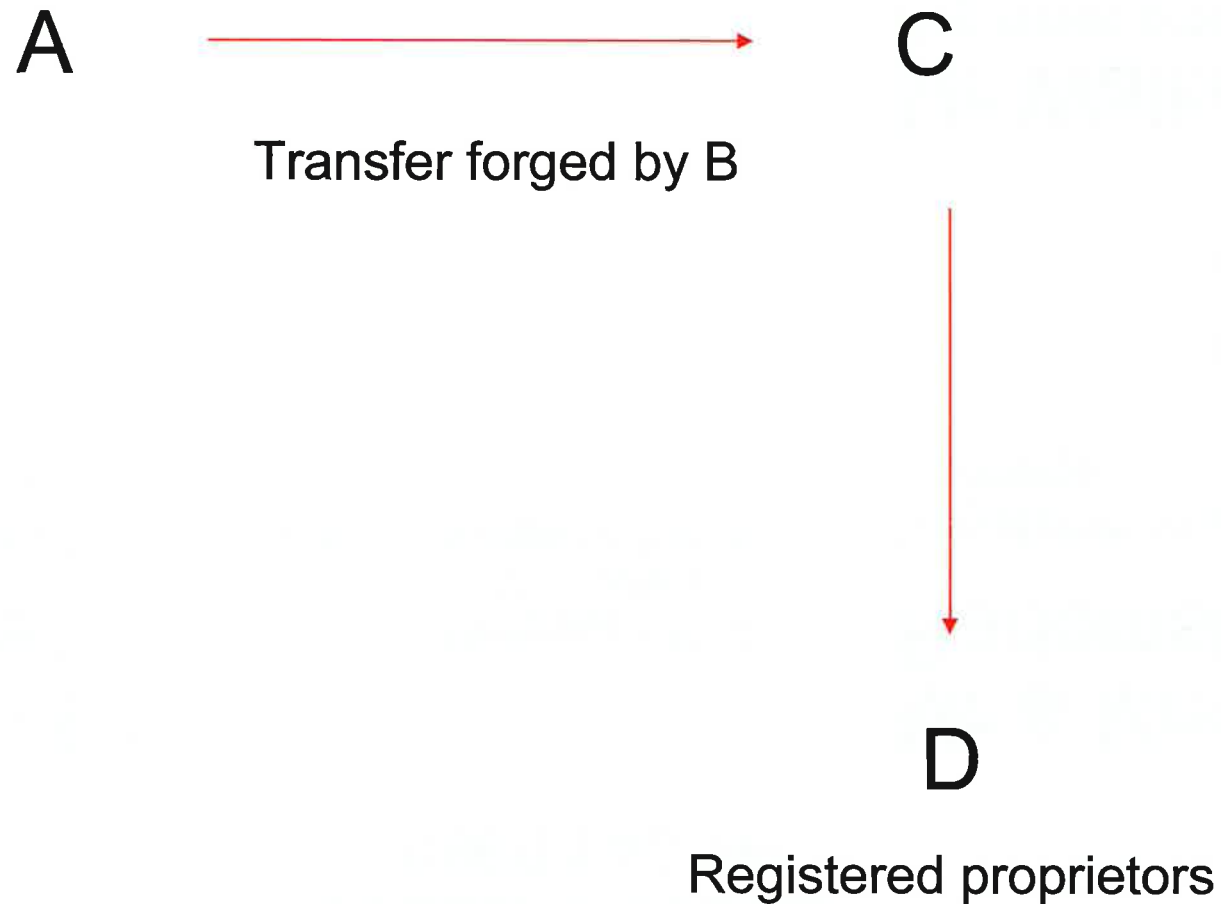
Margaret Stone

26th Annual Bank & Financial Services
Law Conference 2009





Deferred and Immediate Indefeasibility





Frazer v Walker

[1967] 1 AC 569

**Mr & Mrs
Frazer**

Registered proprietors of
fee simple



Mortgage £3000
Mr Frazer's
signature forged

**Mr & Mrs
Radomski**

Registered proprietors of
mortgage



sale under
power of
sale

Mr Walker

Registered proprietor
of fee simple



[T]heir Lordships have accepted the principle that registration ... confers upon a registered proprietor a title to the interest in respect of which he is registered which is ... immune from adverse claims, other than those specifically excepted.

Frazer v Walker [1967] 1 AC 569 at 585



[T]his principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant.

Frazer v Walker [1967] 1 AC 569 at 585



Breskvar v Wall (1971) 126 CLR 376

E & F Breskvar
Registered proprietors of
fee simple



Caveat lodged – blocked
registration of Alban's
transfer



G Petrie
(unreg. transfer)



G W Wall
Registered proprietor of fee
simple



sale

Alban Pty Ltd



*Failure to insert name of transferee prior to execution; *Stamp Act*
1894 (Qld) s53(5)



The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration ...


The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.

Beskvar v Wall (1971) 126 CLR 376 at 385-6 per Barwick CJ.



Breskvar v Wall

(1971) 126 CLR 376

- Alban Pty Ltd acquired an equitable interest in the land.
 - Breskvar had equitable claim (mere equity or equitable interest) to have transfer to Wall/Petrie set aside.
 - Resulting competition between Alban and Breskvar resolved in favour of Alban on equitable principles.
- 



Vassos v State Bank of SA

[1993] 2 VR 316

P, A & T

Registered proprietors
as tenants in common



T forged mortgage
\$500,000

Bank

Registered proprietor of
mortgage

T also forged signatures of P & A on guarantee and
indemnity



Vassos v State Bank of SA

[1993] 1 VR 316

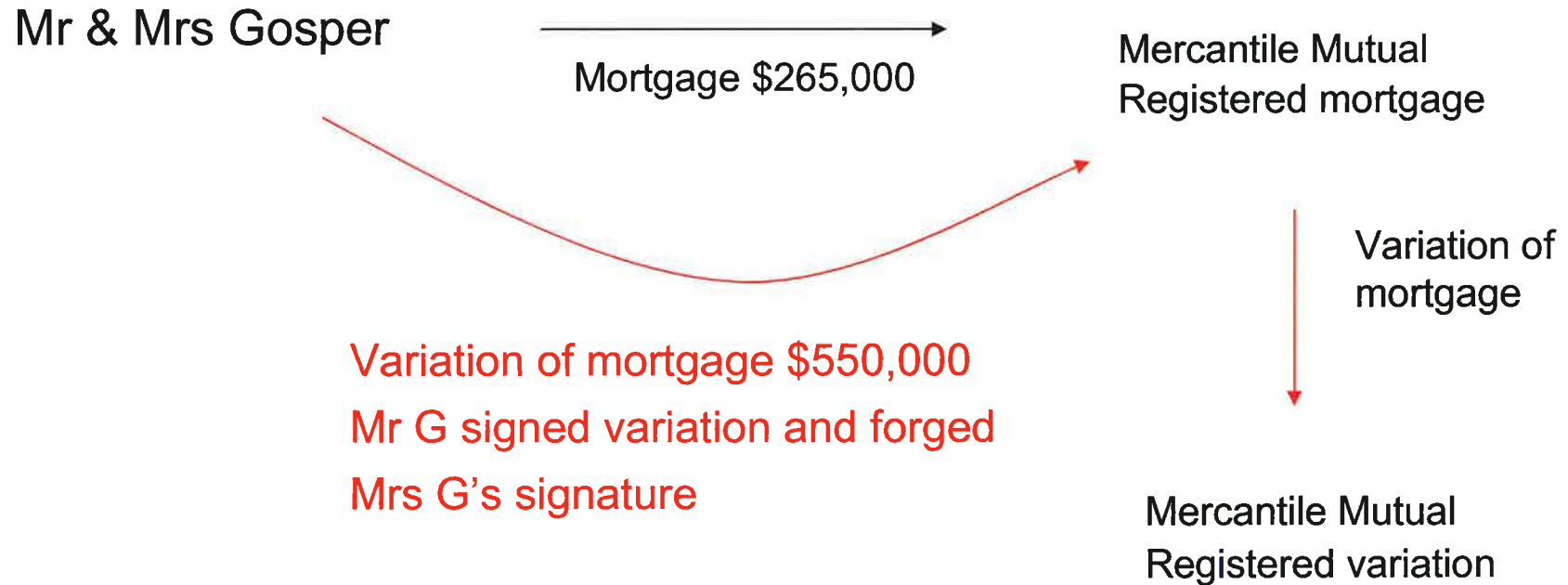
The mortgage secured:

“all amounts owed by **any** of the mortgagors
as guarantors of FHI Group”





Mercantile Mutual Life Insurance Co Ltd v Gosper (1991) 25 NSWLR 32 (NSWCA)





PT Ltd v Maradona
(1992) 25 NSWLR 643

Mrs Thompson

Registered proprietor



Mortgage and
guarantee void –
successful plea of
non est factum

EMF NV

Registered mortgage



transfer of
mortgage

EMF PV

Registered mortgage



PT Ltd v Maradona
(1992) 25 NSWLR 643

“moneys hereby secured” – moneys owing by the mortgagor or moneys owing by any “other indebted person” – any person jointly or severally liable with the mortgagor



Chandra v Perpetual Trustees Victoria

(2007) 13 BPR 24,675

- The mortgage is security for payment to us of the secured money ...
 - “Secured money” – all amounts that are payable at any time or are contingently owing or payable to us under a secured agreement
 - “Secured agreement” any present or future agreement between us and you or any of you ...
- 