

FRAUD IN CONVEYANCING

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Introduction

Fraud within the conveyancing and mortgage industries is becoming an increasingly serious issue for conveyancers in all jurisdictions in Australia. Although conveyancing processes and procedures may differ from State to State, any system of conveyancing that is based upon the registration of title and mortgage documents is inherently susceptible to fraud.

Recent national statistics indicate that 21% of all serious fraud offences committed in Australia and New Zealand involve mortgage fraud². There has also been a dramatic increase in the use of false and forged documentation and fictitious identities in carrying out mortgage fraud against lenders³.

This rise in fraud in the mortgage industry has important implications for conveyancers, particularly in circumstances where the conveyancer is unwittingly involved in a fraudulent transaction. Recent cases in Queensland and New South Wales involving forged signatures on mortgage documents highlight the need for conveyancers acting for borrowers to take special care to identify their client and also to examine the authenticity of title and mortgage documentation involved in the transaction.

This paper will focus on some recent trends in fraud and forgery in the conveyancing industry and provide a summary on how to identify a potentially fraudulent transaction. The article will also discuss opportunities for fraud in the proposed National Electronic Conveyancing System (NECS) and identify some options now available in the market to better manage mortgage/conveyancing fraud risks.

Fraud in the conveyancing context

An integral part of conveyancing practice involves the provision of advice in relation to mortgages and refinances⁴. Conveyancers in New South Wales for example will regularly act for clients in relation to the refinance of a family home or an investment

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² Serious fraud being, amongst other things, financial loss exceeding AUD\$100,000.00. Smith, Russell, G: "Serious Fraud in Australia and New Zealand", Australian Institute of Criminology and PricewaterhouseCoopers, Research and Public Policy Series No 48, March 2003.

³ See for example Murphy, S "One False Move." and Henry, J "Organised Crime" Mortgage Professional Australia, January 2004.

property. Most lenders (particularly lo-doc and no-doc lenders) will require the borrower to sign a declaration of independent legal advice as a condition of the loan. In many cases, it is this requirement for a declaration of independent legal advice which prompts the borrower (and fraudster) to seek the services of the conveyancer.

Fraudsters may also seek the services of a conveyancer in order to sell a property without the knowledge of the true owner. Although it is more common for fraudsters to simply mortgage a property to which they have obtained the title deeds (or have forged the title deeds), conveyancers should be mindful that fraudsters may attempt to sell a property and will seek the services of a conveyancer for this purpose.

Unfortunately, for conveyancers it may be difficult to distinguish between a bone fide client legitimately seeking legal services and a fraudster approaching the conveyancer as simply an obstacle to be overcome in the carrying out of the fraud. The risk to the conveyancer is that in circumstances where a transaction turns out to be perpetrated by fraudsters, the conveyancer's conduct may be closely examined to establish whether the loss suffered by the victim of the fraud can be attributed to any negligence on the part of the conveyancer.

Conveyancers therefore need to be alert to any fraud indicators and need to be careful to properly identify their clients, whether they be vendors or borrowers.

Recent Examples of Fraud

There has been much publicity in the media recently about the rise of mortgage related fraud. However, reported cases of widespread frauds involving real property date back to the beginning of title registration⁵. Here are few recent examples:

- ***\$9 million fraud scheme involving Counterfeit Title Deeds*** - The Sydney Morning Herald has reported that a scheme involving counterfeit title deeds and false identities has been uncovered⁶. There have been only a few cases of this fraud uncovered however the sums involved have been substantial and have involved unencumbered security properties.
- ***Australian Rugby House fraud***⁷ - In July 2006 a group of fraudsters forged the Certificates of Title to a property owned by the Australian Rugby Union in North Sydney.

The fraudsters approached a legitimate mortgage broker and used the forged Certificates of Title to obtain a mortgage of \$14.4 million in order to purchase 605 kilograms of gold bullion from a gold dealer. One of the fraudsters

⁴ For example, in New South Wales section 4 of the Conveyancers Licensing Act 2003 defines "conveyancing work" to include legal work involved in the preparation of a mortgage (providing the amount secured by the mortgage does not exceed \$7 million.)

⁵ Crundwell, R, Golder, H & Wood, R, "From Parchments to Passwords: A History of the Land Titles Office of New South Wales" Hale & Iremonger, 1995.

⁶ See for example Australian Institute of Conveyancers (NSW), February 2007 edition Sydney Morning Herald, 13 January 2007

⁷ Phillip Cornford, The Sydney Morning Herald "Gold Bars just a whisker from crooks' grasp, 22 July 2006.

claimed to be a lawyer and signed Statutory Declarations stating that he was a lawyer confirming that the applicants owned the North Sydney property and had passed various inspections by the broker and mortgagee. The funds were advanced to the fraudsters however their suspicious activities were realised by various parties including the Mint, a security company and the Land Titles Office (who exposed the Certificates of Title as forgeries) and the matter was reported to the police just prior to the gold bullion being delivered to the fraudsters.

As a result of this attempted fraud the Land Titles Office issued a postscript advising lenders to instill rigorous procedures for the identification of borrowers to a loan prior to advancing funds.

- **Replacement Titles scam** – In 2002 to 2003 several instances of Certificate of Title fraud were uncovered. The fraudsters engaged in the practice of creating counterfeit Certificates of Title for properties that were unencumbered, creating false identification documents and securing mortgages over land. In the majority of the frauds that were uncovered, the loans were arranged through mortgage brokers. Further, the fraudsters engaged solicitors who they had never dealt with before to act on their behalf in relation to the transactions and directed them to draw the funds to persons other than the owners of the security properties. The office of Land and Property Information, New South Wales (“LPI”) issued a Circular in March 2003⁸ warning of the existence of these frauds advising practitioners to take care in property related transactions and to contact the LPI should they have any doubts in relation to a Certificate of Title presented to them by their client.

In response to these types of frauds, the New South Wales Law Society, the Department of Lands and the Australian Institute of Conveyancers (NSW) have from time to time issued alerts warning about fraud schemes using counterfeit and fraudulently obtained Certificates of Title and forged identities.

These alerts highlight the need for conveyancers to take care in mortgage transactions particularly in transactions involving unencumbered property. It is suggested that these alerts should be kept and incorporated into the conveyancer’s risk management strategies.

Conveyancers should be mindful that fraud not only affects the victim of fraud, it may have implications for a conveyancer’s professional indemnity insurance in circumstances where the victim of the fraud seeks to recover some or all of his/her losses.

⁸ Des Mooney, General Manager, Land and Property Information NSW, Circular No. 2003/5, “Counterfeit Certificates of Title”, March 2003

Fraud & Professional Negligence – Case Studies

As discussed above, fraud poses a significant risk to conveyancers in circumstances where a conveyancer fails to take adequate care in the transaction to identify the client and examine the authenticity of title and mortgage documentation (including signatures and attestations) involved in the transaction.

In the recent case of *Graham v Hall & Anor* [2006] NSWCA 208 both a solicitor's and witnesses' duty of care to the owner of mortgaged property was examined by the New South Wales Court of Appeal. This case is important for conveyancers acting for the borrower in the refinance transaction and also for conveyancers who are asked to witness mortgage documents, including in their capacity as Justices of the Peace, as the decision arguably highlights the standard of care required for conveyancers acting for borrowers in certain mortgage transactions.

Graham v Hall [2006] NSWCA 208

Mr & Mrs Hall owned a family home near Bathurst in New South Wales. Mr Hall operated a business which was not profitable and had accrued substantial debts. In order to repay his debts, Mr Hall decided to mortgage the family home. However, Mrs Hall was not aware of her husband's financial trouble and so Mr Hall proceeded with the mortgage refinance without her knowledge.

Mr Hall instructed a solicitor to act on his and Mrs Hall's behalf in relation to the mortgage refinance. However, Mr Hall instructed the solicitor that Mr Hall was dying of cancer and therefore could not be visited or contacted. Mr Hall indicated that he would personally obtain Mrs Hall's signature on the mortgage documentation. Mr Hall also indicated that Mrs Hall would not speak to the solicitor as the solicitor had previously acted for a creditor of Mr Hall in a debt recovery matter. The solicitor accepted this position.

Mr Hall executed the mortgage documents in the presence of the solicitor. The mortgage documents, including a declaration of independent legal advice, were purportedly executed by Mrs Hall in the presence of Mr Graham, a Justice of the Peace, as witness. The signatures were actually forged by Mr Hall and Mr Graham simply added his signature to the attestation clauses. Mr Graham did not know Mrs Hall and they had never met. Mrs Hall did not sign the mortgage documents in Mr Graham's presence.

The transaction was completed and the forged mortgage was duly registered. Nearly two years later, Mr Hall died and Mrs Hall discovered the existence of the mortgage.

Mrs Hall did not seek to have the mortgage set aside on the basis of statutory fraud. Instead, Mrs Hall sued both the solicitor and the witness, Mr Graham, for damages in negligence.

The Court at first instance found in favour of Mrs Hall and apportioned damages 60:40 as between the solicitor and the witness. Both the solicitor and witness

appealed. The Court of Appeal unanimously dismissed the appeals and found that both the solicitor and the witness owed a duty of care to Mrs Hall. The Court of Appeal found that both the solicitor and the witness breached that duty.

Solicitor's breach:

- The solicitor failed to contact his client Mrs Hall himself and also failed to arrange another person from his office to either telephone or visit Mrs Hall in relation to the transaction.
- The solicitor took no steps to ascertain whether an apparently a dying woman was able and willing to agree to a significant increase on the mortgage on the family home to which she would be liable to repay.
- The solicitor failed to take reasonable steps to protect Mrs Hall's interests.

Witness's breach:

Although the negligence alleged against the witness did not fall within the established categories of negligence recognised in Australian law, Justice Ipp found that the false attestation that the signature purporting to be that of Mrs Hall was placed on the mortgage in the witness's presence were "powerful factors tending to support the recognition of a duty of care owed by the witness to Mrs Hall" which included:

- The risk of harm to Mrs Hall's interests in the property, resulting from the signature in question not being hers, arose from the likelihood that the mortgage was likely to be registered. This risk was not only foreseeable but self evident;
- Mrs Hall was in a vulnerable position as she was ignorant of what was taking place and ignorant of the liabilities and risks being placed upon her, namely, the risk that the family home could be sold if Mr Hall defaulted in the debt.

The Court of Appeal concluded that the proper apportionment as between the solicitor and the witness was 60:40 as the solicitor expressly took upon himself the duty of taking reasonable steps to protect Mrs Hall's interests (and therefore should take the prime responsibility) and he failed in that duty. The witness bore a significant, although lesser, proportion as he was "morally blameworthy", ie, dishonest⁹.

Young v Hoger [2002] QSC 013

In *Young v Hoger* [2002] QSC 013 the conduct of a solicitor acting for the mortgagee was examined in the context of a fraudulent mortgage transaction. The same

⁹ See also analysis by Mark Newton of Ebsworth & Ebsworth in "E & E Insurance Review Nov 2006 – section 3: professional indemnity, directors & Corporations Act: Witness to mortgage found liable": [www.ebsworth.com.au/.../\\$FILE/E&E+S3+C1+witness+to+mortgage+found+liable.pdf](http://www.ebsworth.com.au/.../$FILE/E&E+S3+C1+witness+to+mortgage+found+liable.pdf) -

analysis could be applied to a conveyancer acting for joint borrowers rather than a mortgagee.

The facts in *Young v Hoger* [2002] QSC 013 are similar to those in *Graham v Hall*. Mr and Mrs Hoger jointly owned a family home and Mrs Hoger and her daughter (who were in financial trouble) sought a mortgage refinance without the knowledge of Mr Hoger. The mortgagee's solicitor forwarded mortgage documentation to the Hogers for execution. Mr Hoger's signature was forged. The forged signature was witnessed by a JP. It is unclear whether the JP failed to follow the proper attestation procedure or whether the JP's signature was also forged as the JP was deceased when the matter came to trial.

The issue before the Queensland Supreme Court was whether the solicitor's conduct in registering the forged mortgage as the agent of the mortgagee amounted to statutory fraud so as to ground an exception to indefeasibility under section 184(3)(b) of the Queensland *Land Title Act* 1994. The Supreme Court found that the mortgage was not enforceable and ordered the mortgage to be removed from the title. The mortgagee appealed and was successful. However, whilst the Court of Appeal found that the solicitor's conduct did not amount to fraud, ie, 'willful blindness and actual dishonesty' within the meaning of the *Land Title Act* 1994, the case raises a number of issues which might ground an action in negligence against the solicitor, particularly in light of *Graham v Hall* and recent articles suggesting that solicitors should take steps to identify solicitors, conveyancers and JPs who witness mortgage documents.

Some issues raised in the case include:

- The fraud was able to be perpetrated because the solicitor failed to contact Mr Hoger about the loan.
- The solicitor did not attempt to contact the JP who witnessed Mr Hoger's signature;
- The solicitor failed to comply with his own verification procedures, namely accepting uncertified copies of identification documents;
- The solicitor knew one of the borrowers was under financial pressure and had no known income details for her;
- Had the solicitor simply contacted either Mr Hoger or the JP the fraud might have been uncovered.

Lessons for Conveyancers

These cases have important implications for conveyancers.

Both *Graham v Hall* and *Young v Hoger* illustrate the need for conveyancers to contact *all parties to the transaction* to ensure that each signatory is aware of the true nature of the transaction, particularly when acting for more than one client named as

a borrower in a mortgage document. A conveyancer's duty of care extends to *all* clients in the transaction, not only the client who provides the instructions and attends the office.

It is also important to identify the client by viewing original identification documents such as a drivers license or passport or *certified copies* of identification documents if the originals cannot be produced. It is strongly suggested that conveyancers adopt the prescribed verification procedure (100 Point Check) set out in the *Financial Transaction Reports Act 1988 (Cth)* which is the standard adopted by the NSW Department of Lands when proof of identity is required.¹⁰

The cases also illustrate that conveyancers should as best practice contact the person who witnesses a borrower's signature if the borrower does not sign the mortgage in the conveyancer's presence. If the witness is a JP or a conveyancer or a solicitor, enquiries should be made with the relevant governing body to ascertain that the person is actually qualified and is listed on a professional register.

Whilst all care should be taken to identify your client, care should also be taken not to provide written warranties or indemnities to lenders in relation to the borrower's identity as any such warranty or indemnity may permit that lender to allege negligence where the lender suffers loss through identity fraud. Any such warranty or indemnity may also be excluded from insurance cover under the conveyancer's professional indemnity policy¹¹

Managing the risk of Fraud

As can be seen from the examples above, fraud in conveyancing typically falls into three broad categories:

- Frauds involving counterfeit Certificates of Title;
- Frauds involving identity theft and impersonation of the victim of the fraud;
- Frauds involving forgery of signature on mortgage and title documents;

All of the above categories of fraud pose a risk to the conveyancer unless due care is taken. In the majority of reported cases of fraud, the fraudster is typically a family member or close friend of the victim and the fraud involves the fraudulent registration of a mortgage for financial gain¹².

Studies undertaken in relation to compensation claims made against the various Torrens Funds in Victoria, Queensland, South Australia and Tasmania also indicate

¹⁰ See Department of Lands FAQ "How do I verify the identity of a person claiming a right to deal with land"? http://www.lands.nsw.gov.au/valuation/faqs/proof_of_identity?SQ_DESIGN_NAME

¹¹ See, Macdermott, Bruce – "Lawcover Risk Management – Managing the Risk of Identity Fraud" Law Society Journal, November 2005 at page 53.

¹² Hammond, Celia "The abolition of the duplicate certificate of title and its potential effect on fraudulent claims over Torrens land" (2000) 8 *Australian Journal of Property Law* 115.

that most frauds involved forged signatures or counterfeit title deeds in mortgage transactions and were carried out by a family member of the victim.¹³

Mortgage work therefore presents the greatest risk to the conveyancer.

Fraud Awareness Checklist – Key Fraud Indicators/Risk Management

As discussed previously in this paper, the New South Wales Law Society, the Department of Lands and the Australian Institute of Conveyancers (NSW) have from time to time issued a number of alerts to solicitors and conveyancers warning about fraud schemes.

The following is a summary of key fraud indicators which conveyancers should be mindful of when acting in a conveyancing/mortgage transaction:

- Establish a procedure for the thorough **identification** of new clients, for example, ask for a copy of your client's Drivers License and keep a copy in the client's file. – adopt 100 Point Check verification procedure as a minimum standard¹⁴.
- Pay extreme care when taking instructions to act for a couple where the only **contact** you have is with one partner: It is imperative that you meet all your clients.
- Pay extreme care in transactions involving **non English speaking borrowers**. Many frauds that have occurred in recent years have involved guarantors that did not know or alleged that they did not know what they were signing. It is important to engage the services of official interpreters or translators if required.
- Obtain **original copies of documents**, try not to settle for photocopies or emailed copies of documents. Fraudsters often use fax machines to conceal document alterations. It is also important to verify the documents that are provided by the client by calling the telephone numbers disclosed on the letterheads. For example, letters from solicitors, accountants and other conveyancers should be verified by contacting the appropriate governing body. ie, the Law Society or the Australian Institute of Conveyancers.
- Exercise due care in **checking the validity of title documents**. Circular no. 2003/5 issued by the LPI in March 2003 warns conveyancing practitioners to:
 - (i) Check the clarity of the State crest;

¹³ Low, Roushi (2006) "Opportunities for fraud in the proposed Australian National Electronic Conveyancing System: Fact or Fiction? *Murdoch University Electronic Journal of Law* 13 (2):pp 225-253

¹⁴ See also the article by Matthew Bransgrove entitled "Mortgage Law: What can solicitors do to reduce mortgage fraud?" - New South Wales Law Society Journal (November 2004) at page 52.

- (ii) Look out for variations in the colour of margin notes and in the words “Certificate of Title” on the reverse side of the title deed;
 - (iii) Ensure the signature of the Registrar General is that of the Registrar General in office at the time of issue of the title deed;
 - (iv) Contact the LPI if a conveyancing practitioner has doubts as to the authenticity of a title deed.
- Exercise due care in the **witnessing of documents**. The Law Society of New South Wales has strongly recommended that, in addition to the need to thoroughly identify clients, a conveyancing practitioner should not act as witness where the client has not been known to you personally for some time and in circumstances where the signature to be witnessed was not inserted on the document in your presence¹⁵.
 - **Check the validity of qualified witnesses**, that is, Solicitors, Justices of the Peace, conveyancers etc. For example, you may check the validity of a solicitor by comparing the contact details on the letter head with those listed on the ‘Find a Lawyer’ section of the Law Society Website. In New South Wales, a Justice of the Peace can be located on the Justices of the Peace Register maintained by the NSW Attorney General’s Department: see <http://jp.lawlink.nsw.gov.au/public/welcomePublic.do>
 - Keep an eye out for **high risk transactions**. High risk transactions include but are not limited to¹⁶:
 - (i) Where the client is not personally known to the conveyancing practitioner and is unable to provide extensive photo identification;
 - (ii) Where the borrower requires an urgent settlement and is unable to provide a valid reason for such urgency;
 - (iii) Where a mortgage broker has been used;
 - (iv) Where the mortgage is to be secured by an unencumbered property and a high rate of interest is payable;
 - (v) Where the edition date on the title deed does not match the edition date on the title search;

¹⁵ Geoff Dunley, President, Law Society of New South Wales “Warning on Counterfeit Certificates of Title”, 10 January 2007

¹⁶ Geoff Dunley, President, Law Society of New South Wales “Warning on Counterfeit Certificates of Title”, 10 January 2007

- (vi) Where the title deed contains a Section 111, Real Property Act notation;
- (vii) Where the client has recently purchased the property on a cash basis and is now borrowing against the property. Also be careful where the borrower has the title deed but has no other documents such as surveys, building certificates, rates notices etc.
- (viii) Where the borrower refuses to attend personally on settlement or where none of the moneys advanced are paid to the borrower on settlement.

Fraud and Electronic Settlements (NECS)

As most conveyancers will be aware, Australia is heading towards a national electronic conveyancing system, referred to as the National Electronic Conveyancing System (NECS). The NECS is described as “Australia's joint government and industry initiative to create an efficient and convenient way of completing property based transactions and lodging land title dealings for registration”¹⁷. The proposed NECS is therefore somewhat of a misnomer as it deals with the settlement and registration aspects of the conveyancing transaction rather than a model for electronic ‘conveyancing’ as a whole. For example, the proposed NECS does not cover preparation and exchange of contracts for sale, pre-settlement investigations, procurement of any insurances required by purchasers, such as title insurance, creation of loan documentation or processes for examining and registering instruments once lodged with a Land Registry¹⁸.

Essentially, a conveyancer using the NECS will *electronically*:

- prepare dealings and related instruments to register changes in ownership and interests
- settle financial transactions (including payment of duties, taxes and any disbursements)
- lodge their dealings with the appropriate Land Registry
- receive confirmation of dealing lodgement and registration.

One question which is often raised is whether the proposed NECS will increase or decrease the scope for conveyancing and mortgage fraud. Certainly, the NECS model has not been designed to specifically deal with the allocation of fraud risk. For example, it is stated on the NECS website that “*the NECS design is based on, as far*

¹⁷ <http://www.necs.gov.au/Home/default.aspx>

¹⁸ See the NECS website: www.necs.gov.au - <http://www.necs.gov.au/default.aspx?ArticleID=50#RISK%20MANAGEMENT%20IN%20NECS>

as possible, maintaining the existing risk allocations and management philosophies in the paper-based conveyancing and settlement processes.” Therefore the NECS model does not appear intended to specifically prevent the types of fraud which are currently occurring in the paper based system from occurring in the electronic based NECS on the basis of the re-allocation of risk.

Conveyancers will still be responsible for the registration of title documents as part of the conveyancing transaction and will be responsible for identifying their clients and acting in their best interests.

Although it is difficult to draw any reliable conclusions given that the NECS is still in the development rather than implementation stage, a recent study based upon the current NECS model has concluded that the types of fraud currently occurring in the paper system, ie, forgery of signature and identity theft, fraud by solicitors and conveyancers, can continue to occur in the proposed NECS.

In relation to forgery of signature it is noted that whilst NECS certifiers will digitally sign mortgage and title instruments on behalf of their clients, NECS requires a client authorisation form to be completed and physically signed by the client, in which case, fraud may still be perpetrated by a fraudster who forges a signature on the authority and the witness does not follow the proper attestation or the attestation is also a forgery. In this respect the paper concluded that “the only difference between the paper system and the NECS is that in the paper system, the forgery is on the land title document, whereas in the NECS, it is on the authorisation form”.¹⁹

Identity fraud can also continue to occur in the NECS and the onus will continue to be placed on the conveyancer as a subscriber to the NECS to properly identify the client. In this regard, the NECS will require conveyancers to provide certifications on electronic instruments prior to signing them on behalf of their clients. The conveyancer must certify that the “prescribed procedures” in verifying the identity of the client have been followed, and the conveyancer is holding a properly completed and signed authorisation form and has thoroughly and carefully examined and retained copies of all identification documentation²⁰.

The identity certification procedure is intended to give all participants in the NECS confidence that the practitioner has followed the prescribed procedures to verify the identity of the client and “may protect the practitioner from a negligence claim if the identity is subsequently proven to be false”²¹. Conveyancers should therefore be mindful that failing to follow the prescribed procedures will almost definitely result in a finding of negligence.

¹⁹ Low, Roushi (2006) “Opportunities for fraud in the proposed Australian National Electronic Conveyancing System: Fact or Fiction? *Murdoch University Electronic Journal of Law* 13 (2):pp 225-253.

²⁰ “Practitioner certifications in electronic conveyancing” – Electronic conveyancing newsletter 2006-12.

²¹ *Ibid.*

Although the precise nature of the prescribed identification documents is yet to be determined it is anticipated that there will be some move towards uniformity across the States and Territories and may result in a 100 point system similar to that under the *Financial Transaction Reports Act 1988* (Cth) being adopted.

It is argued that the NECS may also introduce new opportunities for fraud within the conveyancing industry, namely, the unlawful use of a conveyancer's digital signature certificate (as a certifier in the NECS) to digitally sign documents. That is, a fraudulent person with access to the NECS, such as a law clerk or other employee, would be able to prepare mortgage documentation, digitally sign the document on behalf a client and lodge it for registration.²²

Attached is an Appendix to the study cited in this paper which summarises in table format the key findings of the study.

Compensation for Fraud: Torrens Assurance Fund v Private Title Insurance

Whilst ideally the prevention of conveyancing fraud should be a conveyancers' primary consideration, the reality is that fraud and forgery involving real property will continue to thrive despite the best efforts of the conveyancing profession, leaving many victims of fraud with limited options for recovery and compensation.

What compensation options are currently available to a victim of fraud ?

Torrens Assurance Fund & Indefeasibility

One of the consequences of the Torrens System in New South Wales and other jurisdictions is that a purchaser who acquires land through a forged or fraudulent instrument, but is not a party to the fraud, will receive an indefeasible title on registration of the forged or fraudulent instrument, and the former owner will not be entitled to have the title restored or to monetary compensation from the new owner/purchaser²³. Where an owner is deprived of title as a result of forgery or other fraud, his or her right to recover the land is converted to right to compensation from the Torrens Fund and the former owner is not entitled to have the title restored and is statute barred from commencing an action to recover Torrens title land against the registered proprietor.²⁴

Similar provisions have been enacted in all States and Territories of Australia. For example, in *Vassos v. State Bank South Australia* (1993) 2 VR 316, the signatures of two of the tenants in common of Torrens system land were forged on a mortgage and

²² Low, Roushi (2006) "Opportunities for fraud in the proposed Australian National Electronic Conveyancing System: Fact or Fiction?" *Murdoch University Electronic Journal of Law* 13 (2):pp 225-253

²³ See section 129 of the Real Property Act 1900 (NSW)

²⁴ See section 118 of the Real Property Act 1900 (NSW) .

guarantee by the third tenant in common. A substantial sum of money was obtained. The mortgage was over the land owned by the three tenants in common. The mortgagee was not a party to the fraud and registered the mortgage. The two innocent tenants in common brought proceedings for a declaration that the mortgagee's title was defeated by the forged mortgage. Hayne J held that the title that the mortgagee obtained on registration of the forged mortgage could not be defeated on the ground of fraud if the mortgagee was not a party or privy to that fraud. Unless the mortgagee has engaged in the fraud, the mortgagee acquired an indefeasible title by registration²⁵.

Limitations on Compensation under the Torrens Assurance Fund

Whilst the former owner may seek compensation for their loss from the Torrens Assurance Fund, the compensation provisions in the Torrens legislation have in the past created considerable practical difficulties for claimants as often valid claims were denied and claimants experienced considerable delays in compensation claims being paid²⁶. For example, in the New South Wales Law Reform Commission Report 76 (1996) entitled "Torrens Title – Compensation for Loss" the Commission referred to the case of *Northside Development Pty Ltd v Registrar-General* (1990) 170 CLR 146 which involved a compensation claim commenced in 1981 in the Supreme Court and which concluded in High Court almost *nine years* after proceedings commenced!²⁷

It remains to be seen whether the amendments to the *Real Property Act 1900* brought about by the *Property Amendment (Compensation) Act 2000* will have any practical benefits in overcoming the tendency of the administrators of the Fund towards defending claims on technical points resulting in complex litigation. Recent case law in New South Wales indicates that the Registrar-General may still interpret the new legislation in such a way as to limit the availability of compensation from the Fund²⁸.

For example, in *Challenger Managed Investments Ltds v Direct Money Corp P/L* (2003) NSWSC 1072, which was one of the first cases brought against the Registrar General following a comprehensive reform of the Torrens Assurance provisions to broaden the scope of access to compensation under the Fund, the Registrar-General resisted compensating the claimants and argued that the new section 129 of the Real

²⁵ Bransgrove, M "Indefeasibility of Mortgage Title and Exceptions to It: A Paper presented for The Continuing Professional Education Department of the College of Law, November 2003.

²⁶ Law Reform Commission Report 76 (1996) Torrens Title – Compensation for Loss, paragraph 2.40: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R76CHP2>.

²⁷ New South Wales Law Reform Commission Report 76 (1996) entitled "Torrens Title – Compensation for Loss

²⁸ See for example *Diemasters v Meadowcorp and Jain v Registrar General* (2001) NSWSC 495 (18 June 2001) and *Challenger Managed Investments Ltds v Direct Money Corp P/L* (2003) NSWSC 1072 (28 November 2003).

Property Act was limited to circumstances where ‘acts or omissions’ of the Registrar-General are “tortious or wrongful”.

Senior Counsel for the Registrar General submitted that “it is necessary that the plaintiffs isolate or identify functions or duties executed or performed by the Registrar General in the performance of which it is said that the Registrar General’s impugned act or omission arose; that there is no duty so wide as a duty to save harmless all who deal with Torrens land”.

The Court rejected this argument and found that compensation will be payable in circumstances where loss and damage arises “by the operation of the Act”, ie, by the operation of the indefeasibility provisions of the Act. The claimants were ultimately compensated but only after a lengthy and expensive Supreme Court hearing.

The Torrens statutes in nearly all States and Territories in Australia also provide fault based restrictions on indemnity which further reduces the availability of access to the Fund. Amendments to the Torrens statutes indicate an increasing unwillingness on the part of the government to indemnify for losses caused wholly or partly by the fraud or negligence of agents and professionals acting for the claimant, or by the claimant’s own want of care.²⁹

Accordingly, in circumstances where a loss is caused by any fraudulent, willful, or negligent act or omission by a solicitor, licensed conveyancer, or real estate then a claimant will have no recourse to the Fund and will be required to seek compensation from the solicitor, real estate agent, or conveyancer’s professional indemnity insurer³⁰.

Title Insurance

Private title insurance is another option now available to home owners providing private insurance compensation for losses arising from conveyancing fraud. Unlike the Torrens Assurance Fund, a title insurance policy is a policy of *insurance* and therefore the policy and the conduct of the title insurer in relation to processing the claim are subject to the provisions of the *Insurance Contracts Act 1984* (Cth) and the provisions of the title insurance policy will be construed strictly against the title insurer in accordance with the *contra preferentum* rule

The main advantage of claiming under a title insurance policy rather than the Torrens Assurance Fund in the event of loss through fraud and forgery is that a title insurance policy is a “no fault” policy and the coverage is not limited where the fraud or forgery is occasioned by the insured’s legal practitioner, conveyancer, or real estate agent,

²⁹ O’Connor, P, “Double Indemnity: Title Insurance and the Torrens System” (QUT Law & Justice Journal) Vol 3 No 1 2003

³⁰ Section 129(2)(b)(i)&(ii) of the *Real Property Act 1900*.

nor is it necessary to commence administrative proceedings or legal proceedings in order for compensation to be payable.

Accordingly, whilst there is undoubtedly some element of redundancy in the *risk coverage* offered by title insurance in respect of Torrens Title land, it is arguably the *claims process* that distinguishes the coverage offered by private title insurance from the right to seek compensation from the Torrens Assurance Fund provisions of the *Real Property Act 1900* and similar State and Territory legislation.

Conclusion

Whilst the increase in fraud in the conveyancing industry is clearly a source of concern for conveyancers, there are a number of risk management measures that can be adopted to minimise the likelihood of conveyancers acting for a fraudster in a fraudulent transaction.

Conveyancers should review their current risk management practices to ensure that adequate steps are being taken to minimise the risk of fraud. Recent case law indicates that conveyancers taking active steps to identify the client and ensure the validity of signatures and documentation will become the norm in discharging a conveyancer's duty of care to the client. As a practical matter, conveyancers should keep up to date with alerts issued by regulatory and industry bodies and should always remain alert to fraud in mortgage transactions.

The introduction of electronic settlements and registration as envisaged under the proposed NECS is not likely to provide any comfort to conveyancers with respect to fraud prevention. In short, as long as conveyancing involves the registration of title and mortgage documents, regardless of whether the system of registration is paper based or electronic, then conveyancing and conveyancers will be susceptible to fraud.

However, the risk of fraud can effectively be managed by exercising caution in high risk transactions, ie, mortgage transactions involving unencumbered properties, and by adopting consistent risk management practices.