

## FRAUD AND MORTGAGES

A constant phenomenon of commercial life which is alive and well in modern loan and mortgage transactions is that people from time to time forge signatures on documents.

This article attempts to assist businesses in dealing with a situation whereby someone has committed fraud by forging a signature (for example) on a document or mortgage over which the business has provided finance.

One such possible scenario may be where a bank lends money to someone in exchange for a mortgage over his or her house. It later becomes evident that the house over which the mortgage has been registered is not at all the property of the person to whom your business has lent the money. It would seem unfair that a business which has made all reasonable efforts to ensure the authenticity of the borrower and his or her representations not be able to recover its monies once they become due.

#### Enforcing a Forged Mortgage

This scenario begs the question "**How can a forged mortgage possibly be enforceable at all?**"

It may surprise many to learn that the position at law is that forged mortgages can be valid to create the interest registered.

His Honour Justice Young in *Perpetual Trustees Victoria Ltd v Tsai* [2004] NSWSC 745 held that:

*"There is no doubt at all that under the Torrens system a forged mortgage which might be a nullity under the old system title when registered without fraud is fully efficacious as conferring on the mortgagee the interest in land described in the mortgage. It is often said in a shorthand way that the mortgagee gets an indefeasible interest."*

The legal basis for a forged mortgage being fully efficacious when registered without fraud is legislative, and in New South Wales is contained in section 42 of the Real Property Act, which provides:

*Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:*

There are similar equivalent provisions in other states.

The concept of **Indefeasibility** is that it is registration itself that creates the mortgage, not the validity of what has preceded registration.

This concept is important in that it means that once a mortgage is registered, it is for the person seeking to avoid the mortgage to make out a case as to why they should be able to.

#### Escaping a Forged Mortgage

Despite a forged mortgage becoming indefeasible by registration, there remain **3 broad ways in which that mortgage can be defeated**. The first is if the person seeking to rely on the mortgage (ie the lender) has knowledge (including suspicion) of the fraud, the second is if the mortgage itself does not contain the terms (eg the amount owing) the lender wants to enforce and it is necessary to refer to another document (eg an unregistered loan agreement) for those terms and the third is where the Court would set aside the mortgage even if it had not been forged for unrelated reasons.

#### Conclusion

Forged mortgages continue to be a part of commercial life and parties dealing with forged mortgages need to be aware of current laws so to be able to best protect themselves against fraudulent transactions.

*This article is based on a paper entitled 'Fraud and Personal Covenants in Mortgages' by John Clifton, Barrister and is produced with his consent. John can be contacted at Edmund Barton Chambers in Sydney on (02) 9220 6100.*

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