

Property law problem question: fraud and mortgages



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Background

Jim is the Director of 'Bazinga' a company that specialises in the development of commercial properties. He has identified an old 5 storey office building "The Property" in Melbourne which he would like to purchase and subsequently develop. During the course of securing the \$4,500,000 loan to purchase The Property, Jim's twin brother Sheldon hacked into the online conveyancing platform (MATRIX) and amended the loan documents so that the security for the loan was changed from "The Property" to Jim's house. Sheldon then transferred the full sum of the loan into his personal account. These circumstances resulted in Jim inadvertently mortgaging his own house in order to secure the loan. Secure Bank (the mortgagee) have, following registration of the mortgage become the registered proprietors of Jim's house. Aside from the monetary loss that Jim has suffered, he has also lost the indefeasible title to his house in favour of Secure Bank.

Issue(s):

The central issue concerning our client Secure Bank (the Mortgagee) in the case at hand, is whether Jim (the mortgagor) will be able to render the registered mortgage over his house defeasible, by claiming indemnity (against Secure Bank) under the relevant fraud provisions in the Transfer of Land Act 1958 (Vic) which; if affirmed will have the effect of discharging the mortgage. In determining this issue, consideration will need to be given to the following sub-issues.

Sub-issue 1 – Has Penny acted fraudulently?

False attestation

Sheldon, Jim's twin brother attended the Principal's premise with a view of impersonating Jim – the real mortgagor in this case. Penny a Customer Experience Officer and an apparent agent of my client attended to "Jim" and requested that he sign the personal guarantee for the loan, while he did so Penny left him in order to photocopy his driver's licence. During this encounter Penny failed to witness "Jim" sign the personal guarantee document and upon realising this, retrospectively signed as witness on the document. In determining whether Penny has acted fraudulently, I look to the common law definition of fraud as stated by Mason CJ (at 614) in *Bahr v Nicolay [No 2]* "for the purposes of s42 of the Transfer of Land Act 1958 (Vic) "fraud" comprehends actual fraud, personal dishonesty or moral turpitude on the part of the registered proprietor of the subject estate or interest or of that registered proprietor's agents" [1]. In *Grgic v Australian and New Zealand Banking Group Ltd (1994)* his Honour Powell JA applied the test of "fraud" aforementioned. In *Russo* His Honour Ormiston J. A. adopted the definition of fraud set by the Salmond J in *Waimiha Sawmilling case (at 1173)* that being "it means dishonesty — a wilful and conscious disregard and violation of the rights of other persons" [2]. Both definitions once deconstructed are similar, as such, I choose to apply his Honour Mason CJ's definition to the facts at hand. It cannot be said that Penny acted in any way that was dishonest "in light of what she knew at the time"[3]... on the contrary under the circumstances (she is a Customer Experience Officer, with no prior involvement in the mortgage dealings and given that "Jim" had duplicate copies of the loan documents) she acted under bona fide perspective that "Jim" was the real-registered proprietor. His Honour Powell J. A. in *Grgic* took the view in regard to false attestation that fraud could only

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be made out if the agent knew that the mortgagor was not the real mortgagor[4]. On this point there is no evidence to suggest that Penny knew during her dealings with “ Jim” that he was in fact not the real mortgagor or that he intended on defrauding Jim. It follows then that no “ actual fraud” can be made out on the part of Penny.

Penny’s misrepresentation of facts

Penny’s misrepresentation of facts to Leonard regarding whether she “ checked” the difference in addresses on the licence with “ Jim” cannot satisfy the meaning of fraud under *s42 of the Transfer of Land Act 1958 (Vic)* [5]as no evidence is present that would suggest she knew that she was putting “ *the mortgage forward on path of registration* ”[6]as she is a Customer Experience Officer, not a Loan Manager.

Sub-issue 2 – Has Secure Bank acted fraudulently?

Vassos v State Bank of South Australia (1993) concerned the forgery of a mortgagor’s signature by a co-owner, without knowledge of this forgery the mortgagee registered the instrument. On the facts his Honour Hayne J suggested that the Bank was “ not without neglect” but this negligence did not amount to fraud[7]. Similarly, *Grgic v Australian and New Zealand Banking Group Ltd (1994)* was in relation to the false attestation by a Bank Manager; in this case his Honour Powell J. A. suggested that agents of the Bank had been careless[8]. In both of these cases the context of the neglect and carelessness was in relation to the failure to take the appropriate steps to verify the identity of the respective mortgagors. The court in these cases found that those acts of neglect and carelessness (respectively) did not

amount to unconscionable conduct[9] or fraud. In respect to the facts at hand, the Principal's agents (Penny and Leonard) may have been neglectful or careless in not taking more steps to satisfy themselves that the person executing the mortgage was in fact the registered proprietor... Leonard failing to identify Jim at the first meeting and Penny failing to identify "Jim" during her encounter at the bank. However, as my client or their agent did not have "actual or constructive knowledge of the fraud" the fraud could not be "brought home". Thus "fraud" within the meaning of s. 42 of the Transfer of Land Act 1958 cannot be made out on the part of my client (Secure Bank).

Sub-issue 2 Can Jim establish that Secure Bank's title is defeasible on the basis of the 'in-personam' exception?

Jim may attempt to raise a claim in-personam relying on the precedent set by the court in *Mercantile Mutual Life Insurance Co Ltd v Gosper (1991)*. However, as *Moore et al. states (at 4. 365)* the 'Gosper case' has widely been criticised for broadening the scope of the in-personam claim, and has been "confined to its specific facts"[10]- in that case, there was a variation to the mortgage and an unauthorised use of the certificate of title[11]. The judgement in the Gosper case is not applicable to the facts at hand. As no claim for action against my client can be substantiated and as there is no unconscionable conduct, a claim against my client to render their title defeasible under the in-personam exception would fail.

Advice

There is considerable precedent set by cases such as *Frazer v Walker*, *Schultz v Corwill Properties* and *Ratcliff v Watters* that "a mortgagee

obtained an indefeasible title under a registered mortgage even though the mortgagor's signature on the mortgage has been forged" [12] .

This judgement and with consideration to the analysis presented in the sections above, there is no fraud on part of my client, as my client was not " party or privy to the fraud" and there was no " *designed cheating of a registered proprietor out of his rights*" [13] . It follows that in the absence of " actual or constructive knowledge of the fraud" means that the fraud could not be " brought home" to the Principal; thus at the time of registration the title by way of the doctrine of immediate indefeasibility my client's title cannot be defeated either at law or in equity[14].

Part 2

Introduction

Property Exchange Australia Ltd (PEXA) a private company has been granted approval to operate an Electronic Lodgement Network (ENL) to enable transacting parties, such as conveyancers, financial institutions and lawyers to develop contracts, settle funds and lodge of instruments with the registrar. It has been highlighted in Part 1 of this paper that paper-based conveyancing transactions are not immune to fraud. The cases discussed in Part 1, highlight that registered proprietors and bona fide purchasers can be defrauded in a number of ways ranging from, identity fraud to unauthorised use of certificates of titles; and forgery of signatures and documents. Recent high-profile cases in NSW and Victoria have shown that the National Electronic Conveyancing System (NECS) is not immune to fraud; those instances too, involved identify fraud and forgery; resulting in losses for bona fide purchasers in excess of one million dollars[15]. If the forms of <https://assignbuster.com/property-law-problem-question-fraud-and-mortgages/>

conducting fraud in the electronic conveyancing (e-conveyancing) environment are similar to those in paper conveyancing; the key difference being the medium through which the fraud is conducted... then why would the principles of “ fraud” be redundant in the e-conveyancing environment? The question is not so simple, in the paper-based system of conveyancing fraudsters were more likely to be family members, agents or solicitors. In comparison, the electronic conveyancing system is arguably open to fraudulent activity by anyone with internet access, anywhere in the world. Ultimately, as stated by Eugene Clark (at) [16] “ Electronic Conveyancing is essentially an electronic process in which contracts are created, documents lodged for registration, funds transferred, and interests registered”. This paper will highlight that principles of fraud; those being immediate indefeasibility and rights in-personam are not redundant in the e-conveyancing environment.

Legislative framework: The Electronic Conveyancing National Law (ECNL)

The *Electronic Conveyancing (Adoption of National Law) Act 2013* governs the operation of electronic conveyancing in Victoria. Thomas et al. observes that the Electronic Conveyancing National Law as adopted in jurisdictions across Australia “ do not derogate from the fundamental principles of the Torrens system, such as indefeasibility of title” [17], Thomas et al. further notes that this legislation does not change the role of the Registrar in receiving and processing instruments in accordance to the Transfer of Land Act 1958 (Vic).

PEXA

Principle 1 – Immediate indefeasibility

Electronic conveyancing and immediate indefeasibility go hand-in-hand; electronic conveyancing was introduced to decrease costs, and in general create efficiency in the conveyancing process. The reasons for adopting the principle of immediate indefeasibility are similar i. e. to ensure security of title for subsequent registered proprietors. Carruthers and Skead[18] explain that the principle of 'immediate indefeasibility', is the grant of an indefeasible title to a "non-fraudulent registered proprietor" as soon as that property or interest is registered; irrespective of invalidity or defect in the document being registered or in the process preceding registration. In the paper based conveyancing system, the doctrine of 'immediate indefeasibility' was desirable in that it provided subsequent registered proprietors with immediate security over their title[19]. However, the opportunity to conduct fraudulent activity may increase in the electronic conveyancing environment, due to the way in which the Electronic Lodgement Network 'PEXA' is setup to operate. Griggs states (at 117) that "*PEXA allows subscribers to develop registry instruments in a digital workspace, and then digitally sign the instrument on behalf of the client. Clients will no longer sign registry instruments; rather the subscriber will do so on the client's behalf*"[20]. If the opportunity of fraud is increased, the risk of immediate indefeasibility is that there may be a higher incidents of bona fide purchaser's losing their titles. In order to reduce the risk of fraud s27AB of the *Transfer of Land Act 1958 (Vic) as amended by the Electronic Conveyancing (Adoption of National Law) Act 2013 (Vic)* places greater

obligations on conveyancing agents and subscribers to verify the identity of mortgagors[21]. In the event that subscribers fail to take these “reasonable steps” outlined in Schedule 8 of the ‘*Model Participation Rules*’ [22] and as a result a bona fide party is defrauded, that defrauded party is able to rely on the “*careless mortgage provisions*” in the *Transfer of Land Act 1958 (Vic)* [23]. In this sense the principle of immediate indefeasibility operates in the same manner in the electronic conveyancing environment as in the paper-based system. As has been mentioned the *Electronic Conveyancing National Laws* as adopted to the respective jurisdictions “do not derogate from the fundamental principles of the Torrens system”. Immediate indefeasibility is one such principle and for this reason and for the reasons outlined in this section it is not redundant in the electronic conveyancing environment.

Principle 2 – Rights in personam

Rather than rendering the right in-personam redundant, the electronic conveyancing environment can be argued to have increased its operation. As Carruthers and Skead argue, the introduction of the ECNL and Schedule 8 of the MPR, which clearly set out those reasonable steps required by the mortgagee to take steps in order to appropriately verify the identity of a mortgagor. Accordingly, a court would be justified in allowing an in personam claim is against a mortgagee for their breach of the Schedule 8 of the MPR. make it more likely for a court to find an in personam exception in cases of fraud. In *Frazer v Walker (1976)* Lord Wilberforce stated (at 585) that “*the principle of indefeasibility does not deny the right of the plaintiff to bring against the registered proprietor a claim in personam*”.

Conclusion

Just as the principle of immediate indefeasibility continues to operate in the electronic conveyancing system due to the *Electronic Conveyancing National Laws* not derogating from the well-established Torren System principles; so to, does the principle of the 'in-personam' exception to indefeasibility. These two principles applied in conjunction with the "careless provisions" provide balance to the electronic conveyancing environment and the way in which it operates; on the one hand immediate indefeasibility may be harsh in the eyes of a defrauded mortgagor, but this harshness may be softened by the increased scope of the in personam exception and the addition of the careless provisions. These principles are ingrained in the Torrens Legislation and thus will continue to operate in the context of real property law; whether paper-based or in electronic form, and are therefore not redundant in the electronic conveyancing environment.

Bibliography

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11. Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 A. C. 378.
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14. Vassos v State Bank of South Australia [1993] 2 VR 316, 328.
15. Waimiha Sawmilling case when heard by the New Zealand Court of Appeal: [1923] N. Z. L. R. 1137.

[1]Bahr v Nicolay (No 2) (1988) 164 CLR 604, 614.

[2]Waimiha Sawmilling case when heard by the New Zealand Court of Appeal: [1923] N. Z. L. R. 1137, 1173.

[3]Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 A. C. 378, 389.

[4]Grgic v ANZ Banking Group Ltd (1994) 33 NSWLR 202, 222.

[5]Transfer of land Act 1958 (Vic) s 42.

[6]Russo v Bendigo Bank Ltd (1993) 3 VR 376, 387.

[7]Vassos v State Bank of South Australia [1993] 2 VR 316, 333.

[8]Grgic v ANZ Banking Group Ltd (1994) 33 NSWLR 202, 218.

[9]Vassos v State Bank of South Australia [1993] 2 VR 316, 333. Hayne J states that there was no unconscionable conduct, as there “ was no misrepresentation by it, no misuse of power, and no knowledge of any wrongdoing by any other party” .

[10]Anthony P Moore, *Australian Real Property Law* (sixth edition, 2016) 260 [4. 365].

[11]Vassos v State Bank of South Australia [1993] 2 VR 316, 332.

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[19]Ibid.

[20]L Griggs, ' It's a New Day, It's a New Dawn, It's a New Life ...: PEXA, Electronic Conveyancing, and Consumers' (2016) 6 *Property Law Review* 117, 117.

[21] *Transfer of Land Act 1958* (Vic) s 27AB.

[22] *Model Participation Rules Guidance Notes 4, cl 6. 4(b)*.

[23] *Transfer of land Act 1958* (Vic) s87B.