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Indefeasibility of Mortgage Title and Exceptions to it

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16. Examinations under the Corporations Act and ASIC Act *5 March 2012*†

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Indefeasibility of title

A registered mortgagee holds an indefeasible title to his estate by virtue of section 41(1) of the Real Property Act which reads;

> "….upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature."

and section 42 which reads:

> "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…"

and section 43(1) of the RPA which reads;

> "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

These are the so-called "indefeasibility of title" provisions of the New South Wales RPA. The word "indefeasibility" does not actually appear in these sections or indeed in any part of the Act. The term has its origins in the wording of the original Torrens Act (Real Property Act 1886 of South Australia) s69 of which reads:

> "The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the original certificate of such land, be absolute and indefeasible, subject only to the following qualifications…"

Rights are created by registration

Rights in *rem* are created by registration. This occurs independently of contractual and other mechanism of both law and equity. Thus a registered proprietor can obtain rights which otherwise do not exist. For example an estate in a property adverse to a defrauded proprietor. Legal title and the nature and extent of equitable rights upon it is dependant upon the fact of registration. This concept of title by registration was described in *Breskvar v Wall*[1] by Barwick C.J.[2] who noted:

> "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. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void."

This radically distinguishes registered estates from those protected by caveats or and, for example, the registration of ownership of cars. In *Mercantile Mutual Life Insurance Co v Gosper*[3] Mahoney JA made this clear when he stated:

> "The effect of the Act, and in particular of s 41, is that title and (as in this case) statutory rights are created by registration notwithstanding that, under the documents presented for registration, they would otherwise not exist: the essence of the Torrens System of title is that registration confers title and does not merely record title otherwise acquired".

The Immediate and Deferred Indefeasibility Controversy

For many years there was doubt as to the degree of protection offered by RPA s 42 (and its equivalents in other Torrens Title jurisdictions) to a registered proprietor of an interest in land. One view, known as "deferred indefeasibility", held that a void instrument could not confer an indefeasible title, and that no indefeasible title would exist until such time as a bona fide purchaser for value became register as proprietor in reliance upon the existing state of the register- in other words, indefeasibility was deferred until an innocent third party was later registered. The other school, known as "immediate indefeasibility", held that indefeasibility was conferred immediately whether or not the instrument that was registered would have otherwise been void, and without the need for any subsequent bona fide purchaser for value.

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[1] (1971) 126 CLR 376
[2] at 385 - 386
[3] (1991) 25 NSWLR 32

The controversy was described in *Schultz v Corwill Properties Pty Limited*[4] by Justice Street:

> "…the deferred indefeasibility approach is based on an inquiry into how the proprietor became registered – this is the approach that treats the register as establishing an indefeasible *root of title*; the immediate indefeasibility approach is based upon an inquiry into how far the Act authorizes correction of or interference with the register – this is the approach that treats the register as establishing *title."*

This dispute was resolved in relation to the New Zealand Torrens legislation in1967, when the Privy Council determined in the New Zealand appeal of *Frazer v Walker*[5] in favour of immediate indefeasibility. *Frazer v Walker* was followed by the High Court in *Breskvar v Wall*[6], which concerned the Queensland Torrens legislation. With slight differences in wording between the Torrens legislation in each of the Australian jurisdictions, there was, however, still limited scope to argue for a different result in other Australian jurisdictions.

In New South Wales, *Mayer v Coe*[7] followed *Frazer v Walker*, and was in turn approved by *Breskvar v Wall*. Since then immediate indefeasibility has been applied, inter alia, in the Court of Appeal decision of *Grgic v ANZ Banking Group Ltd*[8]. In the circumstances, deferred indefeasibility can be safely said to have no application in this State.

The High Court decisions of *Bahr v Nicolay(No 2)*[9] and *Leros Pty Ltd v Terara Pty Ltd*[10] affirms immediate indefeasibility in Western Australia.

In Victoria, the single-judge decision of *Chasfield Pty Ltd v Taranto*[11] held that deferred indefeasibility applied in Victoria. This decision, however, has not been followed, but was rejected in four subsequent single-judge decisions, being *Vassos v State Bank of South Australia*[12], *Eade v Vogiazopoulos*[13], *Rasmussen v Rasmussen*[14], and *Beatty v Australia and New Zealand Banking Group Ltd*[15]. The conclusion is that immediate indefeasibility also applies in Victoria.

With respect to the South Australian legislation, the single-judge Federal Court decision of *Rogers v Resi-Statewide Corporation Ltd*[16] held that deferred indefeasibility applied in South Australia. Two Full Court decisions of the South

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[4] (1969) 90 WN (Pt 1) 529
[5] [1967] 1 AC 569
[6](1971) 126 CLR 376
[7] (1968) 88 WN (Pt 1) (NSW) 549
[8] (1994) 33 NSWLR 202
[9] (1988) 164 CLR 604
[10] (1992) 174 CLR 407
[11] [1991] 1 VR 225
[12] [1993] 2 VR 316
[13] (1993) V Conv R 54-458
[14] [1995] 1 VR 613
[15] [1995] 2 VR 301
[16] (1991) 105 ALR 145

Australian Supreme Court, *Arcadi v Whittem*[17] and *Public Trustee v Paradiso*[18], however have declined to follow *Rogers v Resi-Statewide Corporation Ltd*, and have opted instead for immediate indefeasibility. In the circumstances, the position in South Australia is that immediate indefeasibility applies.

In *S v Tasmania Bank*[19], it was effectively conceded by both parties that immediate indefeasibility also applied under Tasmanian law.

It follows from the above that immediate indefeasibility applies with respect to the Torrens legislation in all Australian states, and the concept of deferred indefeasibility is now of little more than historical importance.

Given immediate indefeasibility upon registration, even a forged instrument attracts indefeasibility notwithstanding the usual classification of a forgery as a nullity, and this is well established by such cases as *Grgic v ANZ Banking Group Ltd*[20]. As a matter of logic, the same result would presumably also apply to an instrument which had not been executed by one or both parties but had somehow been registered notwithstanding that fact.

What Triggers Indefeasibility?

The vital requirement for RPA s 42 to apply is that the dealing that is to create the registered interest in land becomes registered. The dealing must not merely be lodged for registration, but registration itself must occur.

When a dealing in registrable form is lodged for registration the Registrar-General can refuse to register a dealing in certain circumstances set out in RPA s 36. Subsection (1C) allows the Registrar-General to refuse a dealing if it does not comply with any requirement of the RPA or any other Act. Subsection (2) permits refusal if the dealing is executed by means of an unregistered power of attorney.

Subsection (1E) gives the Registrar-General a wider power. That subsection states:

> If the Registrar-General has grounds for believing that a dealing or caveat has not been duly executed or attested, the Registrar-General may require the execution or attestation to be proved in such manner as the Registrar-General thinks fit.

The above provision can come into play where, for example, police have informed the Registrar-General that they suspect that forged dealings have taken place with respect to certain land. In such circumstances, if a dealing was lodged with respect to the land, the Registrar-General would have grounds for believing that the dealing had not been duly executed, and could refuse to register the dealing unless and until the Registrar-General was convinced by further evidence that the dealing was not a forgery.

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[17] (1992) 59 SASR 515
[18] (1995) 64 SASR 387
[19] [1991] Tas R 38
[20] (1994) 33 NSWLR 202

Registration of dealings not in the proper form

In *Frazer v Walker*[21], Lord Wilberforce that:

> "[Torrens Title] requires every instrument, including such as a charge any estate, to be signed by the registered proprietor and attested…The appellant invoked [this] section in support of an argument that the forged mortgage could not be received for registration or validly registered…Their Lordships cannot accept this argument, which would be destructive of the whole system of registration …registration once effected must attract the consequences which the Act attaches to registration whether regular or otherwise."

Australian authority for the proposition that once registered a dealing cannot be attacked on manner and form grounds is found in *Breskvar v Wall*[22] where Barwick C.J. held:

> "Proceedings may of course be brought against the registered proprietor… for the causes described in the quoted sections of the Act [the express exceptions to indefeasibility] or by persons setting up matters depending upon the acts of the registered proprietor himself… Thus except in and for the purpose of such excepted proceedings, the conclusiveness of the certificate of title is definitive of the title of the registered proprietor."

Registration of discharges

Mortgagees should not consider that the concept of indefeasibility is a benefit only to them. It is a two edged sword and the achievement of registration innocent of fraud does not necessarily mean the mortgagee is then safe. There is a possibility, for example in the case of a second mortgagee, that a discharge may be fraudulently registered. This occurred in *Schultz v Corwill Properties Pty Limited*[23] where the registered proprietor of a mortgage lost his in *rem* rights after the intervention of a third party relying on the face of the register when forged discharge was registered. His Honour Justice Street stated:

> "Neither counsel has referred me to any authority touching the argument that the indefeasibility sections operate differently upon the registration of a discharge of a mortgage from the manner in which they operate upon registration of other dealings. … The Privy Council has laid down in *Frazer v Walker*[24] that the register is to be regarded as accurately disclosing the state of the title."

True exceptions to Indefeasibility

Apart from the question of voluntary transfers (which will be dealt with later in this paper), the only true exceptions to indefeasibility are the exceptions expressly stated in RPA s 42. Apart from s 42(1)(a), which provides for a registered interest to be defeated by earlier registered interests, none of the exceptions listed in s 42 are likely to be of much importance in mortgage matters, except for the "fraud" exception.

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[21] [1967] 1 AC 569
[22] (1971) 126 CLR 376
[23](1969) 90 WN (Pt 1) 529
[24] [1967] 1 AC 569

Fraud

It is now well established that the fraud exception to RPA s 42 is a narrow one. In order to defeat the title of a registered proprietor, the fraud must be actual (and not mere equitable) fraud on the part of- or to the knowledge of- the holder of the registered interest claiming indefeasibility or his agents: see *Assets Co Ltd v Mere Rohini*[25]; Bahr *v Nicolay (No 2)*[26]and *Grgic v ANZ Banking Group Ltd*[27].

In *Assets Co Ltd v Mere Rohini* the Privy Council stated at 210:

> …by fraud in these Acts is meant actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud- an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

Fraud by an agent

In the case of fraud by an alleged agent of a registered proprietor, the usual principles of agency law must be applied to determine whether the person was indeed the agent of the proprietor for the purpose of the fraud. If the alleged agent in committing the fraud is not acting within the scope of his actual or apparent authority, then the person is no agent of the registered proprietor. Thus when in *Schultz v Corwill Properties Pty Ltd*[28], the mortgagee's solicitor forged the mortgage himself for his own financial gain and without any knowledge on the part of the mortgagee, he was found not to have been truly acting as the agent of the mortgagee for the purpose of the transaction and thus the mortgagee retained her indefeasible title. Justice Street stated:

> "It is not enough to have a principal, a man who is acting as his agent, and knowledge in that man of the presence of a fraud. There must be the additional circumstance that the agent's knowledge of the fraud is to be imputed to his principal. This approach is necessary to give full recognition to (a) the requirement that there must be a real, as distinct from a hypothetical or

[25] [1905] AC 176
[26](1988) 164 CLR 604
[27] (1994) 33 NSWLR 202
[28] (1969) 90 WN (Pt 1) (NSW) 529

> constructive, involvement in the fraud by the person whose title is to be impeached, and (b) the extension allowed by the Privy Council that the exception of fraud under s.42 can be made out if "knowledge of it is *brought home* to him or his agents."

His Honour also expounded that the rule that a principal's adoption of the benefit of his agents fraud makes him vicariously liable did not apply where the principal is only relying the face of the register[29]

Grgic v ANZ Banking Group Ltd was a forgery case involving a bank mortgage, and is a useful example of the application of indefeasibility in the case of forgery. By an elaborate deception involving the registered owner's son and a Justice of the Peace who not only purported to witness the owner's forged signature on some documents but also came to the bank and impersonated the owner with the aid of the son, forging the owner's signature in a bank officer's presence. The son then appropriated the mortgage advance. The entire transaction was certainly a fraud against the owner of the land, yet was not found to be a fraud within the meaning of RPA s 42. This was because the fraud could not be attributed to the bank, despite the fact the fraud took place before its officer's very eyes and the bank officer attested that the proprietor had signed the mortgage- the attestation was made in the honest belief that it was correct, and was thus in no way fraudulent. The Court followed *Assets Co Ltd v Mere Rohini*, holding that the bank had the benefit of indefeasibility and was therefore able to enforce its mortgage against the equally innocent owner. Without the indefeasibility provision of RPA s 42, of course, the entire transaction would have been void as a nullity, and the bank would have lost its security. The Court held:

> "Despite the passage of some ninety years since… *Assets Company Limited v Mere Rohi*[30]….the position remains that, for the purposes of s42 of the Act, "fraud", comprehends actual fraud, … *on the part of the registered proprietor*"

Knowledge of unregistered instruments is not fraud

Mere knowledge of the existence of an earlier unregistered interest that will be defeated or postponed by the registration of an instrument does not constitute fraud within the meaning of RPA s 42. As the Privy Council stated in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd*[31]:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear… The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest..

Fraud involves moral turpitude

In the Privy Council decision of *Assets Company Limited v Mere Rohi*[32]. Lord Lindley laid down that[33]:

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[29] at 540
[30] Ibid
[31] [1926] AC 101 at 106-7
[32] (1905) AC 176

> "By fraud in these Acts [it] is meant actual fraud - ie., dishonesty of some sort…. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can properly be acted upon.".

The High Court stated in *Wicks v Bennett*[34]:

> "Fraud in these sections means something more than mere disregard of rights of which the person sought to be affected had notice. It imports something in the nature of "personal dishonesty or moral turpitude".

In *Bahr v Nicolay [No 2]*[35] Mason CJ and Dawson J noted[36]:

> "Actual fraud, personal dishonesty or moral turpitude lie at the heart of the two sections and their counterparts."

While Mason CJ and Dawson J quoted with approval[37] Lord Buckmaster in *Waimiha Sawmilling Co. v Waione Timber Co*[38] who held:

> "It is not necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend on its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by knowledge of an unregistered interest."

Fraudulent attestation

An issue which arises frequently is the dishonest attestation of a signature of by a mortgagee or his agent or servant. The question is does this dishonest attestation carried out in ignorance of the main fraud deny the mortgagee the benefit of indefeasibility.

Powell J speaking for the whole Court in *Grgic v Australia and New Zealand Banking Group Ltd*[39] held:

> "It being well-established that a person who presents for registration a document which is forged or has been fraudulently or improperly obtained, is not guilty of "fraud" if he honestly believes it to be a genuine document which can be properly acted upon (*Assets Co Ltd v Mere Roihi (at 210); Mayer v Coe*) and that a less than meticulous practice as to the identification of persons purporting to deal with land registered under the provisions of the Act does not constitute a course of conduct so reckless as to be tantamount to fraud."

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[33] at 210
[34] (1921) 30 CLR 80 at 91
[35] (1988) 164 CLR 604
[36] at 614
[37] at 631-632
[38] [1926] A.C. 101
[39] (1994) 33 NSWLR 202

Nevertheless Powell opened the door to Fraud for the purposes of s42 based on recklessness when he went on to say:

> "Mr Sercombe's attestation could not, in my view, constitute "fraud", unless it could be shown, either that he knew that Mr Sierra was not Mr Grgic Snr, or, that, in signing the attestation, he was acting recklessly without caring whether or not Mr Sierra was Mr Grgic Snr."

In the Victoria case of *Australian Guarantee Corporation Ltd v De Jager*[40] Tadgell J held the opposite view[41]:

> "To lodge an instrument for registration in the knowledge that the attesting witness had not been present at the execution must deprive the lodging party of an honest belief that it is a genuine document on which the Registrar can properly act."

Actual knowledge of prior equitable interests is not fraud

A succession of authorities have held that the mere fact there may be actual knowledge of another parties prior equitable interest does not constitute a fraud. To a large extent this is consistent with encouraging the world to regard the register as definitive and holders of interests to register a mortgage or caveat to preserve their priority.

In *Waimiha Sawmilling Co. v Waione Timber Co*[42] Lord Buckmaster held that*:*

> "The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

In *Mills v Stokman*[43] Kitto J held:

> "but merely to take a transfer with notice or even actual knowledge that its registration will defeat an existing unregistered interest is not fraud."

In *Bahr v Nicolay [No 2]*[44] Mason CJ and Dawson J opined[45] that:

> "There is no fraud on the part of a registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that is registration will defeat such an interest."

In *Bahr v Nicolay [No 2]*[46] the registered proprietor not only had notice of the prior equitable interest but had obtained registration by promising to honour it. This was held to create a personal equity and he was compelled to honour the earlier interest.

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[40] [1984] VR 483
[41] at 498
[42] [1926] A.C. 101
[43] (1967) 116 C.L.R 61 at 78
[44] (1988) 164 CLR 604
[45] at 613
[46] (1988) 164 CLR 604

Constructive Fraud is not sufficient and the concept is inapplicable to Fraud within the meaning of the Real Property Act

In Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd (28 October 1997) Victorian Court of appeal held that:

> "[It would be wrong that Fraud within the meaning of the Torrens System] should be given a broad application so as to extend to cases in which a reasonable, honest man would have had knowledge of circumstances telling of the wrongful disposition of trust property ….[This would] … depend, to a large extent, upon an analysis of authorities which are concerned to identify the level of knowledge necessary to constitute a recipient of trust property accountable, as constructive trustee, to the beneficiaries of that property (*Re Montagu's Settlement Trusts* [1987] 1 Ch. 264; *Westpac Bank v. Savin* [1985] 2 N.Z.L.R. 41; *Baden v. Soci,t, G,n,rale* [1993] 1 W.L.R. 509 at 575-6). However none of these authorities was concerned with the level of knowledge or standard of conduct necessary to raise a personal equity in a claimant sufficient to defeat the indefeasibility of a registered interest under the Torrens system of registration. ….
>
> It is, I concede, logically attractive to argue that legitimate equitable claims should not be emasculated by setting the threshold level of conduct, short of statutory fraud, too high; on the other hand it is, in my view, an argument of equally compelling force that the threshold should not be set so low as to defeat the concept of indefeasibility which is entrenched in and central to the Torrens system of registration of interests in land; a system which itself recognizes that the Register is paramount and that, save in exceptional circumstances, those who have suffered loss, without any fault on their own part, will have to content themselves with compensation out of the fund made available for the purpose. If, therefore, the registration of a mortgage over trust property is to be regarded as a "knowing receipt of trust property", the balancing of the competing philosophies requires, in my view, that the registration has been achieved as a result of conduct by the mortgagee amounting to a want of probity before its registered interest can be defeated.
>
> It is sufficient for me to say that I agree with Tadgell, J.A. that it is not possible, consistently with the principles of indefeasibility, to treat the appellant as having "knowingly received trust property" where the registration of the mortgage was honestly obtained.

The consequences of Fraud

A finding of actual fraud for the purposes of s42 is not a remedy founded in the act. Rather it is an exception allowing the subsisting equitable remedies to survive. Thus general law remedies relating to *non est factum* and the like will be applied. Where such equitable remedies co-exist with other remedies, particularly those owing to third parties the defrauded parties equity will be subject to competition and in most events the equity which arose sooner in time will prevail.

In *Breskvar v Wall*[47] at 387 Barwick CJ expounded this when he stated:

> "The …registration was procured by the first respondent by his own actual fraud. Consequently … the first respondent did hold his estate subject to the rights of the appellants. … Such a claim is an equitable claim enforceable by reason of the principles of the Court of Chancery…But the purchase by the third respondent bona fide for value and without notice intervened before that equitable right of the appellants was fulfilled."

The innocent third party prevailed in Breskvar (even though it was prior) because the holder of the competing equity had armed the fraudster with the means of deceiving the third party and so the third part prevailed.

The principle that parties who are victims of frauds but who allow themselves to be so by arming the fraudster is based in equity and operates on normally once the fraud exception to indefeasibility allows it.

In *Garafano v Reliance Finance Corporation Ltd*[48] Meagher J, reflected on the fact the mortgagor knew her property was being mortgaged and accepted it even though her signature was forged by her husband, stating:

> "Even if she did not actually authorize him, by handing him or permitting him to obtain, the certificate of title relating to the property, she is estopped from denying that she authorized him to execute the mortgage."

Volunteers

In Victoria, the position was laid down in *King v Smail*[49] where it was held[50]:

> "The protection given by [the Act] to a registered proprietor, ie a legal owner of land against consequences of notice actual or constructive of trusts or equities affecting his transferor has point where the legal owner is a purchaser for value….On the other hand, to confer on a mere volunteer immunity from the consequences of notice would be illusory, for as already stated volunteer was, on well settled rules of equity, subject to equities which affected his predecessor in title whether with or without notice of such equities."

This was followed in *Rasmussen v Rasmussen*[51] and *Valoutin v Furst*[52]. Thus the position in Victoria is that on the proper construction of the Victorian Torrens legislation that if an interest in land is transferred for no consideration, registration of that interest does not confer indefeasibility but provided an interest no better that that of the transferor. Thus in Victoria, indefeasibility is not granted to a volunteer. In that State, this could be said to be a true exception to indefeasibility.

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[47] (1971) 126 CLR 376
[48] (1992) NSW Conv R 55-640
[49] (1958) VR 273
[50] Adam J at 277-278
[51] [1995] 1 VR 613
[52] (1998) 154 ALR 119

In New South Wales, the case of *Gibbs v Messer*[53] provided authority for the Victorian position when it was held[54]:

> "The object is to save persons *dealing* with registered proprietors from the trouble of going behind the register …That end is accomplished by providing that everyone who purchases, bona fide and for value, from the registered proprietor and enters his deed of transfer on the register, shall thereby acquire an indefeasible right."

However, the New South Wales Court of Appeal in *Bogdanovic v Koteff*[55] declined to follow *King v Smail*, and found that indefeasibility existed regardless of the existence of consideration pronouncing:

> "The broad proposition arrived at by Adam J. in *King*, that a registered proprietor, being a mere volunteer does not obtain a title free from prior equities ….[is no longer good law]."

That this is the law in New South Wales was confirmed by Young J in *JA Westaway & Son Pty Ltd v Registrar-General*[56].

It follows that mortgagees of land in New South Wales are equally protected by RPA s 42 regardless of whether they provided consideration for the grant of the mortgage (save only for the very limited exception contained in s 42 (1)(c) relating to wrongly recorded boundaries). Under this interpretation a person may thus accept additional security, by way of mortgage over New South Wales land, for a pre-existing loan without needing to loan further monies or otherwise provide consideration for the additional security, and still enjoy an indefeasible title.

It should be noted that High Court authority exists which it could be argued reopens the issue in New South Wales. In *Bahr v Nicolay [No 2]*[57] Wilson and Toohey JJ quoted the above passage from *Gibbs v Messer*[58] (which uses the word bona fide and for value) opining*;*

> "That statement still stands as an exposition of the nature and purpose of the Torrens system."

In South Australia section 69 confers indefeasibility on a registered proprietors of estates and interests for value. Thus the issue is settled in that jurisdiction by statute.

In Personam Rights

There are other methods outside the RPA (and similar Torrens legislation in other jurisdictions) by which the proprietor of a registered interest in land can be compelled to give up that interest. This is done by invoking a personal right against the registered

[53] (1891) AC 248
[54] Adam J at 277-278
[55] (1988) 12 NSWLR 472
[56] (1996) 7 BPR 14,773
[57] (1988) 164 CLR 604
[58] (1891) AC 248

proprietor, either arising under common law or equitable principles, or under another statute. An action in personam- a personal suit brought against the proprietor of a registered interest to prevent the proprietor from exercising its statutory rights arising from the Real Property Act by reason of wrongful conduct on the part of the proprietor and/or its agents- is thus often thought of as an exception to indefeasibility, although as will be explained below this statement is not strictly correct.

In *Mercantile Mutual v Gospher*[59] the President of the New South Wales Court of Appeal observed:

> "The casebooks are full of instruction that the concept of indefeasibility of registered title must be qualified by the personal obligations which the registered proprietor of an interest … is bound to respect. That registered proprietor is " … exposed to claims *in personam*."

It is not strictly an exception to indefeasibility but rather a circumnavigation of it. The in personam right being parallel to the rights created by the register and not disturbing them in the same way equitable rights co-exist with legal rights. Barwick CJ in *Breskvar v Wall*[60] noted:

> "It is really no impairment of the conclusiveness of the register that the proprietor remains liable to one of the excepted actions any more than his liability for 'personal equities' derogates from that conclusiveness."

This theme was echoed in *Bahr v Nicolay [No 2]* [61]:

> "This vulnerability on the part of the registered proprietor is not inconsistent with the concept of indefeasibility. The certificate of title is conclusive. If amended by order of a court it is, as Barwick CJ pointed out [in Breskvar v Wall], 'conclusive of the new particulars it contains'".

Personal Equities: In Personam Rights at Common Law or Equity

Although it is possible for an in personam right to arise at law, the great majority of cases involving such rights have involved equitable relief. This has resulted in the expression "personal equity" coming to have an equivalent meaning to "in personam right" (at least when the right is not derived from a statute), to the extent that one may now use the expressions interchangeably when speaking of a non-statutory right.

In *Frazer v Walker*[62] Lord Wilberforce drew the distinction noting:

> "[T]heir Lordships have accepted the general principle that registration under confers upon the registered proprietor a title ..which … is…immune from adverse claims, other than those specifically accepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring

[59] *Mercantile Mutual v Gospher* (1991) 25 NSWLR 32 per Kirby P at 36
[60] (1971) 126 CLR 376
[61] (1988) 164 CLR 604
[62] [1967] 1 AC 569 at 585

> against a registered proprietor a claim in personam, founded in law or equity[63]."

Although often seen as an exception to indefeasibility, this is not technically speaking correct. RPA s 42 deals with right *in rem*, being property rights good against the world in general, whilst a personal equity is a right in personam, being a purely personal right of action of one individual against another. A right in personam, however, impacts on a right in rem when the personal right of action enables a person to compel a proprietor to relinquish its property rights. So long as the registered proprietor remains registered it has an indefeasible title, but if the proprietor loses a personal action against it then the proprietor can be compelled to deregister its interest and thereby forfeit protection of RPA s 42. As Kirby, P stated in the well-known personal equity case of *Mercantile Mutual Life Insurance Co Ltd v Gosper*[64] in the course of explaining why personal equities do not derogate from the RPA system of registered title (p 36):

> "No one in these proceedings contests the state of the land title register. All that the respondent seeks, no equities of innocent third parties having intervened on the faith of the register, is that the relevant folio should be brought into conformity with the personal equities which exist between her and the appellant".

In *Mayer v Coe*[65] Street J held that if the mortgagee is:

> "subject to a personal obligation [he may be] …bound in personam to deal with his registered title in some particular manner[66]".

In *Breskvar v Wall*[67] Barwick CJ stated:

> "Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon acts of the registered proprietor himself."

Examples of In Personam Rights / Personal Equities

There can be no exhaustive list of all the instances in which a personal equity/ in personam right exists, as such an equity or right exists whenever a court is prepared to grant relief at the suit of a person claiming a right in accordance with a known legal or equitable cause of action enforceable against the registered proprietor: see *Mercantile Mutual Life Insurance Co Ltd v Gosper*[68]; *Grgic v ANZ Banking Group Ltd*[69]. In consequence, all that can be done is to give some examples of situations in which an equity or right has been found in the past.

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[63] cited with approval by Wilson and Toohey JJ in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 637
[64] (1991) 25 NSWLR 32
[65] (1968) 88 W.N. (Pt. 1) (N.S.W)
[66] cited with approval by Kirby P in *Mercantile Mututal Life Insurance Co v Gosper* (1991) 25 NSWLR 32
[67] (1971) 126 CLR 376
[68] (1991) 25 NSWLR 32
[69] (1994) 33 NSWLR 202

The categories given below by no means exhaust the situations in which a personal equity has been held to exist, although they include those most commonly arising with respect to mortgages.

A bare forgery does establish a personal equity

In Garafano v Reliance Finance Corporation Ltd Mahoney JA stated[70], that:

> "It [is] …accepted … that … the "personal" equity necessary for such relief does not arise from the mere fact of forgery of the mortgage and that something more is needed."

In Vassos v State Bank of South Australia[71] Hayne J noted:

> "The bare fact that a party has not assented to the transaction recorded in an instrument registered under Torrens System legislation does not, in my opinion, give that person a right enforceable by in personam action to have the transaction reversed. For my part I consider it clear that more than the bare fact of forgery (and thus the absence of assent) must be shown to found any in personam action of the kind spoken of in Frazer v Walker and subsequent cases ….I do not consider that the plaintiffs have any in personam right against the bank; all that they have shown is the mere fact of forgery of the instrument."

This was approved of by Gleeson CJ in *Story v Advance Bank Australia Ltd*[72] who held:

> "Unless a number of the leading cases concerning the registration of forged mortgages were wrongly decided it [a personal equity] cannot arise out of the bare fact of the forgery."

Amadio Unconscionability

One instance in which a personal equity will arise is when the "doctrine of unconscionability" applies. As much of equity involves dealing with unconscionability of one variety or another, the "doctrine of unconscionability" with which I am now dealing is often referred to as "Amadio unconscionability", "the Amadio doctrine" or similar, after the case of *Commercial Bank of Australia Ltd v Amadio*[73] which popularized the doctrine.

The Amadio doctrine is essentially that equity may set aside a transaction against a respondent at the behest of an applicant if each of the following three criteria is met:

(1) To the knowledge of the respondent, the applicant is at a special disadvantage with respect to the respondent;

(2) The respondent unconscientiously exploits the applicant's disadvantage; and

[70] At 37
[71] (1992) V ConvR 54-443
[72] (1993) 31 NSWLR 722
[73] (1983) 151 CLR 447

(3) As a result, the applicant is unable to make a worthwhile judgement as to what is in the applicant's best interest.

There are a number of factors that may lead a court to conclude that a person is at a "special disadvantage", but this list is not exhaustive and may be added to judicially at will. Factors recognised in the past include language difficulties, sickness of mind or body, age, financial need, lack of knowledge and/or experience, and emotional dependency.

Yerkey v Jones Unconscionability

In *Yerkey v Jones*[74] the High Court found that if a lender entrusts the husband of a proposed guarantor- the husband himself being the borrower whose loan is to be guaranteed- to arrange for his wife to supply a guarantee, and then the husband obtains the guarantee by undue influence or by failing to properly inform his wife of the nature of the guarantee, then if the lender has not taken adequate steps to ensure that the wife is independently advised then if the wife was a volunteer receiving no benefit from her guarantee she will have an equity against the lender to set the guarantee aside

After a determination by the New South Wales Court of Appeal in *National Australia Bank Ltd v Garcia*[75] that the *Yerkey v Jones* principle had now ceased to exist or had been subsumed in Amadio unconscionability, the matter came on appeal before the High Court in *Garcia v National Australia Bank Ltd*[76]. The majority of the High Court then affirmed that *Yerkey v Jones* still remained good law, and that the doctrine therein expounded was a type of unconscionability that went beyond Amadio. Also, the Court suggested that the doctrine might apply to other relationships other than wives giving guarantees to their husbands.

In *Elkofairi v Permanent Trustee Co Ltd* (2002) BC200207766, the New South Wales Court of Appeal held that the *Yerkey v Jones* principle only applies in cases in which the lender either has "express notice or any other information sufficient to put it on notice" that the guarantor is (at least in part) a volunteer.

The existence of the *Yerkey v Jones* doctrine underlines the importance of a mortgagee ensuring that a mortgagor who grants a mortgage to secure a guarantee of a loan has been properly independently advised. If the mortgagee merely entrusts the borrower with the task of explaining the transaction to the wife without ensuring that this has been properly done and without the exertion of undue influence, then there is a risk that the mortgage may in consequence be set aside.

Unauthorised Use of a Certificate of Title

In *Mercantile Mutual Life Insurance Co Ltd v Gosper*[77], Mercantile Mutual held a mortgagor's certificate of title as mortgagee under a valid mortgage. A forged variation of mortgage was innocently registered by Mercantile Mutual with the aid of the certificate of title. It was held that Mercantile Mutual owed obligations to the

[74] (1939) 63 CLR 649
[75] (1996) 39 NSWLR 577
[76] (1998) 194 CLR 395
[77] (1991) 25 NSWLR 32

mortgagor arising from its possession of the certificate of title under the original mortgage not to use that certificate of title without the authorization of the mortgagor. Although Mercantile Mutual believed that the variation was authorised by the mortgagor, it was found that it had breached its obligations to the mortgagor by using the certificate of title to register the variation as the use was not in fact authorised. In consequence, a personal equity was found to exist enabling the mortgagor to compel Mercantile Mutual to relinquish the benefit that had been obtained in breach of its obligations, being the registration of the forged variation.

Mahoney JA held:

> "Mercantile Mutual Life Insurance Co then produced the certificate of title to the Registrar-General for the purpose of procuring that the forged variation of mortgage be registered….But the company had no authority to produce or otherwise use the certificate of title for such a purpose…The proper conclusion is, in my opinion, that the company used the certificate of title in breach of its obligations to Mrs Gospher and that its use of it in that way was a necessary step in securing the registration of the forged variation of mortgage…In my opinion where the registration of a forged instrument has been produced by such a breach by the new owner, that is sufficient to create, in the relevant sense, a "personal equity" against the new owner."

It should be noted that there is no requirement for moral turpitude for a personal equity to be found and the in personam rights may arise as a result of negligence, poor procedures or mistake by the mortgagee. However something more than mere negligence is required:

Vassos v State Bank of South Australia[78] Hayn J held:

> "In the present case …it may well be that the bank did not act without neglect but there is in my view no material which would show that the bank acted unconscionably….Even if by making reasonable enquires the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable."

Mistake

A mistake common to both parties reflected in a registered instrument that gives rise to an in personam right to rectify that instrument notwithstanding its registration: *Lukacs v Wood*[79]; *Oh Hiam v Tham Kong*[80].

He who seeks equity must do equity

In *Garafano v Reliance Finance Corporation Ltd*[81] The Plaintiff sought to set aside forged mortgages based on *personal equities*. The court noted that the forged mortgage was used to pay out existing mortgages which she had signed Mahoney JA held:

[78] (1992) V ConvR 54-443
[79] (1978) 19 SASR 520
[80] (1980) 2 BPR 9451
[81] (1992) NSW Conv R 55-640

> "It appears that… some at least of the loans made by the company were used for the benefit of Mrs Garofano and her son and that they were and/or are aware of this, they seek the relief now claimed on the basis that they are not liable to repay any relevant part of them. In the circumstances this alone is, I think, sufficient to defeat their claim."

Meagher J agreed noting[82]:

> "I …accept …that no equitable relief could be ordered in favour of the [mortgagors] unless they were prepared to do equity…which would involve accepting that an allowance should be made, together with interest, in favour of the respondent. Instead, they insisted on claiming the benefit of the [entire] loan and simultaneously denying its validity."

Statutory Rights

To actions "founded in law and equity" can now be added various statutory actions, as legislation such as the Contracts Review Act, the Consumer Credit Code, the Trade Practices Act and the Fair Trading Act have created what are in effect statutory in personam rights to set aside or vary interests in land.

Contracts Review Act

The passing of the Contracts Review Act 1980 (NSW) created a statutory cause of action to set vary or set aside unjust contracts. There are, however, limits to the Act's application. Under s 6(1) of the Act, neither the Crown, a public or local authority, nor a corporation (other than a strata corporation or a corporation set up to provide "company title" to land) can apply for relief under the Act. Under s 6(2), a person cannot be granted relief under the Act in relation to a contract "so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by him or proposed to be carried on by him" other than a farming undertaking in New South Wales. Unlike the case with business purpose declarations under the Consumer Credit Code, however, there is no provision which deems a business purpose if an appropriate "business purposes declaration" is executed, so the execution by a borrower of such a declaration is of no assistance for the purpose of avoiding the Contracts Review Act.

The key provision of the Contracts Review Act is s 7(1), which states:

> Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:-
>
> (a) it may decide to refuse to enforce any or all of the provisions of the contract;
>
> (b) it may make an order declaring the contract void, in whole or in part;

[82] at 39

(c) it may make an order varying, in whole or in part, any provision of the contract;

(d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that-
  (i) varies, or has the effect of varying, the provisions of the land instrument; or
  (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

A "land instrument" includes any dealing under the RPA, and thus the Court can order a mortgagee to discharge its mortgage. By virtue of s 7(2) of the Act, orders varying or voiding a contract can be made to take effect from the making of the contract or such other date as the Court sees fit.

S 9 of the Contracts Review Act sets out a long list of matters to be taken into account by the Court in determining an application under the Act, but this list is not exhaustive and as "the Court shall have regard to the public interest and to all the circumstances of the case", any evidence relating to the injustice of a contract is relevant to an application under the Act.

S 19(1) of the Contracts Review Act prevents orders being made under s 7(1)(b) and (c) of the Act in the case of a contract that is a land instrument registered under the Real Property Act. There is no prohibition in case of registration of orders under s 7 (1)(a) or (d), however, and thus registration is no bar to effective relief under the Act.

The operation of the Contracts Review Act has great similarity to the operation of Amadio unconscionability. The main differences are that an applicant under the Contract Review Act does not have to satisfy each of the three tests for Amadio unconscionability, but simply that the contract was "unjust in the circumstances relating to the contract at the time it was made". As a Contracts Review Act claim is easier to make out than an Amadio claim, the Act has somewhat eclipsed Amadio in relation to cases coming under the Act, as if a Contract Review Act claim fails in such a case then an Amadio claim would also almost inevitably fail. The Contracts Review Act has therefore had the tendency to reduce the use of Amadio to cases which cannot be brought under the Act due to there being a corporate applicant or a contract for business purposes (although sometimes an Amadio claim is made in a Contracts Review Act case simply for more abundant caution).

Contracts Review Act: The Intervention of a Transferee

Although there seems never to have been any dispute that an order under the Contracts Review Act may be made against a mortgagee which became registered in unjust circumstances so as to deprive that mortgagee of its interest notwithstanding RPA s 42, the effect of that section is more contentious in cases in which a mortgage has been transferred to a new registered proprietor some time after the unjust transaction complained of by the Contracts Review Act applicant.

In *Albury v Gulror Pty Ltd*[83], the protection of RPA s 42 was unsuccessfully invoked as protection against Contracts Review Act relief by transferees of a mortgage. Needham AJ stated "In so far as the Real Property Act is inconsistent with the Contracts Review Act, the latter must prevail". His Honour also observed that in the case before him the transferees took their transfer with knowledge of the wrongdoing of the original mortgagees.

In *Lander v Trigger*[84], Newman J found that RPA s 42 was available to a transferee of a mortgage to defeat a Contracts Review Act claim. His Honour appeared to be of the view that s 42 would protect any transferee, although noted that the transferee in the case before him had no knowledge of the original mortgagee's conduct. The decision contains no real analysis of the point in question, and does not cite *Albury v Gulror Pty Ltd.*

Fraser v Power[85] represents the most detailed analysis of the competition between the Contracts Review Act and RPA s 42, although it fails to cite either of the two previously mentioned decisions. In that case guarantors had been sued by the mortgagee and had paid out the loan, and then according to their right of subrogation the guarantors had obtained an assignment of the mortgage from the mortgagee and then, after the transfer of the mortgage had been registered, the guarantors sought to enforce the mortgage against the mortgagor so as to recover the monies they had paid to the original mortgagee. The initial mortgage transaction was found to be unjust in its circumstances within the meaning of the Contracts Review Act, but the guarantors claimed the benefit of RPA s 42.

Simos J rejected the indefeasibility claim. His Honour first commented on the manner in which the Contracts Review Act and RPA s 42 may be reconciled (at 137):

> In my opinion, once a plaintiff has made out the necessary case under the general law relating to unconscionability and/or under the contracts Review Act 1980, entitling him or her to have the relevant transaction set aside, the Court is entitled to mould its relief so as to achieve a just result, even if the effect of its order is to deprive the wrongdoer of the benefit of the indefeasibility provisions of the Real Property Act 1900. The Court is, in my opinion, entitled to do this, not by way of overriding the statute, but by making the appropriate order against the wrongdoer personally, for example by ordering the wrongdoer, in a case such as the present case, to execute a discharge of the subject mortgage. An, in my opinion, as stated above, such an order may be made regardless of whether or not the relevant facts bring the case within the personal equities exception to indefeasibility of title under the Real Property Act 1900.

His Honour then accorded no more protection to the guarantors/transferees than to the original mortgagee on the basis that, having taken the mortgage pursuant to the doctrine of subrogation, the mortgagor was entitled to raise any defence against the transferees that would have been available against the original mortgagee. His Honour also found that that the transferees did not take the transfer for value, but rather due to

[83] (1992) BC9201850
[84] (1999) BC9908362
[85] (2000) BC200008494

the "accidental" circumstance of being sued by the original mortgagee. The transferee thus lost the benefit of their registered mortgage.

Robinson v Watts[86], was another transfer of mortgage case, and was once again decided in apparent ignorance of previous authority on the matter (the judge in question, Hunter J, stating "there appears to be no authority directly in point"). In this case, the transferee successfully invoked RPA s 42. His Honour stated at [74]:

> In my view, the estate or interest of Robinson under the transfer of mortgage from Smits, taken without notice of any of the circumstances attaching to the granting of the mortgage, by reason of the operation of s 42 of the RP Act, cannot be cut down by resort to s 7 of the Act, and in particular s 7(1)(a) or (d).

Hunter J had before him another mortgage transfer case in *Sialepsis v Westpac Banking Group*[87]. In that case the transferee took for valuable consideration and no case was made out against the transferee with respect to any unjust conduct. His Honour remarked that as no authority has been cited to him to the effect that the Contracts Review Act overrode the indefeasibility provisions of the Real Property Act, he had no reason to depart from his views expressed in *Robinson v Watts.*

With conflicting statements as to the priorities of the Contracts Review Act and RPA s 42, and with no decision citing any previous contrary authority, the law on this point might be thought to be in some confusion. I consider, however, that common principles do emerge from these decisions, being as follows:

1. Indefeasibility is of no assistance to the original mortgagee who took the mortgage in unjust circumstances;

2. A transferee who took a registered transfer of the mortgage without notice of the unjust circumstances can rely on the indefeasibility conferred by RPA s 42 regardless of whether the mortgagor would have been able to set aside the underlying transaction under the Contracts Review Act as against the original mortgagee;

3. A transferee who took a transfer with notice of the unjust circumstances is vulnerable to an order pursuant to the Contracts Review Act notwithstanding RPA s 42; and

4. A registered transferee taking not for value but by reason of the doctrine of subrogation is in no better position to resist an order under the Contracts Review Act than the original mortgagee.

The situation of a registered transferee taking without notice but not for value in a case other than subrogation is not clear from the above authorities. Consistently with the position in New South Wales previously analysed where a volunteer registered proprietor has been found to be in as good a position as a registered proprietor taking

[86] (2000) 10 BPR 18,319
[87] (2001) BC200101308

for value, however, one would assume that giving consideration for the transfer would not be a relevant matter and that a gratuitous transfer to an unsuspecting third party is sufficient (except where the doctrine of subrogation applies) to defeat any Contracts Review Act claim.

Consumer Credit Code

For mortgages which come under the Consumer Credit Code ("the Code"), there are further dangers to the mortgagee seeking to assert an indefeasible title.

S 66 of the Code, which does not apply to loans above $125,000, allows a "debtor who is unable reasonably, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations" to a lender to apply to the lender to change the terms of the contract with the lender by extending the period of the loan and/or postponing certain payments. If the lender refuses the debtor's application, the debtor may apply to the Supreme Court or the Commercial Tribunal under s 68 of the Code to change the terms of the contract with the lender, and the Court or Tribunal can stay any enforcement proceedings until this application has been determined.

S 70 of the Code gives the power to the Court or Tribunal "to reopen unjust transactions". This section closely mirrors the regime under the Contracts Review Act, and comments made in relation to that that Act should apply by analogy here. S 71 sets out the powers of the Court or Tribunal when it reopens a transaction, which include power to "order that the mortgagee takes such steps as are necessary to discharge the mortgage".

S 72 of the Code gives the Court or Tribunal power "to annul or reduce" an establishment fee, early termination fee, prepayment fee, or a change to the interest rate. In each case the power can only be used if the fee or charge is "unconscionable". In relation to interest rates, the section does not allow variation of the original interest rate fixed by an agreement, but rather permits the Court or Tribunal to review any subsequent change to that rate.

Trade Practices Act

S 87 of the Trade Practices Act 1974 (Cth) provides wide remedial powers to a court hearing a case in which a person has suffered or is likely loss as a result of conduct of a person which breaches Pt IV, Pt IVA, Pt IVB or Pt V of the Act. These powers include the powers to declare a contract void ab initio; to vary a contract as the Court sees fit; and to refuse to enforce provisions of a contract. S 87(2)(g) further gives the Court the power to make:

> an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:
>
> (i) varies, or has the effect of varying, the first-mentioned instrument; or
> (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation of effect of the first-mentioned instrument.

It can be seen that the above power is very similar to that in s 7(1)(d) of the Contracts Review Act.

Such remedies are most likely to be sought in relation to mortgages through the contravention of one of the following sections of the Trade Practices Act:

- S 51AA, which forbids a corporation from engaging in unconscionable conduct contrary to the unwritten law of a State or Territory. "Unwritten law" refers here to common law and equity, so the section effectively allows orders under the Trade Practices Act to be made in addition to any other orders that might be made in common law or in equity. As the remedies available in equity are already extensive, this section is of little assistance to a mortgagor.

- S 51AB, which states in sub-section (1) that:

  > A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

  The section is not dissimilar to s 7 of the Contracts Review Act, although of more limited scope as it requires supply of goods or services (however a commercial lender would still be caught by the section). It is also confined to "goods or services of a kind normally acquired for personal, domestic or household use or consumption". Sub-section (2) sets out a non-exhaustive list of matters to be taken into account in determining unconscionability, and is reminiscent of s 9 of the Contracts Review Act.

- S 51AC, which is a very similar to s 51AB except that it applies to the supply or acquisition of goods or services in business transactions to the value of up to $3,000,000.

- S 52, the most commonly invoked section of the Act, which prohibits misleading or deceptive conduct. It is important to note that there can be a breach of s 52 regardless of whether there is any intent to deceive, which makes the section of much broader applicability in commercial transactions than doctrines which require unconscionable conduct by a party as a precondition of relief.

In *Gregg v Tasmanian Trustees Ltd*[88], an action was brought in the Federal Court by a mortgagor claiming Amadio unconscionability and making claims under s 51AA and s 52 of the Trade Practices Act. Amadio unconscionability was found to have occurred, and hence there was also a breach of s 51AA. There was also a finding of breach of s 52 because the mortgagee's solicitor presented to the mortgagors a mortgage document to execute, which document contained terms which were materially different to those previously agreed, and where the solicitor omitted to advise the mortgagors of the changes. It was held that relief was available both in equity and under the Trade Practices Act, and the mortgage was set aside insofar as it bound the plaintiff's interest in the security property.

[88] (1997) 73 FCR 91

Fair Trading Act

S 72 of the Fair Trading Act 1987 (NSW) is a mirror of s 87 of the Trade Practices Act. S 42 of the Fair Trading Act is almost identical to s 52 of the Trade Practices Act, and s 43 of the former Act is similar to s 51AB of the latter. The main purpose in re-enacting these provisions in State legislation was to catch natural persons that might otherwise fall outside the provisions of the Trade practices Act.

What is Indefeasible?

Assuming that none of the true exceptions to RPA s 42 apply, assuming there are no in personam rights that prevent a registered proprietor relying on the its registered title, and further assuming that no statute is successfully invoked to deprive the proprietor of the benefit of its registered interest, the proprietor may rely on its "indefeasible" title. In the case of a registered mortgagee with an indefeasible title, the mortgagee can then assert its rights as mortgagee against the whole world- including the mortgagor- even if the mortgage is a forgery or would otherwise be unenforceable as a matter of contract law as against the mortgagor. In such circumstances, it is important to know exactly what rights RPA s 42 has rendered "indefeasible", as without the protection of indefeasibility the rights would be lost.

This question is addressed in *PT Ltd v Maradona Pty Ltd*[89], a case in which a mortgage was found to be indefeasible pursuant to RPA s 42 notwithstanding the availability of a *non est factum* defence. Giles, J, at p 679 states:

> "Registration does not validate all the terms of the instrument which is registered. It validates those which delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietor".

His Honour in determining the essential aspects of a mortgage, then quotes RPA s 52(1), which refers to the fact that transfer of a mortgage shall also convey the right to sue "to recover any debt, sum of money, annuity, or damages thereunder" plus interest thereon, and continues:

> "Clearly enough this provision would catch the debt due from a mortgagor who was also the principal debtor, and the mortgagee's cause of action to recover the debt would be included in the rights rendered secure by registration. That would be necessary to assure to the mortgagee his estate or interest in the land".

His Honour then looked at the mortgage in the case before him, and found that it secured "the Moneys Hereby Secured as hereinafter defined", and that definition essentially referred to all money owing to the mortgagee by the mortgagor or any other person with whom she was jointly or severally liable. The only monies that were potentially owing to the mortgagee by the mortgagor were monies pursuant to a separate guarantee that was unenforceable due to non est factum. He noted:

[89] (1992) 25 NSWLR 643

> "That which is attained by registration is, in the words of s42, an estate or interest in the land. Registration does not validate all the terms and conditions of the instrument which is registered. It validates those which delimit or quantify the estate or interest."

With the failure of the guarantee, there were no monies due to the mortgagee, and therefore His Honour found that the indefeasible mortgage, according to a proper construction of its terms, secured no monies.

Another case in which an indefeasible mortgage, on its proper construction, failed to secure any monies is *Tsan v Electronic Resources Aust Pty Ltd*[90],. The problem in that case was not forgery or non est factum, but the failure of the person drafting the mortgage to specify within the mortgage what the mortgage was supposed to secure. Annexure "A" to the mortgage was only a single paragraph long and stated "The Mortgagee acknowledges the loan of $200,000.00 (two hundred thousand dollars) subject to the Terms and Conditions of the Agreement between" the mortgagee and a third party borrower (to which agreement the mortgagors were not parties). As neither this paragraph or the incorporated Memorandum Q86000 expressly provided that the mortgagors were guaranteeing the loan for $200,000 or that the mortgage was securing that guarantee (and indeed there was also no separate guarantee by the mortgagors), then the mortgagors were entitled to a discharge of the mortgage without the payment of any monies to the mortgagee. In coming to this conclusion, Hodgson J accepted that the contra proferentum rule and the principle that guarantees should be construed strictissimi juris meant that in the case of ambiguity the mortgage was to be construed against the mortgagee's interests.

It follows from the above that a prospective mortgagee should ensure that the proposed mortgage document is drafted so that it is entirely unambiguous from a reading of the mortgage alone as to what obligations the mortgagor owes the mortgagee (being the mortgagor's personal covenant) and that the mortgage secures those obligations. If there is any ambiguity, a court is likely to interpret the mortgage in favour of the mortgagor. *PT v Maradona* shows, in particular, the vulnerability of an "all monies" style of mortgage, as such a mortgage is does not state what monies are owed but instead relies on the enforceability of rights outside the mortgage document to determine what money is secured. The best course is to ensure that the mortgage itself functions as the guarantee or deed of loan, and sets out the mortgagors' obligations expressly rather than relying on a separate document which may itself be set aside.

Defective Mortgages and Rectification

As *Tsan v Electronic Resources Aust Pty Ltd* and *PT v Maradona* demonstrate, if a mortgage is drafted so as not to secure any obligation owed by mortgagor to mortgagee, the mortgage can be set aside. This raises the question as to what extent defective mortgages may be saved by an application for rectification.

Rectification is an equitable remedy by which a document is altered by court order to make it accord with the common intention of the parties thereto at the time of its execution. Normally it is necessary to prove a mutual mistake of both parties in order

[90] 24 July 1997, Hodgson J, Unreported

to obtain rectification, although an innocent party may seek rectification for unilateral mistake of that party if that mistake was induced by the fraud or knowing encouragement of the other party.

There was no claim for rectification in *Tsan v Electronic Resources Aust Pty Ltd*. If there had been such a claim, there is a possibility the mortgagee might have been successful. There was a difficulty for the mortgagee, however, in that one of the two mortgagors claimed a lack of understanding of the transaction- and, indeed, sought relief under the Contracts Review Act. To obtain rectification, the mortgagee would have had to demonstrate that mortgagee and both mortgagors all intended the mortgage to include a guarantee and secure the obligations under that guarantee, but that through mutual error this was not included in the mortgage document. If, however, the mortgagor had made out her contention that she had no understanding of the transaction, then the mortgagee would have failed in showing a common intention of all parties and the rectification suit would have failed.

In *PT v Maradona*, the successful non est factum defence precluded any possibility of using rectification to solve the difficulty encountered with the wording of the mortgage in that case. As the mortgagor did not intend to enter into the transaction at all, clearly no common intention of all parties could have been demonstrated by the mortgagee. The same problem will obviously be encountered in cases of a forged mortgage.

Even in cases where a common intention can be demonstrated, as rectification is an equitable remedy it is discretionary. If a mortgagee seeking rectification has acted wrongfully in the transaction and thus has "unclean hands", this would constitute an equitable defence to rectification and would cause the suit to fail.

Rectification is thus of very limited assistance to a mortgagee to save a defective transaction. It is really only applicable in cases where it is clear from extrinsic evidence that both parties (not just the mortgagee) understood the mortgage to contain certain terms, but due to a drafting error they were not included. An example of a situation in which rectification would be of assistance is where the term of a loan and/or the applicable interest rate had been agreed prior to settlement of the loan, but a clerical error had resulted in the same not being correctly filled in on the form of mortgage executed by the parties and registered.

Appendix

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
PROFESSIONAL NEGLIGENCE LIST

STUDDERT J

Tuesday 5 November 2002

10151/02 GINELLE FINANCE PTY LIMITED v MICHAEL DIAKAKIS

JUDGMENT

1 **HIS HONOUR**: By notice of motion filed on 29 July 2002 the plaintiff, Ginelle Finance Pty Limited, seeks an order for summary judgment pursuant to Pt 13 r 2 of the Supreme Court Rules, and also an order for summary dismissal of the defendant's cross claim against it pursuant to Pt 13 r 5 of the Rules. In addition, the plaintiff seeks leave for a writ of possession to issue forthwith and an order for costs.

2 The plaintiff is the registered proprietor of an interest in a property situated at 259 Botany Street, Kingsford and that interest arises as second mortgagee under a mortgage registered pursuant to the **Real Property Act**, 1900 on the title to that property. The plaintiff seeks summary judgment on its claim for possession of the property by reason of default in payments under the registered mortgage.

3 For his part, the defendant asserts that he is the owner of the property and that he borrowed no money from the plaintiff and entered into no mortgage over that property in favour of the plaintiff. It is the defendant's claim that the signature purporting to be his on the mortgage subsequently registered is a forgery. For the purposes of the present motion, I must, and I do, proceed upon the assumption that the defendant's assertion is the fact.

4 The defendant has amended his pleading and in addition to denying execution of the mortgage and the making of any advance to him, he also pleads reliance upon his amended first cross claim against the plaintiff and in particular on paras 9(A)-(H) which are expressed as follows:

"9A. The cross defendant knew or ought to have known that the cross claimant was a pensioner and unable to repay the mortgage repayments on the Mortgage.

PARTICULARS

9B. a) The cross defendant, by its agent, AAA Finance, had received a loan application in the name of the Cross Claimant stating that the cross claimant was a 'retired/pensioner';

b) The cross defendant, by its agent, AAA Finance, was aware that the account purporting to be in the name of the Cross Claimant was in arrears of the previous outgoing mortgage;

9C. The cross defendant owed the cross claimant an obligation, in equity, to ensure that all conditions of the loan and Mortgage were satisfied.

9D. The cross defendant knew or ought to have known that it was in breach of the aforesaid obligation.

PARTICULARS

9E. a) The cross defendant imposed conditions in a letter dated 24 September 2001 from Bleier Mortgage Corporation, the agent of the cross defendant;

b) The loan was to be for 'business purposes' when the cross defendant knew or ought to have known it was not being applied or used for business purposes;

c) The loan was conditional upon a letter being provided by the cross claimant's Accountant stating that in the Accountant's opinion the cross claimant could afford to pay the interest under the loan, when the cross defendant knew or ought to have known that the cross claimant was unable to pay the interest under the loan;

d) The loan was conditional upon a letter being provided by the cross claimant's Accountant stating that in the Accountant's opinion the cross claimant can make arrangements to repay the principal at the end of the term of the loan, when the cross defendant knew or ought to have known that the cross claimant could not make arrangements to repay the principal at the end of the term;

e) The loan was conditional upon the cross claimant providing evidence that he had satisfactorily repaid the mortgage repayments on the outgoing mortgage when the cross defendant knew or ought to have known that the repayments on the outgoing mortgage were in arrears.

9F. Further, and in the alternative, the cross defendant owed the cross claimant an obligation in equity, to ensure that the title deed to the property belonging to the cross claimant was used for proper purposes, and for authorised purposes.

9G. The cross defendant is in breach of the aforesaid obligation in that the cross claimant did not authorise the use of his title deed for the purpose of effecting registration of the Mortgage in favour of the cross defendant.

9H. The cross defendant knew or ought to have known that the cross claimant did not so authorise the use of his title deed."

5 A party seeking summary judgment under Pt 13 r 2 is required to satisfy the court that there is really no triable issue and it is clear that caution is to be exercised in entertaining an application such as that now before the Court. In their joint judgment in Fancourt v Mercantile Credits Limited[91] Mason CJ and Murphy, Wilson, Deane and Dawson JJ said:

"The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried: see Clarke v. Union Bank of Australia Ltd. (1917) 23 CLR. 5; Jones v. Stone [1894] A.C. 122; Jacobs v. Booth's Distillery Co. (1901) 85 L.T. 262."

6 The burden rests upon the plaintiff to persuade the Court that there is no real question to be tried: see Singh v Kaur (1985) 61 ALR 720 per Samuels JA at 722. Similar considerations apply to the plaintiff's application for summary dismissal of the defendant's cross claim: see General Steel Industries Inc. v Commissioner for Railways (1964) 112 CLR 125.

7 The defendant is also pursuing cross claims against the members of the firm of Grogan and Webb, solicitors, alleging negligence in the discharge of their professional responsibilities owed to him concerning the relevant mortgage. A further claim of the same nature is made by the plaintiff against another solicitor as third cross defendant. Finally, the defendant has pleaded a cross claim against Permanent Custodians Limited, which company also advanced money on the security of a registered mortgage on the Kingsford property. Again the defendant has pleaded that the mortgage in favour of Permanent Custodians is a forgery. None of these cross claims is the subject of an application for summary dismissal.

8 The evidence before the Court on this motion consists of an affidavit of Nicole Stein sworn 25 July 2002 and an affidavit of the defendant sworn 9 October 2002. Additionally both the plaintiff and the defendant rely upon a number of exhibits. Neither deponent was required for cross examination on his or her affidavit.

9 Ms Stein's affidavit evidences the mortgage, the default, the giving of the requisite notice under s 57(2)(b) of the **Real Property Act** and a failure to satisfy the requirements of such notice. In his affidavit the defendant evidenced his birth in Greece, that he is now sixty-three years of age, that he cannot read or write English, and that his ability to converse in English is limited. The defendant's affidavit contains a denial of any involvement whatsoever in the mortgage transaction.

10 The plaintiff relies upon the provisions of the **Real Property Act** in its application for the orders which it seeks, and upon the unchallenged evidence that its mortgage has been registered on the title to the property. In particular, the plaintiff relies upon ss 41 and 42 of the **Real Property Act** which provide for indefeasibility of title for a person who is "the registered proprietor for the time being of any estate or interest in land...except in case of fraud" (s 42(1)). It is not contended by Mr Confos, who appears for the defendant, that the plaintiff acted fraudulently in the circumstances in which the mortgage was executed and subsequently registered.

[91] (1983) 154 CLR 87 at 99

11 I understand it to be well settled that fraud by a person other than the party relying upon the indefeasibility that accompanies registration is not fraud within the exception referred to in s 42. The registered proprietor has to be involved in the fraud either personally or by its agents to lose the benefit of registration. In Grgic v ANZ Banking Group Ltd (1994) 33 NSWLR 202 at 221 Powell JA stated the position thus:

"Despite the passage of some ninety years since Lord Lindley, when delivering the opinion of the Judicial Committee in Assets Co Ltd v Mere Roihi [1905] AC 176 at 210, said:

'... By fraud in these acts is meant actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, ... the fraud which must be proved in order to invalidate the title of a registered purchaser for value, ... must be brought home to the person whose registered title is impeached or to his agents'

and the many cases which have been decided in that period of ninety years, the position still remains that, for the purposes of s 42 of the Act, '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: see Bahr v Nicolay [No 2] (at 614) per Mason CJ and Dawson J; (at 631-632) per Wilson J and Toohey J."

12 The circumstance that a dealing which is registered is a forged document does not of itself defeat indefeasibility of title as ordinarily effected by registration. In Garofano v Reliance Finance Corporation Ltd (1992) 5 BPR 11941 at 11944 Meagher JA, with whose judgment Mahoney JA and Priestley JA agreed, said:

"A series of authorities in this state have decided that forgery does not prevent the operation of the doctrine of indefeasibility: *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549; *Ratcliffe v Watters* (1969) 89 WN (Pt 1) (NSW) 497; *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) 529; and *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32."

13 Then, in Story v Advance Bank (1993) 31 NSWLR 722 Gleeson CJ, with whose judgment Cripps JA agreed, said at 736:

"It is now settled that, subject to certain qualifications, the indefeasibility of title conferred by these provisions [a reference to ss 42 and 43 of the Real Property Act], even in the case of registration of a void instrument, takes effect immediately upon registration: Frazer v Walker [1967] 1 AC 569, Breskvar v Wall (1971) 126 CLR 376, Bahr v Nicolay [No 2] (1988) 164 CLR 604, Leros Pty Ltd v Terara Pty Ltd (1992) 174 CLR 407. Subject to the same qualifications, the mortgagee under a registered mortgage obtains an indefeasible title upon registration even though the signature of the mortgagor has been forged: Mayer v Coe (1968) 88 WN (Pt 1) (NSW) 549; [1968] 2 NSWR 747."

14 Mr Young here submits that indefeasibility of title has been conferred upon the plaintiff effective from registration of the mortgage to it, and that the plaintiff has discharged the burden imposed upon it in seeking summary judgment. This submission applies alike to the application for summary judgment on the plaintiff's claim, and for summary dismissal on the defendant's cross claim.

15 Mr Confos has submitted that the registration did not protect the plaintiff against personal equities. Counsel referred to Logue v Shoalhaven Shire Council (1979) 1 NSWLR 537 at 563 where Mahoney JA said, as to s 42 of the **Real Property Act**, that

"...it does not operate to protect...against what have been described as the 'personal equities'...: Breskvar v Wall (1971) 126 CLR 376 at 385 per Barwick CJ; see Frazer v Walker (1967) 1 AC 569 at 585. These personal equities include, of course, equities created by the registered proprietor after he has become registered: see, e.g., Barry v Heider (1914) 19 CLR 197. But, in my opinion, they are not limited to these. They include equities which have arisen from things which have happened before he became registered."

16 What is encompassed in the concept of a "personal equity"?

17 In Garofano (supra), Meagher JA said at 11945 (referring to "personal equity"):

"I cannot see what that expression is meant to cover except known legal causes of action (for example, deceit) and known equitable causes of action (for example, undue influence)."

18 Then in Grgic (supra), Powell JA said at 222-223:

"I am of the view that the expressions 'personal equity' and 'right in personam' encompass only known legal causes of action or equitable causes of action, albeit that the relevant conduct which may be relied upon to establish 'a personal equity' or 'right in personam' extends to include conduct not only of the registered proprietor but also of those for whose conduct he is responsible, which conduct might antedate or postdate the registration of the dealing which it is sought to have removed from the Register."

19 How then does Mr Confos assert there is a triable issue here?

20 It was submitted that the plaintiff obtained registration of its mortgage by the unauthorised use of the defendant's title deed in circumstances in which the plaintiff's solicitor had notice that such use was unauthorised. Mr Confos placed reliance upon the decision in Mercantile Mutual Life Insurance Co. v Gosper (1991) 25 NSWLR 32.

21 How is it claimed that such notice arose?

22 As I understand it, the argument runs thus: the plaintiff was one of two mortgagees whose mortgages were registered on the title to the subject property (the fourth cross defendant, Permanent Custodians, was the earlier of these two mortgagees). Each such mortgagee had the same solicitors acting for it. Those solicitors must have had

the defendant's certificate of title in order to register each mortgage. Since the plaintiff's mortgage was the later of the two mortgages to be registered, the plaintiff's solicitors must have been aware when presenting it to permit registration of that mortgage that the defendant did not authorise that use of his certificate of title. The knowledge of the solicitor became the knowledge of the plaintiff. Hence, as in Gosper, the circumstances entitled the defendant to have the forged mortgage set aside.

23 I am not attracted by that submission. Indeed, I accept Mr Young's submission that Gosper is distinguishable.

24 In Gosper the mortgagee held the certificate of title of the mortgagor pursuant to a genuine mortgage, but then produced it to permit of the registration of the forged variation of mortgage. In the opinion of Mahoney JA (expressed at 49) the mortgagee "held the certificate of title for the purposes only of the mortgage and subject to, inter alia, the obligation not to permit it to be used for any other purpose." However, there is not in the present case the pre-existing relationship between the plaintiff and the defendant such as existed in Gosper. There the mortgagee had been holding the title deed for several years prior to the time that the mortgagor's husband fraudulently procured further advances, forging the mortgagor's signature on the variation of mortgage. This was then registered upon the presentation by the mortgagee of the certificate of title which it had been holding.

25 Those circumstances are to be contrasted with the present case, in which there was no pre-existing relationship between the plaintiff or its solicitors and the defendant.

26 Immediately prior to the plaintiff's advance pursuant to its mortgage, its solicitors were on notice of two earlier registered mortgages which were to be discharged from the funds to be advanced by Permanent Custodians and the plaintiff. Details of those earlier mortgages, including the principal sums, the commencement dates and the terms, were set out by the solicitors for those earlier mortgagees in the document introduced into evidence as Exhibit B. Then by letter dated 18 October 2001 those same solicitors, Messrs Grogan and Webb, authorised the plaintiff's solicitors to make payments on settlement of the mortgage transactions, which settlement was to take place on 19 October 2001. Omitting formal parts, the letter of authority was in these terms:

"**RE: DIAKAKIS**
Mortgage advance to: PERMANENT CUSTODIANS AND GINELLE FINANCE
Security: 259 Botany Road, Kingsford

We refer to the above matter which is expected to settle at the offices of Legalink, Level 8, The Law Society Building, 170 Phillip Street, Sydney on Friday, 19th October, 2001.

Could we please settle at 2.00 pm instead of 2.30 pm? Please confirm to our office.

On settlement of this matter you are authorised and directed to pay the following monies:

MAY BE TRUST CHEQUES:

1. Grogan & Webb $ 4,120.82
2. Grogan & Webb $ 3,504.16
3. Grogan & Webb $4,116.65

MUST BE BANK CHEQUES:

4. Grogan & Webb Trust Account $294,629.17
5. J. Diakakis $74,314.20

TOTAL $380,685.00"

27 It is plain that the advances from Permanent Custodian and the plaintiff were to be applied to discharge the earlier mortgages, details of which were revealed by search on 19 October 2001 (see Exhibit C). It is also plain that the mortgages in favour of Permanent Custodian and the plaintiff were registered at the same time, because those two mortgages have consecutive dealing numbers: "8053869" and "8053870" (see annexure C to the affidavit of Nicole Stein 25 July 2002).

28 There is no evidence to indicate that the solicitors for the plaintiff had access to the relevant certificate of title earlier than the time of settlement referred to in the letter set out in para 26 above. Presumably the deed was then made available by Grogan and Webb upon payment of what was required to discharge the earlier mortgages.

29 The mere lack of authority from the defendant to register the plaintiff's mortgage does not create a personal equity: see Vassos v State Bank of South Australia (1992) V Conv R 54-443 per Hayne J at 65-180 to 65-181 and Story (supra) per Gleeson CJ at 736-737. As Gleeson CJ observed in Story (at 737):

"Unless a number of the leading cases concerning registration of forged instruments were wrongly decided, it [a personal equity] cannot arise out of the bare fact of the forgery."

30 In the present case it is accepted that the plaintiff was not involved in any fraud. It advanced money upon an apparently regular mortgage.

31 Mr Confos submitted that there was a further feature of this case which gives rise to a triable issue. This arises out of loan conditions which were set by the mortgage broker, Bleier Mortgage Corp. Pty Ltd.

32 On 24 September 2001 that broker obtained what purported to be the defendant's signature on a document advising of approval of an application for finance (Exhibit 3):

"**SUBJECT: DIAKAKIS**

We advise that the following application for finance has been approved subject to the following indicative terms and conditions:-

1. Loan Advance: The lesser of $26,500.00 or 75% of valuation.

2. Interest Rate: 19.00% reducing to 16.50% upon payment within seven days, monthly on the total amount to be advanced. The Lender reserves the right to vary this rate at any time prior to settlement of this advance.

3. Term: 12 months.

4. Security: SECOND Mortgage over the property known as 259 BOTANY STREET, KINGSFORD.

[Signature]
(Borrower must sign here)"

33 The conditions attached to that letter included the following:

"21. Accountant's Letter: It is a condition that the Borrower's Accountant must provide a letter stating that in the Accountant's opinion the Borrower can afford to pay the interest under the loan and can make arrangements to repay the principal at the end of the term. Please note we will provide an Accountant's Certificate as part of the mortgage documentation which must be returned prior to settlement."

34 The defendant denies that he had any dealings with the broker and he denies that his signature appears on the document set out above. The truth of such denials is to be assumed for the purposes of this motion, as is the assertion that no accountant's letter was presented as required by Condition 21 set out above.

35 Mr Confos submitted that since conditions had been attached to the loan by the broker, as the plaintiff's agent, these conditions could not be waived unilaterally. He submitted further that the plaintiff had an obligation to ensure that the conditions were complied with, and if it failed to do so, then in equity it should be prevented from relying upon the mortgage and its registration.

36 Mr Confos was unable to refer to any authority that directly supported that wide-reaching submission. I do not accept that the failure of a lender to enforce a condition of a loan such as that here imposed can give rise to a personal equity to have the registered mortgage set aside. In my opinion, no triable issue arises on this alternative basis.

37 I therefore conclude that the plaintiff is entitled to enforce its security and to have the orders sought. Any redress available to the defendant must be found elsewhere than in proceedings against the plaintiff.

38 Accordingly, I make the orders sought in paras 1, 2, 3 and 4 of the notice of motion filed on 29 July 2002