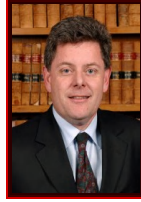


## Banking & Finance Law

Case study by Garry Moffat



### *Tarik Solak v Bank of Western Australia Ltd* [2009] VSC 82

#### **Facts**

A person purporting to be Mr Solak contacted Mr Kheir who was the principal of Kheirs Financial Services to borrow money on the security of Mr Solak's property at 21 Wallace Drive Greenvale. The forger purporting to be Mr Solak secured funds from Bank West through Mr Kheir. Bank West secured a registered mortgage over the Wallace Drive property.

Mr Solak's claim was that the mortgage was void and of no effect. Bank West's response was that by registration of its mortgage it had an indefeasible interest in the Wallace Street property.

Mr Solak contended that indefeasibility conferred by registration did not extend to secure obligations from a forged instrument where the covenant to pay was not registered or found on the title.

#### **Judgment**

There has long been no doubt that registration of a mortgage under the Transfer of Land Act which has been signed by a fraudster provides indefeasibility of title to the mortgagee.

The question to be asked, where the mortgage is an all moneys mortgage and the loan agreement has also been signed by the forger, is "indefeasibility for what".

His Honour considered a number of NSW judgments which address that issue the most recent of which is *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505. Those judgments in substance concluded that as the loan contract which had a forged signature the mortgage did not secure an enforceable loan contract and therefore did not secure anything.

His Honour also considered the Victorian judgments of *Vassos v State Bank of South Australia* {1993} 2 VR 316 and *Pyramid Building Society (in liquidation) v Scorpion Hotels Pty Ltd* [1998] VR 1888.

His Honour analysed the money provisions and the definitions in the Memorandum of Common Provisions (**MCP**). The definition of “Bank Document” was “an agreement or arrangement under which you incur or owe obligations to the Bank or under which the Bank has rights against you and includes a guarantee and this mortgage and any other agreement which you acknowledge in writing to be a Bank Document for the purposes of this mortgage.”

The question was whether as a matter of construction the Bank West home loan contract came within the definition of “Bank Document” in the MCP and if it did would the home loan contract be incorporated in the mortgage.

His Honour found “...the proper construction of the mortgage to be that the covenant to pay is found in the mortgage, incorporating, as it does, the memorandum of common provisions and through it, the Bank West home loan contract. Accordingly the mortgage albeit forged is effective as security.”