PRACTITIONER'S GUIDE TO THE TORRENS ASSURANCE FUND

The Indefeasiblity Guarantee at Work

Section 42 of the *Real Property Act* 1900 provides that, except in cases of fraud, the registered proprietor of an interest in land holds his title free from all other unrecorded estates or interests.[1] The guarantee contained in this fundamental feature of the Torrens system naturally comes at a price – although section 42 is intended to provide a stable and predictable system of title by registration, it does not - and cannot - prevent the conduct of those who, by reason of fraud, are successful in obtaining an interest in land. Section 42 ensures that once an interest is duly registered, title is guaranteed.

In order to overcome the innate unfairness of this position, the Torrens Assurance Fund was created to compensate those persons who, because of fraud or some other species of error in relation to the register, have suffered loss or damage in respect of their interest in land. This is discussed more fully below.

The classic example of the indefeasibilty guarantee of title-by-registration can be found in the oft-quoted authority, *Frazer v Walker* [1967] 1 AC 569. Mrs Frazer obtained a loan by forging her husband's signature on a loan agreement and the mortgage document which secured the repayment obligations created under the loan. The registration of the mortgage led to the couple's property becoming encumbered with that security. A clerk employed by the solicitor engaged to act for Mrs Frazer on the transaction falsely attested to the forged signature on the mortgage document which, together with the property's Certificate of Title, was duly provided to the lender. When the loan obligations were not met, the lender exercised its power of sale by virtue of its enforcement entitlement under the security and the property was subsequently purchased by the Walkers who had no notice of the prior forgery.

Discovering the fraud, Mrs Frazer's husband brought an action seeking a declaration that his interest in the property was unaffected by these shady dealings.

The court found that Mrs Frazer's fraud was not capable of disturbing the immediate indefeasibility gained by the Walkers when their interest in the property was registered. And as the Walkers had purchased the property for valuable

[1] Section 42 provides a number of exceptions to this general principle, largely in relation to an omission or misdescription in the recording of an interest in the land - these are not the subject of this paper.

consideration and without any prior notice of the fraud, their title was secured by reason of the registration of their interest in the land.

What is the Torrens Assurance Fund?

Created as the repository of compensatory funds used to counterbalance the unfair consequences of indefeasibility, the Torrens Assurance Fund represents a necessary 'safety net' for those who have been deprived of an estate or interest in land as a consequence of the indefeasibility guarantee doing its work, whether by reason of fraud, or as a result of an error or omission in the register.

This paper provides a simple practitioner's guide to understanding the workings of the Torrens Assurance Fund and the mechanisms available to claimants who may be entitled to compensation, with a particular emphasis on circumstances of fraud.

It is important always to bear in mind that the entitlement to compensation – and all the incidents that must be proven to make out such an entitlement – is statutorily based. Consequently, principles of general application in such matters as liability and damages will not apply to Torrens Assurance Fund applications. The starting point must always be the legislation itself (*Registrar-General v Behn* (1981) 35 ALR 633 at 636).

The Statutory scheme

The Torrens Assurance Fund, created under Part 14 of the *Real Property Act* 1900, is administered by the Registrar General of New South Wales from revenues collected from lodgment fees and other transactional dealings carried out as part of the everyday functions of the Land and Property Information division of the Department of Finance (previously, the Department of Lands). The Fund is established under s 134 of the *Real Property Act*.

During the 2010-2011 financial year, an 'ad valorem' Torrens Assurance Fund levy was imposed on all purchasers of land with a value greater than $500,000. Such an arrangement was repealed in July 2011[2] however the small allocations to the Fund from some routine transactional dealings remains in place to ensure sufficient compensatory funds remain available to claimants where an entitlement to statutory compensation arises.

[2] *Real Property Amendment (Torrens Assurance Levy Repeal) Act* 2011 No. 7, in force 1 July 2011.

The *Real Property Act* provides two main mechanisms for claiming an entitlement to compensation from the Fund: administrative proceedings or claims and court proceedings.

Administrative Proceedings

Administrative proceedings are claims lodged directly with Land and Property Information under s 131 of the Act. These claims are dealt with by the Department on a case-by-case basis and, depending on the factual circumstances, may result in a determination by the Registrar General that the claimant has an entitlement to statutory compensation and an offer of compensation in accordance with that entitlement is made. A limitation period of 6 years applies to administrative claims and the claims process is set out in section 131. Importantly, a decision of the Registrar General will be accompanied by reasons.

Review of Administrative Decisions

A claimant who either wishes to challenge a refusal by the Registrar General to grant compensation or is otherwise dissatisfied with an offer of settlement by the Registrar General under s 131 may seek a review of that decision in the Supreme Court of New South Wales.[3] Section 122 empowers the Court to reconsider factual matters of relevance to the original determination and to make orders that the Registrar General take certain actions that could have, but for the review, been taken.

Court proceedings

Court proceedings may only be commenced in one of three ways:

- if administrative proceedings have been brought and determined;
- if the Registrar General consents to be joined as a defendant in the action; or
- in the absence of the Registrar General's consent, by leave of the Court (s 132(2)).

If court proceedings are commenced as a result of a claimant being dissatisfied with the result of an administrative claim, court proceedings must be commenced within 3 months of the date of the Registrar General's decision in relation to the administrative claim (s 132(2A)).

In all other cases, section 14(1)(d) of the *Limitation Act* 1969 applies to claims under the Real Property Act, being "a cause of action to recover money recoverable by

[3] *Real Property Act* 1900, s 122

virtue of an enactment". The limitation period is thus six years from the date on which the cause of action first accrues.

The fact that an application for compensation under section 131 has previously been made does not preclude the commencement of proceedings for compensation under section 129 of the Act. Note, however, that the claimant will be exposed to the risk of a costs order where court proceedings result in a less favourable compensation outcome than had otherwise been offered by the Registrar General under s 131 (as to this see s 132(5) of the Act).

Once a section 129 claim is commenced in the Supreme Court, the proceedings are thereafter removed from the administrative processes of the Land and Property Information. Matters of procedure and form are thereafter dealt with in accordance with the usual rules applicable to the Supreme Court. In such cases, the Registrar General is simply joined as another defendant to the litigation (see below).

Many fraud proceedings commenced under s 129 of the Act are brought against a principal defendant (usually, the alleged fraudster) and other defendants who may have participated or benefitted from the impugned property transaction. Such other potential defendants include the mortgage broker who procured the loan or the lender whose credit obligations have given rise to a registered interest in the subject property, or solicitors who were engaged to act in the conveyance and/or transaction but whose professional conduct may have contributed to the loss or damage now suffered. In such proceedings, the Registrar General should always be joined as a nominal defendant under s 132 of the Act.

Once served with the Statement of Claim, the Registrar General may take a variety of steps. So far as the statutory compensation regime is concerned, the threshold issue in any claim is whether or not the claimant has suffered compensable loss.

'Compensable Loss' Under the Real Property Act and the Threshold Issue

Section 129 forms the lynchpin of all court initiated claims for compensation where the threshold issue to be determined is whether or not the applicant has suffered compensable loss within the meaning of s 128 of the statute. As the idea of compensation under the *Real Property Act* is informed by the statute itself, the meaning of compensable loss is not defined at large. This is necessarily so because the range of circumstances which comprise 'compensable loss' are limited to those to which s 129 of the Act has particular regard.

The enquiry therefore begins (and in some cases, ends) with a threshold consideration of whether or not the applicant's loss or damage arose as a direct

consequence of the indefeasibility guarantee in respect of any land under the Real Property Act - an consequence that arises in the context of an act of fraud, or in an error or omission in the register.

There is a well-known line of authority dealing with mortgage fraud under the Torrens system of title-by-registration which is both instructive and (perhaps in some of the later decisions) ethically challenging. Similarly, there is a discrete body of caselaw ascending to the High Court of Australia in relation to error, misdescription and omission in the register. (This article does not include a summary or analysis of those authorities, however reference is made to some key decisions to illustrate the principles discussed in this paper).

Once the threshold issue is established, the qualifying circumstances set out in s 129(1) are then to be considered. If the applicant's circumstances come within one of the seven events described in s 129(1) of the Act, the applicant can establish a prima facie entitlement to statutory compensation. These events include fraud, errors in the Registrar General's refusal to register transfer of property or to record a change of name of the proprietor of land and loss or damage resulting from an error, misdescription or omission in the Register in respect of the land.

The 'F' Word

A great number of cases for which compensation is sought under s 129 of the Act involve fraud in connection with the registration of a mortgage. Some examples include:

- Forgery of a spouse's signature on a loan agreement and mortgage security where the property is jointly owned by the couple;
- Forgery of a mortgage security by a family member who does not have any ownership in the property used as security;
- Fraudulent procurement of signatures on loan and security documents in circumstances where the nature and legal effect of the documents has been deliberately hidden, obscured or misdescribed.

Unsurprisingly, proving fraud and establishing the compensable loss arising from it is not always a straight-forward matter.

A primary example is the first mentioned scenario. Proving a forged signature on loan and mortgage documents does not *necessarily* lead to a finding that the victim's interest in the relevant property will be released from the consequences of the encumbrance (see, for example, *Van den Heuval v Perpetual Trustees of Victoria* [2010] NSWCA 171).

Key Considerations for Practitioners

Once the indefeasibility guarantee under the Torrens system of title-by-registration is understood, the effect of mortgage securities – what they actually secure upon registration of the mortgage – will assume significance.

The question as to the legal effect of a mortgage in respect of a proprietor's interest in his land is eloquently encapsulated in the well quoted phrase of Campbell J in his judgment in *Small v Tomasetti* [2001] NSWSC 1112: "Notwithstanding that registration confers indefeasibility on a mortgage there is still a question, 'indefeasibility for what?'"

Small v Tomasetti involved an application to continue an injunction restraining two mortgagees from disposing of the proceeds of sale of a property previously held by husband and wife joint proprietors. The husband had forged his wife's signatures on two separate mortgages which were subsequently registered as security for loan obligations he had entered into without the knowledge of his wife. The mortgages were expressed to be security for specified debts owed by the mortgagor (in other words, they were not 'all-monies' mortgages, but mortgages that specified the amounts owing in each separate loan obligation). It was clear that the mortgages gained indefeasibility by reason of their registration.

It was in this context that Campbell J asked his well-quoted question, "Indefeasibility for what?" Following principles expounded in *Breskvar v Wall* (1971) 126 CLR 376, his Honour found that the estate or interest in the land was delimited to the extent of the specified sums expressed in each of the mortgages.

But what of the case of 'all monies' mortgages? All monies mortgages secure all amounts owing to the lender in accordance with terms and conditions set out in the mortgage memorandum filed by the mortgagee. It will often be the case that the mortgage document itself is to be read in conjunction with a memorandum filed by the mortgagee some years earlier. In such cases, it is important to have regard to the terms of the memorandum and the terms and conditions of any other agreement (such as a loan facility) which will aid in its interpretation.

The correct interpretation of the loan and mortgage documents will in turn affect the availability of compensation reposing in the Torrens Assurance Fund.

Proof of Forgery is Only Half the Story

For lawyers practicing in this area, the wording of all applicable transactional documents is the obvious (and critical) starting point in understanding the precise nature of the obligations they intend to create and the consequences of any failure to meet those obligations, particularly in relation to any person who appears to have been unfairly bound by the obligations (victims of fraud).

To illustrate this point, recent cases have found that the definition of "you", "us" or "I" in the Terms and Conditions applicable to an impugned loan agreement or mortgage document can sometimes be the deciding factor in determining when obligations created by a fraud cannot be set aside.

The seminal case in relation to the proper construction of loan and mortgage documents is *Perpetual Trustees Victoria Limited v English [2009] NSWSC 478*. In *English*, Simpson J found that, according to the terms of a loan agreement and mortgage, all named borrowers were required to sign the Loan Agreement as a condition of valid acceptance of the lender's Loan Offer. By signing the Loan Agreement, the borrowers accepted that the Agreement was a "Secured Agreement" under the terms of the Mortgage. Notwithstanding that joint and several liability was included as a term of the Mortgage, her Honour found that, as the Loan Agreement did not satisfy the requirements of a "Secured Agreement" under the Mortgage (one of the named borrowers not having actually signed the Loan Agreement), the Mortgage was indefeasible by reason of registration, but ultimately secured nothing.

In the appeal brought by the lender ([2010] NSWCA 32), Allsop P, Campbell JA and Sackville AJA confirmed that the debt in question was not secured as there was no enforceable loan agreement in existence between the parties constituting acceptance of the Loan Offer by Mrs English (the victim whose signature had been forged). Consequently, the lender had no entitlement to enforce a power of sale against her interest in the property.

The Court of Appeal allowed the lender's appeal in respect of the dismissal of its claim against the forger, Mr English, and allowed it to amend its Statement of Claim & file consent orders reflecting a successful appeal against him.

English is a case which outlines all the fundamental issues of which a practitioner ought be aware when determining whether or not a viable cause of action for statutory compensation exists for losses in connection with fraud in the registration of a mortgage.

Her Honour Simpson J's judgment at first instance contains a thorough analysis of the relevant authorities in an historical context, demonstrating the way in which each case has developed and added to the law's refinement of the principles of construction in this area.

Despite initial uncertainty concerning later decisions such as *Van den Heuval* (discussed below), *English* remains authority for the proper approach to construing loan agreements and mortgages in cases where fraud has been alleged, in order to determine what, if anything, is secured by mortgages duly registered in the Torrens System.

In *Van Den Heuval v Permanent Trustees Victoria Ltd* [2010] NSWCA 171 the Court of Appeal reminds us that a lender's intention to advance credit - and the circumstances in which it is willing to do so – will be governed in every case by the language of its own contractual documents and the meaning they acquire when read *in conjunction with one another*. Such intention does not always encapsulate popular ideas of 'fairness'. However, the Court's decision in *Van den Heuval* is an attempt to apply the principles reconcile by Simpson J in *English* with the commercial intention of the parties, and is a reminder to practitioners of the need for precision when considering loan and mortgage obligations and advising clients on the possible outcomes of fraud, however unexpected or contrary to common sense these may seem.

Mr Van den Heuval forged his spouse's signature on a Loan Agreement and an "all-monies" Mortgage which, upon registration, had the effect of encumbering the couple's jointly-owned property. The terms of the loan required the borrowers to execute the Loan Agreement before credit was advanced to the borrower. Further, the Mortgage in its terms secured any obligations existing under a Secured Agreement for which the borrowers had provided a written acknowledgement.

After funds were drawn down, the loan obligations were not met and it was at this point that the forgery came to light. The fact of forgery of Mrs Van den Heuval's signature not being in dispute, the lender sought possession of the couple's property in its entirety, basing its entitlement on the obligations owed under the Loan Agreement by the one borrower whose signature was not forged, Mr Van den Heuval.

The issue decided at first instance was whether the Mortgage in these circumstances secured any amount at all, there being no execution by Mrs Van den Heuval of either the Loan Agreement or the Mortgage.

Based on the particular wording used in the terms applicable to the Loan Agreement and to the Mortgage, Price J concluded that it was *not* contemplated that the Loan Agreement would not be binding until both Mr and Mrs Van den Heuval had signed it.

All the essential elements for a binding contract were present – the husband signed the contract and monies were advanced pursuant to it. Once the mortgage was registered, this was sufficient to secure for the lender an indefeasible interest over the whole of the property for the entire amount advanced under the Loan Agreement (at [71]). Price J ordered in favour of lender and in favour of Mrs Van den Heuval in her cross claim against the Torrens Assurance Fund by reason of being deprived of her interest in the land due to her husband's fraud.

On appeal brought by both Mrs Van den Heuval and the Registrar-General on the issue of the wife's liability to the lender/mortgagee, Hodgson and Young JJA dismissed the appeal, upholding Price J's finding that the Mortgage was, notwithstanding the forgery, binding on the husband and that the lender mortgagee was entitled to possession of the whole of the property, including the wife's aliquot share.

All three appeal judges (Basten JA dissenting) followed the formula set out by the Court of Appeal in *English* in construing the terms of the loan and the mortgage and in particular, the term "Secured Agreement" to which reference was made in the Mortgage.

The majority's findings included the following:

That the execution by the husband of the loan, together with the lender's advance of funds in accordance with that loan, gave rise to an implied agreement secured by the mortgage (Hodgson JA).

The execution of the loan document was part of a contract already made between the husband and the lender (Young JA)

Young JA's judgment included a statement of conclusion which seemed to go beyond Price J's findings (at [162]):

> "The balance of probabilities is that in the light of past history in the industry, the possibility that the wife's signature was forged or that the loan was unenforceable against the wife would have occurred to Perpetual. It would more likely than not accept that in that situation, so long as the husband was bound, it was commercially appropriate to lend out the money."

(The above comments were based on submissions made by counsel for the mortgagee on the appeal, and no evidence as to industry practice – or indeed, the lender's own particular practices - had been tendered to support them. One might argue that the comments seem to invite the obvious question: why would a lender bother to name a co-borrower as a party to the Loan Agreement if only one borrower – "the husband" in Young JA's conclusion - was sufficient to satisfy the mortgagee's

execution and acceptance criteria? One might also be struck by the apparent promotion of gender stereotypes inherent in the comments. Given these anomalies, the comments are perhaps best evaluated in light of their contextual value).

Basten JA dissented, finding that the Mortgage in this case did not secure all monies outstanding on *any* basis as between the mortgagors (or any one of them) and the lender. Rather, the Mortgage only secured monies owing under a contractual agreement entered into by all the parties (with both Mr and Mrs Van den Heuval named as co-borrowers) – in this case, no such agreement by all the parties existed due to the absence of one party's signature and thus the Mortgage secured nothing. His Honour largely relied on the Court of Appeal's decision in *English* in this regard.

So following *Van den Heuval*, it seems the moral of the story is that if the terms of the loan indicate an intention to be bound – and an intention to advance funds to the borrower without the need for a co-borrower's acknowledgment or acceptance, there may be nothing requiring mortgages duly registered in this manner to be set aside. The proof will always be in the language used in each transaction.

Reduction of Compensable Loss

Once a prima facie entitlement to compensation has been established under s 129 of the Act and the applicable terms and conditions of a mortgage and underlying loan agreement are properly construed, a practitioner must turn his/her mind to the question of whether or not any compensable loss may be reduced by circumstances set out in s 129(2) of the Act.

Section 129(2) provides that compensation for any loss or damage established under s 129(1) (ie: *statutory* compensation) will not be payable in a range of circumstances. Three of the most common examples focus on the conduct and circumstances of the claimant:

- Acts or omissions of the plaintiff (s 129(2)(a)): a reduction where the loss or damage claimed is the result of some act or omission of the claimant (for example, the claimant secured an oral loan agreement by handing over a signed Transfer for 'safe keeping' – see for example *Abigail v Lapin* [1934] AC 491; Bryson AJ in Chandra has stated that the acts or omissions to which this provision applies impliedly requires the fault of the claimant);

- Plaintiff's failure to mitigate (s 129(2)(c)): a reduction where the claimant has failed to mitigate his/her losses (for example, a failure by the victim of fraud to apply for urgent relief after discovering the fraud, instead of waiting until after the mortgage has entered into default before seeking a remedy);

- Benefit received by the plaintiff (s 129(2)(d)): a reduction where the claimant has themselves received a benefit arising from substantially the same circumstances (for example, the moneys advanced on the forged security are used to renovate another jointly owned property thus increasing its value).

As a basic principle, the damages recoverable under section 129 are such that will restore the plaintiff (so far as money can do) to the same position s/he would have been in had the wrongful act not occurred. The calculation of damages is based on the value of the land as at the date of hearing rather than the date of the deprivation (see *Registrar-General v Spencer* (1909) 9 CLR 641 at 653).

Bringing an Action Against a Negligent Solicitor

Other reductions in *statutory* compensation under section 129 may arise in circumstances where the applicant (or the person accused of committing an act of fraud against the applicant) had engaged a solicitor to act in the matter. If the solicitor's conduct involved willful or negligent conduct, and the solicitor was covered by a policy of professional indemnity at the time of the relevant conduct, the solicitor may be held liable for a portion of the relevant loss or damage commensurate with that wrongdoing.

The potential fruit of bringing an action against a solicitor who has acted negligently ought never be overlooked. The potential for a judgment to be satisfied if the solicitor is covered by professional indemnity insurance applicable to the period in which the alleged negligence occurred and responds to that event is a powerful reason to join a potentially negligent solicitor. Thus, despite the fact that an applicant's compensation from the Torrens Assurance Fund may be reduced due to a solicitor's liability, such amounts may ultimately be compensated in accordance with a finding of solicitor's liability given the appropriate factual circumstances. An applicant who does not choose to join a solicitor bearing potential liability in the circumstances risks losing a portion of any potential judgment if the Registrar General is successful in seeking a different apportionment of compensation to which the applicant might otherwise have been entitled under section 129.

Chandra v Perpetual Trustees Victoria [2008] NSWSC 178 is an illustration of a solicitor who had unintentionally but negligently facilitated a fraud. In that case, a solicitor prepared and lodged an application for a replacement certificate of title at the behest of Mr Pan, a fraudster who represented himself as agent for the purported mortgagors (the victims). Mr Pan urged the solicitor to act urgently, as the mortgagors – so he said – required finance in a hurry.

Spurned on by the urgent nature of the instructions, the solicitor took no steps to independently verify the authority of Mr Pan to act on behalf of the purported mortgagors and after obtaining the replacement Certificate of Title and providing it to Pan, the fraudster forged the victim's signatures on a loan and used the Certificate of Title to procure a mortgage as security for the loan.

Although Bryson AJ ultimately found that the mortgage secured nothing on the basis that its underlying obligations arose from an unregistered forged loan, his Honour stated that, had the loan been enforceable as against the mortgagors, the solicitor would have been liable in negligence due to his failure to independently verify the authority of the mortgagors in circumstances where they would have had no control over the protection of their own interests. These failures were contrary to what a reasonable solicitor would have done in the same circumstances. His Honour stated that the solicitor would thus have been liable for 10% of the loss suffered by the victims of the fraud.

Some important questions for practitioners to consider when advising a client in relation to a solicitor's liability in circumstances of mortgage fraud are:

- Was the solicitor's contract of insurance current and applicable to the period during which the relevant acts occurred?
- Does the policy of insurance applicable to the solicitor respond to the relevant acts which form the basis for the liability claim?
- If the case against the solicitor encompasses not only an allegation of negligence, but also an allegation of participation in the fraud, will this affect the policy's response to such acts? (ie: the applicable policy will usually not respond to conduct involving dishonesty or fraud)

Special Provisions for 'Low-Doc' or 'Fast-Doc' Lenders

Since the compensation scheme provided in s 129 is available to any person who has suffered loss or damage as a result of the operation of the Act in respect of any land where the loss or damage arises from, inter alia, fraud, the Torrens Assurance Fund is available to mortgagees as well as mortgagors – banks and non-bank (private) lenders alike. This is of course a less common application of the provision, since mortgagees generally have available to them a security with which to satisfy their losses.

It is important to note, however, that even this compensation can be reduced if a mortgagee (and this includes agents such as mortgage brokers or mortgage 'originators') fails to adhere to the requirements of s 56C of the Real Property Act. Section 56C was introduced in 2009 to impose additional identification and record-

keeping requirements on mortgagees in relation to persons who purport to execute a mortgage in their own name or on behalf of another.

Prior to the introduction of section 56C, there had been widespread discontent among policy makers and legislators in relation to the prevalence of private lenders whose less-than-fastidious verification procedures and policies (some of which did not exist) opened the door to fraudulent mortgages being registered and gaining indefeasibility to the detriment of unknowing and vulnerable proprietors.

The additional requirements of section 56C came into effect in November 2011[4] and provide that a mortgagee must "take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf the mortgage was executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates." A method of verifying identification has been developed which includes a 100-point ID check, face-to-face interviews and other steps, including accountability for these steps.

Given the length of time some mortgage fraud cases come to the attention of their victims, it is perhaps unsurprising that pre-section 56C cases are still being commenced either administratively or by the Supreme Court of NSW.

Settlement of Compensation Claims

Section 135 empowers the Registrar General to settle administrative or court proceedings, whether in the course of those proceedings or at mediation. This power is not at large, but will be limited by one of the following:

- an informed assessment of the likely success of the claimant/applicant in proceedings for compensation and the likely amount that would be payable if successful (s 135(3)) or
- more generally, an informed determination that the settlement is otherwise reasonable in all the circumstances of the particular case.

No guidance is provided in the Act as to what the Registrar General may consider "reasonable in all the circumstances" of a particular case. At the time of writing, no case authority has explored this phrase. It is unlikely that such a point would be the subject of litigation in any event, as the limitation appears to be entirely at the discretion of the Registrar General.

[4] *Real Property and Conveyancing Legislation Amendment Act* 2009 No 17, Schedule 1 [4] commencing 1 November 2011.

The payment of a settlement amount by the Registrar General does not preclude that office from taking other action within its powers as might be necessary (for example, the issuing of a new Certificate of Title, or the removal of a registered dealing, etc).

Registrar General's Right of Subrogation and Power to Join Other Parties

Section 133 of the Act deals with the Registrar General's right of subrogation in cases of fraud.

As a result of an amendment to section 133 of the Act in 2009[5], the rights and remedies to which the Registrar General are potentially subrogated expanded. Prior to the amendment, the Registrar General's right of subrogation was extended only to "the claimant's rights and remedies in relation to [the] loss against any relevant professional indemnity insurer".

The current formulation of section 133 provides that in the case of either administrative or court proceedings for compensable loss, the Registrar General will be subrogated to the claimant "in respect of the claimant's rights and remedies against any person in relation to [the compensable] loss." What this means is that the Registrar General may claim not only against persons who caused or contributed to the fraud, but also *any person* against whom the compensated person would have a claim in relation to the loss. This would therefore include claims in tort (negligence) pursuant to any contractual indemnity and claims on insurance generally (not just professional indemnity).

Section 133 also provides a mechanism to recover compensation in situations where there has been 'double dipping' or 'windfall' payments received by the claimant as compensation from other sources in respect of the same loss. Section 133(3) allows the Registrar General to recover such payments from a person's executor if need be. These provisions are obviously intended to protect the integrity of the Fund and ensure that beneficial entitlements are properly and fairly administered. (See comment on s 133A below).

Section 133(4) allows the Registrar General to join any other party against whom, in the opinion of the Registrar General, the claimant has a cause of action in respect of the compensable loss. This entitlement to join other parties may take the form of a cross claim (for example, against a professional indemnity insurer) or, feasibly, a substantive defendant.

[5] *Real Property and Conveyancing Amendment Act* 2009 No 17 Schedule 1 [25] commencing 13 May 2009

An example of the application of the Registrar General's right of subrogation (taken to its ultimate conclusion), appears in *Registrar-General of NSW v LawCover* [2013] NSWSC 1471 ("Pedulla").

In July 2011, proceedings were commenced by a plaintiff against two fraudsters (and the Registrar General as nominal defendant) in relation to two fraudulent property transfers that resulted in the plaintiff losing her properties and seeking compensation from the Torrens Assurance Fund. The Registrar General brought a subrogated action (ie cross-claimed) against a solicitor who had acted in respect of the fraudulent transfers, pursuant to the subrogation entitlement in s 133 of the *Real Property Act*. The cross claim was originally brought by the Registrar General because the solicitor had not initially been joined by the plaintiff to proceedings (but was later joined as a defendant).

At the time he was served with the cross claim, the solicitor's professional indemnity insurer was LawCover. The solicitor's insurance policy was a "claims made" policy, which only covered him for claims that were made against him in the period 1 July 2011 to 30 June 2012. The solicitor notified his insurer of the Registrar General's cross claim and LawCover defended its client on the basis that the impugned conduct was negligent but not fraudulent.

In November 2011, Pembroke J made findings in favour of the plaintiff and in favour of the Registrar General in his subrogated action against the solicitor, whose liability was assessed at 30% of the compensation otherwise payable out of the Torrens Assurance Fund, plus costs. His Honour's findings against the fraudsters also included a finding of dishonesty on the part of the solicitor. These events were found to have taken place in mid 2006 to February 2007 and the fraudulent transfers were found to have been registered in March and April 2007.

Within days of Pembroke J's judgment, LawCover declined to indemnify the solicitor based on a fraud and dishonesty exclusion in its policy. As a result, the Registrar General sought leave under s 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* to commence proceedings against LawCover directly. Section 6 of the 1946 Act permits a party to sue an insurer directly in circumstances where an insured person has entered into a contract of insurance by which that person is indemnified against liability to pay damages or compensation. The intention of s 6(4) is to create a statutory charge on all insurance moneys that are or may become payable in respect of that liability. The *enforcement* of that statutory charge against the insurer is provided in s 6(4), with the court's leave, as being in the same manner as if the action were being brought against the insured person.

Importantly, s 6(4) provides the following limitation:

> *"… Leave shall not be granted in any case where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim, have been taken."*

In its proceedings against LawCover pursuant to s 6 of the 1946 Act, the Registrar General submitted that the event giving rise to the claim for damages was the commencement of the statutory compensation proceedings brought by the plaintiff against the Registrar General ("Compensation Proceedings"), rather than the events of negligence in respect of which proceedings were brought by the plaintiff against the solicitor ("Negligence Proceedings"). Thus the Registrar General sought to distinguish the Compensation Proceedings as the "trigger event" which gave rise to its right of subrogation in s 133(2) of the *Real Property Act* to pursue the solicitor (and thus the event giving rise to the claim for damages under s 6(4) of the 1946 Act).

It was the Registrar General's onus in these proceedings to establish that a charge under s 6(1) had come into existence (at [27]-[28]). The court stated that such a charge "cannot fix on monies payable under a contract of insurance that was not in existence at the time of the event giving rise to the claim for compensation." Thus the Registrar General would need to establish that the event to which s 6 related occurred in the 12 months commencing the day the proceedings were commenced against the Registrar General (at [29]-[30]). In order to make good this submission, the Registrar General would need to demonstrate that the statutory right of subrogation under s 133(2) did not arise directly because of any act of negligence by the solicitor (at [39]).

Following the principle that a cause of action in negligence is complete once measurable loss has been suffered, even if further damage continues to accrue, the court found that the event which crystallised the plaintiff's loss was the registration of the fraudulent transfers in early 2007 (at [34]-[35]). That being so:

> *"[The plaintiff's] cause of action against [the solicitor] was consummated at the first point that she suffered loss as a result. That was the happening of the event giving rise to her claim for damages to which the Registrar-General has become subrogated. The fact that the Registrar-General may not, as in this case, have been called upon to pay compensation until a later time does not alter the fact that the relevant event for the purposes of s 6(1) was the point when [the solicitor's] acts or omissions caused loss. That point was no later than April or May 2011. It follows that no charge was created upon any insurance moneys "that are or may become payable" pursuant to the LawCover policy indemnifying [the insured] for the policy year commencing 1 July 2011. That fact is not altered*

> *by any characterization of the Registrar-General's right of subrogation as a statutory right or a hybrid claim involving a statutory right of action"* (at [40]).

The court therefore found that no charge on any insurance monies payable under the LawCover insurance policy existed at the time of the "happening of the event giving rise to the claim for damages" under the 1946 Act (ie. the registration of the transfers).

As a secondary – though equally important – issue, the court also dealt with the fraud/dishonesty exclusion in the LawCover policy which was the basis for the insurer declining to indemnify its client. In this regard, the onus was on the Registrar-General to prove on the balance of probabilities that the loss was compensable under the policy of insurance so, as a practical exercise, the Registrar-General needed to prove "*facts which show the absence of any ground upon which the insurer could effectively deny liability under the policy*"[6].

In this regard, Pembroke J's explicit finding was that the Registrar-General had not satisfied this onus and LawCover declined the indemnity on the basis that the solicitor had acted dishonestly, in accordance with the terms of the policy.

The court considered the statutory definition of 'compensable loss' in the *Real Property Act* (discussed earlier in this paper) and noted that the definition immediately gave rise to an inconsistency between the Registrar-General's position with regard to its statutory defence at trial (that the plaintiff's compensable loss did not include the solicitor's liability which was the subject of an indemnity under a professional indemnity insurance policy) on the one hand, and the position with regard to the Registrar-General's right of subrogation under s 133(2) to recover from the solicitor the 'compensable loss' said to have been suffered by the plaintiff. In bringing the action for compensation against LawCover directly, the Registrar General was, in effect, seeking to re-litigate the question of whether the solicitor's policy of indemnity responded to the events giving rise to the claim for damages under s 6(1) of the 1946 Act.

The Pedulla case illustrates the conceptual quagmire that can arise when questions of subrogation intersect with rights of compensation and insurance in circumstances where the precision of identifying the event giving rise to compensable loss is paramount.

[6] The court at [44], citing *Chandra v Perpetual Trustees Victoria Pty Ltd* [2007] NSWSC 694 at [64] per Bryson AJ

Overpayments From the Fund

And finally, a word about section 133A of the Act.

Section 133A was inserted into the Real Property Act on 13 May 2009 along with numerous other amendments made by the *Real Property and Conveyancing Legislation Amendment Act* 2009 No 17 (Schedule 1 [28]).

In essence, the provision exists to prevent a claimant from obtaining a windfall (or 'double dipping') from the Torrens Assurance Fund in situations where the claimant has received compensation from another source in respect of the same events. Consistent with the nature and purpose of statutory compensation schemes, the section aims to preserve the integrity of the compensatory system and to ensure that all levies paid towards the fund are protected from exploitation and are used only to the extent necessary to address the imbalances caused by the indefeasibility guarantee.

Conclusion

For lawyers working in property and conveyancing, the prospect of a property transaction "going wrong" is a concern that looms large in the mind of every skillful practitioner. While every attempt is made to cater for all eventualities that may arise, the fact remains that rights in property do remain vulnerable to forgery and the unscrupulous conduct of fraudsters.

Thankfully, the Torrens Assurance Fund provides a necessary safety-net to redress the inevitable deprivations that may come as a result of this robust system of property registration in New South Wales.

Although fraud is only one example in which the Torrens compensatory regime is enlivened, it is hoped that this paper goes some way to demystifying the main workings of the Torrens Assurance Fund and highlighting some of the procedural considerations for lawyers and clients when contemplating a claim for compensation under the Act.

***

August 2016