



Précis Paper

Torrens Assurance Fund

A discussion about the indefeasibility guarantee of s 42 of the *Real Property Act 1900* (NSW) & making a claim for compensation from the Torrens Assurance Fund

Discussion Includes

- Why does the Torrens Assurance Fund exist?
- What is the Torrens Assurance Fund?
- *Perpetual Trustees Victoria Ltd v English & Anor* [2009] NSWSC 478
- *Van den Heuvel v Perpetual Trustees Victoria Ltd* [2010] NSWCA 171

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Torrens Assurance Fund

1. In this edition of BenchTV, Lee-Ann Walsh (Barrister, Frederick Jordan Chambers, Sydney) and Amy Douglas-Baker (Barrister, Fourth Floor Selborne Chambers, Sydney) discuss the indefeasibility guarantee of s 42 of the *Real Property Act 1900* (NSW), and making a claim for compensation from the Torrens Assurance Fund.

Why does the Torrens Assurance Fund exist?

2. In NSW, ownership in land is determined by reference to who the registered proprietor is at any given time, which is otherwise known as the Torrens System of 'title-by-registration'.
3. S 42 of the *Real Property Act* (RPA) states that the registered proprietor's estate or interest in the land is paramount, except in the case of fraud and some other limited exceptions. This is known as the indefeasibility guarantee.
4. The two classic cases that demonstrate this principle are *Frazer v Walker* and *Breskvar v Wall*.
5. In *Frazer v Walker*, the Privy Council solidified the principle of immediate indefeasibility – that is, as soon as registration of a land dealing occurs, it gains immediate indefeasibility, regardless of any fraud that may have preceded it.
6. In *Breskvar v Wall*, Barwick CJ stated that the registration of an interest in land which results from a void instrument is still effective in terms of the registration. In other words, the cause of an instrument being void does not actually affect the indefeasibility it gains upon registration.
7. S 42 – the key provision relating to indefeasibility in NSW – is very powerful, in that inconvenient consequences can easily flow from a landowner's lack of vigilance or ignorance of the power of indefeasibility.

What is the Torrens Assurance Fund (TAF)?

8. The Torrens Assurance Fund is a scheme that is perhaps not very well known, but is an important statutory compensation scheme nonetheless.
9. The scheme was created in NSW under s 134 of the RPA, but conceptually, it dates back to the late 1800s when the Torrens System was first employed in South Australia. Different states handle compensation in respect of land registration differently, but in NSW, all the relevant provisions are contained in Part 14 of the RPA.

10. The Fund itself is comprised of lodgment fees and routine transactional revenue collected by Land Registry Services (previously the LPI).
11. Its main purpose is to redress the imbalances and inconvenient consequences of the indefeasibility guarantee in s 42.
12. It is important to understand that not all losses associated with land dealings are compensated by the Torrens Assurance Fund (TAF). Liability is limited by the statute.
13. The kinds of losses covered by the Fund include:
 - errors, misdescriptions, or omissions in the Register
 - fraud
14. There are two different ways a person can initiate a claim for compensation from the fund
 - *the first: under s 131 of the RPA.* Claims made under this section are known as administrative claims. They are made directly to the Office of the Registrar General. The Registrar General has a discretion to award compensation based on the facts and circumstances presented in the claim.
 - *the second: by way of court proceedings under s 132 of the RPA*

But either way, a claimant has to meet some minimum preconditions.

15. The threshold issue is whether a claimant has suffered a 'compensable loss' within the meaning of the RPA.
16. S 129(1) is very clear about the fact that loss suffered must arise:
 - as a result of the operation of the Act (that is, by some act of registration), and
 - from a particular circumstance prescribed under the section, one of which is where a person is deprived of their interest in land as a consequence of fraud
17. Loss in relation to a dealing in land might very well be attributable to a mistake on the part of the registered proprietor or some predecessor in title which has nothing to do with the operation of the Act itself.
18. Another threshold consideration is the limitation period that applies to court claims for compensation against the Fund. S 14(1)(d) of the *Limitation Act* provides a limitation period of 6 years from the date of registration of the interest or dealing, not from the date when the loss first becomes discoverable. This was clarified by Rein J in *Sinclair v Registrar General NSW* [2010] NSWSC 173.

19. The 'date of accrual' principle can sometimes cause huge headaches for potential claimants who are alleging some kind of fraud in relation to dealings affecting their property.
20. Cases involving fraud always involve some type of subterfuge and concealment when it comes to land dealings. A land owner is not usually in the habit of checking for encumbrances on their title each day to see if something untoward has occurred; they usually only find out when a mortgagee they never knew existed wants to exercise its power of sale, or they attempt to use their land as security for a loan, for example. So the date of accrual is a stumbling block for a lot of people hoping to claim from the fund.
21. It seems the most common types of claims made against the Fund involve fraud. Quite often, there is forgery of some kind (e.g. signatures forged on a loan document and mortgage, or just on the mortgage security document alone).
22. But fraud or forgery alone does not guarantee a compensation payout from the Fund by any means. A claimant has to overcome some hurdles before having a shot at compensation from the Fund.
23. S 129(2) places certain limits on liability reposing in the Fund. For example, the Fund will not be liable:
 - to the extent that the loss or damage was a result of the claimant's own acts or omissions (for example, the claimant left their Certificate of Title lying around on top of a bookshelf for all the world to see);
 - if the loss was a consequence of any fraudulent or negligent act or omission by a solicitor covered by a policy of professional indemnity at the time that fraud or negligence occurred; or
 - if the claimant has failed to mitigate their loss

It is not enough for a claimant to simply allege some kind of fraud in the process of registration.

24. Given what we know about the section 42 guarantee (i.e. that once an encumbrance is registered on the title of a property it gains indefeasibility), determining whether or not a person has suffered loss by reason of the operation of the Act is by no means straightforward.
25. The mere fact that a person's signature may have been forged on some transactional documents will usually not of itself be enough to prove that they have suffered a loss to which the Torrens Assurance Fund will respond. This is where the interpretation of the obligations created within those transactional documents – the loan and the mortgage – require close scrutiny in order to ascertain what exactly has gained indefeasibility upon registration of a mortgage.

26. So in order to ascertain whether or not a mortgage secures anything at all, a practitioner has to separately consider the terms of the mortgage on the one hand, and the liabilities created in the loan agreement secured by the mortgage on the other. And the wording of these documents – even things as simple as 'I' and 'we' – are often of paramount importance. The obligations created by these two transactional documents are not the same; and forgery – whether associated with either or both of them – will not necessarily lead to a conclusion that the victim of the fraud has suffered any loss at all.
27. Bryson J in *Chandra*, emphasised the importance of interpreting the precise obligations created under a loan and mortgage in order to ascertain whether a person has actually suffered any loss to which the Torrens Assurance Fund will respond.
28. Following *Chandra*, there is a long line of authority that sets out the legal principles applicable to the approach that ought to be taken in compensation cases involving land. Two of the key cases in this line of authority are *English* and *Van den Heuvel*.

Perpetual Trustees Victoria Ltd v English & Anor [2009] NSWSC 478

29. *English* sets out the key authorities that consider what exactly happens when a mortgage becomes registered on Torrens title land. This case involved a husband who forged his wife's signature on a loan agreement and on an all-monies mortgage, encumbering the matrimonial home.
30. As the wife had not signed the documents, she claimed that the mortgage – although indefeasible – secured nothing, and that she was therefore entitled to retain her interest in the property which was unaffected by her husband's fraud.
31. Simpson J identified the 'crucial issue' in the case to be identification of the estate or interest in the land which, upon registration of the mortgage, became indefeasible. As it turned out, the terms of the loan document required *all* the named borrowers to execute the loan agreement in order for it be regarded as an agreement secured by the mortgage.
32. Because not all of the named borrowers had signed that loan agreement, there was no secured agreement attached to the mortgage, so the mortgage – although indefeasible – secured nothing.
33. This resulted in a finding that the wife had suffered no loss, and therefore there was no claim to be made against the Fund. Just a year later (in 2010) we saw a slightly different approach by the Court of Appeal in *Van den Heuvel*.

Van den Heuvel v Perpetual Trustees Victoria Ltd [2010] NSWCA 171

34. *Van den Heuvel* was another case involving a husband who forged his wife's signature on a loan agreement and a mortgage. The Court of Appeal in this case had quite a bit more to

say about the interpretation that ought be given to transactional documents in these circumstances.

35. At first instance, the Supreme Court identified a number of key issues relating to the loan and mortgage, including:
 - first, that the lender used a form of all monies mortgage that did not just secure all amounts borrowed, but rather all amounts advanced to the borrower
 - second, that because there was a joint and several liability clause in the loan document, the mortgage secured the whole of the amounts advanced, and the mortgagee's indefeasible interest in the land comprised a security over the whole of the land, not just the husband's interest
36. This led to Mrs Van den Heuvel winning her claim for compensation from the Torrens Assurance Fund in the Supreme Court, which she appealed, on the basis that she had lost her interest in her home. Ultimately, she lost the appeal.
37. Basten J was the only dissenter, taking a very similar approach to that taken by Justice Simpson in *English*.
38. Hodgson J found that there was an agreement based on the lender and the husband's intention to be bound, notwithstanding the forgery of the wife's signature, and that the agreement came into existence the moment the husband signed the mortgage and the funds were advanced to him.
39. Perhaps more controversially, Young J was willing to infer that the possibility of the wife's signature being forged would have occurred to the lender as part of industry practice, and so it would have considered it commercially appropriate to lend the money so long as the husband was bound. However no evidence of industry practice was adduced in the proceedings.
40. There has been some obvious criticism about the formulations and characterisations used by the majority judges in *Van den Heuvel* that enabled them to arrive at a result that essentially ensured the lender got its money and an imperfect agreement was rendered perfect.
41. It is quite clear that the Court - both at first instance and on appeal - took a purely commercial approach towards not only the transactional obligations created in the documents, but also towards dealings between the parties themselves.

BIOGRAPHY

Lee-Ann Walsh

Barrister, Frederick Jordan Chambers, Sydney

Lee-Ann was called to the Bar in 2012. Prior to this, she worked in the legal publishing, research and policy fields and was tipstaff and Associate in the NSW Court of Appeal. She has appeared as junior counsel in key property and commercial cases in the High Court and has developed a diverse range of practices areas including commercial, equity, property and employment law. Lee-Ann was recently appointed Editor of Hallmann's Legal Aspects of Boundary Surveying.

Amy Douglas-Baker

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Amy was called to the Bar in 2009. She previously worked in judges' chambers in the Supreme Court of New South Wales and the Federal Circuit Court of Australia. In 2015, Amy was recognised for achieving excellence in her areas of practice as a finalist for the Women Lawyers Association of NSW Woman Barrister of the Year Award.

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Legislation

Real Property Act 1900 (NSW)

Limitation Act 1969 (NSW)