

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 67/2008  
[2009] NZSC 73**

BETWEEN WESTPAC NEW ZEALAND LIMITED  
Appellant

AND ALAN JOHN CLARK  
Respondent

Hearing: 4 May 2009

Court: Elias CJ, Blanchard, Tipping and Wilson JJ

Counsel: R B Stewart QC and M V Robinson for Appellant  
A C Challis for Respondent

Judgment: 3 July 2009

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant must pay costs of \$15,000 to the respondent together with his reasonable disbursements as fixed by the Registrar.**

**REASONS**

	<b>Para No</b>
Elias CJ	[1]
Blanchard, Tipping, and Wilson JJ	[16]

## **ELIAS CJ**

[1] On 4 October 2005 Westpac New Zealand Ltd was the victim of a sophisticated fraud. It advanced \$180,400 to an impostor who claimed to be the registered proprietor of a property in Remuera, Auckland. The advance was made under a home loan agreement in the name of the registered proprietor but executed by the impostor and therefore a forgery. It was secured by an “all obligations mortgage”, also executed by the impostor and a forgery, which purported to charge the interest of the registered proprietor in the Remuera property. The defendant acted as solicitor for both Westpac and the impostor in preparing the documentation for the loan and mortgage. It is not suggested on the appeal that either he or the bank was negligent in failing to see through the deception. Other banks were similarly taken in. The impostor has not been traced and the money she obtained has not been recovered.

[2] Before the money was made available by Westpac on the strength of the mortgage and the home loan agreement, the defendant had sent it a solicitor’s certificate in which he undertook to “promptly lodge or submit, in a registrable form at the appropriate registry of Land Information New Zealand all Documents which are required by law to be registered (or the non-registration of which might affect the priority of any security interest contained in any Document)”. It is accepted that the defendant was in breach of his undertaking to register the mortgage promptly. He did not present it for registration until 6 December, after receiving an inquiry from Westpac as to registration. By that time, the fraud perpetrated by the impostor had come to light. It had been known to Westpac by 18 November, a fact it did not however communicate to Mr Clark on 6 December when inquiring why the mortgage had not been registered. As a result of its advice to Land Information New Zealand, the Registrar had already lodged a caveat against the title. The Registrar declined to accept the mortgage for registration when it was received from Mr Clark after he had been jolted into action by the Westpac inquiry. When he presented the mortgage for registration Mr Clark remained in ignorance of the fact that it was a forgery.

[3] The undertaking as to registration was confined to the mortgage and did not extend to the loan agreement. Until registration a mortgage would have effect as an equitable charge only and not a legal charge against the land.<sup>1</sup> The bank was vulnerable to loss of priority to subsequent registered dealings with the land. It was foreseeable that failure by the solicitor to perform the undertaking and register the mortgage could cause loss to the bank through inconsistent dealings with the land by the registered proprietor or anyone else, including by fraudulent registration of inconsistent instruments. That was not the type of loss which eventuated here. Westpac's security over the Remuera property was not defeated by inconsistent subsequent dealings with the land but by the fact that its mortgage was void because a forgery.

[4] Westpac contends however that the void forged mortgage would have been treated as valid under the indefeasibility provisions of the Land Transfer Act 1952, if it had been registered without fraud on its part, as it could have been before Westpac became aware of the deception. Westpac claims that the defendant's failure to register the mortgage during the period from the advance of the moneys before the forgery came to light deprived it of such statutory validation. As a result it says it suffered the full loss on the moneys advanced and the interest the loan continues to bear under the terms of the loan agreement because it was unable to exercise a power of sale of the property, as it would have been able to do if the mortgage had become a legal charge upon registration.

[5] Westpac issued proceedings against Mr Clark claiming loss by reason of Mr Clark's failure to register the mortgage. At the same time it applied for summary judgment. Because of the summary judgment application, no statement of defence was filed in the proceedings. Rather, by his notice of opposition to the summary judgment application, Mr Clark put forward a number of defences to summary judgment. In addition to claimed defences no longer live on the appeal, he claimed that:

Even if a breach of duty is proved, the plaintiff will fail to prove that any loss suffered was caused by such breach. Without the necessary causative

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<sup>1</sup> *Re Universal Management Ltd* [1983] NZLR 462 at p 471 per Cooke J (CA).

link, an essential element of proving liability against the defendant is missing.

[6] In the High Court, Associate Judge Christiansen declined to enter summary judgment.<sup>2</sup> He held that the claim was not suitable for summary judgment, even on the alternative basis put forward by the bank of a determination of liability only, because summary judgment would “preclude an opportunity to examine the extent to which the loss, if any, was due to the actions of the plaintiff”.<sup>3</sup> The plaintiff had allowed the drawdown of funds before registration and its own conduct should be considered in case it contributed to any loss. In addition to the role of the plaintiff in contributing to any loss, the Judge considered that the plaintiff had not demonstrated loss as a result of any breach. First, he considered that it was “speculative” whether the mortgage would have been accepted for registration.<sup>4</sup> Secondly, even if the forged mortgage had been registered, the actual loss on the loan had already been suffered. Whether the bank suffered loss through the failure to register depended on its preparedness to exercise a power of sale against the innocent registered proprietor. There was “no evidence before the court that the plaintiff would in this instance have taken that step”,<sup>5</sup> which was likely to have attracted critical public comment. The Judge therefore considered that a “managed process of discovery and trial”<sup>6</sup> was necessary before summary judgment could be entered either for the sum claimed or, as the plaintiff had contended in the alternative, for liability.

[7] Westpac appealed to the Court of Appeal on the basis that the Associate Judge’s determinations that Mr Clark had breached his undertaking to register the mortgage promptly and that it would have obtained an indefeasible interest were inconsistent with the conclusion that summary judgment should not be entered. The Court of Appeal<sup>7</sup> gave short shrift to the reasons in the High Court which were based upon Westpac’s own contribution to the loss and concerns about proof of causation. It considered that whether Westpac could have taken more effective steps to protect

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<sup>2</sup> *Westpac Banking Corporation v Clark* (High Court, Auckland, CIV 2006-404-2175, 2 August 2006).

<sup>3</sup> At para [22].

<sup>4</sup> At para [26].

<sup>5</sup> At para [27].

<sup>6</sup> At para [29].

<sup>7</sup> *Westpac Banking Corporation v Clark* [2009] 1 NZLR 201 (Glazebrook, Robertson and Arnold JJ).

itself against the fraud was simply not relevant because “[h]ad Mr Clark registered the mortgage promptly, Westpac would have had an indefeasible title and thus an enforceable security”.<sup>8</sup> The Court of Appeal considered that there was “no evidential basis” for a suggestion that there would have been any problems with registration of the mortgage before 18 November 2005.<sup>9</sup> Nor did it accept the view of the Associate Judge that it was not clear that Westpac, if registered, would have exercised its power of sale against the innocent registered proprietor. The Court of Appeal thought that there could be no adverse consequences to be weighed by Westpac because the registered proprietor “would have been entitled to compensation under s 172(b) of the Land Transfer Act 1952” and would thus not have been “out of pocket” if Westpac had enforced its mortgage.<sup>10</sup>

[8] The principal question considered by the Court of Appeal was one it raised itself.<sup>11</sup> It concerned the scope of the indefeasibility provisions of the Act. That question was whether the indefeasibility obtained by a forged but registered mortgage extends to the obligation in an unregistered forged loan agreement which it purports to secure. The suggestion was that, if not, the mortgage, although indefeasible, would secure “nothing” because it would not secure the obligation derived from the unregistered and void loan agreement. This was the argument that prevailed and upon which the Court of Appeal affirmed the conclusion to deny summary judgment. The Court concluded that the terms of the forged loan agreement in the present case had not been incorporated into the mortgage. The Land Transfer Act did not have the effect of deeming documents referred to in the registered mortgage to have been executed by the registered proprietor when they had been executed by a forger. The registered proprietor accordingly was not treated as owing the sum secured by the registered mortgage, even if registration deemed the mortgage to have been executed by the registered proprietor.<sup>12</sup>

The rule in s 62 of the [Land Transfer Act] provides for the effect of registration, but it does not purport to extend beyond registered instruments. It is not plausible to suggest that documents that cannot (directly or by

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<sup>8</sup> At para [13].

<sup>9</sup> At para [19].

<sup>10</sup> At para [22].

<sup>11</sup> At para [7]. The Court referred to a question posed and left open by Glazebrook J in *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 at para [147] (CA).

<sup>12</sup> At para [72].

incorporation principles) be brought within the ambit of the registered instrument itself are within the purview of s 62. To so hold would be to misunderstand the Torrens system of registration.

This is the single point upon which leave to appeal to this Court was granted.<sup>13</sup>

[9] Because of the way in which the matter has come before the Supreme Court, the arguments addressed to us turned on interpretation of the provisions of the Land Transfer Act and the effect of the forged mortgage and loan documents in their own terms. On the point argued, I am in agreement with the reasons delivered by Blanchard J for dismissing the appeal on a basis which differs from that accepted in the Court of Appeal but which concludes, as the Court of Appeal concluded, that a registered mortgage, although indefeasible, secures nothing if the debt in respect of which it charges the land is an obligation derived from a forged and unregistered loan agreement. I do not wish to add anything to those reasons. On this basis, the bank has not shown that it suffered loss through the failure to register the mortgage. I write separately however to express reservations about the basis upon which the Court of Appeal dismissed Mr Clark's more fundamental argument that the failure to register the mortgage could not be causative of loss because the unregistered mortgage was a forgery.

[10] This matter of causation was put in issue by the defendant's notice of opposition to summary judgment but seems to have been overshadowed in the Courts below by questions of the bank's own contribution to its loss. It is unfortunate that this focus on the conduct of the bank (which necessarily required some evidential foundation, found to be lacking) seems to have deflected attention from what should have been the prior question: whether recoverable loss is caused through a solicitor's failure to register a forged mortgage. This question turns on general principles of damages and on public policy. It is not adequately answered by the conclusion expressed by the Court of Appeal that there was "no evidential basis" for a suggestion that there would have been any problems with registration of the mortgage before 18 November 2005.

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<sup>13</sup> [2008] NZSC 100 (Blanchard, Tipping and McGrath JJ).

[11] In acting for the bank, Mr Clark was under contractual duties to exercise proper care and skill. He had specifically bound himself to register the mortgage “promptly”. It may readily be accepted that he was in breach of duty in not presenting the mortgage for registration until some ten weeks after his undertaking was given. But whether the bank is entitled to damages for breach of duty, and the extent of those damages, depends upon whether the bank’s claimed loss is shown to have been caused by the breach of duty and was not too remote. Because of the course this appeal has taken, it would be wrong to express any concluded view about the outcome had the questions of causation and remoteness of loss been distinctly addressed. I do not wish however to be taken to acquiesce in the approach to these matters taken in the Court of Appeal. It is well arguable that if properly considered, they may well have been dispositive. I indicate why briefly.

[12] The premise of the claim made by the bank is that it was entitled to have Mr Clark register a forgery and that it has been deprived of that benefit. I doubt whether that can be right. The mortgage executed by the imposter was void and of no effect because a forgery. It was not in “registerable form” because it did not comply with s 101(3) of the Land Transfer Act, which provides that “a mortgage instrument must be executed by the registered proprietor”. Whether or not registration confers immediate indefeasibility does not affect the status of an unregistered instrument. If it is a nullity, it remains a nullity. A person who might benefit should it obtain indefeasibility (as through mistake occasioned by ignorance as to its status) is not entitled to obtain its registration. His own ignorance of its status does not confer such entitlement upon him, even if it protects him from being brought within the fraud exception to indefeasibility should registration occur.

[13] Indefeasibility attaches upon registration, “whether that was regular or otherwise”,<sup>14</sup> and protects the integrity of the register. Non-compliance with the requirements of registration does not affect the validity of registration, because that would be “destructive of the whole system of registration”.<sup>15</sup> But it seems to me well arguable that the policy which attaches on registration does not relate back to overcome the need for compliance with the statutory requirements for registration or

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<sup>14</sup> *Frazer v Walker* [1967] NZLR 1069 at p 1075 per Lord Wilberforce (PC).

<sup>15</sup> *Frazer v Walker* at p 1075.

to confer entitlement to register a void instrument. If a non-complying instrument, as the mortgage here was, is not registrable or is void, it is not at all clear that the bank's loss was caused by the defendant's breach in failing to procure registration. It had no valid security at the time of the advance and it had no registrable and valid instrument to be registered.

[14] Closely associated with the question of causation in the circumstances of the present claim is the question of remoteness of loss. As already indicated at para [3], the loss foreseeable as not unlikely if the solicitor's undertaking were to be breached was loss arising from inconsistent dealings with the land sought to be charged. That was not the loss that eventuated. It arose from the unexpected circumstance that the bank was dealing with an imposter and forger. The bank's claim against the solicitor is for failure to put it in a protected position through registration of a forged mortgage in order to enable it to exercise a power of sale against an innocent proprietor. That would leave the registered proprietor to claim compensation under s 172 of the Land Transfer Act for damages for the "mistake" of the Registrar in registering the forged mortgage. (As an aside, I doubt that this outcome can be regarded with equanimity, as the Court of Appeal seems to have treated it; the "out of pocket" result after mortgagee sale is not neutral in its impact on a registered proprietor.) I am of the view that significant questions of public policy arise in considering whether the loss sought to be recovered in the present circumstances is properly to be regarded as too remote.

[15] I regret that these issues, immediately raised by the decision of the Court of Appeal and determined on a basis I regard as doubtful, have not been directly addressed on appeal. Since, however, the point upon which the Court is unanimous is sufficient to dispose of the appeal, it is not necessary to direct further argument on them, as would have been necessary if the appellant's argument on incorporation had been successful. For the reasons given by Blanchard J, I agree that the appeal should be dismissed. The bank has failed to prove the claimed loss because its charge, even if registered, would not have secured the amount advanced under the forged loan documents.

## **BLANCHARD, TIPPING AND WILSON JJ**

(Given by Blanchard J)

[16] A solicitor negligently delayed registering an “all obligations” mortgage to a bank. By the time the solicitor presented the mortgage for registration under the Torrens system the Registrar had been informed by the bank of its suspicion that the mortgage was a forgery and the Registrar had caveated the title to the affected land. The bank’s suspicion turned out to be correct. Its unregistered mortgage was a nullity. The bank now sues the solicitor alleging that his negligence caused it loss since, if he had acted in a timely manner, the mortgage would have been innocently registered and, as neither the bank nor any agent of the bank was a party to the forgery, the bank would have obtained an immediately indefeasible title as mortgagee.<sup>16</sup>

[17] It is said for the solicitor, however, that although on registration of the mortgage the bank would have obtained an indefeasible charge over the land which was the subject of the mortgage, the obligation to pay the sum advanced by the bank to the forger arose only under a loan contract which was not a registered document nor incorporated by reference into the registered mortgage. The loan contract was also a forgery. It is accordingly a nullity and, it is said, the consequence is that nothing would have been secured under the bank’s mortgage if it had been registered. Therefore the solicitor’s negligence caused the bank no loss.

[18] The Court of Appeal<sup>17</sup> accepted that argument. The bank appeals.

[19] The Court for this appeal was constituted with four members under s 30(1) of the Supreme Court Act 2003.

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<sup>16</sup> *Frazer v Walker* [1967] NZLR 1069 (PC).

<sup>17</sup> *Westpac Banking Corporation v Clark* [2009] 1 NZLR 201 (Glazebrook, Robertson and Arnold JJ).

## **The facts**

[20] Title to a residential property at 63 Shore Road, Remuera, Auckland was registered under the Land Transfer Act 1952 in the name of Marie Antoinette Fenech. In September 2005 a clever impostor pretending to be Ms Fenech, armed with a false passport and other documentation bearing Ms Fenech's name, persuaded Westpac New Zealand Ltd to agree to make an advance of \$180,400 to be secured by way of mortgage against the Shore Road property. The impostor, again pretending to be Ms Fenech, instructed a solicitor, Mr Clark, to act on her behalf. The real Ms Fenech was not known to Mr Clark. Westpac also instructed Mr Clark to act on its behalf.

[21] Having obtained the signature of the impostor on the bank's registrable mortgage form and on the bank's separate unregistrable home loan agreement form, Mr Clark sent a "Solicitor's Certificate and Undertaking" dated 30 September 2005 to Westpac. In the certificate he said he would "promptly lodge or submit, in a registrable form at the appropriate registry of Land Information New Zealand ("LINZ") all Documents which are required by law to be registered (or the non-registration of which might affect the priority of any security interest contained in any Document)". The appeal was argued on the basis that this required of Mr Clark prompt registration of the mortgage which had been executed by the impostor whom he believed to be Ms Fenech.

[22] The advance was made to the impostor on 4 October but Mr Clark failed to despatch the mortgage to LINZ for registration<sup>18</sup> until 6 December, before which time the Registrar had been alerted by Westpac to the possibility of a fraudulent dealing with Ms Fenech's title and had lodged a caveat which blocked any registration of the mortgage.

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<sup>18</sup> A paper (i.e. non-electronic) registration was intended.

## **The security documentation**

[23] Westpac had previously executed and registered under s 155A(2) of the Act a memorandum (No 2001/4106) for application to all its residential mortgages. The mortgage document signed by the impostor was in short form. It was headed “Mortgage (Residential Property)”. It identified Ms Fenech as the mortgagor and the certificate of title number of her land in the North Auckland Land District. Its operative clause read:

In consideration of the “Secured Money”, you, as the Mortgagor, hereby mortgage to the Mortgagee all of your estate and interest in the land described in the above certificate of title. This mortgage incorporates all of the provisions of Memorandum No. 2001/4106 registered in the Land Registry Office for the above district. The term “Secured Money” is defined in the Memorandum.

The memorandum is headed “Residential Mortgage” and provides that it “forms part of your mortgage”. It defines “Secured Money” in cl 1.1 as “all money which you (whether alone or with any one or more others) may owe to Westpac now or in the future for any reason”. On the subject of payment, it says, in cl 2.1:

You must pay to Westpac, on time, the Secured Money. You must pay the Secured Money on demand except where your Loan Agreement or another Bank Document provides otherwise in which case you must pay in the manner agreed in your Loan Agreement or that other Bank Document.

The memorandum refers several times to payments or obligations under “your Loan Agreement” and in cl 6.1 it says that the term Loan Agreement “includes any agreement relating to the money lent to you by Westpac to buy or refinance the Mortgaged Property”. In cl 4.2 it says that if “you” fail to pay any Secured Money when due, then, subject to the Property Law Act 1952 and other relevant laws, Westpac may sell the Mortgaged Property. Clause 4.4 deals with the use of money so recovered.

[24] The home loan agreement signed by the impostor on the same day as the mortgage was addressed to Ms Fenech and contained a series of provisions referring to her as “you”. It said, inter alia, that “[b]efore you can draw your on [sic] Loan

you need to ... complete and sign any new security documentation and satisfy Westpac's security requirements". It provided for an advance of \$180,400 at an initial interest rate. The covenants for payment all address the borrower as "you" (e.g "you will pay all principal and other amounts..."). On the subject of security, the agreement provided:

Your Loan, as well as any other moneys you may owe to Westpac now or in the future under any existing or future agreements between you and Westpac, including under any guarantee you have granted in favour of Westpac, will be secured by all existing and future securities and/or guarantees (together, "Securities") held by Westpac in respect of your obligations, including those Securities listed in Appendix A, and any further Securities which Westpac at any time advises you that it requires. This may constitute a change to your arrangements with Westpac under any of those other agreements.

[25] Appendix A contains a description of the mortgage over the Shore Road property "to secure your present and future indebtedness to Westpac".

### **The decisions below**

[26] Westpac has not been able to recover the moneys advanced to the impostor. It sued Mr Clark for professional negligence. The High Court refused to grant summary judgment.<sup>19</sup> The point with which we are concerned was not taken for Mr Clark before Associate Judge Christiansen who treated the mortgage as security for the advance but nevertheless considered that the facts required further investigation before it could be determined whether Westpac's loss was caused by a breach of duty of care by Mr Clark.

[27] Westpac appealed against this decision. During an initial hearing on 29 May 2007 the Court of Appeal drew counsel for Mr Clark's attention to the possibility, adverted to in Glazebrook J's judgment in *Nathan v Dollars & Sense Finance Ltd*,<sup>20</sup> that where a separate loan document was void because of forgery, the covenant to pay in a registered mortgage might be indefeasible but secure nothing.

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<sup>19</sup> *Westpac Banking Corporation v Clark* (High Court, Auckland, CIV 2006-404-2175, 2 August 2006, Christiansen AJ).

<sup>20</sup> [2007] 2 NZLR 747 at para [147] (CA). The point was not discussed when this Court affirmed the decision of the Court of Appeal: *Nathan v Dollars & Sense Ltd* [2008] 2 NZLR 557.

The appeal was then adjourned and this issue was argued at a further hearing on 9 April 2008 when Mr Stewart QC for the first time appeared for Westpac.

[28] In its reasons for judgment delivered on 5 September 2008, the Court of Appeal accepted that there was no proper evidential basis for an assertion that Westpac did not take adequate steps to prevent fraud. There had been a level of sophistication about the fraud. Nothing had aroused the suspicions of Mr Clark about the impostor's identity. Three other banks and three other solicitors had been similarly fooled. The Court of Appeal also rejected the submission for Mr Clark that Westpac had contributed to its own loss by alerting LINZ to the possibility of fraud. The Court said it would have been totally unacceptable for Westpac, having that knowledge, to have attempted registration without alerting the Registrar and it could not have allowed its agent to have done so. But Mr Clark could have registered before 18 November when Westpac first became aware of the possible fraud. There was no evidential basis to suggest there would have been any problem in doing so before that time. Also rejected was a submission, that, for public relations reasons, Westpac would not have enforced the mortgage if it had been registered: the true Ms Fenech would have been entitled to compensation under s 172(b) of the Land Transfer Act which would have given her sufficient funds to discharge the mortgage. She would not have been left out of pocket.

[29] Having cleared away all other possible defences, the Court of Appeal moved to the issue with which this Court is now confronted. It considered that it was possible to incorporate covenants into a mortgage by reference to and by incorporation of the terms of another document. But the Court said that mere reference to a document did not suffice. In this case, the terms of the forged loan agreement had not been incorporated in the mortgage.<sup>21</sup> "Loan Agreement" was defined as "money lent to you" and "you" was a reference to the registered proprietor, as was explicit in the operative clause of the mortgage. The definition of secured money did not include money owed by "you or anyone purporting to be you".

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<sup>21</sup> At paras [55] – [56].

[30] Nor was the effect of the Act to deem documents referred to in the mortgage to be documents executed by the true registered proprietor. The Court considered that the proper approach was to look at the terms of the registered documents and then to determine which of those terms were indefeasible. Because registration did not validate a personal covenant in a forged mortgage, the true registered proprietor was not deemed to owe the secured sums. The Act did not deem the mortgage to have been executed by the true registered proprietor. All that registration achieved was to delimit or qualify the estate or interest to the mortgagee in the land. At most the personal covenant could provide quantification of the amount by which the land stood charged, but only where that amount was set forth or expressly incorporated into the mortgage itself.<sup>22</sup> The Court went on:

[71] In any event, even if Mr Stewart's submission is correct with regard to the mortgage itself, it is difficult to see how registration deeming the mortgage to have been executed by the registered proprietor could apply to deem unregistered documents to have been so executed. The same applies to the argument that registration somehow incorporates the terms of separate documents even if they would not be held to be incorporated using the normal rules of construction of documents. To accede to such an argument would extend the ambit of the LTA to unregistered documents.

[72] It seems to us that Westpac is asking us to hold, as a matter of statutory interpretation, that the phrase "the money which you . . . may owe to Westpac" . . . includes money owed by "you or anyone purporting to be you, including under any unregistered documents that are not incorporated into the mortgage". It must be remembered that, if this was implied by the LTA, then it would apply no matter how negligent the lender had been, short of actual fraud or wilful blindness, which would distort the concept of registration under the LTA. The rule in s 62 of the LTA provides for the effect of registration, but it does not purport to extend beyond registered instruments. It is not plausible to suggest that documents that cannot (directly or by incorporation principles) be brought within the ambit of the registered instrument itself are within the purview of s 62. To so hold would be to misunderstand the Torrens system of registration.

Westpac's appeal was therefore dismissed.

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<sup>22</sup> At paras [69] – [70].

## Discussion

[31] Until the Privy Council's decision in *Frazer v Walker* in 1966, shortly afterwards followed by the High Court in Australia in *Breskvar v Wall*,<sup>23</sup> it was uncertain whether someone in whose favour a void instrument was innocently registered could have their registration cancelled by order of a court. In *Frazer v Walker* the Privy Council held that such a person obtained immediately on registration of the void instrument (in that case a forged mortgage) a title protected by s 62 of the Act which provides that, subject to certain exceptions of no present relevance:

[T]he registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates or interests whatsoever...

[32] If the mortgage in the present case had been registered before 18 November 2005 neither Westpac nor any agent of Westpac would have been guilty of any fraud in connection with the execution or registration of the mortgage. Westpac would therefore have held its mortgage charging the land subject only to other notified encumbrances, liens, estates or interests, of which there were none which would have had priority over Westpac's mortgage.

[33] In *Duncan v McDonald*, in a passage which Mr Stewart adopted in his written submissions and which Ms Challis did not question, the Court of Appeal said, speaking of a mortgage securing a specified sum:<sup>24</sup>

A registered mortgage consists of a covenant to pay and other supporting covenants by the mortgagor and a charge to secure their performance. Where, apart from registration, the mortgage would have been a nullity, registration protects the charge. In that situation the covenants are effective and enforceable to enable the charge to operate and moneys owing to be recovered by that means, but the covenants are not enforceable against the mortgagor separately from the right of recourse by means of a proceeding for the recovery of debt.

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<sup>23</sup> (1971) 126 CLR 376.

<sup>24</sup> [1997] 3 NZLR 669 at pp 682 – 683 per Blanchard J (CA).

Assume that an unregistered mortgage is null and void. The mortgagee cannot obtain judgment on the personal obligations recorded in the covenants in the instrument nor obtain a judgment ordering sale of the land and application of its proceeds to discharge those obligations. After registration of the instrument is obtained without fraud the latter becomes possible (and the mortgagee can simply sell the land without Court Order in exercise of power of sale) but not the former. Take, for example, a situation like that which existed in *Frazer v Walker* [1967] NZLR 1069 or in *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, of a mortgagee who advances money on the strength of a forged mortgage which is innocently registered. Upon default, the mortgagee can recover the money by exercising the power of sale and recouping the advance from the proceeds. But if the proceeds are insufficient, the mortgagee cannot pursue the mortgagor for the balance in reliance on the forged covenant to pay (*Grgic* at p 224); nor can the mortgagee prior to any such sale elect to sue the mortgagor personally on the covenant, not seeking to enforce the security, perhaps because it is discovered to be valueless. What registration of an otherwise void mortgage gives the innocent mortgagee in these circumstances is the right of recourse to the security for such value as the land may have. The charged property is rendered liable for the debt by the registration. The covenants to pay and supporting covenants given by the registered proprietor then become operative to such extent only as is necessary to enable realisation of the security and recovery of the advance or part thereof by that means.

So, to take an example, if the registered but forged mortgage contained a covenant by the mortgagor to pay \$100,000, the innocent mortgagee could recover that amount by exercising the power of sale in the mortgage but, if there were a shortfall in the net proceeds of sale, it could not recover it from the registered proprietor whose signature had been forged.

[34] Mr Stewart asked rhetorically why the position should be different when it is necessary to look at an unregistered document in order to see what is secured under the mortgage. Counsel said that, even in the case of a fixed sum (traditional) mortgage, it is necessary to look elsewhere in order to know exactly how much is actually owing; that the mortgagee can never simply point to the figure expressed in the mortgage document and that it is always necessary to look to the account between the mortgagor and the mortgagee. That must be so, even if no capital repayments have been made, in order to see the up to date position concerning interest, or perhaps more fundamentally, to ascertain that the fixed sum was actually fully advanced in the first place.

[35] We agree, however, with the Court of Appeal’s rejection of this argument.<sup>25</sup> The flaw in it is that the necessary inquiry is not concerned with what is secured by the mortgage but with the state of accounts between borrower and lender, which has to be examined to see what is actually owing, not what is secured. The fact that, in theory if rarely in practice, a mortgagor might be entitled to have the mortgagee execute a discharge while all or some of the mortgagor’s indebtedness remains outstanding (perhaps because the security does not extend to all of the debt) does not diminish the force of this response to counsel’s argument. The short point is that what is secured and what is actually owing are two different things.

[36] Mr Stewart’s primary submission was that, if the charge contained in a mortgage has the benefit of immediate indefeasibility, it should make no difference whether there is a covenant to pay a specified amount expressed in the mortgage itself or whether the mortgagee’s claim is based on a covenant in a document which is unregistered but linked to the mortgage by a reference in the mortgage. In both cases, he said, the advance by the mortgagee is made on the strength of the mortgage. The indefeasible charge should extend to both. He drew attention to the very wide definition of “mortgage” in s 2<sup>26</sup> and said that the Act recognised “all obligations” mortgages, with a form for such a mortgage being prescribed in Sch 2 of the Land Transfer Regulations 2002. Westpac’s mortgage complied with Form 6. He supported this submission by reference to s 41 of the Act and to the decision of the High Court of Australia in *Gibb v The Registrar of Titles (Victoria)*.<sup>27</sup>

[37] Section 41, like s 62, is a central provision of the Act. The effect of the section, in relation to a mortgage, is that until registration no instrument is effectual to render land under the Act liable as security.<sup>28</sup> But, upon registration, the land

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<sup>25</sup> At para [76].

<sup>26</sup> Mortgage means any charge on land created under the provisions of this Act for securing—

- (a) The repayment of a loan or satisfaction of an existing debt;
- (b) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;
- (c) The payment to the holders for the time being of any bonds, debentures, promissory notes, or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of that charge;
- (d) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rentcharge, or sum of money other than a debt:

<sup>27</sup> (1940) 63 CLR 503.

<sup>28</sup> This does not prevent an unregistered charge, if valid, from creating an equitable interest.

“become[s] liable as security in manner and subject to the covenants, conditions and contingencies *set forth and specified in the instrument*, or by this Act declared to be implied in instruments of a like nature”. The question, which does not appear to have been directly addressed in case law, is whether a covenant in another document can be considered to be “set forth and specified” in the instrument if it is not expressed to be incorporated by reference.<sup>29</sup>

[38] The *Gibb* case was about a Registrar’s objection to the form of a mortgage. The Victorian Torrens statute contained a provision like s 41 providing that on registration of a mortgage the land became liable and subject to “the covenants and conditions set forth and specified in the instrument”.<sup>30</sup> The question for the High Court of Australia concerned the registrability of a mortgage to a building society which contained a mortgagor’s covenant to erect buildings “in accordance ... with the plans and specifications submitted to the mortgagee upon the application for the advance”. The Registrar had declined to accept the mortgage for registration, arguing that the Act did not authorise or contemplate the insertion in a mortgage of any covenant or condition which required for its interpretation a reference to unregistered documents. It was therefore a case about the form of the mortgage – whether it could include reference to an unregistered document – not about the effect of the registration of the mortgage on a covenant in an unregistered document. However, one of the five Judges, Latham CJ, did consider whether the covenant referring to the plans and specifications could be said to be “set forth” in the mortgage instrument. In a somewhat difficult passage he said:<sup>31</sup>

The covenant actually made by the parties is so set forth. *It is true that the covenant refers to and incorporates by reference certain plans and specifications which were not lodged for registration* and which have not been registered in the Titles Office in connection with any other transaction. But the whole of the covenant which the parties in fact made is stated in accurate terms in the instrument presented for registration. In order to ascertain the extent of the obligations created by the covenant it is necessary to refer to other documents, namely, to the plans and specifications, *but those documents cannot, in my opinion, accurately be said to be part of the covenant itself.*

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<sup>29</sup> Section 41(5), which concerns registered instruments without an operative provision, recognises the concept of incorporation.

<sup>30</sup> Section 61 of the Transfer of Land Act 1928.

<sup>31</sup> At p 509 (Emphasis added).

The Chief Justice appears to be taking a generous view of what could be said to be incorporated into a registered document. He seems to be saying that the reference to the plans in the mortgage was sufficient to incorporate them in it even though they were not part of the covenant itself. His remarks were not of course directed to the issue with which we are presently concerned, but do appear to provide some support for Mr Stewart's argument.

[39] In the judgment of Starke J the helpful observation is made that "specified", in the section equivalent to our s 41, means particularised or definitely set forth. The Judge saw no distinction between setting forth and specifying a covenant.<sup>32</sup>

If a covenant in a mortgage requires that a building be erected according to a plan that is annexed to the mortgage or is identifiable, then the plan is particularized and definitely mentioned in the mortgage.

So Starke J, also, was of the view that a mere mention of the unregistered document sufficed for the purposes of the section.

[40] There is nothing elsewhere in *Gibb* which casts light on the effect of an unregistered document to which reference is made in a registered mortgage. However, the wide definition in s 2 of the Land Transfer Act of the term "mortgage", as including a charge on land for securing "payment or satisfaction of any future or unascertained debt or liability contingent, or otherwise", and the recognition of all obligations mortgages by the prescription of a form for such mortgages does suggest that it should be possible to link covenants in unregistered documents to the charge in a mortgage by an adequate identification of a particular document or class of documents without more.

[41] Westpac's position is greatly assisted in the present case by s 155A(7), to which counsel did not draw attention. The section enables a mortgagee to register a memorandum of terms and conditions to apply to a class of mortgage. Form 6, which Mr Stewart mentioned, is in fact for use in connection with such a memorandum. In s 155A, which first appeared in the Act in 1986 and was amended in 2002, a "memorandum" means a memorandum in the prescribed form setting

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<sup>32</sup> At pp 514 – 515.

forth provisions that are intended for inclusion in documents of a class specified in the memorandum.<sup>33</sup> Subsection (2) authorises the execution of a memorandum for the purpose of registration and directs the Registrar to number and register it when it is delivered for registration and is approved by the Registrar. That has occurred in this case. Westpac obtained registration of a memorandum for use with its residential mortgages.

[42] The registration of Westpac's memorandum occurred in 2001 under regulations in force at that time, which have since been replaced, but nothing appears to turn on that point. The important thing is that when the mortgage instrument in the present case was executed, and should have been presented for registration by the respondent, subs (7) of s 155A was in its present form. It provides as follows:

Where an instrument is of a class specified in a memorandum registered under subsection (2) or subsection (3) of this section, or is of a class in respect of which a memorandum has been prescribed under subsection (6) of this section, and contains a provision or reference that incorporates (with or without amendment) any or all of the provisions set out or referred to in that memorandum, those provisions or (as the case may require) those provisions as amended shall be implied in that instrument as fully and effectually as if they were set forth at length in the instrument.<sup>34</sup>

The effect of this subsection is that, because Westpac's mortgage instrument contains a provision (the operative clause quoted in para [23] above) stating that the mortgage "incorporates all of the provisions" of Westpac's memorandum, the provisions set out *or referred to* in the memorandum are implied in the mortgage as fully and effectually as if they were set forth at length in it. The memorandum at several points refers to loan agreements between the mortgagor and Westpac. In particular, it refers to the covenant for payment in "your Loan Agreement". A covenant for payment in a loan agreement signed or authorised by the registered proprietor has effect as if it were set forth in full in the mortgage.

[43] It is a consequence of the Privy Council's endorsement of immediate indefeasibility in *Frazer v Walker* that an invalid but registered mortgage will

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<sup>33</sup> Section 155A(1).

<sup>34</sup> Subsection (7) was amended in 2002 by the insertion of the words "or reference" and "or referred to". Subsection (3) authorises the Registrar to draw up, number, and register a memorandum and subs (6) authorises the Governor-General to make regulations prescribing forms of memorandum for classes of instruments.

provide security to a mortgagee who was innocent of fraud for any amount stated in the mortgage itself. If Westpac had simply taken from the impostor a fixed sum mortgage for \$180,400 it would on registration have obtained security for that sum plus interest and expenses of enforcement. It is unlikely that any question of interpretation of the mortgage could arise. The property would accordingly be charged with the stipulated sum. In a case such as the present where the mortgage on its face secures all obligations of the mortgagor to the mortgagee, the property must after registration be taken to be charged with any such obligation to be found in an unregistered document which has been incorporated by reference in the mortgage (or in a memorandum which forms part of the mortgage where the mortgagee has used s 155A). But it still has to be determined whether a particular unregistered document is in fact one to which the registered documents were making reference.

[44] It therefore does not follow that a covenant in an unregistered loan agreement which was not signed or authorised by Ms Fenech necessarily becomes, for the purpose of the security, Ms Fenech's covenant and incorporated, via s 155A, once the mortgage is registered. That is an unattractive proposition. Such a covenant should be treated as incorporated only if the mortgage and the memorandum, read together as one registered document, must be interpreted as so requiring. Only then can an advance made pursuant to the unregistered document be properly said to have been made on the strength of the mortgage.

[45] As Mr Stewart realistically accepted, in the mortgage the word "you", in the operative clause, is plainly addressed to the true registered proprietor, Ms Fenech, who is named in the document. The same would be true if the mortgage had been expressed in a more traditional way and referred to her as "the mortgagor". Westpac could never at the point of execution have taken, or been intending to take, a valid security from anyone other than the registered proprietor, who was of course the only person who had power to grant the security. That must govern the interpretation both of the mortgage and the memorandum which by incorporation became part of the mortgage. It must determine also the extent of the security afforded by registration and the meaning to be given to the references to other documents in the memorandum. Clause 1.1 of the memorandum states that the "Secured Money" secured by the mortgage "is all money which *you* ... may owe to Westpac". In

context, this encompasses only money which the registered proprietor (the real Ms Fenech) may owe to Westpac. Similarly, the obligation to pay in cl 2.1 is that “*you* must pay in the manner agreed in *your* Loan Agreement or ... other Bank Document”. This can only sensibly mean a loan agreement or other bank document signed or authorised by the registered proprietor. If Ms Fenech herself had signed the loan agreement, the covenant to pay which it contained would certainly have been secured under the mortgage by virtue of ss 41 and 155A. But, as the loan agreement was executed by the impostor who was not the “*you*” spoken of by the mortgage/memorandum, the impostor’s covenant to pay in that agreement is not within the ambit of the registered documents and performance of the impostor’s covenant is thus not secured against the registered proprietor’s land.

[46] Mr Stewart’s argument to the contrary relied heavily upon the recent decision of Pagone J in *Solak v Bank of Western Australia Ltd*<sup>35</sup> where the documentation signed by an impostor was similar to that used in the present case by Westpac. Pagone J’s judgment mentions but does not discuss the Court of Appeal’s decision in this case. The mortgage in *Solak* referred to the mortgagor as “*you*” and named the plaintiff registered proprietor. The mortgage incorporated a registered memorandum which in turn provided that “*you*” will pay in accordance with the terms of a “Bank Document”. That term was defined to mean “an agreement or arrangement under which you incur or owe obligations to the Bank or under which the Bank has rights against you”. The bank’s unregistered home loan contract signed by the impostor identified the borrower as Mr Solak and referred to him as “*you*”.

[47] Pagone J’s analysis proceeded on the basis that the home loan contract was intended to come within the definition of “Bank Document” in the memorandum and therefore to be incorporated into the mortgage. He said the drafting technique was not intended to depend upon an investigation into the existence of legal relations but, rather, “as a description of the documents in which the obligations of the mortgagor to pay are to be found”. “*You*” in the definition of “Bank Document” in the memorandum was, he said, properly to be seen as a drafting device connecting the

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<sup>35</sup> [2009] VSC 82.

person named in the mortgage with the person named in another bank document as a means of identifying the document:<sup>36</sup>

In this case the person named in the mortgage is, of course, the registered proprietor but the person signing the mortgage as such is in fact the same as the person who signed the Bank West home loan contract as the real Mr Solak. It seems to me that the “you” in the memorandum of common provisions which links the obligation to pay in the home loan contract with the security in the mortgage is the same both as a matter of drafting and as a matter of fact: the “you” was the forger purporting to be Mr Solak in each document. The position is the same as if the memorandum of common provision had described Mr Solak by name.

[48] This reasoning is not persuasive. If the person named in the mortgage is the registered proprietor it must surely be that person who is addressed as “you” in the incorporated memorandum, rather than the forger, and it follows that a “Bank Document” is one under which the registered proprietor incurs or owes obligations to the bank. It does not identify any unregistered document other than one signed by the registered proprietor. The “you” in each document is the registered proprietor, not the forger, and it could not possibly have been different if the memorandum had named the registered proprietor. The argument accepted, wrongly in my view, in *Solak* and pursued by Mr Stewart, would be even weaker if the mortgage had been executed by the registered proprietor but the loan agreement was a forgery, yet there would seem to be no means of distinguishing that situation. It demonstrates the need to begin the process of construction with the primary registered documents, namely the mortgage and the incorporated memorandum, the construction of which must determine what other documents are incorporated by reference. It is necessary for this purpose to treat a forged registered document as if it had not been forged and to ask what the mortgagor would then have been contractually committed to. What was the mortgagor’s contractual liability? Did it extend to liability under a document which was not the document of the mortgagor?

[49] It is erroneous to interpret the loan contract as addressing the impostor and then to work backward by transferring that interpretation to the registered documents merely because the language used is common to all. The fact that “you” in the loan contract is the impostor cannot possibly affect what “you” means in the registered documents. When the process is begun, as the Court of Appeal was right to consider

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<sup>36</sup> At para [15].

it logically should be,<sup>37</sup> by examining the registered documents, it becomes obvious that only other documents of the registered proprietor are referred to in the memorandum and intended to be incorporated in the mortgage. The registration of a forged mortgage and the consequent indefeasibility of the charge cannot extend the scope of the intended linkage when the “you” in the mortgage is the registered proprietor.

[50] The covenant to pay in the loan contract was therefore not secured under the mortgage and it follows that Mr Clark’s failure to register the mortgage did not cause Westpac any loss. Its indefeasible charge secured nothing.

[51] A different conclusion might have been reached if the mortgage/memorandum had expressly made the registered proprietor liable under a loan agreement or other bank document signed in the name of the registered proprietor but without the authority of the registered proprietor. But that would have to have been done very explicitly and would have been a bold piece of drafting. A court will certainly not strain to find that a reference in a registered document is apt to encompass an unregistered forged document, and so provide the mortgagee with a security for a covenant to pay moneys for which no obligation was ever accepted by the registered proprietor. In this connection it is to be borne in mind that the statutory safeguards attending execution of documents intended to be registered under the Act do not apply to those which are not to be registered and may be completed without witnessing or other processes which provide a check on the identity of the signatory.

[52] It may be unfortunate for New Zealand banks and other financiers that the compensation provisions of the Act, unlike those in some at least of the Australian states, do not appear to enable them to claim against the Registrar in a situation such as the present after a void mortgage has been innocently registered. But that is not a good reason for giving Westpac’s documentation an interpretation that it simply cannot bear. The compensation provisions, along with the rest of the Act, are under review by the Law Commission, which will no doubt consider whether, and how, they should be modified.

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<sup>37</sup> At para [69].

## **Result**

[53] The appeal must be dismissed and the respondent awarded costs of \$15,000 and his reasonable disbursements as fixed by the Registrar.

Solicitors:  
Simpson Grierson, Auckland for Appellant  
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