

**BETWEEN                      WESTPAC NEW ZEALAND LIMITED**

Appellant

**AND                                      ALAN JOHN CLARK**

Respondent

Hearing:                      4 May 2009

Court:                        Elias CJ  
                                 Blanchard J  
                                 Tipping J  
                                 Wilson J

Appearances:                R B Stewart QC with M V Robinson for the Appellant  
                                 A C Challis for the Respondent

---

5

---

**CIVIL APPEAL**

---

**ELIAS CJ:**

Now as you will see we're only four, we're diminished. Under the Supreme  
10 Court Act we have the ability to sit four if for some reason someone is  
unavailable to sit and Justice McGrath unfortunately is not well this morning  
so we've decided to proceed as four. Thank you.

**MR STEWART QC:**

15 Now Your Honours the issue in respect of which leave to appeal has been  
granted of course is a narrow one. What monies, if any, would have been  
secured by Westpac's forged mortgage had it been registered. Some point's  
are elementary in this matter. there is no doubt that had Westpac's forged  
mortgage been a fixed sum mortgage then upon registration the land would  
20 have become liable as security for the mortgage advance and there's no issue

about that on either side of the Tasman. Or put another way, and commentators do differ as to how they express the indefeasibility concept, Westpac's right to recover, on the personal covenant to pay, becomes indefeasible. That is, the right to recover to the extent of the value of the land  
5 but not beyond that and that seems to be common ground too.

The question for this Court is what, if anything, did the mortgage secure given firstly, the mortgage was a forgery. Secondly, this mortgage was an all obligations mortgage and thirdly the obligation to pay with the particulars of  
10 the indebtedness was recorded and an unregistered loan agreement which was also forged. At common law of course the status of that document unregistered is it's a nullity.

Westpac's primary position on this appeal is that upon registration the land  
15 became liable as security for the monies advanced by Westpac and it does not matter that the loan details were recorded in an unregistered, forged loan document. In other words, it is submitted that it does not matter where the identification of the amount advanced comes from because what registration secures is the promise to repay what is lent or the amount of the advances  
20 secured or charged against the property ie the amount for which recourse can be had and as I'll come to it, it's Westpac's case that even in the case of the fixed sum mortgage, you'd have to go outside the mortgage document to establish what the indebtedness is. It may well be that only part of the fixed sum had been drawn down by the time the forgery was discovered or it may  
25 have been that the forger for some time in seeking to cover his dishonesty has paid off some of the mortgage so the amount recorded in the mortgage is never determinative of the extent of the security which the registered forged mortgage enjoys and in my submission when we get to it in principle there's no difference between the two types of mortgages for this issue and when you  
30 deal outside the mortgage to of course and if a fixed all obligations mortgage to establish what the debt was.

Now Westpac's alternative submission on the facts of this case is that on a proper construction of the mortgage documents the obligation to pay

contained in the loan agreement was incorporated by reference into the mortgage such that the mortgage effectively secured the debt that would have been created by the loan agreement but for the forgery. That involves a matter of construing the documents, the mortgage documents, and my submission leaves off on this argument that if this was a genuine transaction, there can be no doubt, in my submission, that the loan agreement would have been effectively incorporated into the registered mortgage in a registered memorandum for no other reason that the registered memorandum refers to this loan agreement no less than nine times and it specifically says that what is to be paid is the amount set forth in the loan agreement between both parties.

Now at paragraph 4 of the written submissions Your Honours I've set out how we will advance the primary submission this morning and I will, unless indicated otherwise by Your Honours, stick to that outline. Briefly the accepted law concerning forged, fixed sum mortgages. A reference to the recent Australian decisions of which there are nine concerning all obligations mortgages. Then I'll come to whether there is any proper basis in New Zealand for drawing a distinction between fixed sum mortgages and all obligations mortgages in the context of the indefeasibility to be accorded to the forged mortgages upon registration. I then presume the next one to submit, what is the approach that the New Zealand Courts should take in relation to registered forged mortgages. I then deal with the alternative submissions on incorporation and I finish with some references to the policy and objectives of indefeasibility and the corollary of indefeasibility being the compensation scheme enshrined in the Land Transfer Act.

**ELIAS CJ:**

Of course if you're right in the first submission, the whole foundation of that is what you say perhaps accurately is the received position about fixed sum mortgages. That foundation may shift. I mean it may not, it may, it maybe an indication of why the *Frazer v Walker* line should be reassessed.

**MR STEWART QC:**

To be frank Your Honour I've never approached the matter on that way. I'd rather approach this case, that the *Frazer v Walker* –

5 **ELIAS CJ:**

Well it's because of the, it's because of that line that you're able to say, there should be no difference in principle because in both cases you do need to go outside the mortgage to ascertain what is in fact owed.

10 **MR STEWART QC:**

Yes and really, yes I do launch off the *Frazer v Walker* decision and support that position by looking at what the policy and objectives of indefeasibility was and what the compensation scheme, what role that plays in adhering to those objectives because every time we register a transaction a percentage of the  
 15 registration fee goes into the consolidated fund which in New Zealand runs at a very healthy profit and that's designed to ensure that we don't have, as far as possible, an innocent victim and if the law continues to play out in the way that it does with respect to the fixed sum mortgages, the innocent mortgagor who has in this case her home saddled with a mortgage she knows nothing  
 20 about, gets compensated out of the overflowing consolidated fund and then the mortgagor pays that to Westpac who is also innocent, an innocent participant in this transaction and Westpac is compensated.

**ELIAS CJ:**

25 What's the sequence though? Is compensation available before the security is realised?

**MR STEWART QC:**

Yes, yes the mortgagor who has their interest eroded by fraud or forgery  
 30 makes a claim to the Registrar-General and the Registrar-General, if satisfied that it's an appropriate case, can pay the mortgagor and in fact this fraudster targeted about four or five banks at least and my understanding is that the mortgagors in those cases were compensated because the fraudster was not located and the only peculiarity as to why this didn't follow suit in this case

was because the mortgage never in fact got registered. The solicitor acting for the fraudster gave an undertaking to the bank that he would register the document promptly. Because the fraudster was cunning enough to say when signing the documents that would the lawyer mind terribly much if he didn't

5 pay the money until the drawdown from Westpac and then the solicitor said that was fine. She got the money and disappeared and the obligation to register rather went off his radar because the fees weren't in and when he was contacted about, not a good excuse but that's what he said happened, about five months later Your Honours when Westpac was investigating this

10 and all the banks, the detectives and the banks discovered that something was amiss with a few properties and they identified, I don't know how but this could be a possible one, so Westpac alerted the LINZ and the Registrar put a caveat on the title forbidding further registration. At about the same time Westpac's solicitors were chasing up wanting to know where the registered

15 document was and the lawyer was honest enough in his reply to say, look, I'm terribly sorry. I've let this one fall off the radar because I haven't been paid but I'm going to lodge it this afternoon and all will be well. But by the time that he got there –

20 **TIPPING J:**

All was not well.

**MR STEWART QC:**

All was not well, no.

25

**ELIAS CJ:**

It was an unpleasant surprise.

**MR STEWART QC:**

30 Very unpleasant.

**ELIAS CJ:**

It's just that, Mr Stewart, I need to flag that, and I'm sure my colleagues don't have the same problems being much more familiar with these sort of

transactions, but it strikes me as incongruous that effectively the bank comes to the Court and says we're entitled to compensation from the – from a solicitor for not registering a forged mortgage. It just doesn't immediately strike me as a very attractive position.

5

**MR STEWART QC:**

They wouldn't do that of course and this case would never have troubled the judicial system – had the mortgage been registered this would have been dealt with administratively by the Registrar-General and Westpac in  
 10 New Zealand – or mortgagees in New Zealand do not have an independent right to claim compensation under the Land Transfer Act. In Australia they do. The way it operates here is that the mortgagor has a right to claim, Westpac mortgagor at least currently in a fixed sum mortgage is regarded as indefeasible and Westpac would wait patiently for the mortgagor to lodge the  
 15 claim to the Registrar-General, who will only pay out if he's satisfied it was fraudulent and that the mortgagor was innocent of it and that there's no ability to recover from the fraudster, and at that point the payment is made to the mortgagor says to Westpac, here's the money, will you please discharge the mortgage which of course –

20

**BLANCHARD J:**

The Registrar might of course have taken the same point as is now being taken against you. I'm not sure whether the Registrar would have taken that point but if someone had alerted the Registrar, that's what the Registrar might  
 25 well have said.

**MR STEWART QC:**

Sorry Sir, he might well have said?

30 **BLANCHARD J:**

That the mortgage didn't secure anything.

**MR STEWART QC:**

Well yes exactly, yes and I'm sure if he wants the fund to keep growing he will say that.

**BLANCHARD J:**

- 5 And I can imagine the Registrar taking that point in a slightly different scenario assume that some years ago the real Ms Fenech had executed an all monies mortgage to the bank which was just sitting on the title perhaps securing nothing and then the fraudster comes along and the bank says, oh good, well we won't need to do a new mortgage, just sign this loan contract. Now under  
10 those circumstances I would imagine that the Registrar would say, well, there's nothing wrong with the mortgage on the title, it just doesn't secure the monies that are the subject of a subsequent forgery?

**MR STEWART QC:**

- 15 Well yes he may say that. The matter of construction is to whether the mortgage did but I take your point that of course the loan document is not registered you would then have to say in that case whether or not that mortgage was incorporated I imagine and that –

20 **BLANCHARD J:**

But the Registrar might well have a good argument for saying the compensation provisions don't protect the mortgagor against that kind of thing.

25 **MR STEWART QC:**

Yes and then we might have to trouble the Court on that one.

**WILSON J:**

- Mr Stewart, in the case of the other banks that you've mentioned who were  
30 also taken in by this fraudster, do we know the nature of their mortgages that were registered, were they all obligations mortgages?

**MR STEWART QC:**

I don't know that Sir but I'd be surprised if at least one or two of them were not because over 70 percent or more I believe are residential mortgages now are all monies. Of course for good reason that it means you don't have to register variations in mortgages and that secures not only the residential advantages  
 5 but your credit card and whatever other facility so it is the, an expeditious way in which to transact banking business.

**TIPPING J:**

If the mortgage had said \$500,000 or such lesser sum as may from time to  
 10 time be owing, I'm picking out the priority amount, then it would have been a fixed mortgage presumably. I don't know. There does seem, at least prima facie, to be some oddity if you could as it were convert a floating mortgage with a fixed priority amount into a fixed term mortgage just by rewording it in that sort of way that it would make all the difference but I presume that's part  
 15 of your case that these sort of –

**MR STEWART QC:**

Anomalies?

20 **TIPPING J:**

Accidents if you like of precise terminology shouldn't really make any difference.

**MR STEWART QC:**

25 Precisely Sir.

**TIPPING J:**

But what I find intriguing or puzzling Mr Stewart, and I know you're going to go through this in logical sequence, but just right up front, how can the security  
 30 interest be other than co-extensive with the contractual liability? Isn't it always a matter of determining what is the contractual liability because the security interest must match with the contractual liability. It can't be any more than that, it might theoretically be less.



**MR STEWART QC:**

Well it would depend on the terms of the – a matter of construing what the terms of the mortgage were.

5 **TIPPING J:**

Well that's why I think in the end it will come down to what this mortgage truly means and whether the all obligations means all obligations of the true mortgagor or all obligations of both that person and someone else purporting to be that person.

10

**MR STEWART QC:**

Well that is the debate that the Australians have got into. They say well there is no mortgage between – there is no loan agreement between the true mortgagor and the bank because the true mortgagor never knew about this transaction. But in the –

15

**TIPPING J:**

You couldn't sue on the personal covenant?

20 **MR STEWART QC:**

No.

**TIPPING J:**

Right.

25

**MR STEWART QC:**

And that's the same under the fixed sum mortgage –

**TIPPING J:**

30 Of course. But it seems to me that the fixed sum mortgage is in effect the exception not the rule if you like. The principle ought to be that the security interest can be no greater than the true contractual liability but in the case of fixed sums it's deemed to be, if you like, a personal covenant for the fixed sum.

**MR STEWART QC:**

I got into trouble for using that phrase in the Court of Appeal.

5 **ELIAS CJ:**

What phrase?

**MR STEWART QC:**

Deemed.

10

**ELIAS CJ:**

Oh deemed. Well there's awful deeming going on in some parts.

**TIPPING J:**

15 That's where I'll need the particular help as to how you can – okay fixed sums are in a class of their own apparently.

**ELIAS CJ:**

Well why?

20

**TIPPING J:**

Well, never mind why, with respect, but how can you have a security interest that supports a contractual obligation that doesn't exist?

25 **MR STEWART QC:**

Because that is the, that is the effect of the indefeasibility curing the defect in the same way that you might have an ordinance that is passed invalidly. If there's indefeasible interest achieved pursuant to the ordinance, the ordinance is treated as being valid and the –

30

**TIPPING J:**

Just pause. It's the security interest, whatever it may be, that is indefeasible, isn't it? That, to say the secure – indefeasibility in effect validates or makes

the true mortgagor liable, I've never understood that it does that in an absolute sense.

**MR STEWART QC:**

5 Well it doesn't make the true mortgagor liable beyond the extent of the value of the land –

**TIPPING J:**

No.

10

**MR STEWART QC:**

– but the covenant to pay is critical in attaching the liability to the land. The true mortgagor's covenant because, and I do go through this when we come to the mortgage and how it works -

15

**TIPPING J:**

Well perhaps we better leave it then Mr Stewart. I flag that it's in that area of the case that I would like help.

20 **MR STEWART QC:**

Well if you retreat to that position then of course we say well the fixed sum mortgages enjoy no protection either.

**TIPPING J:**

25 Well that would be contrary to *Frazer v Walker* but not on any – there you have what you might call a fictional covenant to pay by the true mortgagor, don't you? You have to have in order to make sense of it?

**MR STEWART QC:**

30 Well yes and it's probably as well that I do come to, very briefly, these cases that do deal with the fixed sum regime and why it is that the land is –

**TIPPING J:**

Well perhaps it would be good for your – I mean if you'd like to go straight there now that would be fine by me.

**MR STEWART QC:**

5 Yes, all right well just –

**ELIAS CJ:**

Did you want to start with the documents however? No?

10 **MR STEWART QC:**

No.

**ELIAS CJ:**

That's all right.

15

**MR STEWART QC:**

In my first draft I had it that way Your Honour but I thought it better that we get over this territory first. Now if we go to paragraph 5 of the submission on page 2, that's dealing with these fixed sum matters. The accepted law concerning  
20 fixed sum mortgages, it is accepted law in New Zealand and Australia that the registration of a forged mortgage in favour of an innocent mortgagee, confers on the mortgagee an indefeasible title to the registered mortgage. Prior to the recent Australian decisions which have drawn a distinction between fixed sum mortgage and all obligation mortgages, at least three Australian cases had  
25 considered and rejected the proposition that since the transaction giving rise to the mortgage was a nullity, the registered mortgage secured nothing.

The first one was *Paradiso*, the signature of one of the mortgagors was forged and the other obtained by fraud. The mortgagors there argued there was no  
30 liability arising under the registered mortgage and that the mortgage was in fact a security for nothing because there was no effective loan transaction between the apparent parties to the mortgage. It was further submitted that section 67 of the Real Property Act did not operate to make an otherwise void transaction efficacious. The Judge dealt with this submission as follows, "The

argument was that the mortgage was security on its face for payment due pursuant to a clause which spoke of a sum lent by the mortgagee to the mortgagor. As no such sum had been lent, there was no liability. There was nothing owing on the personal covenant which purported to require the

5 appellants to pay money. Some provision of the Real Property Act had to be called in aid to alter the position. The submission was that there is no such provision in the Real Property Act. This argument must be rejected. Section 67 of the Real Property Act made the land “liable as security in manner and subject to the covenant, conditions and contingencies set forth and specified

10 in (the mortgage)”. The indefeasible title gained as mortgagee is subject to rights in personam between the parties to the mortgage. However, the liability as security cannot be a nothing. The covenant to repay gains authority from registration.”

15 Now at page 389 of the judgment, which is not in the submission, the Judge –

**ELIAS CJ:**

Well what does that mean really? I mean that, presumably that’s deeming? The covenant to repay gains authority from legislation?

20

**MR STEWART QC:**

Well Your Honour I coined the phrase “deeming” in the High Court but I think the judgment said there was no basis for that.

25 **ELIAS CJ:**

Well there may not be but what can this mean, “gaining authority from registration” but the fact –

**MR STEWART QC:**

30 In effect the matter is then dealt with as though the true mortgagor had granted the mortgage.

**ELIAS CJ:**

I mean the problem with the word “deeming” is that it really does demonstrate that the emperor has very few clothes. That’s why you got into trouble, it’s just a bit difficult for Judges to swallow that concept but it does seem to me that that’s the effect.

5

**MR STEWART QC:**

Yes.

**ELIAS CJ:**

10 That you’re contending for.

**MR STEWART QC:**

Yes and –

15 **TIPPING J:**

Well there is a difference in that the mortgage, if it recites that X dollars has been lent, you can't go behind, the mortgagor can't go behind that under indefeasibility but if it simply says in consideration of all obligations undertaken, the question is what obligations have been undertaken by the mortgagor?

20

**MR STEWART QC:**

Well in the same way you’d deem it again it would be the money is lent –

25 **TIPPING J:**

No, no you don’t deem it. You don’t deem it because that’s an off register. This is an on register.

**MR STEWART QC:**

30 Yes but also you can go behind that too Sir because just because the mortgage says that \$500,000 was advanced for – the mortgage is secured for \$500,000, if in fact only 100,000 has been advanced you do go behind the register, you have to. It would be fraudulent otherwise –

**TIPPING J:**

Oh of course, inter partes, but from the point of view, if it – there'd be an in personam right for the mortgagor to say, hang on a moment, you never lent me half a million, you only lent me a hundred thousand. But that's quite  
 5 different from what makes it indefeasible vis a vis a true lender of that amount.

**MR STEWART QC:**

Yes but even in the forged situation the forgery case, the true mortgagor in looking to settle this matter, would be entitled to go behind what the mortgage  
 10 said, notwithstanding the indefeasibility and say only 100,000 is owing not –

**TIPPING J:**

That's an in personam right to stop the bank fraudulently requiring –

15 **MR STEWART QC:**

Yes.

**TIPPING J:**

– more than was actually lent but I'm talking about a case where the amount  
 20 is actually lent albeit to the fraudster. Then you've got on the title a statement that 500,000 has been lent to the true mortgagor and it's that around which the indefeasibility centres not where it's an off title agreement unless it's incorporated.

25 **MR STEWART QC:**

Why should that make a difference?

**TIPPING J:**

Well it simply does because of the fact that one's on title it's on the register,  
 30 the other is off title.

**MR STEWART QC:**

Unless it's incorporated.

**TIPPING J:**

Unless it's incorporated.

**MR STEWART QC:**

5 Right.

**TIPPING J:**

I think if you can show this is incorporated you're home, but if you can't show it's incorporated I think you're in logical difficulty.

10

**MR STEWART QC:**

Well you see full banking practice would rather of course have the initial position because otherwise you'll have to, each time there's a new loan agreement you need a new mortgage, unless you generically describe, you  
15 cast your description wide enough to incorporate any possible transaction, loan agreement, Visa cards –

**BLANCHARD J:**

I'm not greatly troubled by that thought. These cases are rarities. This is the  
20 first one to arise in a long time and they're infinitesimal in comparison with the number of cases and therefore the number of advantages of using all obligations money –

**MR STEWART QC:**

25 I accept that.

**BLANCHARD J:**

– mortgages.

30 **ELIAS CJ:**

Is there however, in the new form of registration that is evident, the new process, is it likely that there is more opportunity, I'm just thinking about the fact that there have been very few cases of fraud, is there more opportunity.



**MR STEWART QC:**

You're going to get commentators who say that there is and I think my client behind me is of that school.

5 **ELIAS CJ:**

Yes.

**BLANCHARD J:**

10 It's not borne out are the figures, and it's not borne out by the Registrar-General's experience.

**MR STEWART QC:**

15 Then there's the other view that Justice Blanchard has articulated, not for the first time.

**ELIAS CJ:**

All right.

**BLANCHARD J:**

20 I mean the real problem here –

**MR STEWART QC:**

I don't think that's a –

25 **BLANCHARD J:**

The real problem here is the flaw in the compensation scheme at present under which the bank can't take advantage of it.

**MR STEWART QC:**

30 No but the scheme does as it currently operating, give the bank the intended protection that the Land Transfer Act wanted or proposed that the innocent people who are affected by fraud, are protected.

**BLANCHARD J:**

But that's only on the assumption that your case is correct?

**MR STEWART QC:**

Well and that *Frazer v Walker* was correct.

5

**BLANCHARD J:**

No, not challenging *Frazer v Walker*.

**MR STEWART QC:**

10 Well why would the bank be protected on a fixed sum mortgage but not on an all monies mortgage?

**BLANCHARD J:**

15 Well for one good reason. There is greater protection for the register in a fixed mortgage because of the way in which the document has to be executed particularly under the electronic system. That doesn't exist if somebody can simply wander into a bank and say, I'd like another loan contract please.

**MR STEWART QC:**

20 I have considered that possibility Sir but the chances of that are remote because where these forgeries get home is where the person goes to the bank as a new customer for the first time and only a moment's reflection shows for me to go into the bank and say that I'm Mr so and so and the bank already has my signature and the mandate and a history on the – that's much  
25 more risky for the fraudster than if you're going to the bank for the first time and saying, I'm a new customer, as they did in this case. So I could say that the chances of that, the number of times that's going to happen is remote but – and it would be, there's safer ways to perpetrate the fraud, I would imagine.

30 Now *Mayer v Coe* is a decision of Justice Street, New South Wales in 1968, just after *Frazer v Walker*, the mortgagor failed in her application for a declaration that the forged mortgage was null and void and ineffective to confer any interest or rights on the mortgagee following registration. Justice Street said, "The Privy Council's decision is direct and binding

authority laying down that a registered proprietor who acquires his interest under an instrument void for any reason obtains on registration an indefeasible title."

5 **TIPPING J:**

Of course that begs the question indefeasible title for what?

**MR STEWART QC:**

Well that –

10

**BLANCHARD J:**

Which is a question not asked in case law for a long time.

**MR STEWART QC:**

15 No and we do come to that of course, it's the second limb of it all. We would want to, I would have thought in my submission to Your Honours, try and avoid a situation where you get an indefeasible title or indefeasible that secures nothing, that gives nobody any protection for anything. It's a waste of time and space and everything else.

20

**TIPPING J:**

Well that depends on how the document is drafted.

**MR STEWART QC:**

25 Well, and if it's drafted if we can get a consensus here and perhaps a direction to the industry as to –

**TIPPING J:**

Well whatever the decision they'll be able to work out their next best move. If  
30 it's palliative to the borrowing public.

**MR STEWART QC:**

Yes, I mean all obligation mortgages have been in this country since 1870 and we have in the regulations prescribed forms for the fixed sum mortgage and the all monies mortgage but I'll come to that anyway in due course.

5 **BLANCHARD J:**

But they're not drawn with forgery in mind?

**MR STEWART QC:**

No but they are drawn that these are approved forms.

10

**BLANCHARD J:**

Well they're approved forms but the assumption is that they're not going to be the subject of a forgery.

15 **MR STEWART QC:**

No.

**BLANCHARD J:**

Nobody drafts forms on that basis.

20

**MR STEWART QC:**

But until recently the assumption was that, that both forms would enjoy the equal protection intended by the Land Transfer Act and the compensation scheme. It would be anomalous to think well under the fixed sum you've got the protection under the compensation regime but not under the all monies and that's a matter that –

25

**TIPPING J:**

Is it really your client's position that it wants the indefeasibility to run, indefeasibility may not be quite the right word, to all monies that it lends in good faith in reliance on the registered mortgage, never mind to whom?

30

**MR STEWART QC:**

Yes and it could say that I imagine.

**TIPPING J:**

I think that's what your first proposition. You talked about Westpac lending on the faith of the security. I think that's what your client's argument really boils  
 5 down to. You want to be secured for all monies you lend in reliance on the security.

**MR STEWART QC:**

True Sir. That's the effect of it but as Your Honour identified you would still  
 10 have to establish that the monies were captured by the security.

**TIPPING J:**

But the other point of view is that unless it's fixed term and thus on the face of the register it's all monies truly owing by the mortgagor.  
 15

**MR STEWART QC:**

Well only if you don't have indefeasibility for the all monies. I say, and we're not far away from getting to that point, why it is that the land becomes security for the amount advanced pursuant to the mortgage and that's what section 41  
 20 –

**TIPPING J:**

But if your contract said that this mortgage is security for all monies we may lend in good faith on the security of this mortgage, then you might have a  
 25 better case?

**MR STEWART QC:**

Yes, you could – well one Judge, I think it was Sutcliffe J, did say that you could fashion your mortgage to achieve that result.  
 30

**TIPPING J:**

But here's it's couched on the concept of obligation and that relates to the borrower not the lender?

**MR STEWART QC:**

And –

**TIPPING J:**

5 And that's where I think your problem lies.

**MR STEWART QC:**

Well there shouldn't be a difference in the problem between the fixed sum and the all monies and –

10

**TIPPING J:**

Well I know you keep saying that with respect Mr Stewart. It's all very well to say they shouldn't but the simple fact is, one is on title, the other is off title and there is that fundamental difference when in a system where the register is everything, it's understandable that if the register records it, it's indefeasible but if the register doesn't record it, you'd have thought the opposite would apply?

15

**MR STEWART QC:**

20 Well I would have thought that in fact if the register says, perhaps we should go – shall we go and have a look at the –

**TIPPING J:**

At the mortgage?

25

**MR STEWART QC:**

Yes?

**WILSON J:**

30 I think that would be helpful.

**ELIAS CJ:**

Do you also at some stage take us to the statute? I was just wondering –

**MR STEWART QC:**

Yes I do.

**ELIAS CJ:**

- 5 – whether there's some assistance for your argument to be had in section 101?

**MR STEWART QC:**

- Section 41 I take as a starting point, which I set out in paragraph 14  
10 Your Honour, at paragraph 19 of the submission. It's the bold bits related to –

**ELIAS CJ:**

Page?

- 15 **MR STEWART QC:**

Page 17 at paragraph 19.

**TIPPING J:**

- It's the interest in the land that is indefeasible. What that interest is –  
20

**ELIAS CJ:**

But a mortgage doesn't operate –

**MR STEWART QC:**

- 25 No that's right. This deals with the transfer and a mortgage this section. It's dealing with two –

**ELIAS CJ:**

Where?

30

**MR STEWART QC:**

Two – it's dealing with the transfer and the mortgage where there is no transfer, there's simply a charge.

**ELIAS CJ:**

Yes.

**MR STEWART QC:**

5 But section 41 is dealing with both concepts.

**BLANCHARD J:**

The words that you've highlighted in the latter part of that section seem to me to be the key to it. "The land shall become liable as security in manner and  
10 subject to the covenants, conditions and contingencies set forth and specified in the instrument..."

**MR STEWART QC:**

Yes well –

15

**BLANCHARD J:**

So it really is a question of what do those covenants extend to?

**MR STEWART QC:**

20 We'll go to them now.

**BLANCHARD J:**

In the case of a fixed mortgage they extend to payment of the fixed sum, subject to the equities of the situation if the fixed sum isn't actually, hasn't  
25 actually all been advanced for example. But with something that is an all monies mortgage, it depends on what those covenants extend to?

**MR STEWART QC:**

All right. Is it appropriate we just go forward to the loan agreement and the  
30 mortgage itself? If we look at – the mortgage is at page 92 of the case book.

**BLANCHARD J:**

I take it this was electronically registered?



**MR STEWART QC:**

It didn't get registered.

**BLANCHARD J:**

5 Well it would have been?

**MR STEWART QC:**

It would have been.

10 **BLANCHARD J:**

Because actually in this form it probably isn't registerable because it's not typed but as I understand it what happens is that they're prepared in this sort of form and then the electronic version is transmitted electronically.

15 **TIPPING J:**

A typed up version?

**BLANCHARD J:**

Well it exists in cyberspace.

20

**TIPPING J:**

Oh my goodness.

**ELIAS CJ:**

25 It's quite frightening stuff.

**BLANCHARD J:**

And it's actually signed electronically by the solicitor pursuant to an authority, I that correct?

30

**MR STEWART QC:**

I think so Sir, and I'm only just hesitating because –

**TIPPING J:**

Well Mr Clark's got his name attached to a legal –

**BLANCHARD J:**

I don't think this makes any difference to the argument though I think  
5 technically that this –

**MR STEWART QC:**

I'll be pleased if that's the case.

10 **BLANCHARD J:**

– this was never going to be actually the registered document.

**MR STEWART QC:**

Okay. No. I hadn't considered that aspect Sir but looking at the mortgage  
15 here. We've got at the top it's approved, an approved form. We then get the  
mortgagor, Marie Antoinette Fenech and then we get the priority amount.  
Then we get under the operative clause, "In consideration of the secured  
money you as the mortgagor..." Now that "you" can only be a reference to the  
true registered proprietor higher up the page, Marie Antoinette Fenech.  
20 "...hereby mortgaged for the mortgagor all your estate and interest in the  
land..." And then it goes on to say, "...this mortgage incorporates all of the  
provisions of the memorandum...." which we come to in a minute, and at the  
last space it says, "... the term secured money is defined in the  
memorandum."

25

**BLANCHARD J:**

So you accept that you in this document means the registered proprietor?

**MR STEWART QC:**

30 Yes and I say that it means the registered proprietor in the incorporated  
memorandum of provisions and I say there's no mismatch between the "you"  
in those two documents and the "you" in the loan agreement which these  
documents obviously refer to and I've got some authority on that too.

**TIPPING J:**

You accept that “you” means the true registered proprietor –

**MR STEWART QC:**

5 Yes.

**TIPPING J:**

– throughout these documents?

10 **MR STEWART QC:**

Yes.

**TIPPING J:**

Okay. In terms of construing the document. Then we go to page 94 and  
15 these are the standard incorporated terms which are registered in the Land  
Transport Office. Right at the top, “This form is part of your mortgage. Some  
terms used in the mortgage have special meanings and they are set out in  
clause 6.” We go down to secured money. “the secured money secured by  
20 the mortgage is all that money which you whether alone or with one or more  
others may owe to Westpac now or in the future for any reason.”

**BLANCHARD J:**

Well just stopping there, that means then it’s all money which the registered  
proprietor may owe to Westpac now or in the future?

25

**MR STEWART QC:**

Yes in the same way as we come to it, we come to this, in the same way Sir  
that that’s what is meant in the fixed sum too. Even though in the fixed sum  
mortgage the true mortgagor never signed a mortgage, never got the money  
30 and knows nothing about the transaction. Now at 2.1, “You must pay to  
Westpac...”

**WILSON J:**

Just before you go on Mr Stewart, following on from Justice Blanchard's question, you accept here, don't you, that the loan agreement was legally ineffective?

5 **MR STEWART QC:**

Yes unless incorporated. Yes I do.

**WILSON J:**

But if it was ineffective, isn't the consequence of that that the true owner did  
10 not owe to Westpac for the purposes of clause 1.1 the amount of the advance?

**MR STEWART QC:**

Well I don't accept that Sir because you can incorporate into your mortgage  
15 agreement provisions and – in respect of another enforceable document.

**TIPPING J:**

Yes but that depends on incorporation. It on the face of it Justice Wilson must  
20 be right, mustn't he?

**MR STEWART QC:**

Yes I accept that. That is subject to incorporation. Incorporation aside the  
unregistered document is a nullity but we have to work through that, we're not  
quite there yet, to that document, that's the next one after this one. There is  
25 something – I'm coming to a point. So 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."

30

**BLANCHARD J:**

That must mean a loan agreement given by the registered proprietor?

**MR STEWART QC:**

Well we've got to go do that loan agreement.

**BLANCHARD J:**

Yes I know but do you accept what I'm saying to this point?

5

**MR STEWART QC:**

Well it's deemed to be that dare I say it Your Honour.

**TIPPING J:**

10 And the other –

**MR STEWART QC:**

And because –

15 **TIPPING J:**

– bank document must be a document binding on the registered proprietor too surely?

**MR STEWART QC:**

20 Well not if it's indefeasible.

**TIPPING J:**

No if it's brought in –

25 **MR STEWART QC:**

Yes.

**TIPPING J:**

– but not if it's not brought in.

30

**MR STEWART QC:**

Yes and Sir I accept that's the easier part of the argument if it's brought in but I want Your Honours to stay with the submission that there is an earlier – there is an earlier argument or an earlier position to be considered.

**TIPPING J:**

Yes I understand that. We're just teasing it with you.

5 **MR STEWART QC:**

Yes.

**TIPPING J:**

And it seems to be a wee bit shaky at the moment Mr Stewart.

10

**MR STEWART QC:**

Well I see that you need to be carried a bit further along on that first one. Then we see there are other numerous references which I've outlined in my submissions as to where the reference to the loan agreement occurs.

15

**BLANCHARD J:**

But again it's money lent to you, the registered proprietor?

**TIPPING J:**

20 And in 4.2 it's "your" other obligations and "your" loan agreement?

**MR STEWART QC:**

Yes and that means the registered proprietor and when you come to the loan agreement, I agree this is incorporation that I keep coming back to Sir, I'll do that second, but I accept what Your Honour says there.

25

**TIPPING J:**

But what we're trying, or what I'm trying to grasp at the moment is, quite apart from incorporation, which I fully understand the sort of logic of that, how without incorporation do you get this void loan agreement binding the true registered proprietor?

30

**MR STEWART QC:**

All right, let's get to that then. Go past the recent Australian decisions.

**ELIAS CJ:**

Well aren't you going to take us to the loan?

5 **MR STEWART QC:**

Oh yes.

**ELIAS CJ:**

No, no you don't need to. I mean I think it's really a –

10

**MR STEWART QC:**

It's at page 35.

**TIPPING J:**

15 I mean conceptually if it's void it doesn't matter what it says unless it's  
incorporated.

**MR STEWART QC:**

And that's why I'm going to this point now because unless I can persuade

20 Justice Tipping and whoever else is with him on this that –

**WILSON J:**

Well I'm with him.

25 **MR STEWART QC:**

That the loan agreement matters then we don't even get to consider it.

There's nothing in the loan agreement that, on it's own, that elevates its status  
beyond a void document. So I'm going to leave that because –

30 **WILSON J:**

Where does that leave your first argument then?

**MR STEWART QC:**

Well I'm taking you to that now. And I really do this in three bites, starting at page 14 and if you will bear with me I'd like to approach it on this three stage basis rather than going to the end of the argument. At C I ask whether New Zealand has any proper basis for distinguishing between the two types of mortgages.

**BLANCHARD J:**

Where's – oh I see.

**MR STEWART QC:**

Page 14 the bold heading (c).

**TIPPING J:**

Heading (c)? Oh yes it's right at the bottom, yes, thank you.

15

**MR STEWART QC:**

In New Zealand the Land Transfer Act makes express reference to mortgages securing future advances and the regulations provide forms for both fixed sum mortgages and all obligation mortgages. It is accepted law that in respect of both types of mortgages, the mortgagee obtains an indefeasible title to the mortgage upon registration despite the fact that the mortgage was a forgery.

20

One of them secures nothing, the other one secures money, but they both get an indefeasible title to the mortgage interest.

25

It is submitted that in these circumstances it would be an oddity, to say the least, that one type of mortgage would secure the mortgage debt but the other would not. Not only is such a notion contrary to the policy and objectives of indefeasibility but it would provide no protection for the registered proprietor of the mortgage. In short, the indefeasible title would serve no purpose other than to encumber the mortgagor's title with a valueless charge.

30

All of that seems to me it ought to be avoided if it can.



“The question as to whether there is any proper basis for distinguishing between these two forms of mortgages is considered under the following heads:

- (i) the relevant Land Transfer Act provisions;
- 5 (ii) the effect or consequence of registration of a forged mortgage;
- (iii) the illogicality of there being a distinction as demonstrated by considering three scenarios;
- (iv) other matters.”

10 Hopefully by the time you get to the other matters I’ve either got Your Honours with me or I haven’t as to the all monies mortgages being effective without incorporation.

We’ve got the definition of mortgage in the Land Transfer Act section 2. I’ll  
15 point out that section 2(b) specifically refers to, “The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise...”

At 101 the forms of mortgage and we see there at –

20

**TIPPING J:**

Well, yes, 2(c) is quite significant, isn't it?

**MR STEWART QC:**

25 Yes and so is 6. “In this section debt includes further indebtedness and interest.”

**ELIAS CJ:**

Sorry what para are you at now?

30

**MR STEWART QC:**

Sorry Your Honour, that’s paragraph 13, bottom, section 101 which is the section Your Honour mentioned.

**ELIAS CJ:**

Yes, thank you.

**MR STEWART QC:**

- 5 Now paragraph 14. “Section 101 of the Act was amended to its present form by section 45 of the Land Transfer Act. The Act specifically contemplates all obligations mortgages. The forms of mortgage currently prescribed are contained in schedule 2...”
- 10 Unless you wish to we don’t need to go there at the moment. And then we’ve got the regulations and form 6 and 7 in paragraph 17, in the book at page, those forms appear, they’re not entered in this submission, at tab 45. The all obligations as at page 590 and the fixed sum is at page 591. Now what is the effect or consequence of the registration of a forged mortgage? In my
- 15 submission it is instructive to focus on how a forged mortgage takes effect as a valid security upon registration given that the mortgage document is at all times making reference to the true mortgagor who at no time executed the mortgage.
- 20 And we’ve looked at section 41, paragraph 19.

Now the effect of the registration of the mortgage was canvassed in *Duncan v McDonald*. Although it concerned an illegal contract the indefeasibility principles are applicable to this case. In that case Your Honour

25 Justice Blanchard said, I am happy for Your Honours to read that rather than me reading it out if that’s acceptable?

**TIPPING J:**

- You’ve highlighted a bit at the bottom of the next page. Is that the crunch
- 30 Mr Stewart? I’ve read this several times. I’m not terribly inclined to read it a third time. It would help me if you were able to identify what particular passage in here is of assistance to your argument?

**MR STEWART QC:**

Yes all right well ... **(audio stops at 10.53.57)**

**COURT ADJOURNS:**

**COURT RESUMES: 11.22 AM**

5

**MR STEWART QC:**

Your Honours can I just bring something to your attention in the book lest I forget. The loan agreement in the case book at page 35 is the document that was filed in the summary judgment hearing but only every second page of that document found its way into the affidavit and the full loan agreement is the last document in volume 3, that's at page 637 of the authorities. I don't know if you put a pencil mark or something on page 35 saying see page 637 of the authorities is where the full loan agreement appears.

15 **ELIAS CJ:**

Thank you.

**MR STEWART QC:**

Page 15, paragraph 13, the definition of the mortgage. It means any charge on land created under the provisions of this Act for securing the repayment of a loan or satisfaction of an existing debt and then of course repayment of future advances –

**BLANCHARD J:**

25 Sorry Mr Stewart, where are you at, at the moment?

**MR STEWART QC:**

Sorry paragraph 13 Sir on page 15.

30 **BLANCHARD J:**

Right.

**MR STEWART QC:**

And it seems to me that's an important definition when we're looking at what registration the mortgage achieved. Secures payment of the loan or satisfaction of an existing debt or the repayment of future advances or payment or satisfaction of any future or unascertained debt or liability  
 5 contingent or otherwise which of course is where the all monies comes into play.

Then over at page 16, Your Honour Justice Tipping of course referred to the nature of the debt and that could be fixed or future unascertained rather than  
 10 necessarily the amount and 3, a mortgage instrument must be executed by the registered proprietor, and of course it wasn't in this case but indefeasibility means it takes effect as though it was registered by the registered proprietor. In this case debt includes further advances and interest.

15 Now I'll take you to the form. Down the bottom of the page, paragraph 18, and we've been through that, the *Duncan* decision and the points in particular I rely on are – I'm taking Your Honours to, including the highlighted passage on page 18.

20 So rolling those matters together I say at paragraph 21, accordingly upon registration a forged mortgage is protected and the covenants are effective and enforceable to enable the charge to operate and monies to be recovered by that means. That's a position despite the fact that the registered proprietor in fact gave no covenants, the fraudster did. The true mortgagor did not sign  
 25 the mortgage, the fraudster did. No monies were advanced to the mortgagor, they were given to the fraudster. The mortgagor in fact owned no monies to the mortgagee, the fraudster did.

At 23, the simple reality and consequence of the registration of the forged  
 30 mortgage is that the true mortgagor's land becomes liable as security for repayment of the monies secured by the mortgage or we could express it two further ways, which aren't in the submission. It could be all, upon registration the land becomes security for the loan advanced. Secondly, the mortgagee's right to recover on the personal covenant becomes indefeasible.

**ELIAS CJ:**

Sorry, what was the last one?

5 **MR STEWART QC:**

The mortgagee's right to recover on the personal covenant, at least to the extent of the value of the land, becomes indefeasible.

**ELIAS CJ:**

10 What does that mean?

**MR STEWART QC:**

It means that you can, on the personal covenant you can't pursue the registered proprietor personally. Your recovery is limited to – let's say you've  
15 advanced a million dollars but the land's only worth \$500,000?

**ELIAS CJ:**

Yes.

20 **MR STEWART QC:**

Personal covenant can only be pursued to the extent of the value of the land, \$500,000. You can't then look to pick up the balance from the registered proprietor.

25 **BLANCHARD J:**

I think that's an unusual use of the term personal covenant which is usually talking about the debt regardless of security.

**MR STEWART QC:**

30 Yes but it is a term that the cases, as Your Honour will know, talk about and they're talked about in the *Grgic v ANZ*. They do talk about it but it's clearly understood in this country in our case we accept that the action against the registered proprietor's interest in the land or the registered proprietor, it's actually only to the extent of the value of the land. That's as far as

indefeasibility provides a remedy because it's the land that is charged with the debt not the registered proprietor.

**ELIAS CJ:**

5 Yes.

**MR STEWART QC:**

Now at paragraph 24 I went through three scenarios demonstrating the illogicality of it being a distinction between the two types of mortgages. The  
 10 first is assume a mortgage without a separate loan agreement. The mortgage is forged. It contains reference to a specific sum and provides, this mortgage secures my covenant to repay the monies you advanced to me or owe you under this mortgage. The mortgage signature is forged. There are in fact no monies advanced to me or that I owe you under the mortgage, nor is there  
 15 any personal covenant by the mortgagor because the real mortgagor didn't sign. Nevertheless, on registration the mortgagee's right to recover on the personal covenant becomes indefeasible or put another way the mortgagee's right of recourse against the property becomes indefeasible. Now the phrase the mortgagee's right of recourse is what His Honour Justice Blanchard used  
 20 in the *Duncan* decision.

Assume a mortgage provides. This mortgage secures my promise to pay all monies you advanced me or I owe you under a loan agreement that is separate from the mortgage but is incorporated into the mortgage. The  
 25 mortgagor's signature is forged to the mortgage and to the loan agreement. Here too there are in fact no monies advanced to me or that I owe you under the loan agreement. Nor is there any personal covenant by the true mortgagor but on the logic in example (a), why shouldn't the registration of the mortgage make indefeasible the mortgagee's right to recover on the personal  
 30 covenant? Logically the personal covenant would or should be cured or validated just as much here as in example (a) for it is part of the mortgage document just as effectively as if it had been incorporated physically into it.

**BLANCHARD J:**

Well in (a) you can identify the document. In (b) you may not be able to identify the document because it may not be any old loan agreement. It may have to be a loan agreement actually signed by the registered proprietor.

5 **MR STEWART QC:**

Well if it's incorporated it's in the same way – we've seen the provision –

**BLANCHARD J:**

Well it depends on what is incorporated, that's my point.

10

**MR STEWART QC:**

Well –

**BLANCHARD J:**

15 It's not going to be enough just to express it the way you've expressed it there. I don't think a Court is going to say that's adequate because it doesn't identify the loan agreement.

**MR STEWART QC:**

20 Well –

**BLANCHARD J:**

If it said under a loan agreement of even date, signed at such and such a branch of the bank, maybe that would be sufficient, even if the  
25 loan agreement was signed by the forger.

**MR STEWART QC:**

Well if it says – in any loan agreement, if you have one, you just produce the loan agreement and – I come to this and there's authority for it, you construe  
30 that loan agreement as one signed by the registered proprietor if it's incorporated. Now what gets incorporated Sir is not – and what gets the protection of indefeasibility in the loan agreement is not every provision in that loan agreement but only those that limit or qualify the estate as being protected, that is, it's accepted the reference to the debt.

Now the third example is really the one that –

**BLANCHARD J:**

- 5 Well the same argument would apply if it said, all the monies advanced to me on overdraft –

**MR STEWART QC:**

Yes.

10

**BLANCHARD J:**

And then there's a series of forged cheques.

**MR STEWART QC:**

- 15 Yes.

**BLANCHARD J:**

And you say that the mortgage would extend to securing liability over the forged cheques.

20

**MR STEWART QC:**

- Yes. Now it's the third example which really brings us to the point that Your Honours pressed me on. Assume that the mortgage secures my promise to pay all monies you advanced me or I owe you under any
- 25 loan agreement that purports to bear my signature, whether or not the loan agreement has been incorporated into this mortgage. The mortgagor's signature is forged to the mortgage document. Again there are no monies advanced to me or that I owe you nor is there any personal covenant by the true mortgagor. But here too on the logic in (a) why shouldn't registration of
- 30 the mortgage make indefeasible the mortgagee's right to recover on the personal covenant or the mortgagee's right of recourse to the property for the money lent on the faith of the mortgage.

**TIPPING J:**



Well this example is surely governed entirely by under any loan agreement that purports to bear my signature so you are in effect rendering yourself contractually liable for a forgery?

5 **MR STEWART QC:**

Let's remedy that and I did notice that when I went through Sir. Let me –

**ELIAS CJ:**

But I mean that's really the effect of what you're contending for.

10

**TIPPING J:**

It's a sort of Freudian conclusion.

**BLANCHARD J:**

15 That might be what you need to have in order to get incorporation.

**MR STEWART QC:**

Well –

20 **BLANCHARD J:**

If the banker's association is prepared to countenance the public ridicule and contempt that would follow an attempt to have a document like that.

**WILSON J:**

25 And the solicitors, the mortgagors might have some responsibility.

**MR STEWART QC:**

Or under any loan agreement, "that you sign", let's do that. I'm certainly not purporting –

30

**TIPPING J:**

Right. So you want that changed, "that you sign"?

**MR STEWART QC:**

Yes and I think that's closer to the – well any, yes. or any loan agreement with you.

**ELIAS CJ:**

5 Yes.

**MR STEWART QC:**

Any loan agreement with you.

10 **BLANCHARD J:**

Same thing.

**MR STEWART QC:**

Well we could have an unsigned loan agreement.

15

**ELIAS CJ:**

Better put...

**MR STEWART QC:**

20 Okay. But here too on the logic in example (a) why shouldn't registration of the mortgage make indefeasible a mortgagee's right to recover on the personal covenant or the mortgagee's right of recourse to the property for the money lent on the faith of the mortgage. The personal covenant should be cured or validated just as much as in example (a) and (b). In other words, it  
25 should not matter where the identification of the amount advanced comes from, because what registration secures is the promise to repay what is lent or the amount of the advances secured or charged against the property. That is the amount for which recourse can be had. The amount lent might be established by only looking at the mortgage itself, or by looking at the  
30 document incorporated into the mortgage or by looking at a document or records not incorporated into the mortgage. That is merely a matter of identifying the outstanding amount. The key point is that registration of the mortgage gives indefeasibility, adducing evidence of the amount outstanding is logically a separate issue and one that requires reference to documents or

evidence outside the mortgage in every case including the fixed sum mortgage.

Now at that point if I can take Your Honours to a recent article by  
 5 Professor Butt who has been active in this area. He's the leading land law academic writer in –

**ELIAS CJ:**

Cited in the *Duncan* case is he?

10

**MR STEWART QC:**

Yes, yes.

**ELIAS CJ:**

15 Where do we find it?

**MR STEWART QC:**

It's not in yet. I've got a copy coming for you but if I could just read this to you.  
 An article that was published in the October 2008, 82 Australian Law Journal,  
 20 at 671, at page 673 MR Butt says, "In principle there should be no difference between an acknowledgement of a particular principal sum lent, that's a fixed sum, with a covenant to repay that sum. The feature which the authority suggests give the old fashioned mortgage its robustness and on the other hand an acknowledgement of an unparticularised sum or monies with a  
 25 covenant to repay those monies. Now this is obtained in principle –

**TIPPING J:**

Is this is the context of forgery?

30 **MR STEWART QC:**

Indefeasibility.

**TIPPING J:**

Oh indefeasibility, right.

**MR STEWART QC:**

Yes.

5 **TIPPING J:**

That's undoubtedly correct in the abstract but unless he's addressing himself to the issue of forgery –

**MR STEWART QC:**

10 Oh yes the article is concerned with the forgery.

**TIPPING J:**

Right.

15 **MR STEWART QC:**

Indeed with all of these cases it is the forgery he's looking at and that's where the, that's the setting in which the observation is made.

**ELIAS CJ:**

20 It certainly does look as if there's been a rash of them in Australia?

**MR STEWART QC:**

Well –

25 **ELIAS CJ:**

Even if they haven't yet come through here.

**MR STEWART QC:**

30 You know it's – why they're having the press in Australia with the law reports is because they've tinkered with the legislation. They nearly ran the consolidated fund out of money over there. Mainly the lawyers were involved in these forgeries and because that fund was at risk they –

**ELIAS CJ:**

Which can happen here now that it's the solicitors who certify directly, isn't that right? I mean that is one of the features that's raised as a risk in the new electronic system.

5 **MR STEWART QC:**

If that does happen then you've got, apart from the consolidated fund, you have the recourse to the solicitor.

**ELIAS CJ:**

10 Yes.

**MR STEWART QC:**

But the requirement for – the solicitor would have to falsely certify, yes, because now the requirements for a solicitor to certify on identity issues are  
15 increasing all the time. You have to get a passport and do historical searches and what not so I'm perhaps in Justice Blanchard's camp that the risk of forgery under the emailing transactions – E-dealing transactions is not anything to be concerned about. But in Australia now, before you can – you have to make claims against the fund where the solicitor hasn't been negligent  
20 or the solicitor hasn't been dishonest and there are restrictions on it. We have these instances here but they get settled out without recourse to the Court under the current operation of the compensation scheme. So we don't really know, we'd have to ask the Registrar-General. There was some thought at one stage whether he should be a party or be heard in this proceeding as to  
25 what are the number of occasions where the fund is called upon.

**BLANCHARD J:**

Well doesn't he publish material on that?

30 **MR STEWART QC:**

If he does Sir I haven't accessed it.

**BLANCHARD J:**

I think from time to time statistics are provided and they show a very low rate of all kinds of claims.

**MR STEWART QC:**

5 What I was able to find was that the fund does run at a healthy surplus.

**BLANCHARD J:**

I certainly know that there was an article a few years ago in which some statistics appeared and the impression I have, I'm bound to say from  
10 conversations with the registrar at various times, is that the claim rate is very low.

**MR STEWART QC:**

I imagine that could change depending on the climate we're living in.  
15

**BLANCHARD J:**

Well it remained very low in the 1980s too because the statistics certainly covered that period.

20 **MR STEWART QC:**

What it does mean is that where the matter is currently dealt with and apportioned subject to this decision, is that there is a workable compensation scheme that compensates the innocent people and it's drawn off a fund which is established for that very purpose. Naturally there is a policy and objective  
25 which I come to. Now, para 25, "The amount actually secured will always be a matter of evidence outside the registered document. In the case of a fixed sum mortgage..." I've already dealt with that point. Para 26, "It may also be the case that there is no underlying executed agreement supporting monies secured by an all monies mortgage. The monies may simply have been  
30 advanced by way of overdraft into an existing account or, in the case of a private loan, it may be that a cheque is issued to the fraudster or cash advanced. It would be inconsistent and illogical to accord indefeasibility for advances made in those less formal ways but to deny indefeasibility where the loan evidencing the advance involves a forged agreement. The amount

recorded in the loan agreement would be the amount secured whether or not the loan agreement was signed. Execution of the loan agreement would not normally be a precondition to liability in the absence of any dispute as to the amount advanced. Liability for the advance would be established by proving

5 the advance was made. Production of the loan agreement, executed or not, would not be necessary to establish the debt and enforce recovery of the advance. In the present case, the mortgage complies with section 101, covenant to pay and the covenant to pay describes the debt as including further indebtedness as defined by section 101(6). The Act specifically

10 contemplates both all obligations mortgages and fixed sum mortgages and does not contemplate a distinction between the two. The purpose and scheme of the Act is to afford indefeasibility to a mortgagee who registers in accordance with the requirements of the Act. That is what would have occurred if Westpac's solicitor had registered the mortgage promptly. The

15 legislation draws no distinction between the two types of mortgages for the purposes of indefeasibility." I'm not so sure about that last sentence, I'm happy to put a line through that.

Where this does work it's like this. The all monies mortgage, it's not disputed

20 that the innocent mortgagee gets a registered title to its mortgage upon registration, even if it's forged and you have a situation there where you've got to give effect to that charge, the charge takes effect if the charge over the land in respect of a mortgage purportedly granted by the registered proprietor even though the registered proprietor didn't find the mortgage, didn't get the money,

25 knew nothing about it. That's what indefeasibility does in recognising that the mortgagee even in a forged or money mortgage gets a registered title to the mortgage, legal title. Now when we look at the –

**ELIAS CJ:**

30 That term is used as shorthand isn't it? It's a registered title? What –

**MR STEWART QC:**

The title to the mortgage?

**ELIAS CJ:**

You're talking about section 62 aren't you? When you say gets a registered title. I'm just really wondering what it means.

5 **MR STEWART QC:**

Gets – what I mean, I'm meaning in the sense that he gets a legal title i.e. he gets a registered charge.

**TIPPING J:**

10 He is the indisputable mortgagee?

**MR STEWART QC:**

Yes, against all other adverse claims including the mortgagor's claim against him. He has paramouncy of title.

15

**ELIAS CJ:**

Yes.

**MR STEWART QC:**

20 To that mortgage.

**ELIAS CJ:**

That's one use of title I think.

25 **MR STEWART QC:**

Sorry, yes.

**ELIAS CJ:**

Well I don't know, maybe it isn't.

30

**TIPPING J:**

He has title to the charge.

**MR STEWART QC:**



Title to the charge and, well the charge is there to –

**ELIAS CJ:**

He has priority.

5

**TIPPING J:**

And the charge is an interest in land so he has title to that interest.

**MR STEWART QC:**

10 Yes and that is –

**ELIAS CJ:**

Well no he doesn't get title – he doesn't get an interest in land through registration.

15

**BLANCHARD J:**

An interest as mortgagee.

**ELIAS CJ:**

20 I thought one of the provisions –

**MR STEWART QC:**

The land's not transferred to him as it used to be.

25 **ELIAS CJ:**

No.

**MR STEWART QC:**

But he does get a registered charge, legal title.

30

**TIPPING J:**

And that is an interest in land pro tanto.

**ELIAS CJ:**

Yes, yes, yes.

**TIPPING J:**

Are you about to move on to incorporations Mr Stewart?

5

**MR STEWART QC:**

Not quite.

**TIPPING J:**

10 Because there's something I want to ask you but I won't ask it now but before you move on to incorporations.

**MR STEWART QC:**

15 Yes well, yes. and when the, all those mortgages are registered the land becomes, under section 41 of the Land Transfer Act, liable as security and it's security for what, in my submission? It is security for the debt in respect of which the mortgage was granted and it doesn't matter that the mortgagor never got the money or the mortgagor never signed the mortgage. It is just a matter of proving what did this mortgagee lend or advanced on the face of that  
20 indefeasible mortgage.

**BLANCHARD J:**

So it then turns on what was the covenant to pay?

25 **MR STEWART QC:**

Yes the covenant to pay is at page 94, paragraph 2.2.

**BLANCHARD J:**

Two point one.

30

**MR STEWART QC:**

Two point one, I beg your pardon Sir. In this case you must pay in the manner agreed in your loan agreement or that other bank document whatever it be, it might be a cheque.

**WILSON J:**

Don't you look first in 2.1 at the first sentence, their obligation to pay the rest back, the secured money, and the secured money is defined in 1.1 and I'm  
 5 still not clear Mr Stewart, and I'd be grateful for your assistance, as to the basis on which you say that in this case the true owner of the land owes to Westpac the amount advanced under the forged loan agreement?

**MR STEWART QC:**

10 Sorry Sir could I...

**WILSON J:**

Yes. On what basis do you say that the owner of the land owes to Westpac the amount advanced under the forged loan agreement?

15

**MR STEWART QC:**

Because upon registration of the mortgage which we have to accept was signed by the mortgagor, that's part of indefeasibility, that much we're agreed upon I assumed. Because the Act requires a mortgage to be signed by the  
 20 mortgagor, by the registered proprietor.

**TIPPING J:**

That is a very important point but I think with respect it's the, it's the source of your undoing because even if this document had been signed by the true  
 25 mortgagor, the mortgagor would have been saying I promise to pay you all my obligations and the forger's obligation is not the registered proprietor's obligation.

**MR STEWART QC:**

30 I know but when it's forged it's deemed to be.

**TIPPING J:**

No it's not. That's a step too far. The best you can put it is that this mortgage is deemed, forgive the word, to be signed by the registered proprietor, but the

covenants in the mortgage are what count. It's deemed to be signed by the registered proprietor so as to give a charge over the land, that's the, that's the necessary step to give the charge.

5 **MR STEWART QC:**

For the monies advanced on the faith of the security.

**TIPPING J:**

No. that's where I think your argument breaks down. That's looking at it from  
10 the wrong side of the equation. It's not I promise to pay you all monies that you advance on the faith of this mortgage. It is I promise to pay you all monies that I owe you and for which I have secured my, mortgaged my land.

**MR STEWART QC:**

15 All monies advanced to you. All monies advanced to you under the loan agreement or otherwise or howsoever.

**TIPPING J:**

And this is the reconciliation between the fixed mortgage because if the – and  
20 the all obligations because the fixed mortgage, the mortgagor having notionally or deemed to have signed to it, they are not allowed to deny that they have received the fixed sum.

**MR STEWART QC:**

25 But to give effect to the instrument, you read a situation as the mortgagor having signed the mortgage.

**TIPPING J:**

But not having signed the loan agreement.

30

**MR STEWART QC:**

No, but having signed the mortgage to secure monies advanced to you. Now, the "you" in the document always has to be the registered proprietor. You

can't have "you" for some purpose of being the registered proprietor, and some purposes meaning someone else.

**BLANCHARD J:**

5 But no money has been advanced to the registered proprietor.

**MR STEWART QC:**

But the, when the registered proprietor says that they will pay all monies advanced to you, that captures the money, and we're going in circles,  
10 advanced on the faith of the mortgage, to you, even though it wasn't advanced to you.

**TIPPING J:**

Well, that's the crunch point. That would require the mortgage covenant to be  
15 worded in that way. Not looking to the mind of the mortgagee, sorry, the mortgagor, as it is here. Not looking to the obligations of the mortgagor. That would be looking to the conduct of the mortgagee, in advancing on the faith of the mortgage. But the mortgage here, expressly, looks to the obligations of the mortgagor. Now, if it had said, "I promise to pay all monies that you  
20 advance on the faith of this mortgage", this might have been a different matter, altogether.

**MR STEWART QC:**

25 Well, it was money secured by the mortgage under 1.1, wasn't it, this money? It was, except for the forgery.

**BLANCHARD J:**

30 Well, it wasn't.

**WILSON J:**

It is your argument that the true owner of the land did owe this money to Westpac?

**MR STEWART QC:**

By virtue of the indefeasibility, yes.

5 **TIPPING J:**

But not otherwise?

**MR STEWART QC:**

Not otherwise.

10

**TIPPING J:**

Not otherwise. Well, that's the nub, at best.

**MR STEWART QC:**

15 You can't give effect to the indefeasible protection otherwise, unless you take that approach both in respect of the fixed sum mortgage and the all monies.

**TIPPING J:**

Well, for my part, I fully understand the argument.

20

**WILSON J:**

So do I, that's very helpful.

25 **MR STEWART QC:**

Now, Justice Tipping, you hadn't wanted?

**TIPPING J:**

30 No, it's been covered. Thank you.

**MR STEWART QC:**

Now the easy part of the case.

**TIPPING J:**

In comparative terms.

**MR STEWART QC:**

5 Westpac's alternative submission is that the mortgage expressly incorporated the memorandum of provisions, which it did. And the memorandum incorporated the loan agreement by reference, including an express reference to making payment in the matter agreed in the loan agreement. And that's at 2.1, we've just looked at. On the basis of the High Court of Australia decision  
10 in *Gibb in the Registrar of Titles*, the Court of Appeal accepted that it is possible to incorporate covenants into a mortgage by reference, and by incorporation of the terms of another agreement. However, the Court of Appeal held that mere reference to a document does not suffice. In this case, of course, was more than a mere reference. The loan agreement was  
15 referred to nine times, and, in fact, the memorandum required the mortgagor to make the payments as required in terms of the loan agreement. Now, as noted at paragraph 47 of the written submission, Halsbury records that parties routinely incorporate terms of other documents into their agreement, by reference to other documents, even when they do not execute or append  
20 those other documents. That's set out in the submission.

**TIPPING J:**

I don't think there's any doubt about the principle. The question is whether it was sufficiently incorporated here, either expressly or by necessary  
25 implication.

**MR STEWART QC:**

30 And in my submission, sir, it's a low threshold. It's not the party, the parties intend it. Let's say this was a genuine transaction. There can be no doubt that by that memorandum the parties expressly, by reference, incorporated that loan agreement.

**TIPPING J:**

But that begs the very question. Is a false loan agreement incorporated?

**MR STEWART QC:**

5 Yes.

**TIPPING J:**

Because it talks about your loan agreement, meaning the registered proprietor's loan agreement. That would be fine.

10

**BLANCHARD J:**

What is a loan agreement? I'm now looking at the defined term. It's an inclusive definition.

15 **MR STEWART QC:**

It includes that, but it can be, I imagine, any number of agreements. It may be for the purpose of refinancing or purchasing a house. It may be for the purpose of decorating a house. It may be a personal loan. It simply includes those two things, although there can be others, of course. I don't think it's  
20 hard to determine whether a particular agreement is a loan agreement or not. But it would have to be a loan agreement between the mortgagee and you, the mortgagor. Now, when the word "you" is used in the memorandum, it is a reference to the registered proprietor. Even though the registered proprietor did not sign that agreement.

25

**TIPPING J:**

What? That doesn't, we're not talking about indefeasibility here. We're talking about whether a document has been sufficiently incorporated. And the only document that's incorporated is a loan agreement executed by the  
30 registered proprietor.

**MR STEWART QC:**



Yeah, but you can incorporate a document whether it's signed or not. You can incorporate a document which is unenforceable, and you incorporate certain provisions of it.

5 **TIPPING J:**

Well, you wouldn't incorporate Joe Bloggs' loan agreement into here, would you?

**MR STEWART QC:**

10 If you wanted to, you could.

**TIPPING J:**

Well, you could, but you wouldn't dream of doing it on this language. So why incorporate a forger's loan agreement?

15

**MR STEWART QC:**

Well, when you're giving, construing a mortgage document, and this memorandum refers to a loan agreement with you, there is not a mismatch between the "you". It is always the same person. It's you, the registered proprietor, and it's you, even though the registered proprietor did not sign the loan agreement. In the same way, it's you, the registered proprietor, even though you didn't sign the mortgage. Now, I'll come to an authority on that. But only two recent Australian decisions have involved cases where the mortgage has, only two of the recent Australian cases have dealt with the question of a corporation. One is *Vella*, and the other is *Solak*. The very recent case, two months ago. The position with the other decisions is that they didn't have to deal with that argument, but in one case, on appeal, although it wasn't argued, the Court said it would be unlikely to succeed. Now, the starting point in relation to a corporation of s 41 of the Land Transfer Act, which we've looked at, it's set out at para 19 of the submission.

20

25

30

**ELIAS CJ:**

Can I just ask you in terms of authority for incorporation in the same manner as incorporating in agreements more generally, incorporation in respect of the

registration provisions of the Land Transfer Act, is the authority simply, there's no New Zealand authority in point, is there?

**MR STEWART QC:**

5 No.

**ELIAS CJ:**

So it's only *Gibb*, is the critical authority?

10 **MR STEWART QC:**

Yes, and *Gibb* is the authority for the fact that you can incorporate off registered documents into the registered document, even though the off registered document itself could not have been registered.

15 **ELIAS CJ:**

It may well just follow from the general approach to ascertaining the true scope of the mortgage document, and what the parties had agreed, so it may simply follow. But I suppose that there is an argument that the registration provisions may exclude that approach.

20

**MR STEWART QC:**

Not in *Gibb*, it didn't.

**ELIAS CJ:**

25 No, in *Gibb* that argument didn't prevail. But I just wonder whether it doesn't need to be looked at. It's sufficiently covered in, I haven't read *Gibb*.

**MR STEWART QC:**

30 No, but I'm going to take Your Honour to *Gibb*, because that does give the rationale as to why they say in the Land Transfer Act dealing involving registration of certain instruments, can you incorporate.

**ELIAS CJ:**

Yes.

**MR STEWART QC:**

The registrar of lands, or registrar of titles in Australia, was adamant that it could not be incorporated.

5

**BLANCHARD J:**

But that's long settled, it's not being argued against you that there couldn't be incorporation.

10 **MR STEWART QC:**

No, but it's helpful to look at the –

**ELIAS CJ:**

Well my question is, what authority settles it? And you're saying it's *Gibb*?

15

**MR STEWART QC:**

Yes.

**TIPPING J:**

20 It's really shorthand, isn't it? It's a way of not having to repeat in the instant document some provisions in the outside document, you just bring them in by reference?

**MR STEWART QC:**

25 Yes, that's exactly right, and then they're taken to be as if that document is set out in full.

**TIPPING J:**

Indeed.

30

**MR STEWART QC:**

Now, if that happened in this case, if I persuade Your Honours it did, then the loan agreement is read as though it's part of the registered memorandum which incorporated it.

**TIPPING J:**

But one of the things that was interesting me is, does *Gibb* or any case go as far as to say you can incorporate by reference a forged instrument, in other words, bring in both the covenants and the signature, if you like, as if the signature on the outside document were the signature of the registered proprietor?

**MR STEWART QC:**

No, let's assume we had the loan agreement containing the debt and the repayment clauses printed out in the memorandum of turns and registered. On current authority, there would be no doubt that that would be fully affected to secure the monies advanced. You would have the debt in the mortgage document in the same way you do with a fixed sum mortgage, by its incorporation. It has the same status as being registered.

**TIPPING J:**

You'd still have to construe the loan agreement though, wouldn't you?

**MR STEWART QC:**

Well then it would be construed in the same way as the memorandum and it refers to "you" as, to the registered proprietor, even though it wasn't.

**TIPPING J:**

I know, that's the problem.

**MR STEWART QC:**

The problem for Your Honour, but otherwise, you can't give effective indefeasibility of forged mortgages at any level at any stage.

**ELIAS CJ:**

Unless they're complete in the document as registered.

**MR STEWART QC:**

See, we have to treat the fixed sum mortgage even – that person, although they never signed the mortgage never got the money, they're still taken to be the person – the registered proprietor who did those things.

5

**TIPPING J:**

That's the, yes, that's the point we were at a few minutes ago, yes. But how can you take a document unless it was expressly incorporated on the premise that you're going to incorporate all loan agreements whether they're valid or  
10 invalid, as between mortgagor, on the mortgagor. It seems to me to be quite a long step, to say you – it becomes binding, as opposed to it fills up the covenants in the mortgage.

**MR STEWART QC:**

15 You need to approach this on the basis that there, if this was a genuine transaction, no one would be hesitating for a moment under the general law for incorporation by reference that this loan agreement did not form part of the mortgage document by incorporation.

20 **TIPPING J:**

Well I'm just teasing out with you, there's no express authority on this point, it's just really been a matter of assumption has it?

**MR STEWART QC:**

25 You mean in the context of indefeasibility?

**TIPPING J:**

In the context of forged outside documents.

30

**MR STEWART QC:**

Well there is authority in respect of unenforceable outside documents can be incorporated so as to take effect between those two parties. But usually, let's

say there's an outside document that's unenforceable and illegal for whatever reason –

**ELIAS CJ:**

5 A transfer that doesn't comply with –

**MR STEWART QC:**

Yes, it might be, it doesn't have OIC consent or hasn't got the proper ordinance to establish its validity. Parties to an agreement can incorporate  
10 that as part of their agreement and it takes effect as between them, notwithstanding as between two other parties, it may have been an illegal and unenforceable document, there's authority on that.

**TIPPING J:**

15 Yes, we've read, you've referred to those cases. But it's simply that the language is incorporated, as filling up the document into which it's incorporated isn't it, which is conceptually a bit different from saying it fills up the forgery, so to speak. It's as if the registered proprietor had signed it as part of the mortgage when he hasn't signed it. I can understand, it's just how  
20 far we go of bringing forgeries into the picture.

**MR STEWART QC:**

And nor did the registered proprietor sign the memorandum of provisions. That was incorporated by reference. The only document that the registered  
25 proprietor is said to have signed here is that one pager, which then incorporates standard provisions. Now the registered proprietor never signed the standard provisions, never saw them, never heard of them, wouldn't know they existed, but it's still indisputably incorporated as part of the registered document. Nobody has seriously questioned that you can't incorporate  
30 outside, off-register documents as part of the –

**ELIAS CJ:**

Well they may be necessary for you to understand the meaning of the registered document, but it's more on whether they're given de facto effect as

though registered that it's the question, whether that is a necessary consequence.

**MR STEWART QC:**

- 5 They are and they must be, and one of the reasons that *Gibb* says is why they need to be given that status is because they, in fact, comprise an important part of the estate being granted, because, I'll come to *Gibb*, if the property is not built in accordance with plans and specifications lodged with the bank, then that's a default under the mortgage which gives rise to a power of sale.
- 10 But we go to *Gibb*, I've dealt with it reasonably –

**ELIAS CJ:**

- What's the power of sale provision? Sorry, don't take time to go there, but just tell me the section number? Don't worry, I'll look at the index, that's all right.
- 15

**TIPPING J:**

- Well perhaps you haven't really prepared to meet this point, perhaps you might be more convenient if you moved on to the specifics of this case to demonstrate how this was incorporated.
- 20

**MR STEWART QC:**

- Section 92 is the power of sale provision Your Honour and it's now in the new Act, but this case is dealt with under the old Act, it's section 119 under the new Act. This case was developed under the old Act. It's section 119 under
- 25 the new Act.

**ELIAS CJ:**

Yes.

- 30 **TIPPING J:**

Now what I would like to be taken to is the place or places –

**BLANCHARD J:**

Were you referring to Property Law Act then?

**MR STEWART QC:**

Yes.

5 **TIPPING J:**

The place or places where you say the mortgage document incorporates this loan agreement i.e. the forged one?

**MR STEWART QC:**

10 I only need it once of course.

**TIPPING J:**

Yes. Well so far you've had nine shots at it.

15 **MR STEWART QC:**

Well yes, yes, but, you know, it's like argument, it doesn't get any better from repeating it.

**TIPPING J:**

20 No, well once is enough. What's your best one?

**MR STEWART QC:**

2.1.

25 **TIPPING J:**

2.1?

**MR STEWART QC:**

The last two lines.

30

**BLANCHARD J:**

That of course is only dealing with the mechanisms of payment.

**MR STEWART QC:**



The obligation to pay, what you must pay.

**ELIAS CJ:**

That's the first sentence.

5

**MR STEWART QC:**

That's the heading too, yes. you must pay.

**ELIAS CJ:**

10 But the second sentence deals with it –

**BLANCHARD J:**

But yes you must pay the secured money so you have to go back to 1.1 to determine what the secured money is and there's no incorporation by  
15 reference in there. It's a simple statement that the secured money is all money which you may owe to Westpac.

**MR STEWART QC:**

Well if that's a covenant to pay, we don't have one.  
20

**TIPPING J:**

It is a covenant to pay but it doesn't say you're going to pay up, on terms of a forged loan agreement.

25 **MR STEWART QC:**

Well it says, and you know if it's part of the registered document, forms part of it, then it takes effect even though it was forged in the same way the mortgage takes effect as charging the land. We can't pick and choose which provision we're going to give effect to and which ones we're not. You've got to give  
30 effect to them so that the security becomes operative.

**TIPPING J:**

Well 2.1, then it struck me that 4.2(b) might –

**MR STEWART QC:**

Well interest will accrue, 2.3, the first bullet point?

**TIPPING J:**

5 Two point three?

**MR STEWART QC:**

There's a reference there about interest.

10 **TIPPING J:**

But isn't your fundamental problem the conjunction of the word "your" with the word "loan agreement" because that defines it as being a registered proprietor's loan agreement.

15 **MR STEWART QC:**

All right. we see at page 1 of the mortgage that "you" there's a reference to the registered proprietor, just at a starting point, at page 92, mortgagor Marie Antoinette Fenech, in consideration of the secured money you as the mortgagor, now that's a reference to Ms Fenech, has to be.

20

**TIPPING J:**

Yes.

**MR STEWART QC:**

25 Everywhere else in that document and the incorporated document "you" and "your" there's a reference to Marie Fenech.

**TIPPING J:**

The real?

30

**MR STEWART QC:**

The real one, even though she didn't sign the mortgage. That's what an indefeasibility is achieving and when you incorporate a document into the memorandum of terms, such as the loan agreement, the "you" and the "your"

have to be construed as her even though she didn't sign it. There's no getting away from that otherwise you're saying well we're going to be, have the "you" for some purposes but not for others. The registered documents all have to be interpreted consistently. There's no basis why you would do otherwise in

5 terms of construing these documents.

**TIPPING J:**

I don't think I'm in any way challenging that.

10 **BLANCHARD J:**

That argument it seems to me works against you. You start reading the memorandum you'd read the secured money secured by the mortgage is all money which Ms Fenech may owe to Westpac.

15 **MR STEWART QC:**

Sorry, where are you up to Sir?

**BLANCHARD J:**

One point one –

20

**MR STEWART QC:**

Yes.

**BLANCHARD J:**

25 Page 94.

**MR STEWART QC:**

And even though she doesn't owe any money the indefeasible protection is

30 read as though she does owe the money. You can't read it any other way.

**BLANCHARD J:**

Well I have difficulty with that I'm bound to say.

**MR STEWART QC:**

Well if we go back through, I mean this is at the heart of it otherwise –

**ELIAS CJ:**

5 It is after all a system.

**MR STEWART QC:**

We would never have any indefeasible, these are the cases at paragraph 6 that I mention there where years ago they raised the argument that well that's  
10 not me, I didn't sign that mortgage so how can it be me.

**BLANCHARD J:**

Yes but the point is that the obligation arises under the loan agreement.

15 **MR STEWART QC:**

The loan agreement –

**BLANCHARD J:**

There's nothing to be repaid if there's no loan agreement.  
20

**MR STEWART QC:**

Well there is a loan agreement and not only is there a loan agreement Sir but it's actually incorporated as part of the mortgage.

25 **BLANCHARD J:**

Well that's your argument.

**MR STEWART QC:**

Yes and how can it be otherwise. You can't incorporate a document into, a  
30 registered document and say this doesn't have the status of a registered document or doesn't enjoy the status as part of the registered document. Now you'd have to disconnect that to get that result and there's no basis for doing it. You can't bring the document onto the register by saying I'm going to treat it differently or ignore it. And how could you possibly treat the document

differently from the mortgage in the memorandum of terms. In my submission you logically cannot. There is an authority on this which I'll come to towards the end of the section.

- 5 Now if we go to page 25 of the submission. Now here Your Honours the High Court of Australia was dealing with the same provision that we've looked at, at page 17 of the submission, that section 41 and they were looking in particular, if we can go to that section 41 at paragraph 19. They were looking at the requirement that "...the land shall become liable as security in manner  
10 and subject to the covenants, conditions and contingencies set forth and specified in the instrument..."

Now if the incorporated loan agreement therefore gets the status of being specified and set forth in the instrument, then it's got all the protection of  
15 indefeasibility and you can't treat that document, can't construe it differently from the mortgage of a memorandum.

**TIPPING J:**

Your argument really reduces to this, I think Mr Stewart, that in order to  
20 respect indefeasibility, the loan agreement must be treated as well as the mortgage document as having been signed by the real Ms Fenech.

**MR STEWART QC:**

If it's incorporated as part of the registered document.  
25

**TIPPING J:**

That has to be your argument mustn't it?

**MR STEWART QC:**

30 Well it is the argument, yes. I mean if this document, these provisions had been set out in the registered document, we would be dealing with this as a fixed sum mortgage.

**TIPPING J:**

So in the same way as the mortgage itself must be treated as signed by the registered proprietor, the real, so must the loan agreement as a consequence of incorporation?

5 **MR STEWART QC:**

Yes.

**TIPPING J:**

All right.

10

**MR STEWART QC:**

And that's dealt with in *Solak*. If we can get through *Gibb* first because this gives you a feel –

15 **ELIAS CJ:**

Why does section 41, you were just taking us to section 41 then?

**MR STEWART QC:**

Yes.

20

**ELIAS CJ:**

Why does section 41 though provide an answer because it is only dealing with the indefeasibility of the liability for security of the land. The – so it's liable?

25 **MR STEWART QC:**

Because we need to when we're looking at –

**ELIAS CJ:**

30 But you're asking us to go much further and to say that the, that it's not only liable as security for any valid loan but that it makes an invalid loan, it charges the land with the invalid loan.

**MR STEWART QC:**

If, if, yes. The land becomes liable as security, as security, section 41 says subject to the covenant's conditions and contingencies so I need to get the loan agreement in as part of the registered document, that's what section 41 – that's why I'm engaged by section 41. Otherwise, you see, I don't have the

5 terms of the loan agreement on the register. They're not part of the registered instrument. But as soon as it is accepted that they are then all the difficulties about, that she didn't sign the loan agreement, fall away in the same way they fell away by virtue of the fact she didn't sign the mortgage.

10 **ELIAS CJ:**

Why are the purposes of the Land Transfer Act furthered by the argument that you are advancing here? If you're secure in your security, but you have an invalid loan, why does the policy of the Land Transfer Act require your loan to be treated as valid?

15

**MR STEWART QC:**

Because the only reason you take a security in the form of a mortgage is to secure the loan. You wouldn't take a mortgage to secure nothing. In fact I think a mortgage that secured nothing is not a mortgage, I believe there's

20 authority on that. It's invalid.

**TIPPING J:**

You've made a mistake as the lender. You've lent money to the wrong person, thinking you were lending it to the registered proprietor. Now I'm a bit,

25 with the implication in the Chief Justice's question, why do we have to go as far as to help you overcome that mistake as part of the policy of the Land Transfer Act?

**MR STEWART QC:**

30 Well because the Land Transfer Act and the people who drafted it appreciated that fraud was a possibility. Fraud is mentioned many times in the Act.

**ELIAS CJ:**

But you might have fraud in the registration of your security and you're protected against that.

**MR STEWART QC:**

5 But that's –

**ELIAS CJ:**

You've got an undoubted and indefeasible security.

10 **MR STEWART QC:**

That secures nothing under the all monies mortgage.

**ELIAS CJ:**

Well it may or it may not. I mean there maybe serial advances that are made  
15 some of which in fact are invalid loans. You may get, the security may bite on  
the valid advances but why should the Land Transfer Act policy cure what is  
an invalid loan?

**MR STEWART QC:**

20 Because as part of the compromise or the trade off in making land  
transactions and registrations easier, facilitating getting away from the old  
deed system, it recognised that the opportunity for people to suffer loss  
through fraud was increased so that those people don't suffer by virtue of the  
new regime or registration system. They set up a compensation scheme.

25

**ELIAS CJ:**

But it's fraud in the priority of the encumbrances and the transfers and the  
whole system of registration. It's not a guarantee system for bad loans.

30 **MR STEWART QC:**

Not at all, and there's no suggestion that this was a bad loan.

**ELIAS CJ:**

Well, it was, it was a very bad loan.



**MR STEWART QC:**

You're still going to get compensation, even if you were negligent, in this country. I mean, even if you could have done better.

5

**TIPPING J:**

You didn't rely on the register, did you? You relied on the person presenting herself to you as being the registered proprietor.

10 **MR STEWART QC:**

Yes, but I have got on the register that the person who was also a victim of the fraud gets compensated, and she only gets compensated not to get a windfall for herself, she gets compensated so that she can pay off the encumbrance that was registered against her property fraudulently. And she achieves that by paying Westpac.

15

**ELIAS CJ:**

20 But the encumbrance may be wholly valid. Suppose Ms Fenech here had granted the mortgage to secure advances she may have drawn down on in the future. But a fraudster obtained a loan from the bank, purportedly in her name. Why should that advance be procured, be made effective, because you have a valid security?

25

**MR STEWART QC:**

Well, that's not the case we're dealing with here.

30 **ELIAS CJ:**

But it's got to apply, the principle has to apply.

**MR STEWART QC:**

Well, that's a little more problematic, perhaps, in that situation. But what we do know is that the way the Act is intended to apply is when, in 172, which is a compensation provision.

5 **TIPPING J:**

What was the page number?

**MR STEWART QC:**

183. 172(b).

10

**TIPPING J:**

I'm not immediately seeing where it fits into that.

**ELIAS CJ:**

15 No.

**TIPPING J:**

Having not read it carefully before.

20 **MR STEWART QC:**

That's where the mortgagor gets the right. If they've had their estate diminished or deprived through any wrongful misleading registration. They then get the claim.

25 **TIPPING J:**

Deprived of any land or any estate or interest, or by the registration, or by any error, omission or misdescription. I'm not sure, again.

**ELIAS CJ:**

30 Or in any interest in the register.

**WILSON J:**

Mr Stewart, can I test the point this way? If Mr Clark had registered the mortgage promptly in this case, would s 172 have had any application?

**MR STEWART QC:**

Yes.

5 **WILSON J:**

In what way?

**MR STEWART QC:**

Well, Ms Fenech would then have a claim of compensation under the article.

10 That's been accepted by all parties. We're only here because it was his failure to register which meant that Ms Fenech didn't have a claim. I would say that if she had a claim, then she would have paid the money to Westpac. The Court of Appeal dealt with this point.

15 **WILSON J:**

But have you sued Mr Clark on that basis?

**MR STEWART QC:**

Yes, yes, through his breach of undertaking we lost the compensation that we  
20 would have got from, Mr Clark had laid her claim.

**WILSON J:**

So then we come back to the point you touched on earlier as to whether the registrar or relevant official in applying section 172 would have taken the point  
25 that we've been discussing today.

**MR STEWART QC:**

Well, he didn't take the point in the other cases.

30

**WILSON J:**

No, no.

**ELIAS CJ:**

What other cases, sorry, which ones?

**MR STEWART QC:**

The other people who were defrauded by the same person.

5

**WILSON J:**

The other banks.

**MR STEWART QC:**

10 The other banks. We wouldn't be here if we'd pay out like them on the operation of the scheme. But it was because Ms Fenech didn't have a ground for a complaint, because it never got registered. But it should have been registered, we're saying.

15 **WILSON J:**

If that's the case, why do we need to consider the point we've been discussing today?

**MR STEWART QC:**

20 I'm not quite with Your Honour.

**WILSON J:**

Well, if, and I may have misunderstood your answer and please correct me if I'm wrong, but as I understood your explanation a minute or two ago, it was  
25 that if Mr Clark had registered the mortgage on time, as happened with the other banks defrauded by the same fraudster, the true Ms Fenech would have been paid out under section 172. She would have paid Westpac. End of story.

30

**MR STEWART QC:**

So it's his failure to register and that Westpac didn't get paid out, and we say that his failure to register caused us that loss.

**ELIAS CJ:**

Only she could access the fund, and she didn't lose, because the mortgage wasn't registered.

5 **MR STEWART QC:**

No, but had the mortgage been registered as was undertaken by the solicitor, then she would have accessed the fund to get the mortgage.

**ELIAS CJ:**

10 Yes, yes, I understand that.

**MR STEWART QC:**

And we would have been paid, so it's the fact that we didn't get paid, we say, as a result of the undertaking been breached, that we're here.

15

**TIPPING J:**

The summary judgment went against you in the Court of Appeal, solely on the basis that there was no causative effect of the negligence, because you wouldn't have been secured for this money, anyway.

20

**MR STEWART QC:**

No, no, really because there was an argument put that Westpac hadn't given any evidence that they would pursue the unfortunate, sorry, you're talking about the?

25

**TIPPING J:**

I'm talking about the Court of Appeal. The Court of Appeal added this point in and said, well, there may have been negligence, but you wouldn't have suffered any loss anyway because no monies were payable under this mortgage.

30

**MR STEWART QC:**

Yes, that's right.

**TIPPING J:**

And that's how the matter presents itself to us. And frankly, I think that that's all we should confine ourselves to. Was it causative of loss? Because, were monies payable under it? That's the issue. And I agree, the compensation  
5 fund is relevant in the sense of the broad parameters of the Act, but I think that's as far as it goes.

**MR STEWART QC:**

I agree with that.  
10

**TIPPING J:**

The correct construction is informed by the presence of the compensation fund, if you like.

15 **MR STEWART QC:**

Because Mr Clark's response with the help of the Court of Appeal had been.

**TIPPING J:**

Well, never mind where it came from.  
20

**MR STEWART QC:**

Well, you had a secured loan that secured nothing.

**TIPPING J:**

25 Well, exactly. That is the point that we are addressing. Did it secure anything?

**MR STEWART QC:**

Yeah, well, that's what I thought.  
30

**TIPPING J:**

And that, frankly, is the beginning and the end of it, for me.

**MR STEWART QC:**

Yeah, I'm happy with that. That's what I'm here for.

**WILSON J:**

I'm sorry, I just want to understand this. If you are unsuccessful in this appeal,  
5 you don't get a summary judgment. Are you still able to pursue your claim  
against Mr Clark based on his delay in registering the mortgage, effectively  
depriving you of a section 172 claim?

**MR STEWART QC:**

10 No because Mr Clark would say you suffered no loss because you were never  
going to get –

**ELIAS CJ:**

No but if you succeed here then as I understand where matters have been left  
15 in the lower courts, you obtain summary judgment because the arguments put  
up against summary judgment will knock back apart from this one.

**MR STEWART QC:**

Yes, it will be paid by Mr Clark, yes. And by my learned friends here, yes.  
20

**ELIAS CJ:**

Well she wasn't, leave wasn't given on the other points?

**MR STEWART QC:**

25 Nor thought and in the Court of Appeal we recognised the reality that we had  
to confront on this issue even though it wasn't pleaded and not raised in the  
lower court, we got on with it and we're here now.

**TIPPING J:**

30 Well where are you at now Mr Stewart?

**MR STEWART QC:**

I'm trying to get started on –

**TIPPING J:**

Struggling to get this document incorporated.

**MR STEWART QC:**

5 No, no.

**ELIAS CJ:**

You're going to take us to *Gibb*?

10 **MR STEWART QC:**

*Gibb* yes at page 25 of the submission.

**ELIAS CJ:**

Where do we find *Gibb*?

15

**MR STEWART QC:**

Tab 19. And if you look at page 504, just starting at the offending covenant or the covenant that caused the controversy is the second paragraph, "The instrument of mortgage contained the following covenant..." and you need to read down for about eight or 10 lines.

20

**TIPPING J:**

So it's in accordance in all respects with the plans and specifications, that's the key one is it?

25

**MR STEWART QC:**

Yes and those plans and specifications weren't registerable otherwise. Now then we go, you can either – the parts I wish to rely upon, over at 505, about two thirds of the way down the page, halfway down the page we get to Registrar-General's objections to that covenant, starting with the words, "On 22<sup>nd</sup> February." And C and D I highlight, those two objections.

30

**ELIAS CJ:**



I'm a little slow on the uptake here. This was whether the mortgage extended to cover the sums advanced in completion of the building, is that –

**MR STEWART QC:**

5 No –

**ELIAS CJ:**

No?

10 **MR STEWART QC:**

– whether they could registered that covenant which – and incorporate off registered plans and specifications as part of the provisions of the registered mortgage.

15 **TIPPING J:**

To create a default by failure to follow the plans and specifications.

**ELIAS CJ:**

I see, thank you.

20

**MR STEWART QC:**

Now go to 509, halfway down 509. The first question is whether, down to the end of that page. And then if Your Honours will go to page 510, line 1, down to the first eight lines. The next passage is at 511, first 10 lines. Then the  
25 second paragraph on page 511, if the mortgagors pay off the mortgage. Now the –

**BLANCHARD J:**

He has said at page 509, towards the bottom of the page, those documents,  
30 in other words the plans and specifications, cannot in my opinion accurately be said to be part of the covenant itself. In other words I think what he's saying there is they're not incorporated into the covenant?

**MR STEWART QC:**

Well no what he's saying is the question is whether the covenant set forth –

**BLANCHARD J:**

What he's saying is that you can refer to other documents in your covenant.

5

**MR STEWART QC:**

Well and read on so they do – if you read on through the judgment I'll take you to you'll see the reason why, what effect they have. What he's saying is you didn't need to, the part you refer to Sir, have the plans and specifications there in order to say that they had been set forth and specified in the instrument.

10

Now the next one is 514. At the start of the second paragraph it says, the main support, if you go up four lines from that and the words, "The essential thing for the public is that the registration of the mortgage discloses the nature of the covenant and that it affects the title to the land. All the rest is a matter for investigation and requisition."

15

Now the next passage is, it's halfway down page 514 and the sentence starts halfway in, it's about the seventh line, "It was argued that the building covenant was not set forth and specified in the mortgage..." And then, "...consequently the documents that define the obligations of the parties must be registered or those obligations could not bind the land whatever contractual effect might be given to them..."

20

25 **TIPPING J:**

The peculiarity of this particular instance was referred to by Justice Stark, four lines down from the top of page 515, the registrar would actually have been satisfied if it had not said the plans and specifications. He was, he would have been happy if it had simply said, with plans and specifications lodged with the mortgagee. Now, that just shows how dopey this whole thing was.

30

**MR STEWART QC:**

But, that doesn't matter.

**ELIAS CJ:**

He just didn't like his office being mucked up.

**TIPPING J:**

- 5 Well, I mean, I'm with you on this. I think this, clearly, there is a doctrine of incorporation by reference. It's a perfectly sound and sensible doctrine. But the real issue is whether or not you've got it satisfied here.

**MR STEWART QC:**

- 10 Yeah, well, I've only got two more passages to go.

**TIPPING J:**

Do any of them help in the particular case, in our case, or are they just statements of the general?

15

**MR STEWART QC:**

Well, it does show why you can incorporate documents by reference, and what effect they have.

- 20 **TIPPING J:**

Yes, well, that would be helpful.

**MR STEWART QC:**

The next paragraph is top of page 514. At page 521, the last paragraph.

- 25 And at page 522, second paragraph, the object of the Act.

**ELIAS CJ:**

It's not a very exciting read, is it?

30

**MR STEWART QC:**

Not the best, Your Honour but it enunciates some nice principles relating to Land Transfer Act principles and objectives, and why you can incorporate off registered documents and the purpose that serves. Now, the question then is

did this memorandum of standard provisions effectively incorporate the loan agreement? There is a decision that assists on this, Your Honours. That's tab 13. This decision by the way considered *Westpac Bank v Clark*. This decision was a decision of Justice Pagone in the Supreme Court of Victoria delivered on the 17<sup>th</sup> of March, and had the benefit of *Westpac Bank v Clark*. The mortgage in the material respect is the same as the Westpac mortgage, and it also has a home loan agreement that was unregistered. Mr Solak had a mortgage fraudulently registered against his estate at page 128 of the report, have Your Honours got that? At paragraph 3 at the bottom of the page the Judge reports, Mr Solak intended that the indefeasibility conferred by registration under the Act does not extend its secure obligations arising from a forged instrument where the covenant to pay is not registered or found on the title. So that was the issue that the Court was concerned with. If we go to page 135 of the case book, second paragraph, second sentence. The forged mortgage in this case like that in *Vassos* is also an all monies mortgage. Clause 1.2 of the instrument of mortgage registered on the title to the property purports to secure to Bank West the payment of the amount owing by the mortgagor who is described as "you". Previously in the registered mortgage the mortgagor, namely the "you" I have just mentioned, is identified as Tarik Solak, so that is the same as in our case so far. An essential step in the argument for Mr Solak is that the "you" and the "Mr Solak" mentioned in the mortgage are references to the actual registered proprietor and therefore to the real Mr Solak and not the forger whilst the "you" who assumed the obligation to repay the loan in another document is the forger and not the real Mr Solak. The Judge rejects that a little bit further on.

Then at paragraph 11, clause 2.1 of the registered mortgage provides that a reference to this mortgage in this mortgage form, the memorandum or any annexure to this mortgage is a reference to the mortgage made up of this mortgage form, this memorandum and each of those annexures. In other words the registered mortgage expressly incorporates as part of the mortgage the other documents referred to as this mortgage and none of those other documents is the home loan agreement, that comes later.

**BLANCHARD J:**

What does it mean by any annexure?

**MR STEWART QC:**

- 5 That's not mentioned Sir but certainly the home loan agreement was not an annexure.

**BLANCHARD J:**

Right.

10

**MR STEWART QC:**

- Paragraph, page 136, top of the page, the memorandum of common provisions set out the obligations to pay and a description of what the mortgage secured. Clause 3.1, you will pay the amount owing to the bank in  
15 accordance with the terms of a bank document. Clause 4 states that the mortgage was given as security for payment to the bank of the amount owing and for the performance by you of all your other obligations under this mortgage. And then we get the definition of bank document.

- 20 Now the amount owing is also defined in clause 1.1 and relevantly was defined to mean in effect all money which you owe the bank for any reason. In each case the person upon whom the obligation falls was described as "you". Clause 1.1 defined "you" to mean the person or persons named in the mortgage as the mortgagor and "your" has a corresponding meaning.

25

- But enough of the argument to Mr Solak was that the person with the obligations under the mortgage and described as "you" was the real Mr Solak and not the forger purporting to have been Mr Solak. Whilst the "you" who had assumed the obligation to pay under the memorandum of common provisions  
30 was the forger and not Mr Solak, because the only obligation to pay arose under a separate contract styled home loan contract signed by the forger and not by Mr Solak. The real Mr Solak not having assumed any obligation to pay anything to Bank West cannot, so the argument ran, have the obligation referred to in the memorandum of common please and therefore that the

obligation to pay was not pay indefeasible by registration of the mortgage. The Bank West Home Loan Contract identifies the borrower as Mr Solak and for the purposes of the contract defines him as “you”.

- 5 If that person who assumed the obligation to pay money albeit that the signed it on 16 March pretending to be the real Mr Solak, the force of Mr Solak’s claim would soon therefore depend upon whether there is a matter, as a matter of construction a mismatch between the “you” referred to in the memorandum of common provisions and the Bank West Home Loan
- 10 Contract. The argument was that the latter is a contract entered into between Bank West and a person purporting to be Mr Solak but not Mr Solak while the memorandum of common provisions imposes upon the real Mr Solak through registration of the mortgage only those obligations actually assumed by him.
- 15 I do not accept this to be the correct construction of the documents. The Bank West Home Loan Contract is entered to come within the definition of bank document in the memorandum of common provisions and therefore to be incorporated into the mortgage. Indeed the Bank West Home Loan Contract would undoubtedly have been incorporated into the mortgage through the
- 20 memorandum of common provisions<sup>4</sup> but for the drafting technique employed which identified the agreement by reference to whether the “you” referred to in the clause had incurred or owed obligations to the bank. That drafting technique is not intended to depend upon an investigation into the existence of legal relations but rather as a description of the documents in
- 25 which the obligations of the mortgagor to pay are to be found. “You” in the definition of bank document in the memorandum of common provisions is properly to be seen as drafting the device, connecting the person named in the mortgage with a person named in another bank document in a means of identifying the document. In this case, the person named in the mortgage is
- 30 of course a registered proprietor but a person signing the mortgage as such, is in fact the same person who signed the bank best home loan contract as the 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 as 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. It is inherent in any forgery that the victim of the forgery has not assumed contractual obligations upon which he or she can be sued personally. It’s therefore not an answer to the consequences of indefeasibility that there may be no personal obligation assumed by the true owner of the land where the covenant to pay is identified by the mortgage.

10 In *Pyramid*, the Court said that “It has not been contended that the indefeasibility of the mortgage does not extend to the covenant of payment and it is plain that it does so extend. In this case, I consider the proper construction of the mortgage to be that the covenant to pay is found in the mortgage, incorporating, as it does, the memorandum of common provisions and through it, the bank best home loan contract. Accordingly, the mortgage, albeit forged, is effective as security. Now, the Judge then –

**TIPPING J:**

That’s, of course, a different point.

20

**MR STEWART QC:**

I beg your pardon, Your Honour?

**TIPPING J:**

25 Of course it’s effective as security.

**MR STEWART QC:**

Well, the opening part I took you to was whether or not, there was never any doubt that there was a –

30

**TIPPING J:**

I have to say that I find this reasoning unpersuasive.

**MR STEWART QC:**

Well, it may be at first brush Sir, but when you step through it carefully, it is logically consistent and any other reasoning, any other analysis, is illogical. You know, this assumes and proceeds on the basis that the home loan has been incorporated. There's no appeal from this decision, not going any  
5 further.

**BLANCHARD J:**

Really?

10 **WILSON J:**

Would Mr Solak have obtained compensation, do we know, under the Australian legislation?

**MR STEWART QC:**

15 No, but the second half of the judgment is concerned with the credit contracts over there which deals with apportionment, a matter we don't –

**BLANCHARD J:**

The difficulty I have with it is the statement at the bottom of page 137, that the  
20 "you" in all the documents was the forger purporting to be Mr Solak. Now that can't be right.

**MR STEWART QC:**

No that's his argument, Mr Solak's argument that's been rejected.

25

**BLANCHARD J:**

I don't think so. That's the rejection of the argument. It seems to me, that's the Judge, 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  
30 mortgage is the same, both as a matter of drafting, as a matter of fact –

**MR STEWART QC:**

Sorry Sir, what page are you – oh, 137, beg your pardon.



**BLANCHARD J:**

The “you” was the forger, purporting to be Mr Solak in each document. I’d say that can’t be right because when you look at the mortgage, it can’t be a reference to a forger, it’s got to be a reference to the real registered proprietor.

5 Otherwise the document would be nonsense.

**MR STEWART QC:**

Well I think that’s what I’ve said, and when you construe – each document has to be construed with the same reference –

10

**BLANCHARD J:**

But it depends on where you start, if you start with a mortgage, “you” is the registered proprietor.

15 **MR STEWART QC:**

Absolutely, and a person in the memorandum, because that’s also indefeasible, the “you” is the registered proprietor even though the registered proprietor had nothing to do with it.

20 **BLANCHARD J:**

So it’s the money that the registered proprietor may owe to Westpac?

**MR STEWART QC:**

And then, under the home loan agreement that’s incorporated, the “you” is also the registered proprietor even though the registered proprietor did not get the money because that document is registered. That’s all the decision is saying and with respect, that has to be the logic of what’s occurring here if you are applying indefeasibility.

30

**BLANCHARD J:**

Well I hear the argument –

**TIPPING J:**

I have a further difficulty halfway up the page Mr Stewart.

**MR STEWART QC:**

Sorry Sir?

5

**TIPPING J:**

I have a difficulty halfway up the page. This is obviously your best case -

**MR STEWART QC:**

10 What page are you talking about Sir?

**TIPPING J:**

137 which I think I ought to put to you for some assistance. Where the Judge says that draft that's in the middle of his paragraph 15, or close to the middle, that drafting technique, have you got that? That drafting technique is not intended to depend upon an investigation into the existence of legal relations but rather it is a description of the documents in which the obligations of the mortgagor to pay are to be found. Now I regard that as extremely elusive.

20 **MR STEWART QC:**

Do you Sir?

**TIPPING J:**

Yes.

25

**MR STEWART QC:**

See all he's saying there, is that you've got to look at these documents as though these are genuine documents and you're not dealing with a forgery, all right? And you, you –

30

**TIPPING J:**

Well that's the very question that troubles me.

**MR STEWART QC:**

Well it doesn't really because if you're going to give effect to these documents, if in fact indefeasibility means that you give effect to the registered documents, even though none of it's occurred, then you construe them on the basis that it is a genuine transaction and –

5

**TIPPING J:**

But no one in their right mind when signing a mortgage could have intended to incorporate by reference a forged instrument?

10 **MR STEWART QC:**

Well no one, I mean, it's the same, if you like, fiction that you have. They never signed a registered mortgage but they're deemed to have signed it.

**TIPPING J:**

15 Well I see that as a completely different issue. The question must be whether it was intended to bring in this particular loan agreement.

**MR STEWART QC:**

Well Sir no more so than it was never intended that the registered proprietor  
20 signed the mortgage but the affect is given to those documents –

**TIPPING J:**

Even if the mortgage had been signed by the true registered proprietor, which is the fiction upon which the indefeasibility proceeds, the construction of the  
25 document, I don't see how it could have meant to bring in any old loan agreement that might happen to be signed by any old forger.

30

**MR STEWART QC:**

They have referred to the loan agreement – your loan agreement, there was only one. I mean we don't have to produce this document, it says well what is a document –

**ELIAS CJ:**

But it may not be only one.

5 **MR STEWART QC:**

Well it maybe two, it could be three but whatever –

**ELIAS CJ:**

Yes and some maybe valid and some may not be.

10

**MR STEWART QC:**

All right but –

**ELIAS CJ:**

15 And you've got indefeasibility of security. You're really arguing for a lot more. You're arguing for transformation. You are arguing for a deeming through the indefeasibility provisions that the ineffective loan is effective?

**MR STEWART QC:**

20 Your Honour I don't have security. I mean I've got nothing. I've got a mortgage that secures absolutely nothing which has to be a nonsense to anybody who –

**ELIAS CJ:**

25 But it might secure something.

**MR STEWART QC:**

Well only purely coincidentally or fortuitously and those – that scenario is so remote that it would happen that way that you would discount it as being a proper basis on which to approach the document or the problem.

30

**BLANCHARD J:**

Well the real Ms Fenech might have gone into the bank wanting a loan and they might just have given it to her because they thought they had a

mortgage, and they did have a mortgage, and it would secure the loan which she gets from the bank.

**MR STEWART QC:**

- 5 Except the bank details about Ms Fenech that it was their customer and the real Ms Fenech is chalk and cheese. I mean the age for instance, signature.

**BLANCHARD J:**

- 10 The problem might have come to light at that point but theoretically it would secure any advances they made to the real Ms Fenech.

**MR STEWART QC:**

- 15 But the security intended by the taking of that mortgage was to be, to secure the monies advanced and we're looking to construe the mortgage including the loan agreement incorporated and in doing that you construe as though they were genuine transactions because that's what indefeasibility requires.

**ELIAS CJ:**

- 20 Well that's what I'm questioning.

**MR STEWART QC:**

Yes. Time for a sandwich.

**BLANCHARD J:**

- 25 Are you wanting to take us to any of the other Australian authorities?

**MR STEWART QC:**

No they –

30

**BLANCHARD J:**

They're all against you aren't they?

**MR STEWART QC:**

Well yes but for different reasons. I mean if you look at my – some of them don't – only two of them. One of them deals with incorporation and that's the decision of Chief Justice in Equity Young and you won't want to read that decision. It's long, long and rambling and all over the place.

5

**BLANCHARD J:**

I have read judgments of Chief Justice Young –

**TIPPING J:**

10 Yes I've had the misfortune to attempt to read it Mr Stewart and gave up.

**MR STEWART QC:**

Okay.

15 **TIPPING J:**

Because it didn't seem to me to come particularly close to our circumstances anyway.

**MR STEWART QC:**

20 No it's more like an arbitrator's award isn't it but then we've got the - I can say that or perhaps I better delete that. But it doesn't have any structure and it's difficult to come to grips with it. Then there's the only other decision that heard argument on it is the *Solak* case. The only other case that deals with incorporation is *Printy* on appeal where it wasn't argued and wasn't advanced  
25 but Their Honours gave their view on it anyway.

**TIPPING J:**

Was that Justice Basten's view?

30 **MR STEWART QC:**

Yes. so – and of course *Printy* on appeal dealt with their section 57(2) of their Real Property Act as to being the basis for providing the answer. It didn't deal with the fiction of the "you" as can't be the real mortgagor because he or she never signed it. They don't –

**BLANCHARD J:**

Do we have an equivalent of that section?

5 **MR STEWART QC:**

We do, it's section 92 but it's different.

**BLANCHARD J:**

Section 92 of the Property Law Act?

10

**MR STEWART QC:**

Yes. Because our section 92 doesn't specify that the payment agreements have to be contained in the mortgage whereas the section 57(2) did. Now –

15 **ELIAS CJ:**

Mr Stewart where, because it's just about time to take the lunch adjournment, where are you wanting to take us now?

**MR STEWART QC:**

20 Well that brings me to the end except for the policy objectives of indefeasibility at the end of the paper, at page 33.

**ELIAS CJ:**

Do you want to add to those or no?

25

**MR STEWART QC:**

I think we're pretty well set out there.

**TIPPING J:**

30 Excellently set out.

**ELIAS CJ:**

So does that really conclude – if there's something that occurs to you over the lunch adjournment we'll hear you further but otherwise –

**MR STEWART QC:**

I think that's pretty much it.

5 **ELIAS CJ:**

– Ms Challis we'll expect to hear you after lunch.

**COURT ADJOURNS: 1.01 PM**

**COURT RESUMES: 2.18 PM**

10

**ELIAS CJ:**

Thank you.

**MR STEWART QC:**

15 Just a couple of minutes Your Honour.

**ELIAS CJ:**

Yes.

20 **MR STEWART QC:**

Just to confirm that this mortgage was always to be a paper mortgage, it wasn't going to be an E-dealing.

**ELIAS CJ:**

25 Wasn't going to be a?

**MR STEWART QC:**

E-dealing, electronic registration so the document in the bundle is the mortgage that was going to find its way to the Land Transfer Office.

30

**BLANCHARD J:**

Do they accept it with handwriting like that?

**MR STEWART QC:**



For a paper dealing?

**BLANCHARD J:**

Yes? you're no doubt right, I'm not...

5

**MR STEWART QC:**

It's something that Ms Challis who's been involved longer than me may know but she's made a reference to it being something to do with the transition provision but perhaps she could assist. The – in relation to the submission, in relation to my earlier submission that the parties incorporated the loan agreement by reference. Your Honour Justice Tipping observed that the parties would never have intended to incorporate a forged loan agreement. Plainly not but they didn't know, the bank didn't know, had no idea that this was a forgery and the documents were prepared and executed on the basis it was a genuine transaction between genuine parties and so the – it's not answer to say well I can't have intended to incorporate that document because it was a forgery because that just wasn't in the minds of the parties in the, in play at that stage.

Now just two other points. The first one is think and I think this something that I failed to address at all in my written submission but in my submission this does have an important bearing on some of the matters we've discussed this morning. It is this, not all covenants and rights contained in a registered instrument are protected by the indefeasibility provisions. Only those which affect or delimit or qualify the estate or interests with which the instrument deals are upheld or validated. Now there are two statements I can take you to on this which are important in my submission. The first one is a New Zealand case appearing at tab 27. That's the decision of the *Congregational Christian Church* of Barker J and if we go to page 713 of that report. I wish to refer Your Honours to line 50 at the bottom of the page. It talks about of course the covenants which are upheld notwithstanding the invalidity.

Now the next passage I wish to refer to is at tab 28, the next judgment. At page 679, line B to C, talking about that which is attained by registration. Now

that says that indefeasibility validates those which delimit or qualify the estate or interest or are otherwise necessary to assure the estate or interest to the registered proprietor. Now that's important because it's only those provisions of the loan agreement when incorporated that get the benefit and protection of indefeasibility. Now if these covenants are to be protected and validated and given effect to so as to uphold the interests that the registered proprietor is having protected, then they need to be interpreted and construed on the basis that they were covenants given by and affecting the mortgagor otherwise the protection, which is said to be afforded by the validation of indefeasibility is illusory because they end up with no protection at all.

Now the covenant that I'm particularly interested in, in the loan agreement and having validated is the covenant to pay and there is ample authority that the covenant to pay is a covenant that is validated and protected by indefeasibility and a decision of this Court, sorry. A decision of Justice Blanchard in *Laughton* which is at tab 32.

**ELIAS CJ:**

How does, before you go to that, how does, just thinking about the language that's used here, is this the origin of that delimit or qualify the estate, the *PT* case, is that the origin of that term or –

**MR STEWART QC:**

No.

**ELIAS CJ:**

– is that, is it statutory in Australia?

**MR STEWART QC:**

No it's derived from case law both in Australia and New Zealand. The –

**ELIAS CJ:**

Sorry, don't take time on that, but what is the – how does a covenant to pay delimit or qualify the estate or interest?

**MR STEWART QC:**

5 Because, Your Honour, it determines the extent of the security which is being obtained over the land and there's a very good article in the book referred to in the Court of Appeal judgment, it's in fact an article by a Mr Stoljar which unfortunately is not in the authorities but I will ensure that a copy of that article together with Mr Peter Butt article is delivered to the Court by the end of the  
10 day. But the covenant to pay is relevant for that reason. It determines the extent or the size of the interest that's secured by the mortgage. And of course it is the absence of that information in your monies mortgage which creates the present problem because a fixed sum mortgage has it there on the face of the mortgage.

15

Now we had that very important decision *Solak* open. I omitted to take Your Honours to one page to do with the public policy issues and that appears at, starts at page 139, it's tab 13, oh page 138. Now I did take Your Honours to this page but I stopped about four or five lines short and in retrospect I  
20 shouldn't have. Down the bottom, five lines from the bottom, Judge Pagone is dealing with the *Vella* decision and he said in *Vella* Young CJ in Equity held that the forged loan agreement was not incorporated in the mortgage. His Honour's further observation upon the assumption of incorporation that when one then construes the mortgage, there are no monies owing under that  
25 agreement because it was a forgery is, if taken literally, inconsistent with the outcome in *Vassos* and contrary to the passage in *Scorpion Hotels* I have quoted above. Counsel for Mr Solak did not submit that I should adopt the broad view of the dicta from *Vella*, that is, it was not intended, in my view correctly, in this case that a covenant to pay a claim by forgery could not be  
30 enforced upon registration. "The system of title by registration gives effect of the public policy in favour of the title standing in the register over other competing claims. The important public policy in the Torrens system of land titles was recently expressed to be that the land title register should be sufficient of itself to inform those concerned about the nature and extent of

any outstanding interest in relation to the land. The forger harmed both Mr Solak and the mortgagee but upon registration of the mortgage the mortgagee's title was secured and must have effect, notwithstanding the impact against the interest of another innocent party. Not every term, covenant and condition in a mortgage is apt to benefit from the consequences of registration (hence, in part, the question "indefeasibility for what?"), but a covenant to pay found in or incorporated in the registered mortgage is, in my view, within the public policy which the statute favours in preference to other wronged parties."

Thank you Your Honours.

**ELIAS CJ:**

Thank you Mr Stewart. Yes Ms Challis?

**MS CHALLIS:**

Thank you Your Honour. As far as I see it there are two clear issues. I don't propose to go through my submissions in detail but just to focus on some of the issues which have been raised this morning. The first issue was whether there should be any distinction between a fixed sum versus the all obligations mortgage and the second one is in respect of incorporation.

In relation to the first the short answer to that is that a distinction between the two is entirely justified. As it has been pointed out in the fixed sum mortgage the document states specifically that a principal sum has in fact been advanced. The *Printy* decision at first instance did deal with the distinction between the two and it referred to the two different mortgages. One was an all obligations and one was a fixed sum mortgage. There it was quite clear on its face that a sum of up to \$50,000 had been advanced and there was indefeasibility in respect of that sum.

So in relation to the register and seeing what is on its face, the fixed sum can clearly be distinguished from an all obligations mortgage where there is a

requirement then to go further and see what in fact the secured sum or all obligations are.

**ELIAS CJ:**

- 5 Where are fixed – where a mortgage secures future advances do you treat the, has a fixed sum but also secures future advances, on your argument is it only the fixed sum that obtains indefeasibility?

**MS CHALLIS:**

- 10 Yes I believe so. It will depend on the wording of the mortgage ultimately but it is that fixed sum which would limit, I suppose, or cap the obligations that would be indefeasible on the face of that document. If you then had to go further and look at what additional obligations were subsequently assumed, then that portion may well be out and not indefeasible as the fixed sum would
- 15 be. But ultimately it would turn on I believe the terms of the document itself and the priority sum is a different thing obviously so that couldn't be treated in any respect as a fixed sum.

- Westpac appears to rely on an assertion that the Real Property Act in
- 20 Australia, it was in one of the states, makes no provisions for all obligations mortgages and therefore a distinction with the New Zealand position should be made because the Land Transfer Act does refer to both. But when you look at the definition of a mortgage under the Real Property Act it is wide and in my submission would incorporate an all obligations type advance. The
- 25 relevant definition is at section 3 of the Real Property Act and that's at tab 48 of the bundle, page 601B and that just defines a mortgage as any charge on land created merely for securing the payment of a debt. That's very wide and obviously would include both a fixed sum and an all obligations advance. So in that respect there's no real distinction to be drawn with a slightly more
- 30 express nature of the wording of an all obligations mortgage in the Land Transfer Act. The fact that our Act sets out by regulation forms which are to be used doesn't change the fact that we must look at the terms of the mortgage when considering their effect and the terms and this case will

obviously depend on what this particular mortgage secures and that's what appears both on its face and, or is able to be incorporated into it.

That's really all I wanted to say about fixed sum versus all obligations. In my  
5 submission the more key point for Your Honours is this point about  
incorporation generally and whether or not the loan agreement, the forged  
loan agreement can be incorporated into this particular mortgage. In respect  
of *Gibb* when my learned friend started on this point, and putting aside the  
10 general principle about incorporation by reference, about which there is of  
course no dispute, I just note that *Gibb* in general was authority concerning  
the sufficiency of notice as to the nature of a covenant in a mortgage. That's  
whether the covenant sufficiently set forth how it affected titles of the land so it  
was just that somebody looking at the register fully appreciated the nature of  
15 that covenant and in that case it was ultimately found that the covenant itself  
did provide sufficient information. Looking at the plans and specifications in  
that case would then decide or determine whether or not the covenant had  
been breached but the covenant as expressed in that mortgage was ultimately  
found to be sufficient to give notice to those who were searching the register  
as to what the covenant involved. As Justice Stark said in that case the real  
20 question was an objection as to the form of the mortgage and the covenant  
rather than this incorporation point.

In relation to *Solak* I have stated in my written submission that with respect  
this first instance decision was simply incorrect and inconsistent with the  
25 preponderance of other Australian authorities going through all of the – well  
that have been referred to so far, the eight or nine cases that my learned  
friend referred to. To start with I did note that Mr Solak argued only that the  
mortgage was to be treated as being signed by the real Mr Solak. It seemed  
to be that he was arguing the memorandum of common provisions as we  
30 have here, was not in fact signed – to be treated as signed by the true  
proprietor but that's clearly not the case here. There was also reference to an  
annexure. My belief, although it's not perhaps entirely clear, is that the  
annexure might be the similar type of form which gets attached to a mortgage.

In our case we have our mortgage at 92 of the case on appeal, page 93 is headed, although not entirely clear at the top, "Annexure Schedule" and that often lists where there is a guarantor, for example, or other parties who are signing it, they might be listed. Additional information that may not fit, so to speak on the first page of the mortgage. So it maybe in *Solak* the annexure that they were referring to was a document completed in that form. But it doesn't, I don't think it goes anywhere, it just, it was the question asked and I think that's probably the answer to it.

10

But here it is clearly the case that it is the mortgage and the memorandum of common provisions which should be treated as if signed by the true registered proprietor and the memorandum of provisions of course is a document itself on the register as is recorded in the operative clause on page 92 of the mortgage. So we have clearly those two portions of the mortgage document and the memorandum of provisions and then we need to see what additionally is incorporated. In my submission what is intended to be incorporated in this document, and in the definition of loan agreement, is any such agreement which the true registered proprietor has signed and that is for the purpose of determining the extent of the secured money which is defined in clause 1.1 i.e. what is covered by the mortgage. So it is only if there is that type of document that there should be any incorporation from that point.

The assumption which *Solak* seems to proceed on seems to be to the contrary. They're looking at the three documents prior to incorporation rather than looking at the mortgage to see what is incorporated into it. They've gone too far and put the cart before the horse so to speak. So in my submission look at the mortgage does this mortgage then incorporate the third document? In my submission it does not in this case because it is not signed by the true registered proprietor.

30

That in my submission is the simple answer to this case and –

**TIPPING J:**

Do you also argue that even if that point is not found in your favour, there is no sufficient incorporation of the loan agreement in any event or –

**MS CHALLIS:**

5 No it's not.

**TIPPING J:**

– do you accept that if it had been signed by the true registered proprietor it would have been incorporated?

10

**MS CHALLIS:**

Absolutely.

**TIPPING J:**

15 Yes.

**MS CHALLIS:**

Absolutely. And that outcome, this outcome, if my argument is accepted, doesn't offend against the doctrine of indefeasibility at all. Particularly in the  
20 very rare case where we will have forged documents as has occurred in this particular case, the mortgage does remain indefeasible and if banks want to achieve indefeasibility then they use the convenience of an all obligations mortgage then it is for them to either alter the terms of those documents or it's something for the legislator to deal with if necessary.

25

The short – I have mentioned about the paper GM letter that was an issue or not. I don't actually think it is but in this particular case I didn't bring Mr Clark's original file down with me, I thought we'd moved past that but my understanding and recollection is that there was no authority to proceed by  
30 way of E-dealing and this was during the transitional provisions although Mr Clark when seeing Ms Fenech went through the usual steps of verifying her identity. She had obtained a passport with her photo in the name of the true registered proprietor and went through all those steps. In the E-dealing way he hadn't yet changed to E-dealing, he was still using the paper format



for lodging the documents. So as far as that's relevant that's my understanding of the factual background.

But those were the only points, Your Honours, which I wish to emphasise.

5

**ELIAS CJ:**

Thank you Ms Challis. Mr Stewart anything arising out of that?

**MR STEWART QC:**

10 I think I have engaged Your Honours on all the matters that I wish to usefully say on the points that my learned friend has said in her submission.

**ELIAS CJ:**

15 Yes. Thank you counsel. We'll reserve our decision in this matter. Thank you for your help.

**COURT ADJOURNS: 2.42 PM**

20