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Banking and Finance Law E-alert

Beware the Impersonators

Two recent cases highlight the importance of Banks and Building Societies being vigilant in identifying mortgagors and whether or not security documents have been correctly executed.

Case Study 1

The case of *Printy –v– Provident Ltd and Anor (2007) (NSW)* highlights the importance of lenders specifying the actual amount to be secured in the mortgage despite the existence of a separate loan agreement.

The Facts

Printy was living overseas and owned property in New South Wales. While he was away a person impersonating him applied for and was issued with a replacement Certificate of Title for his property. The impersonator then proceeded to obtain two loans over the property, one for \$550,000 and another for \$50,000. Printy's signature was forged on all documents.

When Printy returned to Australia he found the first mortgagee had sold his property as mortgagee exercising power of sale. Printy instituted proceedings in the Supreme Court seeking compensation. He was successful in being compensated for the first mortgage but not for the second.

The Court decision

The first mortgage did not expressly state the amount secured by the Mortgage instrument. The term "secured money" was defined as:

"all money which the mortgagor owes the mortgagee now or in the future for any reason and whether a loan or with another person ..."

The Court held that the loan agreement did not form part of the mortgage and that the mortgage did not incorporate the loan agreement. Although registration of the mortgage created a right over the title to the property it did not create any obligation to pay any amount to the mortgagee.

The second mortgage however did state the actual amount secured by the mortgage as \$50,000 and therefore that mortgagee was successful and Printy was awarded compensation from the Torrens Assurance Fund.

Case Study 2

In the case of *Sabah Yazgi –v– Permanent Custodians Limited (2007)* similar issues to those in Printy arose for consideration by the Court.

The Facts

Mr and Mrs Yazgi jointly owned a property. Mr Yazgi executed a mortgage over the property without his wife's consent by forging her signature on the mortgage and the loan contract.

Like the case of Printy the mortgage did not specify an express amount secured by the Mortgage instrument and there were inconsistencies in the definition of "mortgage debt".

The Court decision

As a result of the inconsistencies in the definition of "mortgage debt" the Court held that the Mortgage did not actually secure any moneys against Mrs Yazgi's interest in the land.

The Court held Mrs Yazgi did not owe any money in respect of her interest in the land however Mr Yazgi was indebted to the mortgagee for the whole of the debt over his interest in the property.

The Court gave an order for the discharge of the mortgage insofar as it affected Mrs Yazgi's interest in the land. Due to the forgery of Mrs Yazgi's signature the mortgage was not enforceable against her interest.

Important Notes for Lenders

These cases highlight the importance of:

- the potential for liability and the need for care in the drafting of mortgages, loan documents and identifying the mortgagors;
- clearly specifying the amount secured expressly in the Mortgage instrument even if there is a separate loan agreement in addition to the usual all monies provision; and
- ensuring that the mortgagors' signatures are witnessed by legal representatives or at least persons who can certify the identification of the mortgagors and confirm the effect of the mortgage has been explained to each of the mortgagors.

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