Perpetual Trustees Victoria v Tsai [2004] NSWSC 745

Mortgage Case Notes / August 4, 2004 / Fraud, Indefeasibility

This was an appeal from Master Harrison who gave summary judgment for a lender (Perpetual) against a borrower (Tsai). The order was that the lender got possession of the subject premises and that the borrower was to pay the lender a sum of money in excess of $500,000.

The statement of claim was filed on 17 July 2003. It recited the loan agreement. It said that under that agreement the first respondent agreed to lend the appellant $500,000, that a mortgage was granted, that pursuant to the loan agreement and the mortgage the appellant was under an obligation to repay the principal sum, and that the loan agreement and the mortgage contained terms the effect of which upon default being made the whole principal sum became due and payable. The plaintiff claimed possession of the property, the principal, interest and costs.

The defence denied that the defendant had ever signed any loan agreement or mortgage as alleged.

There was a surprising omission from the statement of claim ie. any allegation that the money was actually advanced to the defendant. Before the learned Master it was common ground that the mortgage had been registered and that the first respondent had advanced $500,000 though the appellant said there is no evidence that it had been given to him.

It was almost common ground between the parties that the learned Master could assume the mortgage was forged. Further that the authorities binding the learned Master meant that she would need to hold that even if the mortgage was forged, its registration made it indefeasible. It was common ground that the registration was in no way caused through any fraud on the part of the first respondent or its privies and was certainly correct in taking that approach

The Master below appears to have been led into a blind alley by submissions that were made about the decision of Studdert J in *Ginelle Finance Pty Ltd v Diakakis*. That was a case where that learned judge held that there was no personal equity in a borrower merely because his signature was forged. However, the case before the learned Master had nothing to do with equity, it was a pure common law claim for possession and debt. *Ginelle's* case could give her no guidance in the decision that she had to make.
There is no doubt at all that under the Torrens system a forged mortgage which might be a nullity under the old system title when registered without fraud is fully efficacious as conferring on the lender the interest in land described in the mortgage. It is often said in a shorthand way that the lender gets an indefeasible interest.

However, as Campbell J said in *Small v Tomasetti :"Notwithstanding that registration confers indefeasibility on a lender there is still a question, 'Indefeasibility for what?'"*.
The cases show in order to answer his Honour's question that to some extent what is protected will depend on the exact wording of the Real Property Act in each State. Thus, interstate cases must be considered with some care

Ordinarily a guarantee is sufficiently close to the mortgage to be protected, as is a personal covenant to repay.

However, one must be very careful about these wide statements. First of all, the question to a great degree will depend on the wording of the covenant concerned. Secondly, notwithstanding indefeasibility, a personal covenant which is contained in a forged document is not enforceable.

The reason why the personal covenant is considered to be part of the package of rights protected by the indefeasibility principle is that it maps out or may map out the extent of the quantum of the interest of the lender in the land and in that sense is closely related to title requiring it to be considered as to limiting the rights.

On that basis unless there was material to show to the strong degree required in applications to strike out or applications for summary judgment that the loan agreement was in fact signed by the appellant, the application for summary judgment could not succeed. The mere fact that the memorandum under the mortgage, at least so far as clause 2.2 is concerned, was indefeasible would not have been enough.

Under the old fashioned form of mortgage there was a statement of the principal sum lent and an acknowledgment that the money had been lent. The authorities show that the present type of problem was rarely likely to arise with that type of mortgage because the production of the security document was prima facie evidence of the existence of the debt and that, unless the fact was put in issue by the pleadings, the security itself was sufficient evidence of the payment

The modern clause, however, does not go that far especially in a facility mortgage requiring drawn downs to be made later. It would thus not seem that any of the traditional protections to lenders apply to lenders who use this form of loan agreement and mortgage.

It is clear that if no monies are lent under a mortgage then the mortgage is just completely void: see *Re GM Industries Pty Ltd and the Companies Act* (1980) ACLC 40-665 per Needham J. His Honour was there dealing with a company charge rather than a registered mortgage so that the *GM* decision has to be read subject to the effect of indefeasibility of a registered mortgage. There may be a registered mortgage, but it may be a registered mortgage which secures nothing.

As the secured agreement itself does not bring with it any concept of indefeasibility and as there is an issue between the parties as to whether or not it was ever signed by the appellant or merely signed by a person impersonating the appellant, there was not the material to demonstrate to the required standard that there was a loan to the appellant.

If there was no loan to the appellant he could not be in default not repaying the loan and, therefore, the lender was not entitled to possession.

The Master should have dismissed the motion for summary judgment. Appeal allowed with costs.