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Abstract
In 2007 and 2008 there were a series of cases in New South Wales, and two cases in Queensland, dealing with the enforceability of registered mortgages where the mortgagor's (purported) execution of the instrument had been forged. In none of these cases was the mortgagee found to have been guilty of fraud, which meant that the mortgagee obtained an indefeasible interest in the relevant land. However, as Campbell J has pointed out, '[n]otwithstanding that registration confers indefeasibility on a mortgagee, there is still a question "indefeasibility for what?"'. This article examines the consequences for the mortgagor and the mortgagee following the registration, without fraud on the part of the mortgagee, of a mortgage where the mortgagor's execution has been forged.

Keywords
indefeasibility, forged mortgages

RECENT DEVELOPMENTS REGARDING FORGED MORTGAGES: THE INTERRELATIONSHIP BETWEEN INDEFEASIBILITY AND THE PERSONAL COVENANT TO PAY

SCOTT GRATTAN*

I Introduction

In 2007 and 2008 there were a series of cases in New South Wales,[1] and two cases in Queensland,[2] dealing with the enforceability of registered mortgages where the mortgagor's (purported) execution of the instrument had been forged. In none of these cases was the mortgagee found to have been guilty of fraud,[3] which meant that the mortgagee obtained an indefeasible interest in the relevant land.[4] However, as Campbell J has pointed out, '[n]otwithstanding that registration confers

* Senior Lecturer, Faculty of Law, University of Wollongong. This article was written prior to the amendment of the *Real Property Act 1900* (NSW) brought about by enactment of the *Real Property and Conveyancing Legislation Amendment Act 2009* (NSW) on 13 May 2009, and indeed prior to the introduction of the relevant Bill into parliament on 25 March 2009. The effect of the relevant amendments, not all of which have commenced, is dealt with in nn 2, 31 and 52 below.

1 *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24,567; *Vella v Permanent Mortgages Pty Ltd* (2008) NSW Conv R ¶56-221; *Perpetual Trustees Victoria Ltd v Van den Heuvel* [2008] NSWSC 350; *Provident Capital Ltd v Printy* [2008] NSWCA 131; *Perpetual Trustees Australia v Richards* [2008] NSWSC 658; *Perpetual Trustees Victoria Ltd v Cipri* [2008] NSWSC 1128; *Permanent Custodians Ltd v El Ali* [2008] NSWSC 1264.

2 *Hilton v Gray* [2007] QSC 401; *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64. Because of the date of the relevant transactions, the amendments to the *Land Title Act 1994 (Qld)* made in 2005, which require a mortgagee, in order to obtain an indefeasible interest, to take reasonable steps to ensure that the mortgage was executed by the mortgagor rather than an impostor, did not apply: *Hilton v Gray* [2007] QSC 401, [5]. For a consideration of those amendments, see Michael Weir, 'Indefeasibility: Queensland style' (2007) 15 *Australian Property Law Journal* 79, 79-83. A similar regime will take effect in New South Wales when s 56C of the *Real Property Act 1900* (NSW) commences on a day to be proclaimed: see *Real Property and Conveyancing Amendment Act 2009* (NSW).

3 A rare, recent New South Wales case in which a mortgagee was held to be guilty of fraud is *Khan as Trustee for The Khan Family Trust v Hadid [No 2]* [2008] NSWSC 119.

4 *Real Property Act 1900* (NSW), s 42; *Land Title Act 1994* (Qld), s 184.

indefeasibility on a mortgagee, there is still a question "indefeasibility for what?"'.[5] This article examines the consequences for the mortgagor and the mortgagee following the registration, without fraud on the part of the mortgagee, of a mortgage where the mortgagor's execution has been forged.

Specifically, this article will consider two issues. Firstly, does the indefeasibility that gives the mortgagee a charge over the mortgaged land extend to the mortgagor's personal covenant to pay? If it does so extend, the mortgagee would be able to sue the mortgagor in an action in debt, either to recover the secured amount without having moved to enforce to mortgage at all, or alternatively, to recover any amount still owing after the exercise of the mortgagee's power of sale.[6] It will be seen that there is a difference in view between the recent Queensland and New South Wales cases in this regard, with the former holding that the personal covenant to pay does attract the benefit of indefeasibility, with the latter assuming that it does not.

Secondly, this article will describe the distinction in the New South Wales jurisprudence, and primarily articulated by Young CJ in Eq,[7] between: (a) the 'traditional' or 'old fashioned form' of mortgage, which contains an express statement that a specified principal sum was lent, and an acknowledgment by the mortgagor that the sum was received; and (b) the 'modern' or 'new' form of mortgage, also known as an 'all moneys mortgage',[8] that purports to secure the repayment of (an unspecified quantum) of all moneys owing, or that may become owing, by the mortgagor to the mortgage under any collateral loan agreement between the parties. It will be seen that on the registration of the first type of mortgage, even when the mortgagor's execution has been forged, an indefeasible charge is created over the land, and that the charge secures the amount stated in the mortgage as having been lent to the mortgagor. This is so even though the advance was made to the impostor who posed as the mortgagor, rather than to the mortgagor.

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5 *Small v Tomassetti* (2002) NSW ConvR ¶56-011, 58306 [9]. In a similar vein, in *Yazgi v Permanent Custodians Limited* (2007) 13 BPR 24,567, 24,570 [15], the Court of Appeal stated that 'the effect of registration does not give the registered title holder an indefeasible title in general terms. Rather, it is necessary to ascertain the extent of the registered title holder's interest.'

6 See *Hilton v Gray* [2007] QSC 401, [2], [55] (suing to recover the debt independently of the mortgage) and [57] (addressing the issue of suing on the personal covenant to recover any moneys still owing after the exercise of the power of sale).

7 *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22,281, 22,284 [19]-[20]; *Vella v Permanent Mortgages Pty Ltd* (2008) NSW ConvR ¶56-221, [309], [316].

8 *Vella v Permanent Mortgages Pty Ltd* (2008) NSW ConvR ¶56-221, [542]. Also see Justin Vaughan, 'What Do Forged "All Moneys" Mortgages Secure?' (2008) 82 Australian Law Journal 671, 671-672.

However, with the all moneys mortgage, although the registration of the mortgage instrument creates a charge over the land, that charge secures nothing if the mortgagor's execution of the loan agreement has been forged. In that case no money is owing under the loan agreement and there is nothing to be secured by the mortgage.

We will see that these differing results, depending upon the form of mortgage used, is now well established in the New South Wales cases.[9] The extent of this entrenchment is reflected by a decision in which a mortgagee's solicitor was held to be negligent in employing an all moneys mortgage, when the traditional form of mortgage would have been apt for the transaction, and the mortgagee suffered loss because, as it transpired, the mortgagor's execution of the mortgage and the collateral loan agreement were forged.[10] However, our analysis will also consider the complications that can arise in regard to the non-enforceability of a forged all moneys mortgage where: (a) part of the fraudulently obtained advance is used to discharge a pre-existing valid mortgage over the relevant land (thus invoking the doctrine of subrogation); (b) the mortgage secures the joint and several liability of borrowers under a loan agreement and the execution of the loan agreement by one of the borrowers in genuine; or (c) it is alleged by the mortgagee that by virtue of the doctrine of incorporation the all moneys mortgage effectively contains a statement that a particular sum was advanced to and received by the mortgagor, so that the mortgage acquires the protection afforded to the traditional form of mortgage.

The two concerns of this article—whether the mortgagor's personal covenant to pay acquires indefeasibility and the difference in effectiveness between the traditional and all moneys forms of forged mortgage—both concern the causal relationship between the concept of indefeasibility and the personal covenant to pay, but from differing perspectives. The first issue looks at the effect of the creation of an indefeasible charge on the land upon the mortgagor's personal covenant to pay. The

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[9] There does not appear to be a reported Australian case outside New South Wales that expressly deals with this distinction (*Vella v Permanent Mortgages Pty Ltd* (2008) NSW ConvR ¶56-221, [552]), but see *GE Personal Finance Pty Ltd v Liddy* [2008] ACTSC 126, [28], which adopts the New South Wales position without actually referring to the distinction between the forms of mortgage. The New Zealand Court of Appeal has recently endorsed the New South Wales cases in *Westpac Banking Corporation v Clark* [2008] NZCA 346, [33]-[38], [57]-[66], [88].

[10] *Vella v Permanent Mortgages Pty Ltd* (2008) NSW ConvR ¶56-221, [503]-[508], [527]-[534], [542]-[543], [556]-[562].

second issue looks at the effect of the *source* of the mortgagor's personal covenant to pay upon the content of the indefeasible charge, and whether it secures the repayment of any money or not. If the personal covenant to repay a specific sum is included in the mortgage instrument itself (the traditional form of mortgage), then the charge that results from registration secures repayment of that sum. Alternatively, if the covenant to repay a specific sum is located in a separate loan agreement (or agreements), with the mortgage simply purporting to secure moneys owing under that agreement or agreements, then although an indefeasible charge attaches to the land by virtue of registration of the mortgage, that charge secures nothing.

II Indefeasibility and the Mortgagor's Personal Covenant

In this section we assume that the forged mortgage, which obtains indefeasibility via registration, is of the (traditional) type that expressly includes in the mortgage instrument itself a statement of the amount owing. As we have noted, this type of mortgage creates a charge over the land securing the repayment of the debt, and thereby avoids the complications that relate to the all moneys mortgage. The question then is whether indefeasibility also applies to the mortgagor's personal covenant to pay so as to allow the mortgagee, notwithstanding the mortgagor did not sign the mortgage instrument, to sue the mortgagor personally for the debt, either as a supplement or an alternative to enforcing the charge against the land.

A *The Contending Views*

The view that the registration of the mortgage does render the mortgagor's personal covenant enforceable has its origin in the decision of Giles J in *PT Ltd v Maradona Pty Ltd* ('*Maradona*').[11] In that case his Honour had to consider, among other things, the effect of the registration of a mortgage granted by Mrs Thompson that secured her obligations under a deed of guarantee. His Honour found that at the time of her execution of the documents Mrs Thompson lacked the requisite mental capacity to enter into the transaction and that, accordingly, a defence of non est factum was available. This finding meant that the guarantee could not be enforced against Mrs Thompson, but left open the question of whether the mortgagee could enforce the mortgage as a source of the charge that attached to the relevant land *and* the personal covenant by Mrs Thompson to pay the indebtedness under the guarantee.[12]

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11 (1992) 25 NSWLR 643.

12 Ibid 675.

Giles J found that for indefeasibility to attach to a particular covenant in a registered instrument, and thus render the covenant enforceable despite any underlying general law defect, the covenant must be one that 'delimit[s] or qualif[ies] the estate or interest or [is] otherwise necessary to assure that estate or interest to the registered proprietor.'[13] His Honour concluded that the mortgagor's personal covenant to pay the moneys secured by a mortgage was 'so connected' with the mortgagee's registered interest as to attract indefeasibility.[14] In his Honour's view the ability of the mortgagee to recover the debt by suing on the personal covenant to pay was a precondition to the existence of the mortgagee's charge over the land, 'since without the debt the security ... would be nugatory.'[15] This view was further articulated in a subsequent case by Young CJ in Eq as follows: 'the reason 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 mortgagee in the land ...'.[16]

What this meant was that the mortgagee could enforce Mrs Thompson's personal covenant in the mortgage to pay whatever amount was owing by her under the guarantee. However, Giles J held, in a way that was to presage the line of authority that has since developed in relation to the all moneys mortgage, that as no money was owing under the guarantee (because of the non est factum defence), no moneys were owing under the mortgage. This meant that the mortgagee's charge secured nothing and that nothing was owing by Mrs Thompson personally. [17] Notwithstanding this unsatisfactory result for the mortgagee, *Maradona* has remained the talisman for the view that registration of a mortgage validates an otherwise defective personal covenant to pay the secured amount.[18]

The view that registration of a forged mortgage does not validate the mortgagor's personal covenant to pay has its genesis in the decision of the New South Wales

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13 Ibid 679.

14 Ibid 681.

15 Ibid 679. Also see *Karacominakis v Big Country Developments Ltd* (2000) 10 BPR 18,235, 18,246 [55].

16 *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22,281, 22,283 [17]. However, given what Young CJ in Eq said at 22,283 [16] in regard to the non-enforceability of the personal covenant in a forged mortgage, his Honour must be regarded as describing, rather than adopting, the *Maradona* view.

17 (1992) 25 NSWLR 643, 682.

18 *Pyramid Building Society v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 at 196; *Small v Gray* [2004] NSWSC 97, [75]-[76], [80]; *Atlantic 3-Financial (Aust) Pty Ltd v Deskhurst Pty Ltd* [2005] 1 Qd R 1, 9 [22]; *Hilton v Gray* [2007] QSC 401, [49]; *Hypec Electronics v Registrar-General* [2008] NSWSC 18, [37]-[39], [42].

Court of Appeal in *Grgic v Australian & New Zealand Banking Group Ltd* ('*Grgic*'). During the hearing in that case it emerged that the value of the mortgaged land would not be sufficient to discharge the mortgagor's purported liability under the (forged but indefeasible) mortgage. Prompted by this, Powell JA indicated—and a formal Declaration was made to this effect—that although the land would be charged with the full amount owing, the mortgagor would *not* be liable under the personal covenant in the mortgage.[19] This meant that the mortgagee would recover what could be realised through exercising its power of sale of the land and that it had no recourse against the mortgagor personally.

In *Grgic*, the Court did not cite *Maradona*; nor did it address the conception, articulated by Giles J in that case, that the personal covenant to pay delimits the extent of the mortgagee's security interest. Clearly, the result in *Grgic*—that the amount secured by the mortgagee's interest in the land could exceed the personal liability of the mortgagor—is inconsistent with Giles J's assumption. A case that does address the relationship between the mortgagor's covenant to pay and the quantum secured by the mortgagee's charge over the land is *Duncan v McDonald*,[20] a decision of the New Zealand Court of Appeal. It this case the Court, approving the result in *Grgic*,[21] held that the registration of a void mortgage imposed a charge over the land for the amount purportedly secured by the mortgage. The mortgagor's personal covenant to pay was validated only to the extent necessary to enable the enforcement of the charge.[22] The amount secured by the charge on the land is coextensive with the amount for which the mortgagor would have been liable under the personal covenant to pay had the mortgagor validly executed the mortgage instrument.[23] Although his Honour did not refer to *Duncan v McDonald*, Bryson AJ in *Chandra v Perpetual Trustees Victoria Ltd* ('*Chandra*') expounded this theme when he said:[24]

> The operation of a mortgage to charge a money obligation on land is recognisable without any difficulty as an interest in land; the personal obligation of a mortgagor himself to pay the debt, by means of enforcement available for debts generally and not by enforcement specifically against the

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19 (1994) 33 NSWLR 202, 224 (Meagher and Handley JJA agreeing).

20 [1997] 3 NZLR 669.

21 Ibid 682.

22 Ibid 682-683.

23 Also see Jeremy Stoljar, 'Mortgages, indefeasibility and personal covenants to pay' (2008) 82 *Australian Law Journal* 23, 29.

24 (2007) 13 BPR 24,675, 24,684 [29] (emphasis added).

> land is, I think, equally clearly not an interest in land; even though it would quite frequently happen that *the same personal covenant to pay a debt identifies both what debt is charged on land and what debt the mortgagor is personally liable for*.

It is submitted, however, that the holding in *Grgic* can be supported without adopting the *Duncan v McDonald* position that indefeasibility gives limited effect to the mortgagor's personal covenant to pay. This is because a mortgage as a charge on land can exist quite comfortably without the presence of any covenant to pay by the mortgagor.[25] Under such a mortgage, the mortgagor has no personal liability to make up any shortfall if the mortgaged assets prove inadequate to discharge the debt: the mortgagee has 'no recourse' to the mortgagor.[26] So although every loan of money will, in the absence of an express covenant to repay, give rise to an implied covenant to do so, the implication of such a covenant will be rebutted by a provision expressed or implied in the mortgage that the mortgagee is to be restricted to repayment out of the asset over which security has been granted.[27]

The fact that parties may agree that their mortgage transaction is to be one where there is no personal liability upon the mortgagor to repay indicates that there is no obstacle for a court in holding that the registration of a mortgage, where the mortgagor's execution has been forged, creates a valid charge over the land for the repayment of the amount secured, even though the mortgagor has no personal liability to repay that sum. In this way it is not necessary to accept the *Maradona* position that the personal covenant to pay attracts indefeasibility because this is the only way the charge of the land can be delimited. Nor is it necessary to accept the *Duncan v McDonald* position that the personal covenant is given limited effect because so doing is necessary to validate the charge. Having said this, there is little harm in accepting the *Duncan v McDonald* rationale as it leads to the same place as the reasoning above: the charge for the secured sum is an interest in land and therefore indefeasible; whereas the mortgagor's personal covenant to pay is not an interest in land and is therefore not enforceable when contained in a forged mortgage.

Having looked at the various approaches to the question of whether or not the personal covenant to pay attracts indefeasibility, let us turn to the recent cases to see which view has garnered the most support.

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[25] *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302, 308-309 (Latham CJ); *Queensland Premier Mines Pty Ltd v French* (2007) 240 ALR 234, 244 [46].

[26] *NZI Capital Corporation Pty Ltd v Child* (1991) 23 NSWLR 481, 483.

[27] Ibid 489-490.

B *Recent Queensland and NSW Cases*

In the only recent Queensland case to consider the issue—*Hilton v Gray*[28]—Douglas J unambiguously adopted the *Maradona* position that the registration of the forged mortgage renders the mortgagor personally liable under the personal covenant in the mortgage, in preference to the *Grgic* position that although the charge constituted by the mortgage was enforceable, the personal covenant was not. In *Hilton*, the mortgagee sought a judgment for repayment of the mortgage debt and an order for possession of the land. In the alternative, the mortgagee sought an order for the sale of the land. Thus, given the way in which the claim was framed, the enforceability of the personal covenant was a live issue, even though the value of the land appeared to exceed the amount owing under the mortgage.[29]

However, the actual orders made by Douglas J dramatically lessened the importance of the need to choose between the *Maradona* and *Grgic* positions as to the enforceability of the personal covenant. Douglas J stayed orders awarding the primary relief claimed by the mortgagee to allow for the taking of accounts as to the amount required to redeem the mortgage, and for a further reasonable period to enable the mortgagor to pursue a claim against the State of Queensland for compensation under s 188 of the *Land Title Act 1994*, and so be able to redeem the mortgage.[30] The effect of this was, in substance, to prevent the imposition upon the mortgagor of actual personal liability. In this way, the result in *Hilton* reaches towards the position in *Grgic*: the defrauded mortgagor is not personally liable. However, as Douglas J noted in *Hilton*, even under the *Grgic* approach, if a mortgagor wishes to redeem a mortgage, he or she must pay the amount actually secured by the mortgage, even though this might exceed the value of the land.[31] This would mean

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[28] *Hilton v Gray* [2007] QSC 401, [55].

[29] Ibid [1], [48], [57], [59]. Also see *Royalene Pty Ltd v Registrar of Titles* [2008] QSC 64, [71]-[72], [74].

[30] *Hilton v Gray* [2007] QSC 401, [59].

[31] Ibid [58]. The position in New South Wales in this regard has been significantly altered by an amendment to the *Real Property Act 1900* (NSW) that came into operation on 13 May 2009. Section 129B now limits the amount of compensation that is payable in regard to a forged (but indefeasible) mortgage to the value of the land less any amount secured by a mortgage having greater priority. The provision also limits the interest and costs component of such a claim. Whereas 189A of the *Land Title Act 1994 (Qld)* is drafted in terms of limiting the interest and costs component that the mortgagee, under a forged (but indefeasible) mortgage, can claim from the proceeds of the exercise of the power of sale, the New South Wales provision is drafted in terms of a claim by a mortgagee (and not the mortgagor) for compensation from the Torrens assurance fund. Although it is not immediately obvious how s 129B is to work in practice—given that the compensable loss has been suffered by the mortgagor rather than the mortgagee—the intent of the provision

that the mortgagee would be paid what the mortgagee was owed, even though this would exceed the amount that would be recovered through the exercise of the power of sale (given that the mortgagee could not proceed personally against the mortgagor for the shortfall). This has the effect of narrowing the distance between the *Grgic* and *Maradona* approaches. As O'Connor has pointed out, a real difference between them might only arise if the power of sale has already been exercised leaving part of the secured amount unsatisfied.[32] In such circumstances, *Grgic* would leave the mortgagee without recourse, whereas *Maradona* (and *Hilton*) would allow the mortgagee to sue on mortgagor on the personal covenant.

Turning to the recent New South Wales cases, the tide of authority has flowed strongly in favour of the *Grgic* position.[33] In *Chandra*, in support of his statement that the registration of a forged mortgage did not render the personal covenant enforceable, Bryson AJ noted that s 52 of the *Real Property Act 1900* (NSW) expressly provides that the registration of a transfer of mortgage carries with it the right to sue on the debt owing under the mortgage.[34] In his Honour's opinion, this express inclusion would be superfluous if the indefeasibility provisions of the Act would give the transferee of the mortgage a right to sue on the mortgagor's personal covenant.[35] In *Yazgi v Permanent Custodians Ltd*, the Court of Appeal, citing *Grgic*, but otherwise without comment, accepted the parties' agreement that registration of a forged mortgage did not confer indefeasibility upon the personal covenant.[36] And, most

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appears to be to allow the mortgagor to secure a discharge of the forged mortgage by tendering to the mortgagee an amount of compensation that is capped in terms of the value of the land and further capped in terms of allowable interest and costs, rather than the amount owing in accordance with the terms of the mortgage: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 March 2009, 13771-13772 (Mr Collier, Member for Miranda, on behalf of Ms Keneally, Minister for Planning).

32 Pamela O'Connor, 'Registered Land Title, Indefeasibility and the Problem of Bijural Inaccuracy', paper presented to the 8th Real Property Teachers Conference, 2007, Hobart, 16.

33 See Stoljar, above n 23, 36-37 and *Permanent Custodians Ltd v El Ali* [2008] NSWSC 1264, [59].

34 Section 62 is the equivalent provision in the *Land Title Act 1994 (Qld)*.

35 *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675, [30]. Also see Stoljar, above n 23, 31.

36 (2007) 13 BPR 24,567, [13].

tellingly, in *Provident Capital Ltd v Printy* the Court of Appeal, again with reference to *Grgic*, said:[37]

> ... where the loan is contained in the mortgage, although it will involve a separate personal covenant, registration of the mortgage will allow the mortgagee to enforce the debt by the sale of the land, despite not being able to sue the mortgagor personally ...

C *Relevance of Recent High Court Decisions*

In addition to this direct New South Wales authority, there are statements in two recent High Court of Australia cases dealing with the transfer of mortgages and leases that provide some indirect support for the position that indefeasibility does not attach to the mortgagor's personal covenant to pay.

The first of these cases is *Queensland Premier Mines Pty Ltd v French* ('*French*'),[38] in which a mortgage that secured a borrower's obligation under a separate loan agreement was assigned. The High Court held that because the borrower's covenant to pay the loan arose under the collateral agreement, and not under the mortgage instrument itself, the right to sue on the covenant did not pass to the registered transferee of the mortgage pursuant to s 62 of the *Land Title Act 1994* (Qld).[39] In delivering her judgment in which all other members of the Court agreed, Kiefel J said of the decision in *Maradona* that it 'says no more than that the benefit of the personal covenant within a mortgage passes to the assignee upon registration of the transfer of the mortgage.'[40] Although such a brief reference is hardly conclusive, one might speculate that in omitting to refer to the indefeasibility/invalidity aspect of the decision, and referring instead to it as a decision that illustrates the operation of transfer provisions of the Torrens legislation, the High Court is foreshadowing a possible reading down of the import of *Maradona* in so far as it relates to the indefeasibility of the mortgagor's personal covenant.

The second High Court decision—*Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* ('*Gumland*')[41]—is of greater significance for the issue of the enforceability of the mortgagor's personal covenant, notwithstanding that the decision dealt with a lease, rather than a mortgage transaction as in *French*.

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37 [2008] NSWCA 131, [32].

38 (2007) 240 ALR 234.

39 Ibid 246 [55]-[56]. As previously noted, above n 34, s 62 substantially corresponds to s 52 of the *Real Property Act 1900* (NSW).

40 (2007) 240 ALR 234, 246 [53].

41 (2008) 244 ALR 1.

An issue to be decided in the case was whether a guarantee granted in respect of the tenant's obligation to pay rent could be enforced against the guarantor by the transferee of the freehold in the leased premises. The High Court, applying the tests articulated by Lord Oliver of Aylmerton in *P & A Swift Investments (A Firm) v Combined English Stores Group plc*,[42] held that the guarantee could be enforced in this context, as the guarantee obligations touched and concerned the land and that the benefit of the obligations would run with ownership of the land.[43] In so doing, the High Court rejected[44] the argument that this conclusion was contrary to its earlier decision in *Consolidated Trust Co Ltd v Naylor* ('*Naylor*'),[45] in which it was held that the guarantee of a mortgagor's obligation to pay the principal debt did not pass with an assignment of the mortgage.

In distinguishing *Naylor*, the High Court in *Gumland* endorsed[46] a distinction made in earlier cases[47] between the juridical nature of: (1) a tenant's obligation to pay rent under a lease and a guarantee of such an obligation, both of which touch and concern the land; and (2) a mortgagor's covenant to pay the debt and a guarantee of such an obligation, neither of which touch and concern the land. Additionally, the High Court bolstered its conclusion by applying to a mortgagor's covenant to pay the requirement articulated by Lord Oliver that for a covenant to touch and concern the land it must affect the land's value. The High Court noted that the 'value of the mortgaged land, and the mortgagee's interest in it, is not affected by the [borrower's] covenant or its absence.' The value that the land would yield on the realisation of the security will be *unaffected* by the fact that the mortgagor (or guarantor) was bound by a personal covenant to repay a particular sum.[48] By contrast, the value of land *would* be affected by the existence of an obligation of a tenant to pay rent, as well as by the

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42 [1989] AC 632, 642. These tests are set out in *Gumland* at 23 [74].

43 (2008) 244 ALR 1, 27 [96]-[100].

44 Ibid 28-29 [103], [105], [107].

45 (1936) 55 CLR 423.

46 (2008) 244 ALR 1, 28-29 [104].

47 *Kumar v Dunning* [1989] QB 193, 206-207 (English Court of Appeal): 'The borrower's own covenant [under a mortgage] to pay the principal has nothing to do with the land and cannot touch and concern the land …'; *Simmons v Lee* [1998] 2 Qd R 671, 675-676 (McPherson JA): 'Unlike rent, a mortgage debt is not something that issues out of, or is an incident of, the mortgagee's interest in the land …'.

48 (2008) 244 ALR 1, 28 [103].

obligation of a surety who guarantees that obligation, were the land to be sold subject to the lease.[49]

Gumland thus holds that while a tenant's obligation to pay rent under a lease touches and concerns land, a mortgagor's personal covenant to pay does not. But how does this impact upon the question of whether the personal covenant of the mortgagor attracts indefeasibility of title? From *Karacominakis v Big Country Developments Pty Ltd* we know that a tenant's obligation to pay rent under a registered lease attracts indefeasibility.[50] It is submitted that the test of whether a covenant touches and concerns land is a useful marker for determining whether the same covenant would acquire the benefits of indefeasibility. If a covenant does not affect the mode of user or the value of the land to which it 'relates', then it is unlikely that it delimits or qualifies an estate in the land, so as to attract the operation of the doctrine of indefeasibility. On this basis, we could say that it is a *necessary* condition for indefeasibility that a covenant touches and concerns the land. Because *Karacominakis* left open the question of whether indefeasibility attaches to a guarantee, included in the registered instrument, of the tenant's obligation to pay rent,[51] we are unable to state that the fact that a covenant touches and concerns the land is *sufficient* for that covenant to attract indefeasibility. In any case, the fact that a mortgagor's covenant to pay does not touch and concern land should preclude it from attracting indefeasibility.

D *Policy Concerns*

So far we have noted that there is increasing authority in New South Wales against the proposition that indefeasibility attaches to a mortgagor's personal covenant to pay so as to validate the a covenant in a mortgage where the mortgagor's execution has been forged. We have also noted that this personal obligation owed to the mortgagee is conceptually distinct from the mortgagee's charge: the charge can exist without the presence of a covenant to pay, and the covenant does not touch or concern the land. To these matters of precedent and principle we can identify a policy that also militates against conferring indefeasibility upon the personal covenant. If

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[49] Ibid 23, 27 [74] (especially n 58), [98].

[50] (2000) 10 BPR 18,235, [60] (where it was assumed that the lease had otherwise been avoided under the rule in *Pigot's case*, dealing with the unauthorised material alteration of deeds after execution).

[51] It was not necessary to decide whether a guarantee of the tenant's obligation to pay rent attracted indefeasibility because the guarantee related to the lease as executed, and not as altered, and therefore even if the guarantee were indefeasible, there was no subject matter on which it could operate: (2000) 10 BPR 18,235, [97]-[101], [105].

indefeasibility attaches to the mortgagor's personal covenant to pay, then in addition to the mortgagee having a claim against the assurance fund for the value of the land, he or she would have to be compensated for his or her liability under the personal covenant, as it is a central tenet of the Torrens system that where the system imposes loss or damage, the injured party is entitled to compensation.[52] In effect, this would put a mortgagee whose interest arose under a forged mortgage in a better position than one who took under a mortgage that was valid under the general law. In the former case, the State guarantees the payment of any shortfall after the realisation of the security, whereas in the latter case it does not. This points to the superiority, on a policy basis, of *Grgic* over *Maradona*: the State should not have to compensate a mortgagee who takes inadequate security. Of course, where proceedings are initiated prior to the exercise of the power of sale, and the mortgagee is given time to make a claim against the assurance fund and redeem the mortgage, then a mortgagee who has taken inadequate security (as the debt exceeds the value of the land) is, even under *Grgic*, at an advantage *vis a vis* his or her counterpart in a transaction where no forgery was involved. However, this is a function of the fact that land can be charged with a liability that exceeds its value. It provides no warrant for allowing a mortgagee to recover from the assurance fund where the power of sale has been exercised leaving part of the indebtedness unsatisfied.

III The Respective Effectiveness of the Traditional and the All Moneys Mortgage

Having examined what effect the creation of an indefeasible charge has upon the mortgagor's personal covenant to pay, we now turn to the converse question: what significance does the source of the mortgagor's (actual or purported) indebtedness have upon the quantum secured by the indefeasible charge. As we have stated

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[52] *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 59 NSWLR 452, 455; 12 BPR 22,257, 22,273 [67]. However, as referred to above n 31, since 13 May 2009 this is no longer the case in New South Wales. Section 129B of the *Real Property Act 1900* (NSW) now limits the compensation payable from the Torrens assurance fund in regard to a forged (but indefeasible) mortgage to the value of the land, and further caps the compensation payable in regard to the interest and costs component of the claim. This amendment provides even a greater reason to prevent a mortgagee under a forged mortgage from being entitled to sue the mortgagor personally for any shortfall that cannot be recovered by enforcing the charge over the land. It would be a travesty to impose upon the mortgagor under a forged mortgage loss for which he or she cannot be compensated from the Torrens assurance fund.

above,[53] the cases draw a 'distinction of fundamental importance'[54] between two forms of mortgage. The first—the traditional mortgage—expressly states the amount that the mortgage secures. The second—the 'modern' or all moneys mortgage—does not state that a particular amount is secured, but rather purports to secure all moneys owing by the mortgagor to the mortgagee: (a) for any reason;[55] or (b) under any agreement between the parties;[56] or (c) under a particular agreement between the parties.[57] Although the New South Wales Court of Appeal has recently said that the traditional mortgage and the all moneys mortgage 'are not watertight categories',[58] the distinction between the two is well entrenched in the cases and provides the natural point to start our analysis. Complications that might arise with the dichotomy will be discussed below, particularly in connection with the doctrine of incorporation.

A *The Traditional Form of Mortgage*

Where the mortgage expressly states the principal amount it secures, namely the amount that has been advanced to the mortgagor and what the mortgagor has to repay, it is clear that registration of the mortgage, without fraud on the part of the mortgagee, creates an indefeasible charge over the land that is enforceable by the mortgagee, even though the mortgagor's execution of the instrument was forged. This is because the mortgage instrument, on its face and without reference to any other document, indicates what the scope of the mortgagee's interest is.[59]

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53 See above nn 7-10 and accompanying text.

54 *Printy v Provident Capital Ltd* (2007) 13 BPR 24,603, 24,613 [44] (Studdert J).

55 For example, the 'first mortgage' in *Printy v Provident Capital Ltd* (2007) 13 BPR 24,603, 24,606 [18].

56 For example, the mortgage in *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675, 24,681 [22] and the 'Permanent Mortgages' in *Vella v Permanent Mortgages Pty Ltd* (2008) NSW ConvR ¶56-221, [258].

57 For example the mortgage in *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24,567, 24,568 [5], where the particular agreement was the 'Residential Housing Loan Contract dated the [blank] day of [blank] 2003' between the parties; and the 'Mitchell Morgan mortgage' in *Vella v Permanent Mortgages Pty Ltd* (2008) NSW ConvR ¶56-221 [264], where the particular agreement was the 'Loan Agreement between the [parties] dated on or about the date of this Mortgage'.

58 *Provident Capital Ltd v Printy* [2008] NSWCA 131, [47].

59 *Small v Tomassetti* (2002) NSW Conv R 56-011, 58306-58307 [12]-[16]; *Printy v Provident Capital Ltd* (2007) 13 BPR 24,603, 24,613 [44] ('second mortgage'); *Provident Capital Ltd v Printy* [2008] NSWCA 131, [6] ('second mortgage').

The New South Wales Court of Appeal in *Provident Capital Ltd v Printy* has suggested that where a mortgage expresses on its face that it secures a particular sum and, additionally, any other amount that the mortgagor may owe to the mortgagee, then the mortgage will create an indefeasible charge in respect of the amount that is actually stated.[60] Following the Court of Appeal's lead in this respect, Harrison AsJ in *Perpetual Trustee Australia v Richards* concluded that three mortgages, all of which stated that they secured all moneys owed by the mortgagor to mortgagee now or later, including a specified sum as well as other unspecified sums described in generic terms, created an indefeasible mortgage securing the payment of the specified sum.[61]

B *The All Moneys Mortgage*

By contrast, where an all moneys mortgage has been used, it is necessary to look beyond the face of the registered mortgage instrument in order to determine the specific amount of the mortgagor's indebtedness to the mortgagee, and this necessity may produce a different outcome so far as the effectiveness of the mortgage is concerned. This is because the indefeasibility of the registered mortgage does not extend to other documents that have not been registered, such as a loan agreement purportedly between the mortgagor and the mortgagee. If the mortgagor's execution of the loan agreement has been forged, and the mortgagee has advanced money to an impostor rather than the mortgagor, then the agreement will not create any indebtedness in the mortgagor to be secured by the mortgage.[62] Although indefeasibility attaches to a registered mortgage, even one to which the mortgagor's

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[60] [2008] NSWCA 131, [47]. The Court gave this as an example of the inaccuracy of conceptualising the traditional mortgage and the all moneys mortgage as necessarily watertight categories.

[61] [2008] NSWSC 658, [35], [49]-[50].

[62] *Perpetual Trustees Victoria Ltd v Tsai* (2004) 12 BPR 22,281, 22,284 [23]; *Printy v Provident Capital Ltd* (2007) 13 BPR 24,603, 24,611 [40]. In *Printy* at 24,614 [40], Studdert J contemplated that an all moneys mortgage may be so drafted so as to render the mortgagor liable not only for indebtedness arising out of agreements actually entered into by the mortgagor, but also for indebtedness arising out of agreements entered into by persons fraudulently impersonating the mortgagor. If this were the case, then the registration of the forged mortgage would impose a charge that secured the indebtedness arising out of the impostor's dishonesty. However, his Honour stated that the mortgage would need to be drafted in the clearest possible terms for this to occur.

execution has been forged, it is still necessary to construe the terms of the mortgage to establish what debt it secures. Bryson AJ in *Chandra* expressed this as follows:[63]

> All considerations of indefeasibility come later than ascertaining, on the construction of a mortgage, what, according to its true meaning and effect, is the debt which it secures. Sections 40 and 42 of the [New South Wales *Real Property*] Act, while they create indefeasibility, do nothing to enhance what the mortgage actually says.
>
> ... ...
>
> The indefeasibility of the mortgage has no effect upon the question whether another document in fact falls within the general words of reference used in that mortgage.

The most detailed process of construction that has led to the conclusion that an all moneys mortgage secured nothing when the underlying loan documents were forged, is also illustrated by Bryson AJ in *Chandra*. In that case, the mortgagor's execution of the mortgage and the loan agreement pursuant to which an advance was made to a person impersonating the mortgagor was forged. Rather than stating it secured a specified amount, the mortgage stated that it secured:

- Secured Money (ultimately defined as any money owing by the mortgagor to the mortgagee under an agreement between those parties (a 'Secured Agreement'));
- the mortgagor's obligations under the Mortgage (which in turn was ultimately defined as the form of mortgage executed by the mortgagor); and
- Expenses (which were defined as amounts that the mortgagee incurred in various specified circumstances, most of which related to the Mortgage or a Secured Agreement).[64]

Bryson AJ, after construing the provisions of the mortgage and following the trail of interlocking definitions, concluded that, on its own terms, the mortgage did not secure any money at all. Firstly, there was no Secured Money as there was no Secured Agreement between the mortgagor and mortgagee under which money was owing: the loan agreement had not been entered into by the mortgagor, but rather by an impostor. In reaching this conclusion, Bryson AJ rejected the mortgagee's argument that whether or not a Secured Agreement existed should be ascertained from the perspective of the mortgagee, and whether the mortgagee thought that the

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63 *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675, 24,684, 24,685 [31], [36].

64 Ibid 24,681-24,682 [22].

loan agreement had been entered into by the mortgagor. His Honour stated that the question was simply one of objective fact.[65] Secondly, the mortgagor had no obligations under the Mortgage because there was no Mortgage (as defined): the form of mortgage had not been executed by the mortgagor.[66] Finally, there were no Expenses because most of these were defined in terms of a Secured Agreement or the Mortgage (and neither of these existed), and for those that were not defined in this way (for example, preserving the property) there was no evidence that they were actually incurred by the mortgagee (because the mortgagor as registered proprietor was continually in possession). More generally, his Honour expressed disquiet about the possibility that a mortgage, which did not secure a principal amount, might secure (only) expenses relating to its own existence.[67]

The same approach of construing what a (forged) all moneys mortgage purported to secure was applied in *Perpetual Trustees Victoria v Tsai*,[68] *Printy v Provident Capital Limited* (in relation to the first mortgage),[69] *Vella v Permanent Mortgages Pty Ltd*,[70] and by the Court of Appeal in *Yazgi v Permanent Custodians Ltd*.[71] Because in each of these cases the mortgage did not specify the amount secured, but instead referred to whatever might be owing under a separate loan agreement, and because the loan agreement had been executed by an impostor rather than the mortgagor, the mortgage secured nothing.

The approach to dealing with forged all moneys mortgages we have outlined—strictly construing what the mortgage purports to secure to establish whether an indebtedness of the stated type has in fact arisen—was well entrenched by the time the Court of Appeal brought down its decision in *Provident Capital Ltd v Printy*.[72] The Court stated that some might think it surprising that the practical effectiveness of a registered, but forged, mortgage would turn on whether the principal amount secured was identified in the mortgage or in a forged collateral loan agreement. This was especially so given that the all moneys mortgage is a commonly used

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65 Ibid 24,685 [37]-[40].
66 Ibid 24,685-24,686 [41].
67 Ibid 24,686 [42]-[44].
68 Ibid 22,284 [23].
69 Ibid 24,611-24,612 [40].
70 (2008) NSW ConvR ¶56-221, [309], [314].
71 (2007) 13 BPR 24,567, 24,572-24,573 [33]-[35].
72 [2008] NSWCA 131.

commercial instrument.[73] In order to address this possible objection to the current state of the law, the Court of Appeal apparently eschewed reliance on the strict construction of the provisions of the mortgage instrument for the (apparently) more authoritative ground of statutory construction.

The starting point for the Court's analysis was that in order for the mortgagee's power of sale to arise, either of the two alternate requirements of s 57(2)(a) of the *Real Property Act* must have occurred. Accordingly, there must have been either: (1) a default in the payment, in accordance with the terms of the mortgage, of money secured by the mortgage; or (2) a default in the observance of a covenant in the mortgage. The Court found that neither of these grounds had been satisfied with regard to the all moneys mortgage in the case. As the mortgage did not provide for the payment of specified amounts on specified dates, but simply for the payment of money in accordance with a loan agreement between the parties, it could not be said that there had been a default in payment *in accordance with the terms of the mortgage*. Additionally, there had not been a default in the performance of a covenant *in the mortgage* because the only relevant provision of the mortgage required payment of the secured money as provided for in a loan agreement, and the provision of the loan agreement could not be properly described as one expressed in the mortgage. This meant that as neither prerequisite was satisfied, the mortgagee's power of sale had *not* arisen.[74]

The Court then explained:[75]

> One consequence of this reading is to limit the debts which, although unenforceable under the general law, will engage the power of sale attracted to a registered mortgage, to those identified in a covenant 'in the mortgage' or required to be paid 'in accordance with the terms of the mortgage'. Such a result achieves a degree of consistency with the rights capable of transfer pursuant to s 52, as explained by the Victorian Court of Appeal and the High Court in *French*.

The first sentence of this passage indicates that the Court was concerned solely with all moneys mortgages where the accompanying collateral loan agreement had been forged, and not those where the loan agreement had been validly executed, because only in the former case would the debt be unenforceable under the general law. However, there is nothing in the reasoning of the Court that would not also apply to an all moneys mortgage that does secure a debt because the underlying loan

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73 Ibid [9], [47].

74 Ibid [48]-[50].

75 Ibid [51].

agreement is valid.[76] On the basis of what the Court said, a default in payment in those circumstances would not be a default in the payment, in accordance with the terms of the mortgage, of money secured by the mortgage (because the mortgage does not prescribe the relevant payment details); nor would it be a default in a covenant in the mortgage. The matter is also confused by the reference to the decision in *Queensland Premier Mines Ltd v French*, which concerned a valid, and not a forged, collateral loan agreement. Given that it is extremely improbable that the Court of Appeal in *Printy* wished to impugn the ability of a mortgagee to exercise its power of sale where default had occurred under a *valid* loan agreement, the preferable course would be to ignore the reasoning of the Court of Appeal in *Printy* and return to the strict constructionist approach of the previous cases. Such an approach is easily able to explain the different treatment of all moneys mortgages depending upon whether the companion loan agreement was or was not valid.

C *Possible Exceptions: Subrogation, Joint & Several Borrowers, Incorporation*

We now turn to three situations where it is or might be possible for an all moneys mortgage to secure validly a debt that arises in connection with a forged loan agreement.

The first of these is where part of the money that was advanced by the mortgagee pursuant to the forged loan agreement was used to discharge a pre-existing mortgage over the land that was binding on the mortgagor. That earlier mortgage may have been binding either because: (a) the mortgagor had executed it;[77] or (b) although it was also forged, the registered instrument expressly stated the amount that was secured by it, so that an indefeasible charge for that amount had been created.[78] Where this has occurred, the incoming mortgagee under the forged all moneys mortgage is entitled to be subrogated to the rights of the outgoing mortgagee (whose mortgage was valid) to the extent of the amount formerly secured by the discharged mortgage. Because the incoming mortgagee had paid a debt owed by the mortgagor to the outgoing mortgagee, the mortgagor is actually indebted to the incoming mortgagee (notwithstanding that the loan agreement was forged), and the all moneys mortgage validly secures that indebtedness.[79] Of course, the incoming mortgagee's

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[76] Cf *Perpetual Trustees Victoria Ltd v Cipri* [2008] NSWSC 1129 [78].

[77] See *Yazgi v Permanent Custodians Ltd* (2007) 13 BPR 24,567, 24,573 [38].

[78] *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 12 BPR 22,257, 22,271 [57]; *Perpetual Trustees Australia v Richards* [2008] NSWSC 658, [5], [49].

[79] *Perpetual Trustees Australia v Richards* [2008] NSWSC 658, [19]-[22].

right of subrogation does not extend to that part of the money advanced pursuant to the forged loan agreement that was not used to discharge a valid pre-existing mortgage, and the all moneys mortgage does not secure that amount.[80]

An interesting variation of the subrogation principle was applied in *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd*. In that case the fraud that led to the creation of the later mortgage was discovered before the discharge of the earlier mortgage and the later mortgage were registered. Because part of the advance made by the later mortgagee was paid to the earlier mortgagee to discharge that mortgage, the later mortgagee was entitled to be subrogated to the rights of the earlier mortgagee to the extent of the amount owing under the earlier mortgage immediately prior to its discharge. Because the instruments had not yet been registered, the later mortgagee was entitled to the benefit of the earlier mortgagee's mortgage (which was still on the title because the discharge had not been registered), rather than its own mortgage (which had been forged and was not yet registered).[81]

In addition to the subrogation principle, another established way in which a mortgagee who has advanced moneys on the faith of a forged loan agreement might have the advance secured by a registered all moneys mortgage is where the loan agreement and mortgagee purport to be made with two or more mortgagors and the liability of the parties is expressed to be joint and several. This is illustrated in the case of *Perpetual Trustees Victoria Ltd v Cipri* ('*Cipri*').[82]

In this case the mortgagee lent money under a loan agreement purportedly made with a husband and wife, whose liability as borrowers was expressed to be joint and several. An all moneys mortgage was registered over the borrowers' land, which they owed as joint tenants. Their liability as mortgagors was also expressed to be joint and several. The wife executed both the loan agreement and the mortgage, but the husband executed neither; his signature was forged by his wife in both instances.[83] In granting the mortgagee's claim for possession, Hall J's reasoning proceeded as follows. (1) Because the wife had executed the loan agreement and was severally liable under it, she was indebted to the mortgagor for the entire amount advanced. The husband, who was not a party to the loan agreement, owed nothing under it.[84] (2) Under the registered mortgage, each mortgagor charged his or her respective

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80 *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 12 BPR 22,257, 22,272 [63].

81 Ibid 22,271-22,272, [58]-[59], [63].

82 [2008] NSWSC 1128. *Cipri* has been applied in *GE Personal Finance Pty Ltd v Liddy* [2008] ACTSC 126, [28].

83 Ibid [37].

84 Ibid [85]-[89].

interest in the land to secure the amount owing by either of them under the loan agreement. (3) Accordingly, the mortgagee was entitled to enforce the mortgage for the amount owed to it by the wife against the husband's as well as the wife's interest in the land.[85]

What sets the 'joint and several borrowers' case apart from the 'single-borrower' case is that in the latter there is no money owing under the loan agreement and therefore no indebtedness which the mortgage, according to its terms, can secure. However, where the loan agreement is not a nullity, because one of the borrowers has executed it, there is indebtedness to which a mortgage, according to its terms, can attach. The cardinal principle is that one must look to the terms of the mortgage to identify what indebtedness it purports to secure. This is well demonstrated by *Yazgi v Permanent Custodians Ltd* ('*Yazgi*'),[86] which falls between the poles of the 'joint and several borrowers' and the 'single-borrower' paradigms.

In *Yazgi*, which was decided prior to *Cipri*, a loan agreement was purportedly made between the mortgagee on one hand and a husband and wife as mortgagors on the other. A mortgage between the parties that secured liability under the loan agreement was registered. The husband's execution of the agreement and mortgage was genuine, but the wife's signature on each had been forged. The Court of Appeal held that the mortgage attached to the husband's interest in the land only. This was because (unlike *Cipri*) the mortgage was expressed to secure only the *joint* and not the several liability of the husband and wife under the loan agreement.[87] Because the wife had not signed the loan agreement she was not liable under it. There was, therefore no joint liability that was secured against the wife's interest in the property. However, the wife and the mortgagee agreed that the husband was liable for the amount advanced under the loan contract and that this liability was secured by his interest in the land.[88]

The third way in which the mortgagee under an all moneys mortgage might circumvent the problem of a forged loan agreement is via the doctrine of incorporation. The argument is that the statement in the forged loan agreement that a specified sum was advanced is incorporated into the registered mortgage and thus obtains the benefit of indefeasibility. This method for avoiding the pitfalls of a forged

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85 Ibid, [90]-[91].

86 (2007) 13 BPR 24,567.

87 Ibid 24,572-24,573 [33], [35].

88 Ibid 24,568, [2].

loan agreement is substantially more speculative than the subrogation and joint and several borrowers mechanisms. Although the possibility of incorporation was recognised by the Court of Appeal in *Printy*,[89] in no case has it yet been found that the provisions of a forged loan agreement have been effectively incorporated into a registered mortgage. Nor has there yet been a case in which the requirements for such an incorporation have been clearly identified. In *Printy*, the Court of Appeal appears to have required that for incorporation to occur there must be an express term in the mortgage to that effect, at least where the mortgage expressly incorporates into itself the terms of a registered memorandum:[90] the express incorporation of one document (the registered memorandum) might exclude the implied incorporation of another (the loan agreement). Further, the Court rejected the argument that the contemporaneous execution of a loan agreement and a mortgage as part of a single transaction was sufficient to incorporate the payment covenant in the loan agreement (which specified the amount of the mortgagor's indebtedness) into the registered mortgage.[91] However, the Court did not further clarify the requirements for an effective incorporation in the context of an all moneys mortgage.

The only other case thus far in which an argument in favour of incorporation was seriously put is *Vella v Permanent Mortgages Pty Ltd*. In that case the registered all moneys mortgage purported to secure the mortgagor's obligations under 'the Loan Agreement between the Mortgagor and the Mortgagee ... dated on or about the date of this Mortgage ...'. It was argued that the reference to a particular loan agreement, rather than simply 'a loan agreement' or 'any loan agreement', was sufficient to incorporate the statement of specific indebtedness from the forged loan agreement into the registered mortgage, thereby creating an indefeasible charge to secure repayment of the relevant amount.[92] Young CJ in Eq rejected this argument, holding that the relevant provision of the loan agreement had not been incorporated into the registered mortgage, which meant that the mortgage was simply an all moneys mortgage that secured nothing because no advance had actually been made to the mortgagor.[93] His Honour's reasons for rejecting the argument were several and varied, the more prominent of which are as follows.

Firstly, as the doctrine of incorporation was developed by the Ecclesiastical courts as part of the law of probate, whereas the principles governing the construction of

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89 *Provident Capital Ltd v Printy* [2008] NSWCA 131, [47].

90 Ibid [52].

91 Ibid [53].

92 (2008) NSW Conv R ¶56-221, [264], [275]-[280].

93 Ibid [306], [309]-[317].

contracts derive from the common law, one must be careful in commingling these areas of law.[94]

Secondly, the mortgage consisted of the instrument itself, an annexure, and a registered memorandum that was incorporated by statute. The reference to the loan agreement in the annexure to the mortgage proper thus had to be construed having regard to the definitions of 'loan agreement', 'related agreement' and 'secured money' in the registered memorandum. The definitions of the relevant concepts did not necessarily align, and for Young CJ in Eq it was not at all clear that 'the loan agreement' meant any particular loan agreement.[95]

Finally, his Honour thought that the effect of incorporating the relevant provision of the loan agreement into the mortgage would be to 'merely transpose[...] the words "the monies owing to the mortgagee by the mortgagor under the loan agreement between [the named mortgagor] and [the named mortgagee] of [the specified date of execution] form part of the secured money."' Because the loan agreement was a forgery, the mortgagor was not indebted to the mortgagee, which would mean that incorporation would leave the mortgagee in no better position than if no incorporation had taken place.[96]

What emerges from Young CJ in Eq's reasoning is not a single underlying reason as to why an effective incorporation had not occurred, but rather his Honour's extreme reluctance to endorse a process that would treat an all moneys mortgage as equivalent to a mortgage that on its face identified the amount secured. It might be thought that the recognition of a limited doctrine of incorporation—whereby the payment covenant in a specifically identified (by date) loan agreement executed *prior to* the registration of the all moneys mortgage is incorporated into the mortgage—could do little damage. Although if the reach of the doctrine of incorporation were limited in this way there would be no reason for a mortgagee not to utilise the traditional form of mortgage that expressly declares the quantum of the amount secured. What is vital, however, is to maintain a rigid distinction between the traditional and all moneys mortgage archetypes generally, so as not to allow a registered all moneys mortgage to attach an indefeasible charge to indebtedness (purportedly) arising under a forged loan contract created *after* registration of the

94 Ibid [282].

95 Ibid [297]-[298].

96 Ibid [302]-[304].

mortgage. The important policy basis for this assertion is based on the integrity of the Torrens register.

In the context of the issue of whether the registered transfer of an all moneys mortgage effected a transfer of a collateral loan agreement, Kirby J stated:[97]

> One of the fundamental purposes of the Torrens system ... is to give effect to an important public policy. That policy is that the land register should be sufficient of itself to inform those concerned about the nature and extent of any outstanding interest in relation to land.

It is be noted, of course, that what is recorded when a mortgage in the traditional form is registered is the *maximum* principal amount that is secured by the mortgage, rather than the amount that is currently secured. What this means is that a third party (such as a prospective transferee of the mortgagee or a prospective sub-mortgagee) who wants to ascertain the amount currently secured by the mortgage must make enquiries of the mortgagee in this respect.[98] In this way, irrespective of whether a mortgage is in the traditional form or in the all moneys form, the register is not 'self-sufficient'. However, the integrity of the register would be severely compromised if an all moneys mortgage were able to confer indefeasibility prospectively upon a loan agreement created by forgery *after* the registration of the mortgage. Such a loan agreement could be brought into existence without observing any of the safeguards that apply to the registration of instruments, such as the requirement that the mortgagor's execution be properly witnessed and that the duplicate certificate of title be produced for registration of the instrument. The fundamental distinction between the traditional and all moneys mortgage is, accordingly, well founded and faithful to the policy basis identified by Kirby J.

IV Conclusion

The recent New South Wales and Queensland cases illuminate vital issues surrounding the enforceability of forged, but indefeasible, mortgages particularly with regard to the interrelationship between the mortgagee's charge and the mortgagor's personal covenant to pay. Notwithstanding the consistent approach in Queensland to the contrary, we have seen that New South Wales precedent, as well as principle and policy, all support the view that registration of a forged mortgage does not, and should not, validate a mortgagor's personal obligation to pay. The

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97 *Queensland Premier Mines Pty Ltd v French* (2007) 240 ALR 234, 237 [14].

98 *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302, 321-322 (quoted by Kirby J in *Queensland Premier Mines Pty Ltd v French* (2007) 240 ALR 234, 238 [14]); *Atlantic 3-Financial (Aust) Pty Ltd v Deskhurst Pty Ltd* [2005] 1 Qd R 1, 7 [16]. Also see *Westpac Banking Corporation v Clark* [2008] NZCA 346, [75]-[76].

mortgagee's charge over the land and the mortgagor's personal obligation are conceptually distinct, and recent High Court decisions dealing with the running of obligations following the transfer of mortgages and leases also point to a strong difference between personal and proprietary rights which is consistent with this article's conclusion in this respect. Further, to impose personal liability upon the mortgagor where the size of the debt exceeds the value of the land would be tantamount to the State providing a guarantee of the debt, because the mortgagee, via the mortgagor, would be able to call on the assurance fund to satisfy the shortfall.

The distinction between the traditional form and all moneys form of mortgage, in terms of the effectiveness of the mortgagee's charge, has been maintained in the recent New South Wales cases. Where the mortgage instrument expressly states on its face the quantum of the indebtedness secured, then the charge will be effective to secure that amount, notwithstanding the fact that the mortgagor's execution was forged. By contrast, where the mortgage purports to secure unspecified amounts owing under separate loan agreements, then if those loan agreements are forged the mortgagee's charge secures nothing, except where it can be shown that an amount is owing under the loan agreement by virtue of the doctrines of subrogation or of joint and several liability. The cases suggest that there is little hope for a mortgagee to rely on the doctrine of incorporation to marry the flexibility offered by the all moneys mortgage with the effectiveness of the traditional form of mortgage. This article has argued that the need to preserve the integrity of the Torrens register requires a firm distinction between the two types of mortgage, with their differing sources of the mortgagor's indebtedness: in one case a registered, and in the other an unregistered, instrument.