

## Consumer Section

### Property Law Review

#### The Changing Face of Conveyancing Responsibility\*

**Abstract:** In this note we examine two cases, one from Australia, the other from New Zealand, both of which explore the responsibility of legal practitioners engaged as professionals in the buying and selling of land. What will be shown is that the allocation of risk and responsibility is constantly under scrutiny for those involved in the conveyancing process, something ~~to~~ which the nascent Australian electronic conveyancing protocols will only heighten.

The process of conveyancing intersects the interests of consumers and conveyancing professionals. In the two cases to be discussed, the liability risks for conveyancing agents are highlighted. The first is the New South Wales Supreme Court decision of *Commonwealth Bank of Australia v Hamilton*.<sup>1</sup> The facts of this case starkly demonstrate how liability for conveyancing agents is embedded within the process, and how consumers and conveyancing agents can be drawn into the fraudulent behaviour undertaken by third parties in respect of land transactions. We also consider a recent example from New Zealand, which arose in the context of the removal of a practitioner (Mr Sharma) from the roll of Barristers and Solicitors. It was found that Mr Sharma had used Landonline (New Zealand's electronic conveyancing system) to achieve a dealing for a personal benefit.<sup>2</sup> While it highlights some peculiarities around Landonline that will not be evident in the Australian electronic conveyancing system, the time lag of 19 months between the suspicious activity and its discovery, illustrates a very real danger for the system that provides us security of land title by registration.

#### *Commonwealth Bank v Hamilton*<sup>3</sup>

Mr and Mrs Hamilton were at the time of the proceedings the registered proprietors of two adjoining units in the state of New South Wales. The Commonwealth Bank of Australia had previously provided a mortgage in respect of each of the properties. The contract of sale for each property stated the price was \$560,000, with the Bank providing a mortgage of \$448,000. Prior to settlement a deed of variation was finalised in relation to each property which saw the purchase price reduced to \$365,000. The

\* The authors thank the referee for their insights into an earlier version of the paper.

<sup>1</sup> [2012] NSWSC 242.

<sup>2</sup> *Auckland Standards Committee No. 2 v Rohineet Sharma* [2015] NZLCDT 12.

<sup>3</sup> [2012] NSWSC 242.

contracts also recorded that Webb Lawyers were to be the solicitors on record for both the purchaser and the seller. Where this tale took a twist was that the lawyer, Mr Webb, was in possession of instructions that appeared to indicate that one Mr Lee, <sup>4</sup>a close friend of Mr Hamilton, <sup>5</sup>was authorised to act on behalf of the purchasers in relation to the distribution of funds ~~with respect to~~ <sup>in relation to</sup> the properties. As Price J. found:

The evidence before me plainly demonstrates that Mr Lee was involved in a fraudulent scheme for the sale of units 12 and 13 in the apartment block at Lydbrook Street, which involved *inter alia* producing to the bank a copy of the front page of the contracts for the purchase of these units at inflated prices, supplying to the bank false material as to Mr and Mrs Hamilton's financial circumstances, the obtaining of bank finance on 80 per cent of those prices, the reduction in the purchase price after finance approval at a price substantially below that approved by the bank, forgery of signatures on documentation, collecting on settlement the loan funds and transferring the surplus funds to himself.<sup>5</sup>

When the repayments were not made, the Commonwealth Bank of Australia sought to recover the amount owing under the mortgages. The Bank also joined Mr Webb, the principal of Webb Lawyers, seeking damages because of the alleged breach of warranty of authority. In making this claim, and given that this is a strict liability action with a contractual basis, the Bank pleaded that Mr Webb had warranted that he was authorised to receive the funds and to distribute them in accordance with the instructions of Lee (being instructions which the Court found to have been made fraudulently). The Bank had proceeded to completion in consideration of this warranty by Mr Webb.<sup>6</sup>

Mr Webb's response to this, was that he was authorised by the Hamiltons to act in the manner that he did.<sup>7</sup> Alternately, he sought an indemnity from his insurer. He was unsuccessful on both counts. The Court held as follows:

I have given profound consideration as to whether the evidence amounts to no more than negligence or to a reckless disregard by Mr Webb of the falsity of the transactions. An assessment of the whole of the evidence leads to the conclusion on the balance of probabilities that Mr Webb knew that the purchase prices of the... Hamilton contracts were a sham. I do not make this finding lightly and it is with deep regret that such a finding is made in the case of a legal practitioner.<sup>8</sup>

As the mortgages were null and void and therefore unenforceable,<sup>9</sup> the Court found that responsibility lay not with the Hamiltons but with Mr Webb. Since the breach of warranty claim was a matter of strict liability, a plea of contributory negligence was not available, <sup>2</sup> and there was no apportionment of

---

<sup>4</sup> As noted by Price J., *Ibid*, [48].

<sup>5</sup> *Ibid*, [20].

<sup>6</sup> *Ibid*, [29].

<sup>7</sup> *Ibid*, [30].

<sup>8</sup> *Ibid*, [274].

<sup>9</sup> *Ibid*, [69].

damages.<sup>10</sup> Judgment was given for the Hamiltons against the Bank, but in favour of the Bank against the Law Firm in the sum of \$497,056. The insurer was not required to indemnify the lawyer.

*Commonwealth Bank v Hamilton* sharply illustrates the potential liability for some of the key players (lawyers and banks) when they are entwined by a web of fraudulent behaviour by others. While consumers of real estate may draw comfort that Mr and Mrs Hamilton were not held responsible for the actions of others, this conclusion was only drawn after an undoubtedly stressful, and doubtless expensive court action.

What this decision confirms is that conveyancing professionals are already required to provide a warrant of authority to others involved in the conveyancing process. This obligation is not altered by e-conveyancing and the authors have previously addressed the additional responsibilities imposed by the new environment.<sup>11</sup> With newly established responsibilities to verify identity, conveyancing professionals will need to check their insurance, risk management matrices, the security behind their IT systems and to what degree the conveyancing environment, and particularly the new e-conveyancing environment will open them to increased responsibilities and potential liability.

The nascent electronic conveyancing framework will invoke the most significant change in conveyancing practice that this country has seen. The consumers involved in buying and selling of land will no longer physically sign the forms that lead to change of ownership, rather the forms will be signed by a legal practitioner or licensed conveyancer who is registered as a subscriber to the electronic lodgement network. Further as a “subscriber” to the automated system, under the required licence to operate the online system, the practitioner or conveyancer will invariably have accepted some form of indemnification liability arising out of subsequent abuse of the system. Thus while States have not to date suggested their role of indemnifiers of the Torrens register will be abdicated, one could easily envisage a scenario where a financially strapped Crown would consider that the new model has moved the risk from the State to the subscribers. Accordingly the Crown may — and seek to exclude from compensation parties injured by the default of a subscriber to the conveyancing network,<sup>12</sup> or seek to

**Commented [A1]:** Sentence is too long so I have proposed breaking it in two

<sup>10</sup> Had the defence of contributory negligence been available, the bank’s damages would have been reduced by 35%. Ibid, [331].

<sup>11</sup> L. Griggs, R. Low and R. Thomas, ‘Electronic Conveyancing in Australia: is anyone concerned about security’, (2014) 23(1) *APLJ* 1; L. Griggs, R. Low and R. Thomas, ‘Australasian Torrens Automation, its integrity and the three proof requirements’, (2013) 2 *NZ L. Rev.* 227.

<sup>12</sup> For parallels as to what might occur see New South Wales (*Real Property Act 1900*, s129(2)(a) and 2(b)); Queensland, (*Land Title Act 1994*, s 189(1) and (2)); Northern Territory, (*Land Title Act* s195) and Victoria (*Transfer of Land Act 1958*, s110). Broadly speaking these jurisdictions provide that where the default is caused by the actions of a conveyancing agent whom is covered by their own professional indemnity, the assurance fund will not be liable.

promote a culture of reliance on individual responsibility, potentially through title insurance.<sup>13</sup> This may arise out of breaches of the online licence access terms, or as a matter of change of State policy.

Australian practitioners, looking east to the decade-long experience of New Zealand and their use of electronic conveyancing, will learn that appropriate training, in-house education, governance, and understanding of the allocation of risk is essential to ensure that potential liability for the firm, and the people within it, is not unduly enhanced. To this effect, the disciplinary decision of the Auckland Standards Committee in their matter against Sharma<sup>14</sup> highlights the risks inherent in e-conveyancing though there is one critical difference between Australia and New Zealand in their respective evolution of e-conveyancing. In Australia subscribers will not be making changes to the Register. This act will remain the function of the Registrar or Recorder of Titles. As to how this would alter the outcome of what occurred in *Sharma* remains, at this juncture, a matter of some conjecture.

#### *Auckland Standards Committee No. 2 v Rohineet Sharma*

More now on the New Zealand example of abuse of the Landonline system. Mr Sharma, a barrister and solicitor, was seeking to purchase a commercial property for his own benefit. His intention was to relocate his office to this new location. To enable this to happen, Sharma discharged a mortgage with BNZ over his own residential property, but without the Bank's authority, and used the mortgage-free status of this residential property to obtain a new mortgage from Westpac Bank.

The obtaining of the new mortgage was supported by the supply by him of a false solicitor's certificate. To explain the context of this, for a transaction within New Zealand's Landonline system, a practitioner is required to verify on at least two occasions that he/she has the requisite authority from the client, and Sharma's certifications were consequentially false. It is an issue of some real interest that BNZ took 19 months to discover that its mortgage had been discharged, and apparently only found the discrepancy out following an internal audit of its systems. The Bank then immediately lodged caveats, cancelled the loan contracts and demanded repayment in full, with this latter requirement being subsequently met. The Committee noted the concerns about Sharma's conduct which were expressed by the Registrar in testimony:

---

<sup>13</sup> Something that has occurred in Ontario, where title insurance is a common cost for the consumer. From July 2015, New Zealand practitioners will have the option of taking out capped conveyancing insurance for \$56NZ + GST, provided every conveyancing transaction within the firm opts for this coverage. For a discussion of this see LawNews, "Capped Conveyancing" insurance – a new approach to managing risk in residential conveyancing" July 3 2015, available at: <http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/7/3/%E2%80%9Ccapped-conveyancing%E2%80%9D-insurance-%E2%80%93-a-new-approach-to-managing-risk-in-residential-conveyancing/>.

<sup>14</sup> *Auckland Standards Committee No. 2 v Rohineet Sharma* [2015] NZLCDT 12.

The Registrar, Mr Muir, went on to discuss the integrity of the land title system and its reliance upon lawyers diligently performing their obligations when certifying land title transactions. These comments confirm the seriousness of the misconduct insofar as it affects the reputation of the profession as a whole and the integrity of the land transfer system in this country.<sup>15</sup>

Having been satisfied that the conduct of Sharma was deliberate and not merely inadvertent, the breach was considered to involve dishonesty.<sup>16</sup> Sharma was consequentially removed from the roll of practitioners.

### *Conclusion*

What these two cases highlight are some of the risks embedded within conveyancing in Australia and New Zealand. *Commonwealth Bank of Australia v Hamilton* identifies that the risks for a subscriber, in providing a warranty of authority to other parties, are already inherent in the current conveyancing system and under the common law rules. These risks are now heightened by the additional responsibilities placed on subscribers within an e-conveyancing framework and the loss of control by transacting parties at the point of executing instruments. If land fraud becomes a topic of public notoriety, and the scenario that occurred in *Sharma* may well be the beginning of this, the faith in the registration system will undoubtedly be shaken. That faith is something that needs to be carefully recognised as we in Australia begin a jurisprudence associated with the Electronic Conveyancing National Law.

*Lynden Griggs, Rouhshi Low, Rod Thomas (respectively, University of Tasmania, Queensland University of Technology and Auckland University of Technology)*

---

<sup>15</sup> Ibid, [34].

<sup>16</sup> Ibid, [38].