

Who do you think they are?

Identifying your client

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The recent decision of *Mascarello & Anor v Registrar-General of New South Wales* [2018] NSWSC 284 illustrates the importance of a solicitors' duty when identifying clients before witnessing their signatures on loan and associated security documents.

The facts

Mr and Mrs Mascarello owned three properties outright. Their son, Dennis, conceived of a plan to raise money fraudulently using his parents' properties as collateral. He obtained his parents' original passports and driver's licences and found two impostors to masquerade as the Mascarellos.

Dennis was assisted in the scheme by a now-banned mortgage broker. Dennis arranged for a company to be registered with Mr and Mrs Mascarello as directors.

The company then took out consecutive short-term loans supported by guarantees from Mr and Mrs Mascarello and mortgages over their properties. A solicitor was retained to review the identification documents and witness the imposter's signatures on the loan documents.

The Mascarellos learned of Dennis's activities after the final loan went into default. They sold all of their properties to pay off the debt and made a claim for compensation from the NSW Torrens Assurance Fund. After they commenced proceedings, the Registrar General ('RG') joined the solicitor by cross-claim.

Findings

Justice Sackar found that the solicitor had not breached the duty of care owed to the Mascarellos. She took reasonable steps to identify the Mascarellos with reference to original photographic identification documents, although she was ultimately duped by the imposters. His Honour found that she was not obliged to exceed the requirements imposed on her by the Solicitors Rules and the *Real Property Regulations* or to uncover a well-orchestrated fraud.

Snapshot

- The recent Supreme Court decision of *Mascarello & Anor v Registrar-General of NSW* emphasises the importance of identifying clients before witnessing their signatures on loan and associated security documents.
- While cases about a solicitors' level of responsibility for mortgage fraud turn on their own facts, solicitors will have a better chance of defending claims if they insist on seeing original photographic identification, keep colour copies of identification documents on file and ensure the people before them resemble the photographs in identification documents.

The RG argued that the impostors very likely did not resemble the Mascarellos, and it was unreasonable for the solicitor to rely on the identification documents produced. However, his Honour inferred that the imposters did resemble the people in the photographs, and noted that the solicitor was the only person able to give evidence of what they looked like because she was the only person to have seen them.

Further, even if the solicitor *did* breach her duty of care, His Honour found that:

- the solicitor did not cause the loss and adhered to her limited retainer (at [287]); and
- other concurrent wrongdoers caused or contributed to the loss, including Dennis, the mortgage broker, the impostors and the person who registered the company (at [336]-[340]).

The solicitor's proportionate liability could not have been more than 5 per cent (at [342]) and she was entitled to limit her liability by operation of the Law Society Limitation of Liability Scheme.

His Honour found that the RG could not avoid the operation of the scheme by reason of section 5(2), which provided that the Act did not apply to proceedings under Parts 13 or 15 of the *Real Property Act 1900* (NSW) ('RPA'), because the RG's claim against the solicitor was based on subrogated common law rights, not on the RPA (at [345]).

Proportionate liability

His Honour's assessment of the solicitor's hypothetical proportionate liability at 5 per cent was in line with, albeit at the low end of, findings about solicitors' responsibility for losses arising from mortgage fraud. Other cases which have assessed a solicitor's liability have apportioned a higher level of liability to the solicitor, for example:

- Solicitors who failed to communicate with the registered proprietor of properties to ensure they wanted a duplicate Certificate of Title or consented to a refinancing proposal have

been found liable for only 10 per cent of the loss (*Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694 and *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60).

- A solicitor who was found to have negligently drafted an ‘all moneys’ mortgage rather than one securing a covenant to pay a stated amount, with the result that the lender had no effective security in the event of fraud, fared slightly worse with a 12.5 per cent apportionment (*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10).
- The ‘high-water mark’ was *Pedulla v Panetta & Ors* [2011] NSWSC 1386 where a solicitor transferred a property into the owner’s (fraudulent) brother’s name and then assisted the fraudster to sell it, without making contact with the owner. The solicitor’s conduct in that case was found to have been ‘central and causative’ to the plaintiff’s loss, but his responsibility was assessed at only 30 per cent.

Interestingly, the RG contended that the solicitor’s responsibility in *Mascarello* should be assessed at 50 per cent but later moderated that to 15-25 per cent.

Conclusion

Cases about a solicitors’ level of responsibility for mortgage fraud turn on their own facts and this decision relates specifically to the solicitor’s conduct in this particular set of circumstances. However, solicitors will have a better chance of defending claims if they:

- use the Verification of Identity Standard as set out in the NSW Participation Rules for Electronic Conveyancing to confirm the identity of clients (www.registrargeneral.nsw.gov.au/publications-and-rules/nsw-participation-rules);
- insist on seeing original photographic identification;
- take photographs of signatories and keep clear, colour copies of cited identification on file indefinitely; and
- take careful steps to ensure that persons before them resemble the photographs in that identification.

In the *Mascarello* case, the RG might have been deterred from bringing the claim at all if the solicitor held a better record of identification on file along with photographic evidence of the imposters. **LSJ**

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