

next few months. The balance of the funds is given directly to Mr. X, or is directed by Mr. X to a foreign exchange office, converted into U.S. dollars and moved offshore.

This scenario, with some variations, has been discovered in the greater Toronto area on numerous occasions. In one situation, Mr. X did this six times over a five-month period on different properties. After about six or seven months, the money in the bank account ran out and the new mortgages were in default. Mr. X had stolen \$1.5 million. In another case, \$850,000 was stolen on two mortgages over three months. In yet another case, \$700,000 was stolen on two mortgages in two weeks.

Step 4: The plan unravels

In the meantime, in each case, a lawyer has certified to the new lender that it has a first mortgage on the property. The bank, whose mortgage has been improperly discharged from title, is still receiving payments from Mr. and Mrs. Smith who live in the house but who do not have registered title. When the new mortgage

goes into default, and demand is made on the occupants, everyone starts scratching their heads wondering who has what and who is to blame.

There is little or nothing that would make this loan transaction suspicious in the ordinary course. Presumably, the lender has already checked out the borrower. Even then, Mr. X is the registered owner of the property under Land Titles; he produced acceptable photo identification. What circumstances would there have to be for the lawyer to blow the whistle on a straight-forward residential mortgage loan?

Unfortunately, real estate lawyers seem to be necessary pawns in the fraud because they act for the new lenders and they certify title and the validity of the mortgages that they register. The legal issues that arise not only in this type of fraud but in any fraud, forgery and impostor cases, including such questions as who is entitled to relief and what is the role of the lawyer, are complicated.

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Can we really rely on the Land Titles Register?

What may be more shocking than the brazen conduct of the fraudsters is the damage done by the fraud and how the authorities react to it.

The lawyer's first reaction is probably that these instances of identity fraud are a case for the Land Titles Assurance Fund since, of course, Land Titles guarantees titles and guarantees against fraud. Surely, the new lender and the lawyer were entitled to rely on the title register to take a mortgage from Mr. X. Surely Land Titles has responsibility for registering and vouching for the deed to Mr. X and the bank's mortgage discharge.

Most lawyers would, without hesitation, come to the defence of a lawyer who clearly followed accepted conveyancing practice. The lawyer relied on the Land Titles system that guarantees title to the registered owner and received photo identification from the borrower.

Unfortunately, the Land Titles system does not do that or if it does, it does so in a very limited way. The Land Titles system, and all rights arising under it, depend on the statutory provisions contained in the *Land Titles Act*. The two major principles of Land Titles that arise from the Act, the mirror principle (the title

register reflects ownership) and the curtain principle (one does not have to look behind the title of the person shown as registered owner) do not operate without qualification when there is fraud. Specifically, a forged document is null and void even in Land Titles and, but for certain provisions in the *Land Titles Act*, it has no effect. It is for this reason alone that lawyers giving opinions on the validity and enforceability of documents must consider confirming the identity of signing parties.

The ability of lawyers to rely on the title register in Land Titles has its theoretical roots in the interpretation of the *Land Titles Act* and the application of one of two doctrines: immediate indefeasibility and deferred indefeasibility of title. In fact, and as discussed later, the provisions of the *Land Titles Act* and not the application of these theories govern.

Immediate indefeasibility

The doctrine of immediate indefeasibility would find that once Mr. X was registered as owner of the land, he is, in fact, the owner, even if he became the registered owner fraudulently. That does not appear to be the law in Ontario and nothing in the *Land Titles Act* supports that conclusion. The person who has fraudulently been registered as owner does not acquire good title. The title register does not guarantee good title to the fraudster simply by virtue of being named the owner on title.

Deferred indefeasibility

However, with deferred indefeasibility, while Mr. X does not get title simply by being the registered owner, anyone who innocently deals with him as the registered owner, regardless of how Mr. X became the registered owner, and without actual notice of the fraud, will acquire an interest in the land. It is the second person relying on the registered title and not the fraudulent titled owner that gets title. An indefeasible title is deferred to the innocent person dealing with the person registered as owner.

In our case, Mr. X never gets title to the property just because he is registered as owner. The mirror principle and the right to rely on the title register breaks down.

However, the new lender can obtain a valid interest in land and can rely on the mirror principle and the curtain principle to obtain a valid interest in land since the lender relies on deferred indefeasibility.

This principle is embodied in the *Land Titles Act* which provides in Section 45 that only the first registered owner in Land Titles is declared the owner of property. Thereafter, and according to Sections 66, 68, 86, 87 and 93, only the registered owner can

transfer or charge land. If Mr. X is noted on title as the registered owner by virtue of a forged transfer, the transfer is invalid since it was not signed by the registered owner. But if Mr. X, as registered owner, transfers or charges the land, Mr. X will, according to the Act, transfer or charge the land to the innocent purchaser or chargee.

A good example of this principle is set out in the recently reported *Durrani v. Augier* (50 O.R.(3d) 353) case where an innocent bank's mortgage was valid even though the borrower was held ultimately not to be the owner of the property.

However, there is a catch to this doctrine of deferred indefeasibility embodied in the above sections of the *Land Titles Act* which explains why impostors and forgers, signing for registered owners, can never create valid interests in land for subsequent holders, unless they have previously put title into their own real names.

The *Land Titles Act* specifies that only the person registered as owner can charge land. Thus, the new mortgage is valid according to the Act and the principle of deferred indefeasibility applies only if the person who is the registered owner has signed the mortgage. If, after the initial step of the fraud, the person who is registered on title does not exist or if the registered owner is a made-up name, or if the fraudster registered title in the name of another person and then used phoney identification to pose as that person, the mortgage is invalid and deferred indefeasibility does not apply. The Act requires that the registered owner transfers or charges land, and that the registered owner must be the real person who deals with the property in his or her own name.

Similarly, if there was a real Mr. X, but the person who attended at the lawyer's office was an impostor for Mr. X, then the mortgage is invalid according to the doctrine of deferred indefeasibility and the *Land Titles Act* because only the registered owner has the right to charge the property. This is the common problem when Mr. X appears with his impostor spouse to sign a mortgage or when, in the case of identity theft, the fraudster poses as some other person with forged or fraudulent identification. The real person did not charge the property; the lender gets no interest in land.

If, however, the real Mr. X took title and signed the documentation, then the new mortgage would qualify for deferred indefeasibility (even though it was a forgery that got title to Mr. X in the first place). The new mortgage is valid *vis a vis* the fraudulently discharged bank mortgage. As for the owners who are no longer registered as owners, they are entitled, presumably, to be reregistered as owners but now they are subject to the mortgage that they had nothing to do with, and their mortgage to the bank, on which they are still liable presumably on the covenant, is not registered on title.