WHAT CAN SOLICITORS DO TO **REDUCE MORTGAGE FRAUD?**

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By Matthew Bransgrove

Despite the heightened awareness of lenders, solicitors and mortgage intermediaries in the wake of the GFC, there has been an increase in the number of reported cases of mortgage fraud.

The wider dissemination of knowledge of lending practices to an ever-growing pool of potential fraudsters through the practice of copying people on email messages to 'keep them in the loop' has led to a vast increase in the number of real estate agents, lawyers, paralegals, accountants, clerks and borrowers learning all about the steps involved in writing a loan – and being given perfect copies of the documents involved.

The abundance of sophisticated but easy-to-use technology has made the fraudster's dissemblance harder than ever to detect. Electronic bank statements, spreadsheets, graphics programs, high-resolution printers, disposable mobile phones, cloud technology, free Wi-Fi hotspots, cheap domain hosting and email, lax practices for identification of domain registrations, websites, open source content management systems and social networking, have each enhanced the ability of fraudsters to steal identities, create identities, accurately falsify bank statements, tax returns and employment records, and even fabricate fictitious employers, accountants, valuers and solicitors. Lenders are often best placed to take a variety of steps to prevent fraud, but there is also much that is incumbent on solicitors.

Snapshot

- The number of mortgage fraud cases reported in recent years suggests that this problem is actually on the rise despite a heightened awareness among lenders, brokers and solicitors in the wake of the GFC.
- Whilst lenders take a number of practical steps to safeguard against mortgage fraud, solicitors are not exempt from this obligation.
- A number of recent cases reminds us that solicitors must be vigilant, and that they can easily take a number of key steps to guard against some of the more common kinds of mortgage fraud perpetrated through the use of modern technology.

The fraudsters

Likely contenders include persons who have worked for finance brokers, property developers, solicitors, licensed conveyances, real estate agents and registration agents. A key element in spotting fraud is to understand that fraudsters can mimic and emulate normal conveyancing behaviour. A practitioner should not draw comfort from the apparent normality of a transaction. A chat on the telephone with a paralegal who uses all the correct terminology and knows all the correct procedures is no guarantee a transaction is *bona fide*.

Solicitors need to be aware that mortgage fraudsters are not just anonymous strangers. An area where fraud is often least expected but most frequent is within families. Typically, this will involve spouses defrauding each other (e.g. the high-profile case of *Commonwealth Bank of Australia v Perrin* [2011] QSC 274), or children defrauding their parents, or carers defrauding the vulnerable. Those close to the property owner have inside knowledge of when they are indisposed, where key documents are kept and, importantly, the ability to intercept the property owner's mail. These frauds often blur the line with undue influence and other kinds of scenarios involving unjust behaviour.

In *Bendigo and Adelaide Bank v Stamatis* [2014] NSWSC 1233 the son procured his elderly parents' genuine signatures on some documents by telling them he was arranging a cheaper refinance, and forged their signatures on others.

It is not just imposters impersonating mortgagors that solicitors need to be on guard against. The facts set down in *Werden v The Queen* [2015] VSCA 72 provide a detailed look into the persistence, audacity and ingenuity of a professional mortgage fraudster. The fraudster, a former lawyer, advertised as a mortgage broker, and so lured victims genuinely seeking finance. This allowed the fraudster to send the real property owners off to be identified on behalf of the real lender before interposing himself to abscond with the bulk of the funds.

A variant of this occurred in *Britroc Investments v PT* [2015] NSWSC 524. There the fraudster advertised custodial services for self-managed superannuation funds wanting to buy property. To completely eliminate any suspicion by the victims, the fraudster put the property into the name of Perpetual Trustee. The transfer and mortgage purported to be signed by two actual officers of Perpetual Trustee, but the document was in fact a forgery, which went undetected. Solicitors need to be alive to the possibility of being made pawns in these types of mortgage frauds against their genuine clients.

Fraudsters often bypass the need to create false identities by making themselves the directors of the property-owning company. This 'corporate hijack' fraud is similar to trust account fraud ('I was going to put it back') as the perpetrator is readily identifiable from a search and typically plans to encumber a property, use the money to turn a profit, and then repay the loan. Family companies are vulnerable to this sort of fraud because family members can claim it was agreed among the family that the fraudster could take these steps. Family members are also more likely to have access to copies of documents that have the corporate key on it.

Your most powerful tools in detecting fraud

Four of the most powerful tools in detecting fraud are:

1. Title and company searches
2. Solicitor searches
3. Driver's licences and passports
4. Internet searches
5. Calm reflection

Title and company searches – read and think

A title search can tell you many things. An unencumbered title is particularly inviting to fraudsters as they only need to dupe the incoming mortgagee – not the outgoing mortgagee as well. An unencumbered property is rare, because the bulk of mortgages are refinances or purchases, so it prompts a closer look. If you have suspicions, then run historical searches as these will give you even more background.

Where a company is involved, matters to check include:

- the dates the director was appointed;
- the dates shareholdings were acquired;
- the past directors;
- the dates and places of birth;
- send letters to shareholders and past shareholders at their residential addresses if you have any doubt.

Question the scenario you are being given, then verify it by independently contacting those concerned or formerly concerned. If your client is interacting with a broker or other party, question whether there is a need to perform due diligence on these parties and ask yourself, if they were perpetrating a fraud, how would they go about it and what actions by you would thwart it?

Solicitor searches – verify who you are dealing with

You can trust other solicitors but the question is, are you dealing with another solicitor? These days, with solicitors disseminating electronic copies of their letterhead to all and sundry, it is breathtakingly simple for fraudsters to create false letters that will pass any scrutiny. The matter is easily put to rest by independently searching the solicitor's details and contacting them by telephone.

Driver's licences and passports

The new PEXA electronic conveyancing regime has brought with it, through its model participation rules, a Verification of Identity (VOI) standard that requires a face-to-face interview with the mortgagor and rigid requirements for what identification documents can be relied upon. Some lenders have adopted the practice of nominating the solicitor for the mortgagor to certify the mortgagor's identification. The standard, if followed, offers a safe harbour for lenders and indirectly for those certifying. However, the buck stops with the person identifying and, in particular, with the proper scrutiny of the identification document proffered and the face of the person being identified.

Whether you are certifying the mortgagor's identity for the lender or not, solicitors acting for mortgagors should insist on sighting their original driver's licence and passport. These documents are hard to forge and both have a photo. Credit cards and Medicare cards are of limited use, as all they prove is that a fraudster has access to the registered proprietor's wallet. If your client claims not to have a passport or driver's licence you need to be on heightened alert and conduct meaningful enquiries to ensure you are not dealing with an imposter.

If real identification is used by an imposter and you do not detect it you should expect to be found negligent. The case of *Perpetual Trustee Company Ltd v CTC Group* [2012] NSWCA 252 (special leave to appeal dismissed, [2013] HCASL 16) is demonstrative. In that case, the lender alleged that the originator did not take reasonable care to identify the mortgagor. The trial judge was sympathetic to the duped originator, finding that even though CTC obtained a photocopy of the mortgagor's passport, the possibility remained that a family member with a resemblance to the mortgagor impersonated him. Thus, the trial judge was not satisfied that there was any breach of duty. However, this was overturned by the NSW Court of Appeal. Macfarlan JA (with whom Meagher and Barrett JJA agreed) essentially applied *res ipsa loquitur* ([2012] NSWCA 252 at [26]), commenting:

'The primary judge's unchallenged findings were that [the mortgagor] did not sign the application ... If [the officer of CTC] did not make the requisite comparison between the signatory of the application and the original passport photograph, he failed to act with reasonable care ... The fact that the application was submitted despite [the mortgagor] not having signed it, strongly suggests that he did not.'

Internet searches

It is good practice to run an internet search of the names of all individuals and companies involved in a mortgage transaction. If the transaction is not run of the mill, for example, it involves private mortgage finance, this should be supplemented with a search of AustLII for any prior cases involving the parties. These searches are free and quick to perform and can save you many hours being grilled in the witness box. One of the biggest mortgage frauds in Australian history, described in *R v Jenkins* [2000] VSC 503; *R v Jenkins* [2002] VSCA 224; *Jenkins v R* [2004] HCA 57; *Director of Public Prosecutions v Bulfin* [1998] VSC 261, would not have occurred if some basic searches had been done on the borrower, who had a history of questionable property dealings.

Conclusion

In essence, exercising some calm reflection is always key. Beware of urgency. Most frauds are carried out in a rush to increase the chances of success. If a settlement is urgent, ask why it is urgent, then follow up and verify what you have been told.

If there is a notice to complete on another property, ask to see the notice and call the solicitor who issued it. The fraudster might be pushing for a quick settlement because he or she is worried your correspondence will be received by the real registered proprietor.

The real registered proprietor is more likely to receive your correspondence if you send letters to the security address by express post. The most important thing is that you consider the transaction holistically, asking yourself whether everything makes sense and whether there could be some sort of fraud being practised. **LSJ**