

1. Invalidity of Mortgage – Identity Fraud – Covered Risk 2.1(d)

At settlement insufficient funds were held to pay the stamp duty which delayed registration of transfer of the property into the borrower's name and the Insured lender's mortgage.

While attempts to obtain the shortfall of the stamp duty from the borrower were being made, the borrower sold the property back to the vendor, who was known to her, without the knowledge of the Insured lender. The vendor then proceeded to sell the property to another party, resulting in the Insured's loan being unsecured. It was claimed by the borrower's brother that the property was sold back to the vendor due to the ill health of the borrower. The borrower repaid part of the loan through other means, however there appeared to be fraudulent activity in the way the property was sold back to the vendor.

First Title retained lawyers and a private investigator to investigate this issue. The conclusion was that the "borrower" had never existed and an identity fraud had been perpetrated by the person claiming to be the borrower's brother.

When confronted with this information, the "borrower's brother" advised that he would repay the loan on behalf of his sister who was still allegedly unwell. During negotiations with the "borrower's brother", it was claimed that the "sister" had died. Eventually, a settlement was made and First Title ensured that the lender suffered no loss, meeting the lender's legal fees in full.

2. Invalidity of Mortgage – Identity Fraud - Perpetual Trustees Victoria Limited v Tsai – Covered Risk 2.1(d)

The "borrower" used an unencumbered property as security for a lo-doc mortgage to assist with the purchase of an investment property. No repayments were made following settlement. The lender brought default proceedings. It transpired that the true owner of the property, Mr Tsai, did not apply for the loan or receive funds at settlement. This was a fraud perpetrated by an organised Asian crime gang.

First Title obtained summary judgment for possession of the property, based on the mortgage being validly registered. Mr Tsai lodged a claim against the Registrar General of the Torrens Assurance Fund for indemnification. The summary judgment was then appealed by Mr Tsai, although it was unclear whether he was acting under the direction of the Registrar General. Mr Tsai argued on appeal that the mortgage did not create any indebtedness on the part of the mortgagor, nor did it contain a covenant to pay. The mortgage was an "all monies" mortgage which is a simple two page document that incorporated a separate memorandum of mortgage filed with the Land Titles Office. Mr Tsai argued that as he did not sign the loan agreement (the fraudsters did) there was no obligation the subject of a charge over his land.

First Title argued on the lender's behalf that the registration of the mortgage operated to create a valid interest in the land and Mr Tsai's property was charged with repayment of the funds advanced by the Insured. It was further argued that the principles of indefeasibility must mean that registration of the mortgage created a valid and enforceable security.

The Court found in favour of Mr Tsai. His Honour Chief Justice Young said that the personal covenant to repay was contained in collateral loan documentation, that is the loan agreement terms and conditions. As that loan agreement had not been signed by Mr Tsai, the covenant was not enforceable against him. He went on to say that even though the mortgage was registered, *"it may be a registered mortgage which secures nothing"*.

This is a good test of the value of the Torrens Assurance Fund. Here, even though the owner had a valid claim against the Fund, he appears to have first been required to pursue litigation at his own cost seeking recourse via other means.

First Title indemnified the lender for its loss including all legal costs. This case goes to show that the template "all monies" mortgage form currently used by many lenders may not provide protection to the lender even if the mortgage is registered and grants indefeasibility status to the lender. This is especially so if the matter involves fraud.

3. Invalidity of Mortgage – Identity Fraud – Covered Risk 2.1(d)

A loan for over \$200,000 was taken out by the "borrower" in 2002. Repayments were made for almost 2 years before the loan went into default. Possession proceedings were commenced by the lender, the "borrower" even coming into the law firm's office to accept service. The lender was successful in obtaining possession orders. However, several weeks later, the lender received a surprise when the Sheriff who was attending the property to change the locks was informed that the "borrower" had been dead for over 2 years. It turned out that the deceased had left his property to his daughter in his will and probate had only just been issued. The beneficiary's lawyers had immediately contacted the lender and commenced injunctive proceedings to have the possession orders set aside.



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First Title was notified and commenced investigations, as part of the "Duty to Defend" coverage under the policy. It turned out that the deceased's niece was the executrix and therefore had custody of the title deeds. Her (now estranged) husband was a mortgage broker who had used the title deeds to obtain a loan by fraudulent means, purporting to be the "borrower". As the injunctive proceedings were on foot and after discussions with the beneficiary's lawyers, First Title took the view that the claim should be paid. This was partly as a result of the *Perpetual Trustee Victoria Limited v Tsai* decision. As in the *Tsai* decision (see example 2 above), this was an "all moneys" mortgage, where the collateral loan documentation had been signed by a fraudster and not the true owner. According to the Supreme Court of New South Wales, this would mean that the lender had an indefeasible mortgage (as it was registered) but in respect of "nothing".

4. Invalidity of Mortgage – Incapacity of the Borrower – Covered Risk 2.1(d)

The borrower challenged the validity of the Insured lo-doc mortgage and a default judgment for possession obtained by the lender over 2 properties mortgaged by the borrower, on the basis that the borrower lacked the requisite capacity to enter into the transaction. The borrower was then institutionalised and his affairs managed by the Protective Commissioner.

The Protective Commissioner successfully set aside the default judgment on the basis that the borrower:

1. lacked capacity when entering into the transaction (of which the lender ought to have been aware);
2. lacked capacity to duly defend the default judgment orders; and
3. would be deprived of a place to live in the event that he recovered.

First Title negotiated an agreement with the Protective Commissioner and the borrower's estranged wife, on behalf of the lender, which secured one of the borrower's properties for the lender to exercise a power of sale with the other property being retained by the borrower's estate to provide a place for the borrower to live in the future.

First Title's policy met all legal expenses, the shortfall left when the sale proceeds did not repay the lender in full and ensured that the lender did not suffer a loss.

5. Invalidity of Mortgage – Unconscionability – Covered Risk 2.1(d)

This claim is based on finance raised against an unencumbered property to invest in an investment scheme. The borrower commenced action in the Supreme Court against (amongst others) the Insured lender on the basis that the lender should have known that the borrower was investing the money being drawn down in a questionable scheme.

The borrower attempted to set aside the mortgage on the basis of unconscionability. After lengthy discovery and other pre-trial motions the borrower was ordered to discontinue proceedings against the Insured with costs to be assessed since their case had no merit.

Even though the borrower's defence never looked like succeeding, the lender was put to extensive legal work which incurred legal fees in excess of \$100,000. These were met by First Title under the "Duty to Defend" coverage. Without First Title's policy, the lender would have been put to this work and expense.

6. Enforceability of Mortgage – Misappropriation of Loan Proceeds by Broker – Covered Risk 2.1(d)

The borrowers sought to have their mortgage set aside, seeking relief under the Trade Practices Act. They successfully showed that the mortgage broker misappropriated part of the loan proceeds at settlement. The borrower's son and a director of the broker colluded to defraud the borrowers.

First Title obtained a valid enforceable mortgage for the lender equal to the amount paid to refinance the borrower's prior mortgagee at settlement and reimbursed the lender for its shortfall.

First Title pursued the borrower's son and the mortgage broker, but ultimately had to discontinue proceedings after the mortgage broker disappeared, (his evidence being essential in order to succeed against the son). The broker then turned up in the news, after a police raid on a home where a man was shot dead after attacking the police with a sword. The broker was apparently also in the house and was arrested.

7. Enforceability of Mortgage – Misappropriation of Loan Proceeds by Broker – Covered Risk 2.1(d)

The borrowers did not receive the full benefit of all the loan proceeds and defended the lender's default proceedings on the basis of professional misconduct by the broker that handled the transaction, who misappropriated over \$100,000.00 of the loan proceeds.



Part of the loan proceeds were used to refinance another financial institution's mortgage. As the borrowers did receive the benefit of these proceeds, First Title reduced the debt owed to the Insured to the amount used to refinance the other financial institution and obtained a valid and enforceable mortgage for the Insured for this lesser amount.

First Title reimbursed the lender for its loss and paid its legal expenses in full. Debt proceedings were commenced by First Title against the broker.

8. Enforceability of Mortgage – Tenants in Possession – Covered Risk 2.1(d)

The Insured lender sought possession orders when the borrower defaulted on his loan repayments. The tenants living at the property claimed they had entered into an agreement to purchase the property from the borrower. The tenants commenced proceedings for a stay of the eviction orders obtained by the Insured lender because of their purported interest. It was questionable whether the Insured lender's mortgage had priority over the tenants' interest in the property.

The matter was set down for hearing, with substantial legal costs being incurred. Immediately prior to the hearing, the parties agreed to mediate. First Title took part in the mediation for and on behalf of the Insured lender. First Title assisted the parties to arrive at a resolution ensuring the Insured lender's losses were mitigated.

Because of the Insured lender's coverage under its policy with First Title, First Title paid all legal costs incurred for and on behalf of the Insured lender in defending the matter.

9. Priority of Mortgage – Unattended Settlement - Covered Risk 2.2(h)

The Insured lender made a refinance loan to the borrowers by way of unattended settlement, whereby the borrowers' home loan with their existing lender was paid out, the Insured notified the outgoing financial institution of the refinance. Subsequently, the outgoing financial institution allowed the borrowers to re-draw approximately \$130,000.00. The borrowers were not in a position to repay the total debt and the aggregate of the two loans was in excess of 100% of the property value.

As the re-draw was allowed after the outgoing financial institution had been given notice that its loan had been cleared, First Title sought the postponement of the outgoing financial institution's mortgage to enable the Insured's mortgage to be registered as first priority. The outgoing financial institution declined this request on the basis it was obligated under the prior loan contract to make the \$130,000 further advance to the borrowers.

First Title instructed lawyers to act on behalf of the Insured to compel the postponement of the outgoing financial institution's mortgage. Proceedings were commenced and the matter was heard in December 2004. The Court found that the outgoing financial institution was not obligated to make further advances to the borrower, but decided amongst other things, that the outgoing financial institution did not have **actual** knowledge that the Insured lender had an unregistered second mortgage from the borrowers albeit that the notice from the Insured to the outgoing financial institution indicated a "refinance". Further, the Court found that as the notice was given to a junior discharge clerk this was not sufficient to affect the outgoing financial institution's conscience, that is, notice was not given to a person who represented the mind of the outgoing financial institution.

As the Insured was unsuccessful in registering its mortgage in first priority, First Title will indemnify the Insured for any shortfall that may exist in the event of a mortgagee sale or any other loss suffered by the Insured lender as a result of not being able to enforce its mortgage. First Title met all legal fees as a result of the litigation.

10. Invalidity of Mortgage – Incapacity of the Borrower – Covered Risk 2.1(d)

The borrower commenced proceedings alleging she suffered from seasonal bipolar disorder and that she could not recall entering into a loan. She had obtained a loan of \$540,000 to refinance an existing debt and purchase a second property. The loan went into default and as the borrower had no income. She sought to have the lender's mortgages over both her properties set aside and claimed that she would commit suicide if both her properties were sold.

First Title acted on the Insured's behalf under the "Duty to Defend" coverage. The matter ran for over six months and was eventually settled. First Title's policy ensured that the lender did not suffer a loss.