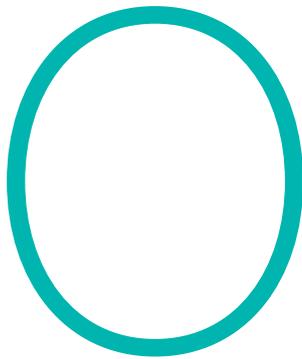


# That belongs to me

Mark Brassey and James McWilliams consider minimising risk of property fraud, the legal position and the Land Registry indemnity scheme



Often one of the most valuable assets of any individual or business, property has long been a target for fraudsters. This is a significant problem: one study by the now-disbanded National Fraud Authority in 2013 estimated the losses due to mortgage fraud alone as in the region of £1bn a year (<http://bit.ly/1zU4oQI>).

The scale of property fraud presently seen is perhaps in part due to the relative ease with which title to property can now be transferred. What was once a cumbersome process involving watermarked paper certificates and original copies is now generally easy, cheap and saved electronically. Although the advantages of the modern system are obvious, there is no doubt that it makes some kinds of property fraud easier.

One of the most common types of such fraud occurs broadly as follows: the fraudster first attempts to acquire ownership of a property by using forged

documents or deceiving the rightful owner. Once they have obtained title, the fraudster will then borrow funds from an innocent lender secured by a mortgage against the property. The victims will invariably only discover what has happened when the fraudster defaults on the mortgage payments; these may often be kept up for some time to delay discovery. When the fraud is eventually uncovered, the fraudster is nowhere to be found, the rightful owner faces demands to repay a loan or lose possession of their home and the lender is left with a borrower in default and its security in question.

## Where do the victims stand legally?

Although both the rightful owner and the lender will each have claims they are often of little use, because even if the fraudster can be found it may not be possible to recover all the losses. The more pressing question is where the victims stand in relation to one another: absent payment; can

the lender enforce its security against the rightful owner or can the rightful owner remove the lender's charge from the title to the property?

The starting point is to understand that the Land Registration Act 2002 (<http://bit.ly/1JUngJL>) states that the register of title is designed to be complete and conclusive. Registration of a transaction gives priority over all interests that are not protected on the register, with the exception of a reduced list of overriding interests.

So notwithstanding the fraud, the fraudster will be shown on the register as the proprietor and will be entitled to exercise the powers of an owner (including granting a charge); the lender will be the holder of a registered charge over the property (sections 58, 23 and 24 of the act). Unless and until the rightful owner can secure the removal of the charge from the register of title to the property, *prima facie* it will be subject to the charge and the lender can seek to enforce that security.



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It is possible for the register of title to be altered; those circumstances, which include “so as to correct a mistake”, are set out in Schedule 4 to the act. But it is not clear what amounts to a mistake and can thus be corrected. The rightful owner may not have intended a charge to be registered against the property, but it does not necessarily follow that this was then a mistake. The fraudster was the registered proprietor and so entitled to exercise the powers of an owner, including the grant of a charge to the lender.

Whether the registration of a charge granted to a fraudster by an innocent lender amounts to a mistake will depend on the status of the original transfer of the property to the fraudster



(*Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 EGLR 123). If the transfer is merely voidable (for example, freely entered into with the victim but as a result of a fraudulent misrepresentation), the registration will not amount to a mistake. That is because the transfer to the fraudster will be valid. They will then be entitled to be registered as proprietor, unless and until the victim of the fraud rescinds that transfer.

Conversely, if the transfer is void (for example, forged by the fraudster) then the registration of the charge will amount to a mistake. That is because the transfer was never of any effect and the fraudster was never entitled to be registered or exercise a proprietor's powers.

The legal position of the victims of such fraud is often a precarious one, depending on what can seem like very fine distinctions.

### The Land Registry indemnity scheme

If the rightful owner is able to obtain rectification of the register and the removal of the innocent lender's charge, what then happens? The lender has done nothing wrong: it has simply relied on the register and taken an interest in the property.

The answer lies in the Land Registry's indemnity scheme. Schedule 8 to the 2002 act provides for the payment of an indemnity for loss suffered by the proprietor of a registered estate or charge claiming in good faith under a forged disposition.

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The indemnity will be payable where the register has been altered to correct a mistake that prejudicially affects the title of the proprietor. Entitlement to an indemnity is not automatic and it can be affected if the loss is suffered wholly or partly as a result of the proprietor's own fraud or lack of care. Nevertheless, it offers a considerable degree of protection for innocent and competent lenders.

Fraud, usually by way of forgery, in fact represents the most significant in value of the indemnity payments made under the scheme by the Land Registry. In its most recent annual report for 2014/15, the Land Registry states that some £8.4m was paid in respect of 968 indemnity claims in that year alone, of which £5.2m was paid regarding 54 fraud-related claims valued at £5.9m.

### Is prevention better than cure?

However generous the Land Registry indemnity scheme, it is far better never to be placed in a situation where one might have to rely on it. The following are just a few vital tips.

1. Be aware if the property is particularly at risk: properties that are empty, let to tenants or free of a mortgage are more vulnerable than most.

2. If a money-making scheme involving the transfer of property sounds too good to be true, it probably is.
3. Make sure that your property is registered with the Land Registry.
4. Ensure that the Land Registry has up-to-date contact details for the registered proprietor.
5. Register for property alerts from the Land Registry. These will not prevent changes to the register but they will alert property owners when changes are made, so that action can be taken. Alerts for up to 10 properties are available free of charge.
6. A restriction can be placed on the title to the property. This will stop the registration of a transfer or charge unless a conveyancer or solicitor certifies that the application was made by the property owner themselves. 



Mark Brassey is a partner at Child & Child  
markbrassey@childandchild.co.uk

James McWilliams is a barrister at Littleton Chambers  
jmw@littletonchambers.co.uk