

Who is your new client?

By MATTHEW HARDING and KAVEETHA KUMAR

Increasing incidents of identity fraud are posing new risks and higher burdens for solicitors, especially conveyancing solicitors who are required to verify the identity of new clients unknown to them.

If you are acting for a mortgagor and if the mortgagor is an individual, be mindful that the mortgagor's full name, date of birth and residential address must be verified from an original or certified copy of a primary photographic identification document (for example, a driver's licence) or a primary non-photographic identification document (for example, a birth certificate) and a secondary identification document such as a rates notice or tax assessment (r.11B, Real Property Amendment Regulation 2011). These requirements have been in place since November 2011.

The identification documents must be legible, unaltered and consistent with information provided by the mortgagor.

If the mortgage was executed under a power of attorney, the identity and authority of the attorney must be verified (r.11D). Ask to see the power of attorney and check that it was registered.

If you are witnessing the execution of a dealing in land (or a caveat) you must sight original identification documents.

If the mortgagor is a company, obtain the name as registered with ASIC, the address of the registered office and principal place of business, the ACN, registration status and name of each office holder. Verify this information against an ASIC search (r.11C).

Check the identity of a new client

If you are instructed to act on the sale of a property, check the identity of the vendor client. Checking that the certificate of title is not forged and is genuine, while necessary, is only one part of the inquiry required to determine that the persons presenting themselves as the

registered owners are in fact the persons named on the certificate of title.

In a recent example, the plaintiff's ex-wife (and an imposter posing as the plaintiff and co-owner of the property) retained a solicitor to act on their behalf in the sale of a property. The ex-wife and imposter were 'walk-in' clients. The plaintiff's ex-wife signed in his name the contract for sale and the transfer document. The property was sold without his knowledge or consent, and the proceeds were paid to the ex-wife. One issue was whether the solicitor ought to have sought photographic identification to ensure that his clients were who they said they were.

The court accepted the evidence of the plaintiff's expert conveyancing solicitor who considered that a solicitor, who receives instructions from clients who are unknown to him and not referred to him by anyone, should require photographic identification.

The court found that the solicitor did have an obligation to the plaintiff to make an enquiry about the identity of the plaintiff's ex-wife and the person who presented as him for reasons including that she and the imposter were completely unknown to him, he had no signature from the real co-owner (the plaintiff) and had not seen the imposter sign anything in his presence.

The court held that the solicitor ought to have appreciated that the clients might not be who they said they were and that there was a risk of significant harm, that is, that by failing to check their identities the solicitor would assist those persons to deprive the real owners of their title to the property.

Other factors to consider

If you have a client who is borrowing money on the security of a mortgage on a property owned by a family member, consider whether the mort-



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gagor has obtained independent legal advice and is aware of the mortgage. One example has been an adult child having signed a mortgage document as witness to her elderly mother signing it and where the mother alleged she did not know anything about the mortgage when the mortgagee took steps to enforce the mortgage.

If you are acting for a lender and the borrower is not also the mortgagor, consider whether you need to obtain further instructions to ascertain the relationship between the borrower and mortgagor. Does the mortgagor have their own solicitor? Is the borrower in a position of influence over the mortgagor? Did the mortgagor really sign the mortgage document? Who witnessed the mortgage document? Is there a third person who is exercising influence over the borrower?

New Solicitors' Rules

The NSW Professional Conduct and Practice Rules 2013 commenced on 1 January. The approved practice to be followed when engaged to advise a proposed signatory (borrower, mortgagor or guarantor) on loan or security documents is set out in Rule 58. The solicitor must identify the proposed signatory as the person described by reference to one of the following documents: a passport, driver's licence, Medicare card, credit card, rates notice, or other. (Rule 58.4.1 is in almost identical terms to rule 45.5.1 of the Revised Professional Conduct and Practice Rules 1995).

These rules do not specify the need to verify a mortgagor's identity against both a primary non-photographic identification document (such as a birth certificate) and a secondary identification docu-

ment such as a rates notice if a passport or driver's licence is not available. However, reliance on one of these forms of identification alone is insufficient in the current climate of sophisticated fraud and identity theft. In particular, relying solely on a credit card to identify the mortgagor or borrower is risky.

It is important to note the requirements under the Real Property Amendment Regulation 2011.

Steps to take

Check whether the address on the identification document matches the address provided to you. Does your client's signature match the signature on the identification documents?

Is there anything unusual about the identity documents? For example, does the emblem on the driver's licence or layout look unusual?

Identify the borrower independently. Consider searching the register to examine signatures on the previous transfer or mortgage. Do the details match? Are there any unusual features in relation to the transaction such as undue urgency? If the transaction is said to be urgent, ask why.

Record a file note of the instructions concerning your new client's full name, date of birth and address. Photocopy the identification provided. (Under s.56C(3) of the *Real Property Act*, a mortgagee must keep a written record of the steps taken to confirm the mortgagor's identity or keep a copy of records of the mortgagor's identity.) Photocopy the executed transactional documents. Be risk conscious. □

Lawcover has an Identity and Mortgage Fraud Checklist on its website at www.lawcover.com.au.