

PART VIII – EXCEPTIONS TO INDEFEASIBILITY

I Introduction

A Categories of Exception

The mirror principle cannot be universal. This means that some unregistered interests will in certain circumstances attain paramountcy over the registered interest of the proprietor. Registration protection is therefore limited. Exceptions are created by four distinct sources:

1 Express exceptions created by the Torrens Legislation

In Victoria, the following exceptions are created:

- Fraud, including forgery;
- Prior folio;
- Misdescription;
- Reservations in Crown grants;
- Adverse possession;
- Public rights of way;
- Easements;
- Interests of tenants in possession; and
- Government and utility charges and land taxes.

These exceptions have expression in s 42(1) and (2).

The effect of these exceptions is to make it necessary for purchasers of land to look beyond the title. They have the effect of undermining the curtain principle. Thus, a purchaser of land in Victoria must examine the land itself to determine whether anyone is in possession, must conduct research to determine whether there are any easements or rights of way over the land, and must not engage in or be party to fraud. These obligations may not seem particularly onerous or controversial, but they have given rise to considerable debate about the proper scope of unregistered interests within the Torrens system.

2 The Registrar

The TLA grants the Registrar of Titles the power to correct the register in some instances: s 103.

3 Overriding statutes

Further exceptions are imposed by other statutes:

- Public rights and burdens affect a title even if unregistered;
- Rights of expropriation by government
- Utility easements
- Planning restrictions
- Building compliance laws
- Fire standards
- Mining or exploration grants

Statutory systems may also allow others to enter and change private land (eg, council inspectors and fire fighters). There are some 260 state and Commonwealth Acts that impose restrictions and responsibilities upon landowners.

See, eg, *Pratten v Warringah Shire Council*; *Hillpalm Pty Ltd v Heaven's Door*.

4 Judicial exceptions

Registered interests are overridden by the aforementioned exceptions. However, although the Torrens system provides for the layering of interests and articulates basic priority rules, these rules need further elaboration in more complex cases. Judicial interpretation of the Torrens legislation has therefore had a significant impact on the scope of indefeasibility.

Courts have also read down indefeasibility protection so that volunteers do not receive its benefits (see, eg, *Rasmussen v Rasmussen*; cf *Bogdanovic v Koteff*).

Further, the meaning of fraud is a largely judicial development. Thus, it is not fraud for a party who knows of an unregistered interest to proceed to register an inconsistent interest.

However, the Torrens register does not protect individuals from rights they themselves create (eg, trusts, contracts, covenants). Thus, a registered owner is always bound by their:

- Contracts (personal); and
- Equitable interests (proprietary).

For example, the *in personam* exception has been interpreted as meaning that any legal or equitable causes of action which are able to be asserted against the registered owner or an owner about to be registered continue to be enforceable (ie, are paramount to registration). The Courts thus have a substantial role in determining the precise rights which will be created by a land owner's behaviour and in applying the relevant law which gives rise to the claim.

B Exceptions Created by the Torrens Legislation

Several paramount interests are declared in s 42 of the *TLA*. They constitute exceptions to the indefeasibility of a registered proprietor's title and fall within the first category of exceptions identified above.

If one of these paramount interests is unregistered but exists prior to the registered title, then the registered title will still be subject to that earlier interest, despite it being unregistered. If the registration is procured as a result of one of these exceptions, it may be set aside altogether, or a right to set it aside may be vested automatically in the previous registered proprietor or affected unregistered claimant, as applicable.

Section 42 — Estate of registered proprietor paramount:

- (1) Notwithstanding the existence in any other person of any estate or interest ... but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except —

- (a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
 - (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
- (2) ...
- (a) ... the reservations exceptions conditions and powers...contained in the Crown grant of the land;
 - (b) any rights subsisting under any adverse possession of the land;
 - (c) any public rights of way;
 - (d) any easements howsoever acquired subsisting over or upon or affecting the land;
 - (e) the interest (but excluding any option to purchase) of a tenant in possession of the land;
 - (f) any unpaid land tax, and also any unpaid rates and other charges ... *Local Government Act 1958*, s 158 of the *Water Act 1989* ...

These exceptions have the effect of rendering the register inconclusive. There are these eight classes of interest which, despite not being listed on the register, will be paramount where a registered proprietor fails to look beyond the register. To this extent, they represent (arguably) necessary concessions to the curtain principle.

The folio exception deals with a situation of administrative error. For example, the folio of a previous proprietor may have erroneously been misplaced.

The s 42(2) 'exceptions' are arguably the most significant exceptions to indefeasibility in any Australian jurisdiction. Many unregistered interests are enforceable against subsequent registered proprietors.

Several policy considerations are raised by these exceptions:

- 1 Adverse possession – should it be recognised?
 - Can't be determined by searching the register
 - Undermines the idea of conclusiveness
- 2 Is section 42(2)(d) (easements) consistent with the policy of the Torrens system?
 - Arguably the Torrens legislation in Victoria creates very wide statutory exceptions to indefeasibility of title and to that extent raises questions about the conclusive nature of the register
 - In Victoria there is little incentive to register easements because even where unregistered such an instrument may prevail over the title of the registered proprietor by virtue of s 42(2)(d)
 - This undermines the incentive for parties to register their interests
- 3 Can a mortgagor create a lease without the consent of the mortgagee?
 - If he or she does so, will the lease bind a purchaser from the mortgagee?
 - What if the lease is registered?
 - See *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589

II **Fraud**

A *Introduction*

Fraud is the most significant exception to indefeasibility. Sections 42 of the *TLA* provides for the existence of the exception. Section 43 articulates several implications in the context of notice. The consequences of fraud are formally defined by s 44 of the *TLA*:

Section 44 — Certificate ... void for fraud:

- (1) Any folio procured by ... fraud shall be void as against any person defrauded or sought to be defrauded and no party to the fraud shall take any benefit therefrom...
- (2) But nothing...shall be interpreted so as to leave subject to ... ejection or ... damages or deprivation of the estate or interest in respect of which he is registered proprietor any *bona fide* purchaser for valuable consideration of the land on the ground that the person through whom he claims was registered through fraud.

These provisions make it clear that registration can be 'undone' on the basis of fraud. However, having regard to s 44(2) and the objectives of the Torrens system, courts have interpreted this exception reasonably narrowly.

In interpreting and applying s 44, three basic questions arise:

- 1 What is fraud?**
Only conduct that involves actual moral turpitude and dishonesty will constitute fraud;
- 2 By whom must the fraud be perpetrated?**
Generally, only the fraud of the registered proprietor of the interest that is being challenged, or of his or her agents, will suffice; and
- 3 Before when must the fraud be perpetrated?**
Generally, the fraud must occur before the interest that is being challenged is lodged for registration.

B *Definition of Fraud*

Fraud is 'personal dishonesty or moral turpitude'.¹ The archetypal definition of fraud was given by the Privy Council in *Assets v Mere Roihi* (a case concerning the colonisation of Maori settlements in New Zealand). In that case, Lord Lindley stated (at 210) that

fraud ... means actual fraud, that is, dishonesty of some sort ... Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered proprietor for value ... must be brought home to the person whose registered title is impeached or to his agents.

¹ *Butler v Fairclough* (1917) 23 CLR 78, 90.

The following requirements, generally speaking, delimit the boundaries of the legal concept of fraud under the Torrens system:

- (i) Knowledge of an unregistered interest is not of itself fraud (*Mills v Stockman*);
- (ii) There must be actual fraud not 'equitable' fraud (*Wicks v Bennett*);
- (iii) There must be more than mere negligence on part of registered proprietor (*Grgic*);
- (iv) Knowledge of a fraud committed by someone else can constitute fraud (*Russo*); and
- (v) Wilful blindness or recklessness as to someone else's fraud can constitute fraud (*Pyramid*).

These boundaries are examined in turn.

1 Notice of an unregistered interest is insufficient

Section 43 of the TLA alters the common law position vis-à-vis the doctrine of notice. Knowledge by the registered proprietor that any such trust or unregistered interest is in existence shall not of itself be deemed fraudulent. At common law as well, mere notice does not constitute fraud; however, notice of a prior equitable interest will render same enforceable (*Mills v Stockman*). Under the Torrens system, by contrast, subsequent registration will still defeat a prior interest even when the registered proprietor has actual notice that interest: TLA s 43.

Mills v Stokman (1967) HCA:

Facts

- Two plots of land exist: one is Torrens land title and the other general law land
- In 1955, the Mills became owners of the land
- 1955 — The Mills and Warren entered an agreement (in writing but not under seal) allowing Warren to come on the land and take the slate in return for payment (this is held to be a profit a prendre)
- 1960 — Warren assigns the benefit of the agreement (the profit) to Stokman
- 1960 — The Mills sell the land to Daphne Mills (Mr Mills' mother), but payment of the purchase price and conveyance of the title does not take place until 1963
- 1964 — Mrs Mills refuses to allow Stokman to come on the land (due to a dispute regarding payment); however, she does have notice of Stokman's prior interest
- Stokman brings an action seeking an injunction to restrain Mills preventing entry

Issue

- Can Stokman enforce his profit a prendre against Mills?

Reasoning

- Barwick CJ:
 - Mills purchased land with notice of Warrens' equitable interest
 - Impact of the doctrine of notice: person taking for value with notice of prior interest bound by that interest
 - Here, as regards the general law land, the profit binding upon the owner of the land who subsequently purchases with notice of the interest
 - Torrens system

- Profit not enforceable in respect of the Torrens land because mere notice was not fraud and registration extinguished the prior equitable interest of Stokman.
- Spectrum - from Notice to Fraud
- Mere notice will not constitute fraud for TLA (see s43).

Decision

- Barwick CJ: ‘...the 1955 agreement, plus consideration paid for it, creates an equitable profit a prendre: express grant of right to enter the land and remove the slate in the heap.’

Knowledge of an unregistered interest is not fraud (*Mills v Stockman*).

On a spectrum of fraud, notice lies at one (the innocent) end. At the other end lies forgery. The more morally ambiguous zones lie in between; for example, where the registered proprietor has notice of the interest and takes some further action (eg, a promise), or where the registered proprietor perhaps ought to have known of another’s fraud.

Although notice of an unregistered interest is insufficient to amount to fraud (*Mills v Stockman*), additional promises made to the holder of that interest may, when made dishonestly, be fraudulent (*Loke Yew v Port Swettenham Rubber Co Ltd*).

Loke Yew v Port Swettenham Rubber Co Ltd (1913) Privy Council:

Facts

- Eusope is the owner of 322 acres of land in Malaysia
- Loke Yew has an equitable interest in 58 of those acres
- Rubber Co wants to buy the land
- Eusope refused to sign unless he got an assurance from them that they would not disturb Loke Yew’s possession
- To induce Eusope to enter a transaction, Mr Glass, representing Rubber Co, agrees not to disturb Loke Yew in his possession of the 58 acres of land
- Eusope is still not satisfied with that and he presses for a written agreement
- Consequently, Mr Glass signs a document to the effect that for the purchase of the land, ‘...as regards Loke Yew’s ... land which is included in the said grant I shall have to make my own arrangements’
- Mr Glass signed a document and made the oral promise; Eusope, upon receiving that document, transferred all 322 acres to the rubber company
- The transaction is completed and Rubber Co becomes registered proprietor
- However, the promise (both oral and written) was made dishonestly; Glass never intended to honour it, and it was made solely for the purpose of inducing Eusope to execute a transfer of the whole 322 acres
- After the transfer Rubber Co offers to buy Loke Yew’s land at a price substantially less than its market value
- Loke Yew declines the offer and the rubber company now seeks to evict Loke Yew
- Loke Yew brings a counter-claim seeking a declaration that the transfer should be set aside and that he owns the 58 acres

Issue

- Was giving a false promise fraud on the part of Mr Glass?

Reasoning

- Clearly, Glass knew of Loke Yew's unregistered interest; naturally, this is insufficient
- However, Glass went further: there was an explicit promise to respect the rights of Loke Yew and this was contravened
- Mere notice of an unregistered interest and moving to defeat that interest by registration will not constitute fraud
- However, fraud will be found where there is notice of the unregistered interest, *plus* some additional conduct

Decision

- The conduct was fraudulent and the transaction is set aside
- This was fraud, and an exception to indefeasibility
- The agent deliberately induced Loke Yew to enter the contract intending to defraud him of his interest

The requirement that there be more than mere notice was confirmed in *Bahr v Nicolay [No 2]* by Mason CJ and Dawson J:

Bahr v Nicolay [No 2] (1988) HCA:

Reasoning (Mason CJ and Dawson J)

- 'There is no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest' (*Mills v Stokman*)
- Fraud requires 'actual dishonesty'

2 *There must be actual fraud*

There must be actual, not equitable fraud. Equitable fraud is more akin to *in personam* rights (see *Bahr v Nicolay [No 2]*).

Wicks v Bennett (1921) HCA:

Facts

- Wicks and others, including Bennett, formed a partnership
- They occupy land in Broken Hill, building up their business
- The cohabitation occurs under an unregistered agreement for lease
- This lease did not fall within the exception for leases in s 42(2)(e) equivalent – not a paramount interest
- Without his knowledge, Bennett acquires the fee simple and sell it to Diplock
- Wicks had casually spoken to Diplock and let him know that he had an interest in the land (the lease)
- A conflict arises in the partnership; Wicks and others take action against Bennett
- They now seek to have the sale set aside on the grounds that he is not a *bona fide* purchaser; they want to impeach his title
- Wicks argues that Diplock paid too high a price, 'colouring' the transaction between Diplock and Bennett

Issue

- Was the transaction fraudulent?

Reasoning

- The transaction was *bona fide*, and not a collusive sale (cf *Latec Investments*)
- It didn't amount to anything more than notice
- The actions of Diplock were consistent with his knowing that Bennett was a member of the partnership, and selling the land in his capacity as such
- 'Fraud ... means something more than mere disregard of rights of which the person sought to be affected had notice. It imports something in the nature of "**personal dishonesty or moral turpitude.**"'
- Serious conduct: almost connotes a mental element, a *rea*
- Higgins J:
 - Where there is nothing but knowledge of an unregistered interest, it is not a fraud to buy
 - Such knowledge of an unregistered interest 'may be an element in the building up of a case of fraud, but it does not "of itself" constitute fraud.'
 - The party seeking to impugn the transaction must therefore show something more than mere knowledge or equitable fraud

Decision

- No fraud

Wicks v Bennett suggests that a mental element — an intention to defraud — must be shown on the part of the impugned party. It is not enough to show that the registered proprietor 'closed her mind' to the fact of another's unregistered interest. Careless disregard is not sufficient and there must be some form of dishonesty.

Similarly, unless there is dishonesty, use of registration to defeat an unregistered interest, without more, will not amount to fraud (*R M Hosking Properties Pty Ltd v Barnes*).

R M Hosking Properties Pty Ltd v Barnes (1971) SA SC:Facts

- A parcel of land contains a pharmacy in the Adelaide central business district
- The registered proprietor leases this land to Barnes for 2 years
- The lease is in registrable form but had not been registered
 - The South Australian short term leases exception only applies to leases of less than one year in duration
 - This means that the lease didn't comply with the formalities and was hence equitable only
- The lease also contains a covenant whereby the owner agrees to grant an option for renewal for two years (for a term of years plus another option to renew for same)
- However, the registered proprietor ('RP1') enters into an agreement to sell the land to Hosking (they want to develop a car park on the land)
- Hosking knew about the lease, but thought it would end forever in a few months' time
- After the contract between RP1 and Hosking, but before settlement, the managing director finds out about the option
- The director of Hosking writes a letter to Barnes stating as follows:
 - 'I was not aware of the full terms of your lease and am concerned'

- He offers to pay Barnes \$1000 if he vacates within 90 days
- Barnes declines, having an established business on the premises
- Hosking has the land transferred and becomes RP2
- Hosking asks Barnes to vacate and commences an action of ejectment

Issue

- Is this something more than notice, such as to render Hosking's conduct fraudulent?

Reasoning

- Hosking only had knowledge of the lease and of the option to renew; this is insufficient for fraud
 - Knowledge of the option was 'not itself evidence of fraud'
 - It would 'stiltify provisions of the Torrens legislation' to hold such
 - 'In enacting [s 42 equivalent], the legislature meant that a *bona fide* purchaser need not take into account the rights of persons claiming under that interest'
 - Commercial certainty is recognised over justice

Decision

- There was no actual fraud in the sense of dishonesty of some sort
- Hosking is the registered proprietor free from all unregistered encumbrances

3 *There must be more than mere negligence*

Because fraud must be dishonest, mere negligence will not suffice. Actual fraud entails something more than mere negligence (*Grgic v Australian and New Zealand Banking Group Ltd*).

Grgic v Australian and New Zealand Banking Group Ltd (1994) NSW SC:Facts

- Mr Grgic's son and daughter-in-law want to obtain a loan to prop up their ailing business
- They intend to use Mr Grgic's property as security
- They obtain his certificate of title, and have a friend of Mr Grgic's, Mr Sierra, impersonate him at the bank
- Mr Circum, the bank manager, explains everything to "Mr Grgic" and outlines his obligations, asking him if he wants to seek independent legal advice, etc
- Mr Circum witnesses Mr Sierra's signature, in effect claiming that he has witnessed the signature of the mortgagor and real registered proprietor 'known to him personally'
- However, at no time during the proceedings did he obtain "Mr Grgic's" identification

Issue

- Was this gross negligence on the part of Mr Circum, and his false attestation that the real registered proprietor was 'known to him personally', fraudulent?

Reasoning

- The bank always honestly believed they were dealing with the real registered proprietor
- This case stands for the proposition that mere negligence doesn't constitute fraud
- The facts fell short of demonstrating any personal dishonesty on the part of the bank manager
- There was 'not the slightest evidence' that the bank 'was seeking ... to take advantage of Mr Grgic Snr'

- Therefore, there is no mental element (intention to defraud)
- The Court found that the Bank staff were 'less meticulous than they might otherwise have been in seeking to establish that the person who was introduced to them ... was in truth the registered proprietor'
- However:
 - '...a less than meticulous practice as to the identification of persons purporting to deal with land registered under the provisions of the Act does not constitute a course of conduct so reckless as to be tantamount to fraud...'
 - Thus, the bank was less than meticulous, slack, even negligent, but this is not fraud

Decision

- Mr Grgic loses his house, but even that doesn't cover the costs of the mortgage
- However, he doesn't have to pay more than that and is not bound by the personal covenants made by his impersonator

In some circumstances, negligence may even mitigate against fraud, since it may be that the negligent party is innocent as to the consequences of their actions and engages in the relevant conduct without knowledge of the consequences and hence without dishonest intent. In such circumstances, there cannot be fraud on the part of that party, or of the party for whom they act as agent, if the principal does not have knowledge of the conduct (*Russo v Bendigo Bank Ltd and Reichman*).

4 Knowledge of fraud can amount to fraud

Actual or imputed notice of another's fraud can constitute fraud (*Russo*).

Russo v Bendigo Bank Ltd and Reichman (1999) Vic SC:

Facts

- The Bendigo Bank registers a mortgage with Brigida Russo, the mortgagor, to secure a loan for a company controlled by Russo's daughter and son-in-law
- The documents contain a forged signature by Russo's son-in-law
- A solicitor's clerk also signs the attestation clause even though not present at the actual signing of the documents (she can't remember when the signing took place)
- Reichman, her employer, gave her explicit instructions not to sign anything without being in their presence
- The clerk did not have much knowledge about how documents were signed or the significance of attestation and nevertheless registered the document

Issue

- Was the clerk's conduct fraudulent?
- Was the bank guilty of fraud?

Reasoning

- Clerk's conduct
 - Although the attestation by clerk was false, this is not fraud as there is no 'dishonesty or moral turpitude' on the part of the clerk
 - This qualifies the elements of personal dishonesty:
 - There is no sense of a wilful and conscious disregard and violation of the

- rights of other persons
 - No evidence that the clerk knew she was 'putting the mortgage on the path to registration', and that it would have the consequences that it did (giving indefeasible title to the bank)
 - Not the requisite knowledge about the consequences of her actions
 - Alternatively, fraud by the bank's agent could not be imputed back to bank
- The solicitor
 - Reichman was not guilty of fraud within the meaning of s 42 because he had no knowledge that Mrs Russo did not personally sign the documents or of the falseness of the attestation by clerk, and he cannot be fixed with constructive notice
- Bank's conduct
 - Responsibility for procedures leading to mortgage registration?
 - "...for the present it may be assumed that some accumulation or aggregation of matters or factors may be permitted for this purpose [as in *AGC v De Jager* where knowledge of false attestation held to constitute wilful blindness and thus fraud]."
 - Present case different. "No combination of acts in the present case which could properly be held to amount to fraud." Ormiston JA at 389.
- Ormiston JA (Winneke P and Batt JA agreeing):
 - Applying *Assets Co*, fraud requires actual dishonesty: 'a wilful and conscious disregard and violation of the rights of the other person'
 - Because Reichman did not know of the clerk's false attestation, he could not be fixed with the clerk's fraud, and nor could the bank
 - Reichman's failure to make enquiries into the attestation does not constitute fraud because there was nothing suspicious in the matter to put him on notice
- Batt JA:
 - Fraud involves an intent to adversely affect the rights of another, or at least recklessness that such rights might be affected
 - The clerk did not possess such an intention and so cannot be said to have committed fraud

Decision

- Registration of the mortgage was not acquired by the bank's fraud, and they cannot be fixed with imputed knowledge of the fraud because Reichman likewise had no actual or constructive knowledge
- Consequently, the bank's registered mortgage is indefeasible

In *Latec Investments*, the circumstances of Latec's sale gave rise to the inference that it was made in bad faith and therefore fraudulent. This fraud is 'fixed' (attributed to) Latec's subsidiary, Southern Hotels. Southern Hotels was the party obtaining registration (see below), so the sale could be set aside for fraud.

Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965) HCA:

Reasoning

- All Justices: the sale is fraudulent

- The purchaser was a subsidiary of itself: same board of directors, wholly owned
- The sale took place after an auction which
 - was scheduled on an unfavourable day: Friday afternoon (instead of Wednesday)
 - was not well advertised
 - had an unreasonably high reserve price (\$85 000)
- The auctioneer advised Latec to take the highest bid (\$58 000), being above their valuation
- However, Latec makes *no effort* to negotiate with the highest bidder
- It was a sham auction designed to testing the market to see what would look plausible so they could sell it to themselves
- Being passed in at auction, the sale proceeds to Latec's subsidiary at a price slightly higher than the highest bid at sale (\$60 000)
- Menzies J:
 - The sale showed a want of good faith
 - The transaction was thereby voidable for fraud
 - Southern Hotels is 'fixed' with Latec's fraud
 - 'The lack of good faith on the part of Latec to which of course its creature, Southern must have been a party is sufficient ground for avoiding the sale to Southern.'
- Kitto J:
 - It was 'a collusive and colourable sale'

As *Latec* illustrates, knowledge of a fraud committed by someone else can constitute fraud and may mean that the registered proprietor loses the benefit of indefeasibility (*Assets Co Ltd v Mere Roihi*).

However, constructive notice of another's fraud is insufficient (*Vassos v State Bank*).

5 *Wilful blindness can amount to fraud*

The possibility that a registered proprietor might, in hiding his eyes to the existence of a fraud, be himself act fraudulently was raised in *Bahr v Nicolay [No 2]*:

The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

However, a failure to make enquiries does not itself constitute fraud (*Pyramid Building Society v Scorpion Hotels*). In *Pyramid*, a mortgagor could not deny the enforceability of a registered mortgage because fraud under the TLA does not include a failure to make enquiries which should have been made, so the mortgagee did not act fraudulently. Applying *Vassos v State Bank*, the fraud of a third party is not sufficient to set aside the mortgage. Therefore, the mortgage cannot be set aside.

Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd (1997) Vic CA:Facts

- Pyramid lends money to Scorpion Hotels; an agent of Scorpion, the mortgagor, signs the mortgage instrument to purchase a building at Queenscliff
- Two directors were required to witness the creation of the mortgage; however, the agent and his witness are not directors of the company
- Scorpion subsequently defaults on the mortgage repayments and Pyramid sues Scorpion for possession of the mortgaged premises
- Scorpion argues that in failing to verify the mortgagor's affixation of the company seal, Pyramid was reckless or wilfully blind to the truth of falsity of the mortgage
 - It thus contends that the registration of the mortgage by the mortgagee was fraud
 - It argues that the mortgage was void because it had not been properly executed
 - The affixing of the common seal of the company had not been witnessed by two directors as was required by Scorpion's rules
 - Mary Lewis who had signed as a director, was not in fact a director
 - A number of other actions by a Scorpion director and Pyramid and its solicitors are said to amount to fraud on the part of Pyramid, because they were wilfully blind or recklessly indifferent to the validity or truth of the instrument of mortgage

Issue

- Is the mortgagee's registered title defeated by fraud under s 42 of the *Transfer of Land Act 1958* (Vic)?

Reasoning (Hayne JA)

- The fact that the registered mortgage was not executed by the mortgagor does not affect the rights of the mortgagee upon registration
- The mortgagee's title upon registration cannot be defeated on the basis of fraud if it is the fraud of another party
- Fraud means 'actual dishonesty or moral turpitude'; there must be proof of dishonesty **by the person who registered the title** (*Vassos*)
 - Fraud may take various forms
 - 'pretence and collusion in the conscious misuse of a power' or a 'dishonest course' (Kitto J in *Latec*)
 - Or registering an instrument which the registrant knows to be forged
 - *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483 and *Beatty v Australia and New Zealand Banking Group Ltd* [1995] 2 VR 301:
 - '[The] fact that a person employed by the mortgagee had signed an instrument of mortgage as a witness to the affixing of the signature by one of the mortgagors when in fact that witness had not seen the mortgagor sign the document.'
 - 'Thus in both cases the employee of the mortgagee knew that the document contained a false statement that it had been executed by the mortgagor in the presence of the person who had signed as witness. In each case it was held that the mortgagee was guilty of fraud within s 42 of the *Transfer of Land Act*.'
- Here, however, there was no forgery; Pyramid did not know anything of the kind; it was just alleged that it was recklessly indifferent to the truth of the mortgage document
 - 'In my view no such case was made out here ... in this case, there is no evidence that Pyramid, or anyone acting on its behalf, knew that the witness to the affixing of the mortgagor's company seal was not a director of the company (if in fact that was so).'
 - 'There was no evidence that Pyramid, or anyone acting on its behalf, knew that the execution of the mortgage had not been authorised by Scorpion (if that was so).'

- Wilful blindness
 - It was not suggested to Carr (the solicitor who had acted for Pyramid in the mortgage transaction) that he had chosen not to make enquiries about these (or any other) matters because he feared what he might find out; again, ‘no such case was made out.’
 - There is no evidence that Pyramid, or anyone acting on its behalf, knew that the execution of the mortgage had not been authorised
 - Simply failing to go further and make enquiries which should have been made is not fraud, even if it would have shown the mortgage not to be properly executed
 - There was no ‘moral obtuseness’
- However, it may be possible for Scorpion to obtain an *in personam* remedy, as in *Frazer v Walker*
 - Here, though, neither the conduct of Pyramid nor its solicitor was such as to give rise to a personal equity in Scorpion sufficient to set the mortgage aside

Decision

- On the facts, there is nothing to indicate that the mortgagee knew the mortgagor’s agent was not authorised to execute the mortgage; even though the mortgagee could have taken further steps to discover that the mortgage had not been properly executed, their failure to do so is not fraud
- Therefore, the title obtained by Pyramid on registration of its mortgage is indefeasible

Pyramid is authority for the proposition that it is not fraud simply to fail to make enquiries that may have uncovered or discovered evidence of fraud. The evidence showed that the mortgagee did not know that the seal had not been properly affixed, only that they may have discovered this had they made enquiries. That is not fraud.

As Sir Anthony Mason notes, ‘it is difficult to see how [in the context of the Torrens title fraud exception] wilful blindness can amount to fraud’. Wilful blindness can only give constructive notice of fraud. However, notice is not enough.

Pyramid reinforces this seminal statement from *Assets Co*:

Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered proprietor for value ... must be brought home to the person whose registered title is impeached or to his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him.

In *Macquarie Bank v Sixty-Fourth Throne*, there was also no evidence to support wilful blindness. The case may be contrasted with *AGC v DeJager*.

Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd (1998) Vic SC:

Facts

- A solicitor, Michael Kandy, and his wife, Mrs Kandy, invest money in property
- One such property, in Ringwood, is acquired and developed, and later transferred to the Taffs (Kandy’s parents-in-law)
- 64 Throne is the trustee company for the Taffs (it owned the land on trust)

- Kandy encounters financial difficulties and seeks to refinance a loan of ~\$34m through Macquarie Bank
- As security, he offers the 64 Throne property and signs a personal guarantee
- Though unclear from the facts, an inference may be drawn that Kandy and his wife engaged in a forgery when attaining the mortgage; they affix the common seal of the Taffs without their permission and subsequently register the mortgage
- There are also irregularities in the way the mortgage was executed
- One of the bank's officers knew that Kandy was no longer a director of the company, and that he did not own 64 Throne
- Solicitors who prepare the mortgage documents had performed a company search on 64 Throne, but had not checked that search against the signing of the mortgage
- It emerges that the solicitors had not ascertained that the mortgage was forged

Issue

- Can the mortgage be set aside for fraud on the part of Macquarie Bank?

Reasoning

- The Court approves a definition of fraud requiring some form of personal dishonesty beyond equitable fraud
- Applies *Bahr v Nicolay* per Mason and Dawson JJ (who in turn apply *Assets Co*)
- Examples:
 - Lodgement of a mortgage with knowledge of the forgery is fraud
 - Lodgement of a mortgage where ignorance is attributable to a reckless failure to enquire is not fraud
 - Principle that dishonesty by virtue of the second limb of *Barnes v Addy* (receipt of trust property) is fraud
- Although Macquarie Bank had been reckless, they did not, on the facts, have actual knowledge of forgery
 - Though the bank had facts before them that, had they further investigated, would have led them to discover the fraud, their failure to make such enquiries was not sufficient to defeat Macquarie's indefeasible title
 - Tadgell JA: need actual fraud, not recklessness or carelessness
 - '...wilful blindness connotes a form of designed or calculated ignorance of which none on the part of the appellant or its agents was proved'
 - Thus there is no evidence that the bank through any servant or agent had actual knowledge of the forgery before registration
 - It is therefore not fraud
 - Even if it was the case that Macquarie Bank had constructive knowledge of the fraud (that there were circumstances which should have put them on enquiry), this would not amount to fraud because there would not be actual knowledge
- This is a strict definition of fraud: need actual knowledge
- Was it possible to aggregate the knowledge of individual officers to impute the sum of it to the corporation (bank) to establish fraud?
 - No, it is not possible to simply aggregate all the knowledge of the corporation to create a 'super mind' of a corporation ('the bank') that could be fixed with such knowledge
 - This is because the Court cannot create a notional person with dishonest intent
 - Actual fraud (moral turpitude) lies at the heart of ss 42–4
 - However, an *in personam* remedy is available

Decision

- Applying *Barclays Bank v O'Brien*, they had acted unconscionably toward 64 Throne; the trial judge sets aside the mortgage on the *in personam* ground

6 Summary

- Actual fraud is personal dishonesty or moral turpitude (*Assets Co; Wicks v Bennett*);
- Mere notice does not equal fraud (*Mills v Stockman*);
- Mere notice plus dishonest disregard of rights is fraud (*Loke Yew*);
- Mere notice plus disregard of rights is qualified by the need for fraudulent intent or personal dishonesty and moral turpitude (*Wicks; Hoskings*);
- There must be wilful and conscious disregard of rights (*Russo*);
- Knowledge of fraud may amount to fraud (*Russo; Latec*);
- Mere negligence is not fraud (*Grgic*); and
- Wilful blindness may amount to fraud, but simply failing to make enquiries is not wilful blindness (*Pyramid*).

'Forgery of an instrument by a person who becomes registered as proprietor by virtue of that instrument will be regarded as fraud.'

'Australian courts have treated species of equitable fraud that involve dishonesty or moral turpitude by the registered proprietor as falling within the fraud exception' (*Latec Investments v Hotel Terrigal*). However, 'the most recent Australian cases continue to maintain a strict approach to the fraud exception' (see, eg, *Pyramid Building Society*).

'Cases of fraud against a previous registered proprietor do not usually involve prior equities if the perpetrator of the fraud remains registered as proprietor, the title is not indefeasible and the previous proprietor can recover possession. If, however, a *bona fide* purchaser for value becomes registered, the victim loses the right to recover possession and is relegated to a right to recover damages from the Crown under the compensation provisions.' This is the result of the application of immediate indefeasibility.

C Identity of the Fraudster

The fraud must be that of the registered proprietor or his agent. Fraud by another party is insufficient, even if the registered proprietor is wilfully blind to it (*Pyramid Building Society*).

If fraud is to be used to impeach a registered title, the current approach of immediate indefeasibility mandates that such fraud be that of the registrant. The test for fraud is thus strict. The fraud of another party to the instrument is insufficient basis for denying the title of the registrant (*Vassos v State Bank*). Thus, title, once registered, cannot be defeated unless the registrant registered it fraudulently or was privy to fraud.

Vassos v State Bank of South Australia (1993) Vic SC:Facts

- Peter Vassos, Anne Pettinato and Tommy Vassos are the registered proprietors in fee simple as tenants in common in equal shares of a hotel in the city
- The property is subject to a registered mortgage to Sandhurst as security for a \$130 000 loan
- The father, Peter, was repaying the mortgage
- Due to rising interest rates, Tommy takes out a replacement mortgage from the State Bank of South Australia, but to the value of \$500 000, not \$130 000 (he exceeds his authority)

- Tommy fraudulently forges the signatures of Peter and Anne in order to do so
- State Bank was not aware of the fraud
- Peter and Anne seek declarations that the guarantee under the new mortgage is void *ab initio* as against the defendant bank

Issue

- Is the effect of Tommy's fraud to void the mortgage under s 44(1) of the *Transfer of Land Act 1958* (Vic)?
- If not, does the bank hold their interest as mortgagee in common with Peter, Anne and Tommy?

Reasoning (Hayne J)

- If the bank acquired an indefeasible interest as mortgagee, it does not matter whether Peter and Anne's actual signatures were present on the form: registration cures defects
- *Chasfild Pty Ltd v Taranto*:
 - Fraud in s 44(1) means 'fraud associated with the registration'
 - An innocent proprietor who becomes registered as a result of fraud holds subject to the interest of the previous, defrauded proprietor until the land is subsequently sold to and registered by a second, *bona fide* purchaser
 - This reflects the doctrine of deferred indefeasibility
 - Even if a mortgagee obtains registration without fraud or knowledge thereof, the mortgagor whose signature had been forged prevails
 - This is no longer good law in Victoria
- The labels 'immediate indefeasibility' and 'deferred indefeasibility' are 'no more than convenient shorthand expressions generally describing the effect of provisions of Torrens title legislation' — not general principles by which to construe the legislation
 - Although **indefeasibility is 'the very essence of the Torrens system'** (*Breskvar v Wall* per Windeyer J), the registered proprietor has legal title 'subject only to equities and such interests as the Act expressly preserves'
 - Issue: is the bank subject to an equity or interest preserved by the Act?
- *Frazer v Walker*: mortgagor's signature forged, defaults, mortgagee exercises power of sale and sells land to *bona fide* third party; no fraud, but at common law mortgage is void; registration however is effective to divest title and protect registered proprietor of the mortgage against adverse claims (at 584)
- *Breskvar v Wall*: applies *Frazer v Walker* (which concerned New Zealand legislation) to Queensland Torrens legislation
 - 'The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration'
- Deferred indefeasibility: *Clements v Ellis* (Dixon J)
 - 'The principle, in my opinion, is that a prior registered estate or interest, for the removal of which from the register there is no authority but a **forged or void instrument**, is not destroyed unless afterwards a person, who, according to the existing condition of the register is entitled to do so, gives a registrable instrument which is **taken bona fide for value and registered**. The justification for destroying an existing legal estate or interest, which has already been duly established upon the register, is, in other words, found only in the **necessity of protecting those who subsequently deal in good faith and for value in a manner, which, upon its face, the register appears to authorise**, and who then obtain registration.'

- This view was conclusively rejected in *Bahr v Nicolay [No 2]* and *Breskvar v Wall*
- Forgery of a signature is undoubtedly fraud; the issue is whether fraud of a third party to the registration is sufficient to set aside the registration, or whether it must be the fraud of the person seeking registration
 - 'In my view the words of s 44(1) suggest that there must be established fraud by or on behalf of the party who seeks and obtains registration'
 - 'Showing no more than that **a party to the instrument** that is registered has acted fraudulently in connection with the execution of the instrument **does not show that the folio of the register or the amendment to the register was procured or made by fraud** – it shows only that the instrument, as distinct from the amendment to the register, **was procured or made by fraud**'
- Other sections in the *Transfer of Land Act* also refer to 'fraud'
 - '...the exception "in case of fraud" that is mentioned in s 42 is limited to fraud by or on behalf of the person obtaining registration'
 - 'it is clear that s 42 is now to be read as providing for an exception to indefeasibility only in cases where the registered proprietor has obtained registration by fraud'
 - '...s 42(1) provides a general rule of indefeasibility, subject to an exception for cases of fraud on the part of the person making the registration or his agent, and s 44(1) then deals expressly with the **consequences that are to flow with respect to the register** as between the person defrauded and parties to the fraud. Section 44(2) goes on to deal with the position of the *bona fide* purchaser from a person who has procured registration by fraud.'
- *Chasfild's Case* was wrongly decided: 'on its true construction s 44(1) is not intended to and does not extend the operation of the fraud exception to s 42(1)'

Decision

- Here, the title obtained by the bank, once registered, cannot be defeated unless the bank registered it fraudulently or was privy to fraud
- The mere fact that some other party to the instrument of mortgage (Tommy) has acted fraudulently is insufficient to defeat the registration, even though it was this instrument that the bank registered
- Consequently, the bank is entitled to possession of the land
- Because there was no 'fraud, neglect or willful default on the part of [Peter and Anne], registration of the forged mortgage confers a right to compensation under s 110(1)(c) of the *Transfer of Land Act*
 - They are indemnified under s 110 to an amount of \$190 000 and not further bound by the mortgage, which is set aside

Vassos is authority for the proposition that s 42 fraud means the fraud of the person obtaining registration. Section s 44(1) merely states the consequences that flow from that fraud.

Pyramid building Society v Scorpion Hotels applies *Vassos* and overrules *Chasfild*. In so doing, it confirms that unless the registered proprietor (or its agent) has engaged in fraud, an indefeasible title is obtained. However, on the facts, neither Pyramid nor their agent (the solicitor) was dishonest, so no fraud is made out.

Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd (1997) Vic CA:Reasoning

- There must be fraud by the registered proprietor
- It is not enough that there is some general fraud involved in the transaction
 - (A failure to make enquiries or want of due care are often argued to establish that it is the registered proprietor who is party to the fraud)
- 'It was accepted in argument by all parties that the exception "in case of fraud" that is mentioned in s 42 is limited to fraud by or on behalf of the person obtaining registration' (per Hayne J at 326)
- 'If s 44 (1) is to be read as avoiding entries on the register resulting from instruments in connection with which any of the parties has acted fraudulently, it represents a significant additional inroad on the indefeasibility otherwise created by s 42' (per Hayne J at 327)

Decision

- Only the fraud of the new registered proprietor (here the mortgagee) itself can vitiate a title under ss 42 or 44 of the TLA
- Thus, unless *Pyramid* was a party to the fraud (and hence itself fraudulent), the title could not be defeated

Even the exalted *Assets Co* definition of fraud acknowledges that the fraud which must be proved to establish defeasibility is that of the new registered proprietor or their agent:

Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered proprietor for value ... must be brought home to the person whose registered title is impeached or to his agents.

D *Fraud of an Agent*

Issue: when is the fraud of an agent imputed to their principal?

- 1 When the agent is fraudulent him or herself within the meaning of s 42(2); and
- 2 When the agent is acting within the actual or apparent scope of his or her authority.

An agent will be said to act fraudulently if he or she knows of facts that would make it fraudulent to continue with registration. The agent is typically a solicitor or banker. Agency principles apply to impute the fraud of the agent to the principal where the agent has actual knowledge of the fraud.

For example, in *Russo*, the inexperienced clerk put the documents on the path to registration with an honest mind. Her principal, Reichman, had not known that a party had falsely attested to the mortgage and had still gone on to register the document. However, if Reichman had known of the false attestation, or if the clerk did dishonestly make the attestation, then that would have been fraud and it would have been fixed to the principal (the bank), since they were acting within the scope of their authority to act with respect to the conveyance.

The difference between actual and apparent authority is as follows:

- **Actual authority**
Specific instructions to the agent (eg, mortgagee to solicitors: 'you must fix up the

mortgage’);

- **Apparent authority**

Matters necessarily incidental to a general direction or instruction, though not specifically mentioned (eg, getting the transfer signed, lodged and registered).

In *Loke Yew*, for example, Mr Glass made representations to the plaintiff while acting within the apparent scope of his authority. Consequently, his fraud was imputed to the defendant.

Loke Yew v Port Swettenham Rubber Co Ltd (1913) Privy Council:

Decision

- In making representations, the agent Glass was acting within the scope of his agency
- Therefore, fraud by Glass as agent was imputed to his principal (Rubber Co)
- The fraud was in this way ‘brought home to the registered proprietor’
- The case is one of ‘fraudulent conduct arising from the dishonest repudiation of a prior interest which the registered proprietor has acknowledged or has agreed to recognise as a basis for obtaining title’

It seems clear that fraud carried out by an agent acting within the actual or apparent scope of their authority will be imputed to the principal. This is so even if the agent was acting for their own gain.

Similarly, where the agent has actual knowledge of a fraud, this is imputed to the principal (*Schultz v Corwill Properties*). However, if the agent was acting outside their actual or apparent authority when they discovered the fraud, no imputation will be possible.

Schultz v Corwill Properties (1969) NSW SC:

Facts

- Corwill Properties is the registered proprietor of land
- Schultz advances money to his solicitor, Galea, on a mortgage to be taken out over property
- Galea then forges the mortgage document, takes the certificate of title from his safe (which he held as solicitor), took the money and spent it
- Schultz obtains registration of the mortgage and certificate of title, the former of which he is unaware has been forged
- Corwill now seeks to sell their property
- Galea, aware that he needs to hide his forgery, requests the return of the certificate of title from Schultz and promises to discharge the mortgage at settlement
- Schultz is tricked by Galea into signing a form of discharge
- Corwill goes ahead and registers the discharge
- However, Schultz is not repaid

Issue

- Was the registration of mortgage affected by Galea’s fraud?
- Was the discharge of mortgage affected by Galea’s fraud?

Reasoning

- Fraud of an agent will be brought home to his principal because
 - of the operation of agency principles; and
 - because the agent has actual knowledge of the fraud
- Mere knowledge of the fraud by the agent is not enough: the knowledge must be directly imputed to the principal
 - So even if the agent has knowledge, there is still another step – imputing to the principal; express knowledge will bounce back to the principal, but not constructive
 - The registered proprietor can be fixed with fraud from actual or constructive notice, or imputed by actual (but not constructive) knowledge by an agent
- Agency principles
 - The act of an agent **within the scope of their actual or apparent authority** does not cease to bind the principal because the agent was acting fraudulently and in furtherance of own interests
 - However, the agent must be acting within the scope of their actual or apparent authority
 - *Respondeat superior* is the presumption that the agent has told the principal what the agent knows: this is the rationale justifying the imputation of knowledge to the principal
 - This presumption may only be rebutted where the fraud is the agent's own fraud, or where the agent's knowledge is gained during the course of another fraud
- Application
 - It was not within Galea's actual or apparent authority to forge mortgage documents as an agent for Schultz
 - This was an independent activity in furtherance of his own interests, not done on behalf of Mrs Schultz
 - Consequently, it is not within the scope of agency
 - And Schultz did not himself have any actual knowledge of his agent
 - Therefore it is not possible to impute Galea's knowledge back to Schultz
 - Nor was it within the actual or apparent authority to forge a discharge of mortgage as agent for Corwill

Decision

- Galea's knowledge of the fraud cannot be imputed to Schultz
- Consequently, registration was not affected

Knowledge of fraud by an employee can also be imputed back to the principal (the employer). In *De Jager*, for example, fraud was imputed to the principal because the employees knew that a witness was not present at a signing but witnessed the document anyway. *Grgic* distinguished *De Jager* because there was no actual knowledge on the part of the bank's employee that the attestation was false.

In *Russo v Bendigo Bank*, if the clerk had falsely (and, unlike what actually occurred, dishonestly) attested to a document for registration then knowledge of the fraud may be imputed to the solicitor, and then back to the principal (the bank, who becomes registered proprietor). If this had occurred, the bank's title would have been defeasible for fraud imputed from its agent.

Fraud must induce detrimental action. If an employee's fraud is purely internal and does not affect the other party in any way, then it is unlikely that there is an intention to defraud. Consequently, fraud will not be imputed to the principal (*Bank of South Australia v Ferguson*).

Bank of South Australia v Ferguson (1988) FCA:

Facts

- The bank manager forges and amends some internal bank documents (position statements in relation to a loan)
- These documents did not affect Ferguson's liability or affect his legal obligations under the mortgage
- These actions did not induce Ferguson to act to his detriment
- Ferguson was not misled as a consequence of the forgery, which was strictly internal

Decision

- There was no intention to defraud Ferguson
- The forged signatures did not bind Ferguson
- They served only to speed things up in the bank's processing
- Therefore, the bank was not fraudulent in obtaining registration of the mortgage

E *Timing of the Fraud*

Issue: when must the fraud occur?

The traditional position is that the fraud must occur prior to obtaining registration (*Loke Yew*).

Bahr v Nicolay [No 2] (1988) HCA:

Facts

- The Bahrs receive a Crown grant on the condition that they develop the property
- To obtain money for the development, the property is transferred to Nicolay and leased back to the Bahrs for three years with a provision to repurchase (cl 6)
- Nicolay registers the transfer and becomes registered proprietor
- Nicolay later contracts to sell to the Thompsons, with the condition in the contract (in cl 4) that they acknowledge the rights of the Bahrs to repurchase for \$450 000 (the sale and buyback amount)
- The Thompsons agree to the contract and take and register the transfer, becoming registered proprietor
- They know about the agreement with the Bahrs (by cl 4)
- The Thompsons' solicitor's sends a letter to the Bahrs acknowledging their right to repurchase
- The Bahrs subsequently give notice that they are exercising their right to repurchase and pay a deposit to that effect
- The Thompsons deny that they must give effect to cl 4, relying on their registration
- They refuse to transfer (though there is the issue of whether the Bahrs could actually pay the balance had they agreed at that time)

Issue

- Were the Thompsons fraudulent in obtaining registration?
- Did the conduct of the Thompsons give rise to rights *in personam*?
- The Thompsons argued that it was not fraudulent in obtaining registration so therefore not fraudulent (*Loke Yew*)

Reasoning

- Mason CJ and Dawson J (dissenting):
 - There is no fraud in acquiring with notice of the Bahr's interest
 - Bahr's interest is an equitable interest: notice of it is not fraud (*Mills v Stokman*)
 - There needs to be 'conscious disregard' for their right (*Loke Yew*)
 - Fraud requires dishonesty: must be actual and not constructive fraud
 - Fraud does not exclude all species of equitable fraud: eg, a 'collusive and colourable sale' (suggesting that, like *Latec*, some species of equitable fraud might be included)
 - Fraud need not be limited to getting on the register
 - Time for fraud:
 - The language of previous case law and the Torrens legislation doesn't warrant a restrictive interpretation about when fraud must occur
 - Current approach (*Ferguson*): favour orthodox approach, needs to be prior to registration
 - An undertaking to comply with cl 4 was honestly given at the time of the execution of the transfer
 - This promise was subsequently repudiated
 - The repudiation is fraudulent because it has as its object the destruction of the unregistered interest: preservation of the unregistered interest was the assumption underlying the execution of the transfer
- Wilson Toohey JJ:
 - Despite disparity between New Zealand and Australian cases, the basic principles are clear: there must be actual fraud involving some personal dishonesty on the part of the person obtaining registration
 - Acquiring with notice of a prior unregistered interest and after registration refusing to acknowledge the prior interest is not fraud
 - Disagree with Mason CJ Dawson J:
 - Fraud must be in obtaining registration
 - This best fits with an interpretation of ss 43 and 44(1)
 - The fraud must be before registration
 - Repudiating the interest after registration is therefore not fraud
 - Unlike Mr Glass in *Loke Yew*, at the time they agreed to cl 4 the Thompsons intended to abide by it
 - It was only *after* registration that their intention to repudiate this aspect of their agreement was manifested
 - Because fraud must occur at or before registration, this later repudiation cannot amount to fraud
- Brennan J:
 - No fraud within meaning of s 42 (statutory definition)
 - However, there may be equitable fraud: equity will impose a constructive trust to prevent the unconscionable attempt by the Thompsons 'to deny the unregistered interests to which [they have] undertaken to subject [their] registered title'
 - *In personam* equitable fraud is very different to statutory fraud (see below)
 - A registered proprietor who has undertaken that the transfer should be

- subject to an unregistered interest and who repudiates that interest when the transfer is registered is acting fraudulently in equity and may be compelled to honour (in equity) that unregistered interest
- Indefeasibility does not free the registered proprietor from interests by which he himself has undertaken to be bound: where they deny such interests, it would be fraud to do so, equity prevents the fraud by imposing a constructive trust
 - However, fraud in a legal sense must occur before registration

Decision

- Mason CJ and Dawson J: fraudulent repudiation that occurs *after* registration of an undertaking which induces the transfer can be fraud
- Wilson and Toohey JJ (and Brennan J): fraud must be *prior* to registration
- All Justices agree about the definition of fraud
- The difference between the minority and majority views concerned the relevant time by which fraud had to be manifested
- All Justices: the conduct of the Thompsons created rights *in personam* (the Bahrs are ultimately successful on this basis: see below)

Of note in *Bahr v Nicolay [No 2]* is the inklings of a recognition by Mason CJ and Dawson J (dissenting) that some species of equitable fraud may be included within the statutory definition. Their Honours noted (at 606) that 'not ... all species of equitable fraud stand outside the statutory concept of fraud'. However, it still seems clear that fraud for purposes of s 42 requires personal dishonesty, more than negligence, and so on.

F *Reform Proposals*

Various law reform committees have noted a marked increase in fraud and forgery. This means that immediate indefeasibility will validate a void transfer in an increasing number of cases. Some such bodies have recommended reintroducing deferred indefeasibility in order to offer protection against fraudulent transfers. 'Discretionary' indefeasibility has also been proposed.

See above part VII.

G *Summary*

What conduct will constitute fraud?

- (i) Knowledge of an unregistered interest is not of itself fraud
- (ii) There must be actual fraud not 'equitable' fraud
- (iii) There must be more than mere negligence
- (iv) Knowledge of a fraud committed by someone else can constitute fraud
- (v) Wilful blindness or recklessness about someone else's fraud can constitute fraud

III *Prior Folio or Certificate of Title*

The title of a registered proprietor is not indefeasible against the interest of a prior registered proprietor claiming the same land under a prior folio, grant or certificate of title: *TLA* s 42(1)(a).

Consequently, where two certificates are issued over the same land, the former issuance prevails (*Stevens v Williams*).

IV *Incorrect Description*

The title of a registered proprietor is not indefeasible with respect to any part of their folio whose boundaries were erroneously misdescribed: *TLA* s 42(1)(b).

This means that the benefit of surveying mistakes (which normally arise during the process of converting general law to Torrens land) is not passed to the registered proprietor. The existing boundaries are retained.

There are two situations in which this exception might arise. First, if a party incorrectly describes the land with respect to which they seek registration, and somehow manages to obtain a certificate over that land, their title is defeasible as against the real owner of that land.

Second, a party may correctly describe her land and obtain registration of their certificate, but the folio issued may incorrectly describe the subject land. This will not fall afoul of the exception; if the applicant becomes registered (and is not fraudulent) she will have indefeasible title.

V *Easements*

The title of a registered proprietor is subject to any unregistered easements as may exist over their property: *TLA* s 42(2)(d).

VI Adverse Possession

Title is created not by registration but by a process 'adverse' to the registered title holder (physical occupation with an intention to possess the land). Adverse possession is one of the many ways in which an interest may be acquired through an 'informal' process that later can be formalised by registration.

Once the prior title is extinguished, the holder of possessory title can make an application for possessory title to be registered. Adverse possession is a paramount interest by s 42(2)(b) of the TLA and is therefore a statutory exception to indefeasibility. This means that the prior registered proprietor cannot resist the possessor's claim to registration.

Adverse possession is said to be justified by reference to economic efficiency and certainty, in that after a sufficiently long lapse of time, it is easier to let the boundaries be recorded as they lie.

Adverse possession is an example of the Torrens system's balance between 'informality', fairness and individual justice, viz, the promotion of certainty and security of registered title under Torrens registration. The result is that the contents of the register are far from identical to the actual interests held in land.

VII Tenants in Possession

All jurisdictions accept the propriety of subjecting a registered proprietor to the interest of a short term tenant (less than 3 years) in possession of land. However, there are difficulties with the Victorian exception to indefeasibility for leases, as created by s 42(2)(e) of the TLA, because:

- Tenancy is not restricted by the duration of the lease, so a tenant could sign a 20 year lease with the previous owner and the new proprietor would be bound; and
- A tenant's equity of rectification binds the purchaser (*Downie v Lockwood*), so such amendments as to duration could be made without their knowledge.

Downie v Lockwood holds that a tenant's equity for rectification of the lease forms part of the leasehold estate and binds a purchaser of the property. This is because of the equitable interest arising out of a specifically enforceable leasehold agreement.

***Downie v Lockwood* (1965) Vic SC:**

Facts

- Downie, the tenant in possession, has a written lease agreement with the landlord (registered proprietor)
- Pursuant to this agreement, Downie is required to pay rates and repairs on the house
- The agreement is varied such that the tenant does not need to pay for rates or repairs
- However, the lease is not registered
- The registered proprietor subsequently dies, and property in the land passes to Lockwood, the new registered proprietor
- Lockwood wants to hold Downie to the original written agreement
- The lessee seeks rectification of the lease to remove these additional obligations and reflect his unregistered variation

Issue

- Was the PI's right to have the lease agreement rectified part of the paramount interest that qualified the title of Lockwood under s 42(2)(e) (ie, by making it defeasible)?

Reasoning

- Although not registered, Lockwood takes subject to Downie's lease as a result of s 42(2)(e)
- Lockwood argues, in reliance upon *Smith v Jones* and *TLA* s 42, that said s 42(2)(e) ('interest of tenant in possession') doesn't extend to a right of rectification
 - *Smith v Jones* inapplicable on these facts
- The court rejects this argument: the interest of the tenant includes rectification
 - Need to construe s 42(2)(e) widely
 - '... any person in actual occupation of the land obtains as against any inconsistent registered dealing protection and priority for any equitable interest to which his [or her] occupation is incident...'
- Equity will thus grant specific performance of the varied agreement
- Downie had an agreement with Tovell, including the term reapportioning liability; this was the bargain between the parties which the court enforced
 - *Walsh v Lonsdale* (specifically enforceable contract for a lease creates equitable interest)
 - It is this equitable leasehold which is being enforced

Decision

- Lockwood was subject to that right in Downie
 - PI has an equitable leasehold
 - Entitled to occupy the premises without the obligation to pay rates or insurance
- As against Tovell [and thus new registered proprietor], PI would be entitled to rectification by deleting rates and charges. Interest was an 'interest ... of tenant in possession of land'

The s 42(2)(e) exception is somewhat problematic because it is not limited to short term leases. Theoretically, a tenant in possession may have a 20 year lease which is enforceable against a subsequent purchaser. This is a significant, possibly fatal, inconvenience to the new purchaser. The exception arguably goes beyond what is necessary to accommodate the informality with which short leases are made and executed.

Additionally, if the written lease does not reflect the actual agreement, then a visual inspection of the property or existing lease agreement may not be sufficient to reveal the interests held by a tenant in possession. A visual inspection of the property is clearly necessary. Questions must also be asked of the tenant about their agreement.

By contrast, in South Australia the limitation is set at one year. Any lease longer than one year falls outside the exception. However, most short leases are not placed in registrable form or registered because of the higher transaction costs that would be associated with that practice. This means that short term tenants cannot enforce their lease against a purchaser from their landlord, even if the purchaser has notice of the lease (*RM Hosking Properties Pty Ltd v Barnes*).

VIII Registered Volunteers

A Volunteers and Defeasibility

'In *Bogdanovic v Koteff*, the NSW Court of Appeal held that, under the *Real Property Act 1900* (NSW), the benefits of indefeasibility are available to volunteers as well as purchasers for value. In the Court's view the principle of immediate indefeasibility was inconsistent with any distinction between volunteers and purchasers for value. ... But the Court left unanswered the question whether volunteers take subject to unregistered interests of which they had notice when they acquired their interest.'

According to *Bogdanovic v Koteff*, volunteers do receive the benefit of indefeasibility:

***Bogdanovic v Koteff* (1988) NSW CA:**

Facts

- The appellant occupies a house as tenant; the lessor dies and leaves his estate to his son, who seeks to evict the appellant
- Mrs Bogdanovic argues that the deceased held the land on trust for her or that she has a life estate, or alternatively a licence to remain indefinitely

Issue

- Is Koteff's interest subject to the prior unregistered interest of Mrs Bogdanovic?

Reasoning

- In *King v Smail*, the Victorian legislation was read as showing a general intention not to confer the benefit of indefeasibility upon volunteers
- Volunteers were not seen as being within the meaning of s 42
- However, this reasoning should not be followed
- *Frazer* establishes that the only exceptions to indefeasibility are those explicitly created in the statute itself; as there is no reference to volunteers there is no separate exception
- Mrs Bogdanovic would need to show that Mr Koteff owed personal obligations to her

Decision

- There is no evidence of that, so Mr Koteff holds his interest 'absolutely free' from any estate or interest vested in Mrs Bogdanovic

However, *Rasmussen v Rasmussen* declined to follow this approach. The Victorian Supreme Court held that a registered proprietor who takes as volunteer cannot acquire a title better than her predecessor.

***Rasmussen v Rasmussen* (1995) Vic SC:**

Facts

- The registered proprietor had previously made a gift of his interest in land, which was subsequently granted to Harold
- Harold brings a legal action seeking to remove Earnest from the property

Issue

- Is Harold's interest defeasible?

Reasoning (Coldrey J)

- A registered proprietor, being a mere volunteer, does not obtain a title free from prior equities
- Both *Breskvar* and *Frazer* were concerned with the situation of a purchaser for value
- In *Bahr v Nicolay*, reference was made by Wilson and Toohey JJ to the requirement that indefeasibility is conferred upon 'everyone who purchases, in bona fide and for value, from a registered proprietor'
- 'In my view the reasoning of the High Court decisions does not destroy the principles enunciated in *King's case*'
- '*Bogdanovic* contains no discussion of the rationale for distinguishing between the indefeasibility of title of a purchase for value as distinct from a mere volunteer'

Decision

- Harold is a volunteer
 - Section 43: does not apply to volunteers
 - Therefore, Harold is not protected by the indefeasibility provisions

IX In Personam Rights

A Introduction

Even if a transaction is not fraudulent, it may still be possible to defeat a registered proprietor's title. One basis on which this may be possible is the *in personam* exception to indefeasibility. Although the registered proprietor has paramountcy and generally indefeasible title, he or she may not refuse to perform contractual obligations on that basis. The *in personam* exception 'relaxes the rigour of immediate indefeasibility' to give effect to personal obligations:²

*These claims, legal as well as equitable, include rights which a registered proprietor creates, whether by contract or by conduct, in favour of another, provided that they are enforceable and not affected by the protection which indefeasibility gives to those who deal with the registered proprietor on the faith of the register.*³

The *in personam* exception recognises that indefeasibility of title will not displace personal obligations created by the registered proprietor. Where they exist, specific performance of contracts may be granted and trusts enforced against them.

Bahr v Nicolay (No 2) provides an example of an *in personam* claim. In that case, conduct and events prior to registration gave rise to a constructive trust (Wilson and Toohey JJ, Brennan J).

Several issues arise in this context:

- 1 What is needed to establish an *in personam* claim against a registered proprietor?
- 2 Will an *in personam* claim necessarily result in the registered proprietor being divested of his or her registered interest?
- 3 Is the enforcement of a claim *in personam* against a registered proprietor consistent with the principle of indefeasibility?

B Doctrinal Basis and Ideological Tensions

In personam claims are a judicially-created exception to indefeasibility of title. To be successful, there must be a common law cause of action or equitable basis for relief available to the person seeking to impugn registration.

The Torrens system of land registration did not destroy fundamental principles of equity (*Barry v Heider*). Rather, it makes title hinge upon registration:

The essence of Australian real property law is the Torrens system. This system should be seen as changing the nature of interests in land. The system is one where title to land is derived from registration — it is a system of title by registration and not one of registration of title

² Ibid 8.

³ Ibid 12.

Central to the Torrens system are a conclusive register and the indefeasibility conferred by registration. However, this is subject to certain exceptions. As Gummow J noted (at 53):

‘There was nothing in the system which rendered it necessary that trusts not exist nor contracts not be enforced.’

There are tensions between the objectives of the Torrens system and equitable doctrines, which continue to operate in several areas of the Torrens system:

- Equitable estates and interests in relation to land (eg, trusts)
- Equitable remedies that enforce statutory prohibitions and protect statutory rights
- Powers of the land registrar to grant declaratory and injunctive relief
- Protecting equitable interests via lodgement of caveats
- The courts’ general jurisdiction to enforce common law rights and equitable obligations and duties by *in personam* remedies

C Requirements

Requirements for a claim *in personam*:

- The claim must be based on a known cause of action in law (for example deceit) or equity (for example undue influence)
- The claim must be against the person who is registered as proprietor (or his or her agents or employees)

Bahr v Nicolay [No 2] (1989) HCA:

Reasoning

- Fraud
 - Brennan J
 - There is no fraud within the meaning of s 42 of the TLA
 - It is not fraud to obtain registration knowing that it will defeat an unregistered interest
- *In personam*
 - The indefeasibility provisions protect a transferee from defects in the transferor’s title but do not free the transferee from interests with which *he has burdened his own title*
 - Put another way, indefeasibility of title doesn’t protect the registered proprietor from the consequences of their own actions where those actions have given rise to a personal equity in another: *Breskvar, Frazer*
 - *Frazer v Walker*.
 - The Torrens system does not deny the ‘right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant’
 - ‘Neither ... section [42 or 43] nor the principle of indefeasibility preclude a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself
 - These claims are based on the personal legal or equitable liability of the registered proprietor

- Requirements of the *in personam* exception
 - Can be based on actions taken before or after registration
 - That conduct must give rise to a known cause of action in law or in equity
 - All judges agreed upon the existence of the Bahr's ability to bring an *in personam* action as an exception to indefeasibility
 - However, each judgment approached the nature of exception differently
 - The registered proprietor's vulnerability to claims *in personam* is not inconsistent with the concept of indefeasibility of title
 - Equity may bind the registered proprietor as a result of conduct engaged in during a transaction (*Barry v Heider*)
 - Thus, equity created by the conduct of the registered proprietor before registration can be enforced
 - Here, the *in personam* exception operates where the registered proprietor purchases land having acknowledged the existence of a prior unregistered interest binding on the vendor *and having expressly (or by implication) agreed to take subject to his rights*

- Different characterisations of the nature and basis of the interest
 - Mason and Dawson JJ:
 - The clause in the contract of sale between Nicolay and the Thompsons
 - Its legal effect was to create an express trust in favour of the Bahrs such that the Thompsons held their registered interest in the land subject to the right to purchase of the Bahrs created by their agreement with Nicolay
 - Wilson and Toohy JJ:
 - The agreement with Nicolay gave the Bahrs a prior equitable interest in the land
 - Their interest was 'measured by ... specific performance'
 - Even if it is only a right to enforce the promise under an equitable estoppel argument, or a right to have transfer set aside for fraud (mere equity), it nevertheless was enforceable against the Thompsons
 - Brennan J:
 - The registered proprietor's repudiation of their agreement to be bound by the Bahrs' right to purchase amounts to 'equitable fraud' (unconscionability)
 - What interest did the Bahr's have?
 - An equitable interest in land created by a specifically enforceable agreement between Bahr and Nicolay
 - Effect of clause 4?
 - More than mere acknowledgement, notice
 - It also acknowledged that Thompson's interest was acquired subject to and limited by the rights of the Bahrs; they had an intention to be bound
 - If acquire registration subject to right of unregistered interest then repudiate it- acting fraudulently in equity, equity will prevent fraud by imposing a constructive trust

Decision

- No fraud is established on the facts
 - The purchaser must be a party to the fraud such that the 'designed object of the transfer ... was to cheat the [unregistered interest holders] of their existing right.'
- However, an *in personam* claim is recognised
 - Specific performance of the agreement is granted
 - The Thompsons must deliver a registrable transfer to the Bahrs on payment by

them of \$45 000

- Is this remedy is appropriate in the circumstances?
- What if there had been a significant increase in the value of the land: should the right to repurchase be enforced?
- Where the registered proprietor purchases land on terms that he or she will be bound by a prior unregistered interest, then the registered proprietor will take possession subject to that prior interest
 - 'A registered proprietor who has undertaken that his transfer should be subject to an unregistered interest and who repudiates the unregistered interest when his transfer is registered is, in equity's eye, acting fraudulently and he may be compelled to honour the unregistered interest'

Breskvar v Wall (1971) HCA:

Facts

- See above Part VI

Reasoning

- Barwick CJ:
 - 'Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon the acts of the registered proprietor himself [*in personam* claims]. These may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title'

'Narrow' basis of *in personam*:

- The claim must be more specific than rights arising from a forgery
- It is not enough that a signature on the transfer or mortgage was forged as the basis of an *in personam* action
- See *Gosper* (Mahoney JA) and *Vassos* (Hayne J)
- See also *Eade v Vogiazopolous* (Smith J)

To succeed in an *in personam* claim, a party must show that their claim is:

- Against the registered proprietor, their agent or employee; and
- Based on a known cause of action in law or equity (*Grgic*); and
- Gives rise to a proprietary interest; or
- Can be satisfied by subjecting the registered proprietor's interest to that of the person bringing the action; but
- It is not sufficient that a forged signature was placed upon the instrument of transfer or mortgage.

However, the majority in *Mercantile Mutual Life Insurance v Gosper* held that forgery was sufficient basis for an *in personam* claim.

Mercantile Mutual Life Insurance Co Limited v Gosper (1991) NSWSC:Facts

- Mrs Gosper is the registered proprietor of land, subject to a registered mortgage in favour of Mercantile Mutual Insurance
- Her husband, Mr Gosper, arranges for a variation of the mortgage (ie, some additional money) to be taken over by Mercantile, and forges her signature
- The variation is registered
- The husband takes the money, spends it, and dies

Issue

- Is there a basis for an *in personam* action by Mrs Gosper against Mercantile such that the latter's title in respect of the mortgage variation is defeasible as against Mrs Gosper?

Reasoning

- Mahoney JA:
 - Mercantile Mutual did not have authority to produce or use the certificate of title to obtain registration of a forged variation of mortgage
 - They therefore used their certificate of title in breach of their obligation to Mrs Gosper in respect of their custody and possession of her certificate of title
 - This creates a personal equity enforceable against the registered proprietor of the mortgage, Mercantile Mutual
- Kirby JA:
 - Mrs Gosper's right is akin to an equity of redemption
 - Mercantile Mutual retained possession of the certificate of title for only limited purposes
 - These purposes did not include granting a mortgage advance to her husband
- Meagher JA (dissenting):
 - Mrs Gosper's claim depends on rights arising from a forgery
 - However, this is insufficient
 - Something more than a forged signature on the mortgage instrument is needed to support an *in personam* action

Decision

- Mercantile Mutual used the certificate of title in breach of its obligations to Mrs Gosper
- This was sufficient to create a personal equity in Mrs Gosper enforceable against them
- This means that their title in respect of the mortgage variation is defeasible

The decision in *Mercantile Mutual Life Insurance v Gosper* was somewhat controversial, in that it introduced uncertainty into the granting of securities by financial institutions. Apparently it is no longer sufficient to rely on a (forged) signature in circumstances absent suspicion. Such institutions now need to determine whether the person requesting the security was actually authorised to do so.

Importantly, this also contradicts *Vassos* and *Eade*, which are authority for the limitation on *in personam* claims that they cannot be founded on a forgery of the relevant instrument. If this were so, potentially all registrations could be impugned on the basis of forged attestations and the registered proprietor would be powerless to protect itself.

Vassos v State Bank of South Australia (1993) Vic SC:Reasoning

- 'If, as the plaintiffs contended, the fact of a lack of assent of the mortgagor gives an *in personam* right to a discharge, then every mortgagor whose signature was forged would be entitled to compel the mortgagee to discharge the mortgage ... That flies in the face of indefeasibility of title for without any fault on the part of the mortgagee he could always be compelled to discharge his security...'
- "“personal” equities arise only from acts of the new owner ... it may well be that the bank did not act without neglect but ... even if by making reasonable enquiries the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable'

Decision

- No action *in personam* is available

The issue of whether a constructive trust occasioned by the registered proprietor's conduct can give rise to an *in personam* remedy is also unclear. *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* addressed this issue, but the case was ultimately decided on a lack of notice.

Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd (1998) Vic SC:Facts

- See above
- At first instance, it was held that there was no fraud but *in personam* relief was granted

Issue

- Is *in personam* relief available on the basis of the mortgagee's constructive notice of unconscionable conduct on the part of Sixty-Fourth?

Reasoning

- Tadgell JA (Winneke P agreeing):
 - The doctrine of constructive notice is wholly excluded from the operation of s 43 and related provisions
 - No *in personam* relief is available
- Ashley AJA (dissenting): yes, an *in personam* remedy is available
 - 'To accept such a position is ... to deny the operation of a remedy which squarely falls within the *in personam* exception to indefeasibility, an exception which undoubtedly exists as a basis for indirect attack upon registration separate from the direct attack available by reliance upon statutory fraud. The approach accepts that, speaking generally, improper receipt of trust property can give rise to a constructive trust...'
 - 'The proposition that an equity may be recognised and enforced so long as it involves no conflict with the indefeasibility provisions has not prevented the High Court from imposing constructive trusts so as to recognise equities in cases where the transfer of real property was effected at different stages in the course of events giving rise to the equities: thus *Bahr*, *Muschinski* and *Baumgartner*. In my opinion this Court is not obliged to, nor should, deny the applicability of the constructive trust remedy in a case such as this.'
 - 'Moreover, it has been said that the purpose of indefeasibility is to protect a

transferee from defects in the title of the transferor; not to free the transferee from interests with which he has burdened his own title. To deny the applicability of the *in personam* remedy now under discussion would not, I think, achieve that outcome.'

Decision

- Court of Appeal: no fraud
- General unconscionability as argued by Sixty-Fourth Throne is insufficient

The view of Ashley AJA is rejected in *LHK Nominees Pty Ltd v Kenworthy* in favour of that of the majority. This suggests that there may be less room than thought for constructive trusts of the kind recognised in *Muschinski* and *Baumgartner* to give rise to an *in personam* claim against a registered proprietor–trustee.

However, it remains to be seen whether, in a situation where the registered proprietor is ‘the primary wrongdoer’, they will be found to owe personal obligations on account of their earlier dealings. The remedial basis itself (constructive trust) also appears to have largely escaped criticism, suggesting that the approaches of Brennan, Wilson and Toohey JJ in *Bahr v Nicolay* may still have currency.

***LHK Nominees Pty Ltd v Kenworthy* (2002) WASC:**

Facts

- The appellants claim against the respondent that they acted in breach of trust in relation to the transfer of property held by the appellant as trustee

Issue

- How does Torrens registration alter the position of the recipient of trust property?

Reasoning

- A registered proprietor cannot be held to be in receipt of a trust if there is no dishonesty
- They gain title by registration
- Accessory liability; there must be dishonesty equivalent to ‘actual fraud’
- Pullin J:
 - ‘The dispute between the members of the Queensland and Victorian Courts of Appeal is whether the only exceptions to indefeasibility are the statutory exceptions, or whether an *in personam* claim not based on fraud of the registered proprietor is also an exception.’ (at [281])
 - Ashley AJA relies on reasoning in *Bahr* regarding the ‘balance between indefeasibility and *in personam* claims’, adopting the reasoning of Wilson and Toohey JJ in that case
 - *In personam* and personal obligations:
 - [289] ‘... in *Bahr v Nicolay*, the defendant was the primary wrongdoer, attempting to ignore an obligation to share or convey the land with or to the plaintiff. In none of those cases was the defendant a party who merely had notice of an earlier interest or notice of third party fraud ... [these] are of the type described by Brennan J in *Bahr v Nicolay* (653), where he said:
 - “... the title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to

- that interest. Equity will compel him to perform his obligation.”
- This is not a case where the defendant is the primary wrongdoer, so *Bahr v Nicolay* is not directly applicable; Ashley AJA's approach is rejected

Decision

- The Court rejects the approach adopted by the minority in *Sixty-Fourth Throne* and confirms the majority view in *Sixty-Fourth Throne*

D Mortgagee Negligence

Issue: is negligence by a mortgagee sufficient conduct to give rise to an *in personam* exception?

Grgic appears to accept that negligence by a mortgagee may be a recognised cause of action sufficient to found an *in personam* claim. However, on the facts the claimant is unsuccessful.

Grgic v Australian and New Zealand Banking Group Ltd (200x) Court:

Reasoning (Powell JA)

- *Grgic* argues that a general ground of unconscionable conduct should support an *in personam* claim
- If such a ground is not recognised, *Grgic* claims in the alternative that one of the following remedies is available:
 - Deceit
 - Breach of statutory duty
 - Negligence
- No extension is recognised; 'general unconscionability' would be too wide and indeterminate as a basis for an *in personam* claim
- Such claims must be based on firm causes of action

Decision

- On the facts, *Grgic* did not make out any claim sufficient to support another cause of action
- No *in personam* remedy is available

Pyramid suggests that negligence, insofar as it applies to a lawyer acting in a conveyance, will not support an action by a mortgagor for negligence of the mortgagee's solicitor. This is because such a solicitor does not owe a duty of care to their opponent.

Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd (1997) Vic CA:

Reasoning

- A registered proprietor's negligence must be actionable by the person seeking to be reinstated or to vary the register
- This confirms the idea that it is the conduct of the registered proprietor [or their agents or employees] that founds the *in personam* claim and that the conduct must fall within a given cause of action

Decision

- In this instance, no duty of care is owed by Pyramid's solicitor to Scorpion, the opponent

E Summary

- Knowledge of an unregistered or equitable interest and becoming registered proprietor so as to defeat that interest does not is fraud and will not found an *in personam* claim
- The statutory definition of fraud is narrow: need actual fraud, notice and some form of dishonest conduct, moral turpitude, wilful and conscious disregard of rights
 - Some form of mere negligence generally insufficient
- *In personam* requires more than mere notice of the interest
 - There must be some additional personal obligation undertaken by the registered proprietor, or his agents
 - For example, by promising to give effect to an earlier interest
 - Plus some 'wrongful conduct' that fits within a known cause of action or equitable basis of liability (*Grgic* per Powell JA)
- *In personam* and Torrens objectives
 - The key objective of the Torrens system was to provide a conclusive public register to promote greater simplicity and certainty in land dealings
 - *In personam* claims relate to the personal conduct of the registered proprietor
 - As such it is not possible to know 'from the face of the register' if registered proprietor affected by *in personam* claim
 - One of the questions that arises are the objectives of the Torrens system compatible with the recognition of the *in personam* exception?
 - However, it is arguable that, as Ashley AJA recognised in *Sixty-Fourth Throne*, indefeasibility was never intended to confer immunity from a registered proprietor's personal obligations
 - The purpose of indefeasibility is to protect a transferee from defects in the title of the transferor; not to free the transferee from interests with which he has burdened his own title
 - Or does the *in personam* right indicate that the courts are overriding the legislative intent of Parliament as expressed in the Torrens legislation?
 - How do you reconcile the principle of indefeasibility and the *in personam* exception?
 - Why should not parties simply rely upon the compensation scheme?
 - Compensation is often insufficient to replace land

Policy questions:

- What should be the dividing line between fraud, *in personam*, negligence and notice?
- On what basis should the borderlines be drawn — whose interests should be preferred?
- What is the effect upon commercial certainty of the *in personam* exception?
- Is or should there be recourse to other means of relief or compensation?
- How effective is the assurance fund in serving this function?
- Should a distinction be drawn between wrongdoing by a registered proprietor and wrongdoing by another?

Relevant case law:

- *Frazer v Walker*
- *Bahr v Nicolay*
 - Mason CJ and Dawson J
 - Wilson and Toohey JJ
 - Brennan J
- *Barry v Heider*
- *Mercantile Mutual Life Insurance v Gosper*
- *Grgic v ANZ*
- *Pyramid v Scorpion*
- *Vassos v State Bank of SA*
- *Russo v Bendigo Bank*
- *Macquarie Bank v Sixty-Fourth Throne*
 - Tadgell JA
 - Ashley AJA

X Correction by the Registrar

A Power to Correct the Register

The Registrar can amend any folio of the Register, including any instrument lodged for registration, if he is satisfied by the evidence of such folio or instrument's inaccuracy:

Section 103:

- (2) ...
- (a) upon such evidence as appears to him to be sufficient correct errors in the Register or in any instrument or....but in any case he shall not erase, delete or render illegible the original entry or recording ...
 - (b) Every correction recording or entry ... shall have the like validity and effect as if the error or omission had not occurred but without prejudicing any rights accrued from any recording made in the register prior to the actual time of correcting the error...

B Compensation Scheme

Parties are entitled to indemnity from the following kinds of harm, which are set out in s 110:

- For loss or damage (whether by deprivation of land or otherwise): s 110(1)
 - Note: in Victoria there is no specific category for those losing their interest as the result of fraud; such loss must be fitted within another head
- Any error or misdescription in the Register or the registration of any other person as proprietor: s 110(1)(c)

The Registrar may compensate without a claim being made: s 111. However, the amount of compensation is limited in quantum: s 110(4).

Section 110:

- (1) Subject to this Act any person sustaining loss or damage (whether by deprivation of land or otherwise) by reason of —
- (a) the bringing of any land under this Act ... or by the creation of a provisional folio ... ; ...
 - (b) any amendment of the Register;
 - (c) any error omission or misdescription in the Register or the registration of any other person as proprietor; ...

shall be entitled to be indemnified.

However, s 110(3) denies indemnification where:

- The registered proprietor or their agent caused or substantially contributed to the loss by fraud, neglect or wilful default (*Vassos v State Bank of South Australia*); or
- Title is derived from a person who (or whose agent) has been guilty of fraud, neglect or wilful default (unless valuable consideration is given).

Similarly, s 109(2) provides that there shall be no indemnity where the loss, damage or deprivation is occasioned by any breach of trust (whether express, implied or constructive). Specifically, the Consolidated Fund is not liable for any

Loss damage or deprivation occasioned by the breach of any trust, whether express implied or constructive.

The amount of any indemnity is limited by section 110(4):

Section 110:

- (4) Any indemnity paid in respect of the loss of any estate or interest in land shall not exceed —
- (a) where the Register is not amended, the value of the estate or interest at the time when the error omission mistake or misfeasance which caused the loss was made;
 - (b) where the Register is amended, the value of the estate or interest immediately before the time of amendment.

Essentially, a person cannot be better off as a result of a mistake made by the Registrar.

Further, no indemnity is payable on account of costs incurred in taking or defending any legal proceedings without the consent of the Registrar.

Any compensation paid can be recovered from the person actually responsible for the loss: s 109(3)(a).

XI Tutorial 10

A *Indefeasibility and the In Personam Exception*

- *Introduction*
- Tension between equity and Torrens
- Equitable interest a part of the Torrens system
- *In personam* extends role of equity to render title defeasible based on conduct of the registered proprietor
- Exceptions are narrow and must be justified (Griggs)
- *Legislative Intent and the Torrens System*

Purposes of the Torrens system:

- Conclusive register
- Indefeasibility of title, subject to certain exceptions
 - Indefeasibility is not absolute

- *The Nature of In Personam Rights*

Bahr v Nicolay: possible to enforce equities arising out of the registered proprietor's conduct.

Note *Arcape*: extension of *in personam* exception to circumstances where registered proprietor acknowledges the equitable interest (trust) of a previous owner.

Broader than fraud. Necessarily inconsistent with Torrens principles of certainty?

- *Inconsistency or Necessary Qualification?*

Arguably equity envisaged as a part of the Torrens system.

B *Hypothetical*

- No fraud
 - Mere notice insufficient
 - No actual dishonesty
- *In personam*
 - Unlikely because no claim against Jimmy
 - ?
- If there had been writing
 - More acknowledgement
 - Breach of contract