

**FRAUD AND INDEFEASIBILITY OF TITLE**  
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**1. INTRODUCTION**

The Torrens system establishes a regime pursuant to which Title is acquired by registration. It is basic to the Torrens system that Title held under a registered interest is “indefeasible”.

The terms “indefeasible” or “indefeasibility” do not appear in the Real Property Act. The term has been coined in various cases, for example *Frazer v Walker* (1997) 1 AC 569, at pages 580-581.

In *Breskvar v Wall* (1971) 126 CLR 376 at page 385, Barwick CJ said:

“... the conclusiveness of the certificate of title is definitive of the title of the registered proprietor. That is to say, in the jargon which has had currency, there is immediate indefeasibility of title by the registration of the proprietor named in the register”.

Judges have used various terms to describe indefeasibility, such as “unimpeachable”, “conclusive”, “absolute”, “unexaminable”, and “unassailable”. Whalan suggests a more accurate description of the nature of title conferred by registration under the Torrens system is “State-guaranteed”.

The Register maintained by Land & Property Information certifies the interests affecting a parcel of land, and who is entitled to those interests.

**2. LEGISLATIVE PROVISIONS**

The following sections of the Real Property Act are relevant to indefeasibility of title:

Sec 12(1)(d), 28O, 28P, 28Y, 38(4), 40, 42, 43, 43A, 44, 45-45G, 46B, 115, 124, 125, 135 and 136.

The principal sections are 40, 41, 42, 43, 43A, 124 and 135. These are set out below:

**“SECTION 40 MANUAL FOLIO TO BE CONCLUSIVE EVIDENCE OF TITLE, AND THAT THE LAND HAS BEEN DULY BROUGHT UNDER THE ACT**

40(1) A manual folio shall be received by all courts or persons having by law or consent of parties authority to hear, receive and examine evidence as evidence of the particulars therein recorded and shall be conclusive evidence that any person recorded in the folio as the registered proprietor of an estate or interest

in the land comprised in the folio is the registered proprietor of that estate or interest and that the land comprised in that folio has been duly brought under the provisions of this Act.

40(1A) Where a computer folio certificate is issued in respect of a folio of the Register-

- (a) the certificate is evidence of the particulars recorded in that folio; and
- (b) it shall be conclusively presumed that-
  - (i) the certificate contains all the information that was recorded in that folio at the time specified in the certificate;
  - (ii) the land to which the certificate relates was, at that time, under the provisions of this Act; and
  - (iii) a person recorded in the certificate as the registered proprietor of an estate or interest in the land to which the certificate relates was, at that time, the registered proprietor of that estate or interest.

a 40(1B) Where, in a manual folio or computer folio certificate, the estate or interest of registered proprietor is expressed to be subject to-

- (a) an estate or interest evidenced by an instrument;
- (b) a provision of an instrument; or
- (c) an enumerated provision of an Act or of an Act of the Parliament of the Commonwealth,

the whole of the contents of the instrument, provision or enumerated provision, as the case may be, shall be deemed to be set forth at length in the folio or certificate.

40(2) No folio of the Register shall be impeached or defeasible on the ground of want of notice or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application, or in the proceedings pursuant thereto, by the Registrar-General.

40(2A) No folio of the Register shall be impeached or defeasible on the ground of want of notice or of insufficient notice of a possessory application relating to the land therein described, or on account of any error, omission or informality in the application, or in the proceedings pursuant thereto, by the Registrar-General.

- 40(3) The person recorded in any folio of the Register as entitled to the land therein described shall be held in every Court to be seised of the reversion expectant upon any lease that may be recorded thereon, and to have all powers, rights, and remedies to which a reversioner is by law entitled, and shall be subject to all covenants and conditions therein expressed to be performed on the part of the lessor.

**SECTION 41 DEALINGS NOT EFFECTUAL UNTIL RECORDED IN REGISTER**

- 41(1) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.

**SECTION 42 ESTATE OF REGISTERED PROPRIETOR PARAMOUNT**

- 42(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except -
- (a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land;
  - (a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,
  - (b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land;
  - (c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value; and
  - (d) a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition

by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he was not protected:

Provided that -

- (i) the term for which the tenancy was created does not exceed three years; and
- (ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.
- (iii) (Repealed by No 23 of 1970, s10(k)(v).)

42(2) In subsection (1), a reference to an estate or interest in land recorded in a folio of the Register includes a reference to an estate or interest recorded in a registered mortgage, charge or lease that may be directly or indirectly identified from a distinctive reference in that folio.

**SECTION 43 PURCHASER FROM REGISTERED PROPRIETOR NOT TO BE AFFECTED BY NOTICE**

43(1) Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

43(2) Subsection (1) does not operate to defeat any claim based on a subsisting interest, within the meaning of Part IVA, affecting land comprised in a qualified folio of the Register.

**SECTION 43A PROTECTION AS TO NOTICE OF PERSON CONTRACTING OR DEALING IN RESPECT OF LAND UNDER THIS ACT BEFORE REGISTRATION**

43A(1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate.

(2) No person contracting or dealing in respect of an estate or interest in land under the provisions of this Act shall be affected by notice of any instrument,

fact, or thing merely by omission to search in a register not kept under this Act.

- (3) Registration under Division 1 of Part 23 of the Conveyancing Act 1919 shall not of itself affect the rights of any person contracting or dealing in respect of estates or interests in land under the provisions of this Act.
- (4) Nothing in subsection (2) or (3) operates to defeat any claim based on a subsisting interest, within the meaning of Part IVA, affecting land comprised in a qualified folio of the Register.

#### **SECTION 124 REGISTRAR-GENERAL MAY STATE CASE FOR SUPREME COURT**

124(1) [**Where Registrar General may state case**] If any question arises in respect of:

- (a) land under the provisions of this Act, or
- (b) land the subject of action under Part 4, 4A, 4B or 6A with regard to the performance or exercise of any duties or functions conferred or imposed on the Registrar-General by or under this or any other Act,

the Registrar-General may state a case for the opinion of the Supreme Court.

124(2) [**Applicant's entitlements**] If the question arises in connection with:

- (a) an application to bring the land under the provisions of this Act, or
- (b) a possessory application,

The applicant is entitled to appear and be heard, either personally or by a legal practitioner, at the hearing of the matter.

124(3) [**Effect of Supreme Court's opinion**] The Supreme Court's opinion on the stated case binds the Registrar-General in relation to the question.

#### **SECTION 135 REGISTRAR-GENERAL MAY SETTLE CLAIMS**

135(1) [**Settling Claims**] The Registrar-General may settle any claim for payment of compensation from the Torrens Assurance Fund, whether in the course of litigation to enforce the claim or otherwise.

135(2) [**Registrar-General's participation**] For the purpose of settling such a claim, the Registrar-General may participate in proceedings in the nature of mediation or neutral evaluation.

135(3) [**Restriction of Registrar-General's power**] The power of the Registrar-General to settle such a claim is subject to the following restrictions:

- (a) the claim must not be settled unless the Registrar-General is satisfied:
  - (i) that the claimant would or will be successful in proceedings to enforce the claim, or
  - (ii) that it is otherwise reasonable in all the circumstances of the case to settle the claim,
- (b) any amount to be paid in settlement of the claim must not exceed \$250,000 (or such other amount as may be prescribed by the regulations) unless the Minister has approved of the settlement.

135(4) [**Settlement amounts**] In settling such a claim, the Registrar-General:

- (a) may pay such amount (which may include amounts by way of costs and interest) as the Registrar-General thinks reasonable, and
- (b) may, instead of or in addition to payment of a settlement amount, take other action.

135(5) [**Claimant's costs before settlement**] A settlement amount may include any costs incurred by the claimant before the settlement.

135(6) [**Officers' power to settle claims**] An officer or person employed in the office of the Registrar-General has no power to settle claims on the Registrar-General's behalf unless duly authorised to do so by a delegation in accordance with section 135M.”

### 3. INDEFEASIBILITY BY REGISTRATION

In theory, a purchaser, or anyone dealing with the registered proprietor, does not need to investigate the validity of registered dealings or how they were acquired (Sections 42 and 43 Real Property Act).

Registration is a process separate from the process of Transfer. Transfer involves the party to the transaction executing registrable documents. Registration involves the Registrar registering the documents. If a document is registered, Title passes to the registered transferee even if there is some invalidity in the process of Transfer. The transferee's Title will be indefeasible unless the invalidity in the process of Transfer involves fraud on the part of the transferee, or he or she was fraudulent in some other way. If that is the case, Title still vests in the transferee, but it is a defeasible Title. A previous registered proprietor, who has been defrauded, can bring action to recover the Title.

*Breskvar* emphasises the fact that registration is the means by which Title passes. The Breskvards were the registered proprietors of land. They handed their Certificate of Title to Petrie, as security for a loan provided by Petrie. They also signed a Transfer of the land. The name of the transferee was omitted from the Transfer. Under the Stamps Act 1894 (Qld) a Transfer signed in such a manner was a void document. The parties' intention was that the Transfer should be completed and registered if the Breskvards defaulted in payment of the amounts due under the mortgage. Even though the Breskvards had not defaulted, Petrie fraudulently inserted the name of his grandson, Wall, in the Transfer and registered it. Wall was a party to the fraud. Wall contracted to sell to Alban Pty Limited and executed a Transfer. The Breskvards argued that as the Transfer to Wall was a void instrument (under the Stamps Act), it did not pass Title to Wall. The High Court took the view that an invalidity in the process of Transfer did not prevent Title passing on registration. The fact that Wall had been fraudulent resulted in his Title being defeasible, but while he was on the Title, he, as the registered proprietor, could create valid interests in third parties. The dispute was therefore between the Breskvards and Alban Pty Limited, both of whom were innocent parties, and holders of unregistered interests. The Breskvards had a right to sue to recover the land and have the Register rectified. Alban Pty Limited had an equitable interest under the Contract of Sale. The dispute was resolved in favour of Alban Pty Limited.

The most common void instrument is a forged instrument. It could also be void as a result of non est factum or lack of capacity. A Mortgage may be void because of unauthorised alterations. However the voidness or invalidity will be cured by registration.

#### **4. DEFERRED OR IMMEDIATE INDEFEASIBILITY**

For some time, Australian courts, following *Gibbs v Messer* [1891] AC 248, adopted deferred indefeasibility (That is, title obtained under a defective dealing does not obtain immediate indefeasibility, and the registered proprietor's title may be challenged. Indefeasibility is deferred until registration of one further dealing, affecting that interest. Registration then renders the earlier dealing indefeasible). However, since *Frazer v Walker*, the theory of immediate indefeasibility has been embraced (That is, the registered proprietor, on registration of the dealing transferring title to him or her of an interest in the land, has a guaranteed title which is effective even though there may have been deficiencies in the dealing).

In *Gibbs v Messer*, Mrs Messer, a registered proprietor, left her Certificate of Title with her solicitor, Cresswell. Cresswell fraudulently prepared, and forged Mrs Messer's name, on a Transfer to "Cameron", a non-existent person. Cameron became the registered proprietor. Cresswell prepared a Mortgage from Cameron to the McIntyres, who were also his clients, as security for an advance from the McIntyres to Cameron. The Mortgage by Cameron to McIntyres was registered. Cresswell decamped with the money. Mrs Messer brought action to cancel the Certificate of Title and have a new one in her name issued, without the mortgage to McIntyres being noted as an encumbrance. The Privy Council found for her and

ordered that her name be restored to the Register. The Mortgage to the McIntyres was held not to be an encumbrance on her Title.

A number of reasons have been propounded to explain this decision. Whatever the reason, the Privy Council accepted that a bona fide purchaser from the McIntyres would have obtained an indefeasible Title.

In *Frazer v Walker*, Mr and Mrs Frazer were the registered proprietors of land. Mrs Frazer forged her husband's signature to a Mortgage in favour of the Radonskis. Mrs Frazer failed to meet the Mortgage payments and the Radonskis, as registered mortgagees, sold, under their power of sale, to Walker. Walker became the registered proprietor and attempted to obtain possession. Mr Frazer claimed that the Mortgage to the Radonskis was a nullity because of his wife's forgery. Mr Frazer sought orders that the Mortgage to the Radonskis and the interest of Walker be cancelled. Strictly it was not necessary for the Privy Council to consider immediate or deferred indefeasibility, as Walker was one transaction removed from the invalid documents (the forged Mortgage from the Frazers to the Radonskis), and, even if deferred indefeasibility applied, Walker, as a bona fide purchaser, would have defeated the Frazers. However, the Court held in favour of immediate indefeasibility, stating that the Title of the Radonskis, while on foot, was an indefeasible Title from the time of registration. The Radonskis had taken without fraud on their part. Even though the Mortgage was a void document at common law, it did not affect the indefeasibility of their Title.

The Court's decision did not overrule *Gibbs v Messer* but distinguished it on the basis that Gibbs and Messer involved a fictitious person. Many commentators disagree, taking the view that the decision in *Gibbs v Messer* would have been the same even if Cameron had been a real person.

In New South Wales, a legislative attempt was made to overcome the difficulties in *Gibbs v Messer*, by amending the Real Property Act in 2000 to include, in section 3(1)(a) a definition of "fraud". That definition is, "Fraud includes fraud involving a fictitious person". Most commentators do not believe that that amendment achieves its aim.

The High Court in *Breskvar v Wall* accepted the principle of immediate indefeasibility.

Conveyancing practice point: As *Gibbs v Messer* has not been over-ruled, ensure that vendor is not a fictitious person.

## **5. INDEFEASIBILITY AND THE PROTECTION OF INDIVIDUAL TERMS IN REGISTERED DOCUMENTS**

Does the principle of indefeasibility attach to all covenants in a registered document? In *Mercantile Credits Limited v Shell Co of Australia Limited* (1976) 136 CLR 326, the High Court held that an option to renew, contained in a registered Lease, derived indefeasibility from the registration of the Lease. Registration of an instrument does not give indefeasibility to every right which the instrument creates. Personal covenants which do not affect the estate or interest in the land, do not attract indefeasibility simply because they are in a registered document. In *Mercantile Credits Limited v Shell Co of Australia Limited*, the option to

renew in a registered Lease was been held to be a covenant touching and concerning the land, and not personal in nature. A mortgagee's interest in the land and the right to exercise its power of sale are protected by indefeasibility once the Mortgage is registered.

## 6. RIGHTS IN PERSONAM (CONTRACTS AND PERSONAL EQUITIES)

The concept of indefeasibility does not affect the personal obligations of the registered proprietor. The registered proprietor is subject to contracts he or she has entered into, and to trusts, whether express or implied, over the property. For example, if the registered proprietor contracts to sell the land, the purchaser can seek specific performance of the contract if the registered proprietor declines to complete. Such an action cannot be defended by the registered proprietor arguing that his or her title is indefeasible. If the registered proprietor is a trustee of the land for another person, that other person, the beneficiary, can probably enforce the trust against the registered proprietor.

In *Rasmanis v Jurewitsch* (1969) 70 SR (NSW) 407 J killed H. J and H had owned a parcel of land as joint tenants. Normally H's interest would have vested in J, by survivorship. However, principles of equity intervened to deprive a felon of the benefits which would otherwise come from his crime. J was entitled to register a Notice of Death, resulting in him becoming the registered proprietor. However the Court declared that J held the property upon trust for himself and the administrator of H's estate, as equitable tenants in common in equal shares.

In the Queensland Court of Appeal in *Tara Shire Council v Garner* (2002) [QCA ¶232], A sold Torrens Title land to B. Before B registered his Transfer, A sold the same land to C. C's Transfer was registered. A told C, before C purchased, that A had already sold the land to B, and that the land belonged, not to A, but to B. These were interlocutory proceedings. The Court held that B's claim against C was arguable. (That was sufficient to resolve the issues in an interlocutory appeal). Atkinson J. said that a person who receives a transfer of trust property, knowing the transfer is in breach of trust, holds the property subject to the trust. The "trust" here was A's obligation to hold the property as bare trustee for B. C purchased, knowing the fact that gave rise to the trusteeship. The sale to C was clearly in breach of the trust. How does this decision sit with the rule that registration of a Torrens Title Transfer confers an indefeasible title? The Court distinguished between taking title with "mere notice of a trust", and taking title with "notice of a breach of trust". Indefeasibility did not protect a registered transferee from interests with which he or she had burdened his or her own title. To take with notice of a breach of trust is to burden his or her title. The Torrens system was not intended to protect the registered proprietor who obtained title "by knowingly participating in a breach of trust".

Davies JA, disagreed with the majority view of the Court. His view was that C's title was indefeasible, unless C was guilty of fraud.

Peter Butt takes the view that the decision of Davies JA is more in line with accepted principles governing indefeasibility of title.

There is sometimes a fine dividing line between the “fraud” exception and the “in personam” exception.

## 7. FRAUD

What is “fraud” for purposes of the Real Property Act?

Sections 42(1) and 43 of the Real Property Act (reproduced earlier in this paper) state that fraud is an exception to the indefeasibility of title gained on the registration of a dealing.

The Real Property Act does not define fraud (other than in section 3(1)(a) of the Real Property Act, referred to earlier, where fraud is defined as “fraud includes fraud involving a fictitious person”), though section 43(1) says, “the knowledge that any such trust or unregistered instrument is in existence shall not of itself be imputed as fraud”. So knowledge of an unregistered interest or trust is not of itself to be imputed as fraud.

The leading judicial statement as to what constitutes fraud within the Torrens title legislation, is the following extract from *Assets Company Ltd v Mere Roihi* (1905) AC 176, at p210:

*“by fraud in [this Act] is meant actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud ... [T]he fraud which must be proved in order to invalidate the title of a registered purchaser for value ... must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making enquiries for fear of learning the truth, the case is very different and fraud may be properly 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.”*

“Fraud” requires actual fraud, and actual personal dishonesty or moral turpitude by the registered proprietor, for example *National Commercial Banking Corporation of Australia Limited v Hedley* (1984) NSW ConvR 55-211, and a number of other cases.

Under the general law (Old System Title), the holder of a legal interest is subject to all prior equitable interests of which he or she has notice. However, under the Torrens system, notice of itself, by the registered proprietor, does not make his or her interest subject to the interest of the prior equitable (unregistered) interest, though where there is notice, along with other

factors, which reveal a plan or scheme to deprive another of an interest, fraud may be attributed to the registered proprietor. Sometimes “willful blindness” or “voluntary ignorance” (Waimiha Saw Milling Co Limited (in liq) v Waione Timber Co Limited [1923] NZLR 1137, may be the “something extra”, in addition to notice, required, to constitute fraud.

Most recent Australian cases have required some “personal dishonesty” or “moral turpitude” on the part of the registered proprietor.

For there to be fraud, there must be knowledge either that someone would be deprived of an interest, or that the Registrar General would be misled (for example Australian Guarantee Corporation v De Jager [1984] VR 483, where employees of the mortgagee knew that the attesting witness had not been present when the mortgagors executed the Mortgage. Therefore presentation of the Mortgage to the Registrar General was a deliberate misrepresentation that the document had been properly executed and was therefore fraud). However, in Russo v Bendigo Bank Limited [1999] 3 VR 376, an inexperienced clerk of a solicitor, who was aware that the witness had not been present when a Mortgage was signed by the mortgagor, was found not to be aware of the significance of proper execution, and there was therefore no fraud.

Generally, it is only fraud in the period prior to registration that is capable of falling within the fraud exception and resulting in the registered proprietor’s title being defeasible (though in very limited circumstances the fraud exception may extend to conduct occurring after registration (Bahr & Anor v Nicolay & Ors [No 2] (1987 - 1988) 164CLR 604)).

In Efstratiou v Glantschnig (1972) NZLR594, Mr Glantschnig purchased a property. Mrs Glantschnig provided half of the deposit. They separated and signed a Separation Agreement in which the husband acknowledged that he owed to his wife as a debt, the amount which she paid towards the deposit. Mr Glantschnig then, without his wife’s knowledge, listed the property with a Real Estate Agent (Petrovic) who sold it to Efstratiou, who settled in three days. The sale price was significantly less than the value of the property. The Court found that there was fraud on the part of the husband and that the agent and the purchaser had participated in that fraud, because he were aware of the wife’s equitable interest (resulting trust, arising from her payment of half of the deposit). The transfer to the purchaser was set aside.

In Wiamiha Sawmilling Co Ltd v Waiore Timber Co Ltd (1923) NZLR1,137, at page 1,173 and 1,175, the Court said:

*“The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant’s rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant’s rights, if they exist, he is guilty of that wilful blindness or*

*voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.”*

Conveyancing Point:

As it is difficult to determine the boundary between those situations in which the purchaser may complete a transaction with knowledge that some unregistered interest will be defeated as mere notice, is not fraud, and conduct which might be held to be fraudulent (for example Efstratiou where the purchaser procured a property at a bargain price, almost constituted a conspiracy to defraud the wife of her interest), any purchaser who has notice of an unregistered interest before completion of the transaction should not take the risk and complete, where there is any possibility of his conduct being regarded as dishonest.

In Ginelle Finance Pty Limited v Diakakis [2004] NSW ConvR 56-064 (Supreme Court of NSW, Common Law Division) the plaintiff Ginelle Finance Pty Limited was the registered proprietor of an interest in property at 259 Botany Street, Kingsford. That interest arose as second mortgagee. The defendant, Diakakis, was the owner of the property. He asserted that he did not borrow money from Ginelle Finance and that the signature purporting to be his on the mortgage, subsequently registered, was a forgery. The Court proceeded on the assumption that Diakakis' assertion was fact. Ginelle Finance relied upon Section 41 and 42 of the Real Property Act which provides for indefeasibility of title for a person who is “the registered proprietor for the time being of any estate or interest in land ..... except in case of fraud”.

His Honour Mr Justice Studdert said:

- i. “I understand it to be well settled that fraud by a person other than the party relying upon the indefeasibility that accompanies registration is not fraud within the exception referred to in s 42. The registered proprietor has to be involved in the fraud either personally or by its agents to lose the benefit of registration. In Grgic v ANZ Banking Group Ltd (1994) 33 NSWLR 202 at 221 Powell JA stated the position thus:

‘Despite the passage of some ninety years since Lord Lindley, when delivering the opinion of the Judicial Committee in Assets Co Ltd v Mere Roihi [1905] AC176 at 210, said:

‘...By fraud in these acts is meant actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, ... the fraud which must be proved in order to invalidate the title of a registered purchaser for value, ... must be brought home to the person whose registered title is impeached or to his agents’

and the many cases which have been decided in that period of ninety years, the position still remains that, for the purposes of s 42 of the Act, ‘fraud’ comprehends actual fraud, personal dishonesty or moral turpitude on the part

of the registered proprietor of the subject estate or interest or of that registered proprietor's agents: see *Bahr v Nicolay* [No 2] (at 614) per Mason CJ and Dawson J; (at 631-632) per Wilson J and Toohey J.”

- ii. The fact that a dealing which is registered, is a forged document, does not of itself defeat indefeasibility of title as ordinarily effected by registration. In *Garofano v Reliance Finance Corporation Ltd* (1992) 5 BPR 11941 at 11944 Meagher JA, said:

“A series of authorities in this state have decided that forgery does not prevent the operation of the doctrine of indefeasibility: *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549; *Ratcliffe v Watters* (1969) 89 WN (Pt 1) (NSW) 497; *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) 529; and *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32.”

- iii. In *Story v Advance Bank* (1993) 31 NSWLR 722, where Gleeson CJ said:

“It is now settled that, subject to certain qualifications, the indefeasibility of title conferred by these provisions [a reference to ss 42 and 43 of the Real Property Act], even in the case of registration of a void instrument, takes effect immediately upon registration: *Frazer v Walker* [1967] 1 AC 569, *Breskvar v Wall* (1971) 126 CLR 376, *Bahr v Nicolay* [No 2] (1988) 164 CLR 604, *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407. Subject to the same qualifications, the mortgagee under a registered mortgage obtains an indefeasible title upon registration even though the signature of the mortgagor has been forged: *Mayer v Coe* (1968) 88 WN (Pt 1) (NSW) 549; [1968] 2 NSWLR 747.”

- iv. It was accepted that Ginelle Finance was not involved in any fraud. It advanced money upon an apparently regular mortgage. Diakakis argued that registration did not protect Ginelle Finance against personal equity, or against a “right in personam”, which Diakakis had against Ginelle Finance. Diakakis asserted that as the same solicitors acted for the first mortgagee and Ginelle Finance, and those solicitors “were aware” that Diakakis had not authorised use of his Certificate of Title, to register the second mortgage, that knowledge of the solicitors became the knowledge of Ginelle Finance, thus removing any indefeasibility of title which Ginelle Finance may otherwise have had.

The Court, in *Ginelle Finance* did not accept that Diakakis had rights in personam against Ginelle Finance, and distinguished the circumstances here from those in *Gosper* where there was a strong pre-existing relationship between the parties. The Court concluded that Ginelle Finance was entitled to enforce its security.

## 8. FRAUD BY AN AGENT

If the agent acts within the scope of his or her actual or apparent authority, then the fraud of the agent becomes the fraud of the principal. Forgery by a solicitor of his client's signature on a Mortgage, mortgaging the client's property, was for the benefit of that solicitor, and therefore outside his authority. The fraud of the solicitor was therefore not the fraud of the registered proprietor (*Schultz v Corwill Properties Pty Limited* (1969) WN (Pt1) NSW 59.) However, where the solicitor's fraud was comprised of a false attestation of a document presented for registration, the fraud may be within the scope of his authority, because it was not for the solicitor's own benefit, and properly ascribed to the principal (*Russo v Bendigo Bank Limited*).

In *Westpac Banking Corporation v Sansom & Anor* (1995) NSW ConvR 55-733, it was held that false attestation makes a mortgage void. A wife mortgaged her and her husband's home to Westpac Banking Corporation, without her husband's knowledge. She forged her husband's signature on the mortgage. An Officer of Westpac falsely attested that the husband had signed the mortgage, in his presence. The mortgage was registered. The Court held that the bank was guilty of fraud and so the mortgage, as against the husband, was set aside. However, in *Sansom v Westpac Banking Corporation* (1996) NSW ConvR 55-790, an appeal by the husband against his unsecured liability to the Bank was dismissed, as the Bank had no actual notice of any fraud, nor did Mr Sansom establish that the Bank knew of facts which would indicate fraud, or irregularity, to a reasonable banker. The Bank had a judgment against Mr Sansom and was entitled to enforce it.

If an agent personally knows that fraud, pursuant to which a previous registered proprietor has been deprived of all or part of his or her estate, that knowledge is imputed to the principal and is sufficient to impeach the Title of the principal/registered proprietor. The agent's knowledge may be imputed to the principal where the agent has deliberately "closed his eyes to the fraud". There is a rebuttable presumption that the agent has communicated to the principal all information, of which he or she has express knowledge, concerning the transaction.

## 9. AGENT'S OWN FRAUD

However, if the matter concerns the agent's own fraud, then the principal's imputed knowledge is rebuttable, as it is unlikely that the agent would have communicated his or her fraud to the principal.

In *Schultz v Corwill Properties Pty Ltd* Street J accepted as correct the following principle stating in "Williams on Vendor and Purchaser", fourth edition at page 306:

"The rule is, however, subject to the exception that, if the matter, of which it is sought to affect the principal with notice, is the agent's own fraud or fraudulent dealing or some equity arising thereout, or if the agent during the time of his employment as

such, and when he acquired the information in question, was a party to a scheme of fraud, then the principal is permitted to give evidence to rebut the above presumption and prove his ignorance of the matter; for the supposition that the agent communicated his fraud to the principal is too improbable to be entertained even by a court of equity.”

The cases generally hold that forgery and fraud are not within an agent’s actual or apparent authority, as they are independent activities carried out by the agent to further his own interests, and are not done for or on behalf of the innocent principal.

In Schultz Street J concluded, in respect of the mortgage to Mrs Schultz:

“I therefore hold that so far as concerns the mortgage, although it was a forgery, and hence for the purposes of s.42 a fraud, that fraud was not ‘brought home to the person whose registered title is impeached or to his agents’. Nor was ‘knowledge of it brought home to him or his agents’. The exception of fraud recognised under s.42 is not made out so as to invalidate the mortgage.”

If a solicitor’s employee falsely attested a Transfer, and the solicitor knew of the falsity (or had no real belief in the validity of the document), and it was registered, knowledge of the fraud (false attestation) may be imputed to the transferee/registered proprietor, resulting in the registered proprietor’s interest being defeasible.

In Williams v Davis [2003] NSW SC 453 (Supreme Court of NSW Equity Division, Davis AJ) the facts were:

- i. Mr & Mrs Williams contracted to purchase a house at 19 Heyson Avenue, Ermington from the Housing Commission of NSW, pursuant to a Terms Contract. It was a term of the contract that Mr & Mrs Williams purchased as joint tenants.
- ii. In 1969 Mr & Mrs Williams separated but Mr Williams remained living in the house.
- iii. The Terms Contract had been fully paid off in or about January 1987.
- iv. Mr Williams instructed a Solicitor, Ms Janice Pinter, to seek a transfer of the property from the Housing Commission. It sent a transfer of the property, into the names of Mr & Mrs Williams as joint tenants, to Ms Pinter. Ms Pinter accepted it on behalf of both the transferees. (The Court commented adversely on her doing that, when she was acting for Mr Williams only.)
- v. Mr Williams instructed Ms Pinter to sever the joint tenancy between himself and his estranged wife. Ms Pinter prepared a transfer of Mr Williams’ half interest in the property to himself. That transfer, on registration, would sever the joint tenancy (Section 97 of the Real Property Act).
- vi. Ms Pinter instructed her employee Lodgement Clerk, Vicki Moore, to stamp the transfer severing the joint tenancy and to register both transfers. Ms Moore “took it

into her head to save duty on the second transfer” by altering the transfer from the Housing Commission to Mr & Mrs Williams as tenants in common. Ms Moore crossed out the words “joint tenants” and wrote in the words “tenants in common in equal shares”. She then lodged the transfer for registration.

The Court said:

- a. Fraud, for purposes of Section 42 of the Real Property Act, involves some act of dishonesty on the part of the person whose title is sought to be impeached.
- b. The present case is not concerned with acts done to defraud Mrs Williams. Mr Williams, Ms Pinter and Ms Moore did not have that in mind.
- c. We are concerned with fraud upon the Registrar General, in the preparation, execution and certification of a document lodged for registration. Fraud in this context has sometimes been referred to as “fraud for purposes of the Act”.
- d. Ms Pinter’s actions were “grossly negligent” in not rectifying the actions of the registration’s clerk, as she knew that what had been registered was wrong. Her conduct had an element of reckless indifference but here, it is her conduct prior to registration which matters.
- e. Ms Moore altered the transfer after it had been signed. She knew that this did not represent the transaction between the Housing Commission and Mr & Mrs Williams. She deliberately altered the transfer with the intention that the Registrar General would act upon the alteration. She took this course for the purpose of saving a small amount of stamp duty. Her conduct amounted to fraud for the purposes of the Act.
- f. Ms Moore’s fraud was not authorised, but it was committed in the course of and for the purposes of the transaction which Ms Moore was employed to do. “Her fraud was fraud for which Mr Williams was responsible, it having been carried out by his agent in the course of his employment and, if it were necessary to add, for his benefit”.
- g. An order should be made for rectification of the register, to state that the property was owned by Mr & Mrs Williams as joint tenants.

**Comment:**

*Williams v Davis* is instructive in relation to the duty of care to be adopted by a Solicitor in a conveyancing transaction.

Further, it emphasises the far-reaching affects of fraud. In this case, if the transfer to Mr & Mrs Williams as joint tenants and the transfer from Mr Williams to himself, severing the joint tenancy, had been registered simultaneously, the effect would have been that Mr & Mrs Williams owned the property as tenants in common in equal shares. Mr Williams died after registration of the transfer. His estranged wife, assuming that his interest as joint tenant in the property would have passed to her by survivorship, commenced proceedings when she

ascertained that the property was owned as tenants in common. Because Mr Williams had died, the transfer severing the joint tenancy could now no longer be registered as his interest had passed to his estranged wife on his death, by survivorship. The effect of this is that his estranged wife, (and not his preferred beneficiary), received, by survivorship, his half of the property.

The question must be asked whether Davis, as the executor of Mr William's estate, should commence proceedings for negligence against Ms Pinter, to recover damages, the measure of which would presumably be the half value of the property, which the estate would have received if it had not been for Ms Pinter's negligence.

In *Ryan v Starr & 2 Ors* [2005] NSWSC 170, the plaintiff, Ryan, maintained that he had an existing estate or interest in adjoining land by reason of the fact that he had an agreement with the previous owner, Hennessy, to whom he had paid \$17,000.00 for a "right of access", and by the execution by Hennessy and delivery to him of a Transfer Granting Easement (which was never registered). Hennessy sold to the defendants, Starrs. Hennessy sold to the Starrs. The Contract contained a special condition 39:

"39. This contract is subject to the Purchasers' acknowledgment of a right of carriageway as set out in the annexed plan for the benefit of the registered proprietor from time to time of Lot A DP 359328 [sic] situate and known as 50 Carrington Street West Wallsend."

Ryan asserted that the Starrs (who were now the registered proprietors of the adjoining land, over which Ryan maintained a right of access), were bound by his interest either:

- (a) because, for them to deny it, was fraudulent because they were aware of the existence of the "right of access" (and that this was a case of fraud within the meaning of s42 of the *Real Property Act*.) or
- (b) because of the "personal equity" exception to indefeasibility.

In his judgment, White J determined that the 'fraud' exception was not made out by Ryan, but that the 'personal equity' exception was, by reason of the existence of a constructive trust. (*As an aside, towards the end of his judgment, White J states that, "I cannot leave this case without referring to the lamentable conveyancing practices which it has revealed."*.)

White J then considered "whether special condition 39 obliges the first and second defendants to observe and give effect to the unregistered easement to which it refers... and if so, what is the extent of that obligation.". He found that the special condition went "further than merely satisfying the vendor's duty to disclose the interest to which the property was subject...", (His Honour found that, "By special condition 39 the purchasers agreed to observe and give effect to what was described as 'a right of carriageway as set out in the annexed plan' not only for the benefit of the plaintiff, but also for his successors in title", and that not only the defendants, but their successors in title, would be bound to give effect to the easement to be enjoyed by the plaintiff and his successors in title.)

The plaintiff's claim, in relation to fraud as an exception to indefeasibility of title, was not made out. His Honour reasoned that the defendants' actions did not constitute fraudulent conduct as determined in *Bahr v Nicolay (No.2) (1988) 164 CLR 604*, (a case in which the majority "did not extend the ambit of what is considered to be fraud for the purposes of s 42 of the *Real Property Act*."). His Honour judged that, "Fraud for the purposes of that section requires dishonesty or moral-turpitude and not what is called constructive or equitable fraud, where there is no dishonesty or intention to cheat... The first and second defendants did not intend to cheat the plaintiff. At the time they became registered as proprietors... they did not intend by acknowledging the plaintiff's rights in the contract to put themselves in the position of being able to be registered so that they could defeat his rights. This is not a case of fraud within the meaning of s 42 of the *Real Property Act*".

The plaintiff's alternative claim, that the defendants were bound by his interest because of the "personal equity" exception to indefeasibility, *was* made out.

Again relying on *Bahr v Nicolay (No.2)*, His Honour found that a personal equity existed and that it did so in the form of a constructive trust.

## **10. MERE NOTICE IS NOT FRAUD**

Generally, the Australian Courts have literally applied the Section 43 Real Property Act exception that knowledge of the existence of a trust or unregistered interest "shall not of itself be imputed as fraud".

In *Achatz v De Reuver* (1971) SAFR 240, the Court said:

"Mere notice, even actual knowledge by the plaintiff or her agent of the defendant's prior equitable interest, does not of itself constitute fraud. 'Fraud' in this context means actual fraud, i.e. dishonesty of some sort, and not what is sometimes called constructive or equitable fraud."

In *Wicks v Bennett* (1921) 30CLR 80, the Court said:

"Where there is nothing but knowledge of an unregistered interest, it is not a fraud to buy. Such knowledge may be an element in the building up of a case of fraud, but it does not 'of itself' constitute fraud. It is not necessary, or perhaps possible, to define fraud. Fraud is a fact to be proved; and it has not been proved here."

## **11. CONSEQUENCES OF FRAUD, AND TORRENS ASSURANCE FUND**

Generally, the person whose interest in the land has been defeated or diminished by a fraudulent transaction, may apply, to the Supreme Court, to be restored in the register, as a result of the fraud. However, there may be circumstances where that cannot occur, for example:

- i. A is the registered proprietor.
- ii. B forges A's signature to a transfer to B (or to C who is involved in the fraud).
- iii. B (or C) executes a mortgage to D (bona fide lender, without notice of the fraud).

If A challenges the transaction, the result will be:

- iv. B's (or C's) title is defeasible, because of the fraud, at the suit of A, who would be entitled to have the Register rectified, so as to be reinstated as the registered proprietor.
- v. However, D has an indefeasible title, as mortgagee.
- vi. A's title would therefore be subject to the mortgage.
- vii. A could sue B (or C, or both of them) for damages, and could also claim against the Torrens Assurance Fund.

The Torrens Assurance Fund has been established by the State Government. It is financed by a levy on all dealings lodged under the Real Property Act. Any shortfall will be met from the Consolidated Fund, but must be repaid by the Torrens Assurance Fund.

Section 129(1) of the Real Property Act states that any person who suffers loss or damage as a result of operation of the Real Property Act in respect of any land, is entitled to compensation from the Torrens Assurance Fund, where the loss or damage arises from:

- (a) Any act or omission of the Registrar-General;
- (b) Registration of some other person as proprietor of the land, or of an interest in it;
- (c) Error, misdescriptions or omission in the register in relation to the land;
- (d) The land being bought under the provisions of the Real Property Act;
- (e) The person having been deprived of land, or an interest in it, as a result of fraud; or
- (f) An error or omission in an official search in relation to the land.

Section 129(2) sets out the circumstances in which compensation is not payable. (These include situations where: the loss or damage is as a result of an act or omission of the claimant; it is a consequence of fraudulent, willful or negligent act or omission of a Solicitor, Licensed Conveyancer or Real Estate Agent and is compensable under an indemnity given by an insurer, a scheme or a fund; failure to mitigate loss; loss offset by benefit; error or

miscalculation in the measurement of land; breach of trust; land included in two or more grants; recording or failure to record native title; and some others).

To seek compensation, an application must be made, on the approved form, to the Registrar-General. The Registrar General may determine a claim by making an offer to settle or by refusing a claim. Before making an offer of compensation in excess of \$250,000.00, the Registrar General must obtain Ministerial approval. An administrative claim is taken to have been refused, if it has not been determined within twelve months. If a decision has not been made within twelve months, or the applicant is not satisfied with the Registrar-General's decision, then the applicant has another twelve months within which to take Court proceedings for compensation, against the Registrar-General, as nominal defendant.

## **12. SUMMARY - FRAUD**

Whether there is fraud, depends on the facts. An analysis of the facts of past decisions therefore only provides limited practical guidance. The demarcation line for fraud is difficult to delineate because mere notice is not fraud.

- i. Fraud by a person, other than the party relying upon the indefeasibility that accompanies registration, is not fraud within the exception referred to in Section 42. To lose the benefit of registration, the registered proprietor has to be involved in the fraud, either personally or by its agents. This enables the person defrauded of his interest to attack the interest gained through the fraud, either before or after registration of that interest.
- ii. Fraud by or on behalf of the holder of a registered interest (the transferor) is irrelevant unless the transferee is involved in the fraud.
- iii. Fraud which caused the interest of a previous registered proprietor to be divested will not affect a subsequent registered proprietor (who was not involved in the fraud) or persons dealing with his interest in the land.

## **13. PRACTICAL STEPS TO REDUCE MORTGAGE FRAUD**

Matthew Bransgrove, in his article entitled "Mortgage Law: What Can Solicitors Do to Reduce Mortgage Fraud?", in the November 2004 edition of the Law Society Journal, sets out some very practical, though quite simple, strategies for reducing mortgage fraud. He suggests that the most powerful tools in detecting fraud are:

- i. Title searches (An unencumbered title is inviting to fraudsters as they do not need to dupe the discharging mortgagee. The edition date on the search will disclose the date

of the last transaction. If that date was when the borrower turned 7, then you are not dealing with the right person. The words "this edition issued pursuant to Section 111 Real Property Act 1900" is a red flag. It means the Registrar General was satisfied the previous edition was lost, mislaid or destroyed. The real owner may have the original title deed in his possession. Caveats which only go the interest of one or two or more registered proprietors may indicate last resort borrowing.)

- ii. Solicitors searches (Check with the Law Society to ascertain that the person, representing the other side, and purporting to be a solicitor, is in fact a solicitor).
- iii. Driver's Licences and passports (Check photograph, names and dates of birth. Watch out for anyone who claims that they have neither a passport or a driver's licence.)

He cautions us to beware urgency. Many frauds are carried out in a rush, to increase the chances of success. Ascertain the reason for urgency. If it is asserted, for example, that a Notice to Complete has issued, examine it and speak to the Solicitor who issued it.

Conveyancing practice point: Ensure that all documentation is properly executed and attested (with particular attention to whether fraud has been involved).

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1. "Australian Real Property Law" by Bradbook MacCallum, & Moore - Lawbook Co 2002.
2. "New South Wales Conveyancing Law and Practice" - Lang - CCH Australia Limited.
3. "The Standard Contract for Sale of Land in New South Wales" by Butt - The Law Book Co Limited.

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