

Exceptions to Indefeasibility

Fraud Exception

Fraud is “the most compelling of all personal equities”: *Bourseguin v Stannard Brothers*

184 Quality of registered interests

- (1) A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.
- (2) In particular, the registered proprietor—
 - (a) is not affected by actual or constructive notice of an unregistered interest affecting the lot; and
 - (b) is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot.
- (3) However, subsections (1) and (2) do not apply—
 - (a) to an interest mentioned in section 185; or
 - (b) if there has been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest.

1. Apply the elements of fraud

a. Definition of fraud

Personal dishonesty - *Assets Co v Mere Roihi* at 210: actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud

Moral turpitude - Kitto J in *Latec*: moral turpitude; a designed cheating of a registered proprietor out of his rights

Designed Cheating - *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* at 106-7: if the designed object of a transfer be to cheat a person of a known existing right, that is fraudulent there must be dishonesty and moral turpitude and there has to be a wilful and conscious disregard and designed cheating

Bahr v Nicholay No. 2 - Actual fraud, dishonesty or moral turpitude lie at the heart of the fraud provisions

Young v Hoger: - Fraud can “..include wilful blindness, an abstention from inquiry for fear of learning the truth, & possibly reckless indifference in other respects, although in any case it must amount to actual dishonesty.”

“..there must be a causal link between fraud & the defrauded party’s loss of an interest in the land.” (665)

b. By the registered proprietor or their agent

LTA s 184(3)(b): “whether or not there has been fraud by a person from or through whom the RP has derived the registered interest”

Assets Co v Mere Roihi at 210: “Fraud by persons from whom he claims doesn’t affect him unless knowledge of it is brought home to him or his agents.”

“fraud... must be brought home to the person whose registered title is impeached or to his agents.”

Registered Proprietor’s agents include employees, lawyers, accountants, company directors & officers

- Fraud must be brought home to the principal by the actions of the agent, either because:
 - agent's fraud is within the scope of authority (**Russo v Bendigo Bank Ltd**);
 - agent's knowledge of fraud is imputable to RP (**Schultz v Corwill Properties Pty Ltd**)
 - (agent's conduct & knowledge imputed to RP due to agent's wide authority & discretion in carrying out RP's business) - **Khan v Hadid**

Employees: For actions of employees which are not authorised by the employer, the test is: "...whether the connection between the employee's duties and the wrongful act is sufficiently close to regard the wrongful act as within the scope of the employment." - **Davis v Williams (2003) 11 BPR 21,313**

c. Before registration or directly enables registration
i. (Note uncertainty re **Bahr v Nicholay)**

Example of **supervening** (or post-registration) **fraud**: a person becomes RP intending to recognise an unregistered interest but dishonestly decides not to after registration.

Split decision in this case on whether fraud can occur after registration (supervening fraud – person becomes RP intending to recognise an unregistered interest but dishonestly decides not to after registration). Therefore, no fixed authority

Mason CJ & Dawson J – fraud exception may extend to supervening fraud
 Wilson and Toohey JJ – doesn't extend to supervening fraud
 Brennan J – silent (decision based on the personal equity exception)

d. Which directly deprives the plaintiff of an interest in the property (which may be legal or equitable)

Against the RP:

Gibbs v Messer

- Facts:
 - Mrs Messer gave her husband a power of attorney to deal with her land in Victoria. Her husband left the certificate of title and power of attorney with a trusted solicitor Creswell. Creswell forged Mrs Ms signature and transferred the land to Hugh Cameron, a fictitious person to the MacIntyres for security for a loan. This mortgage was registered. Creswell absconded with the money. When Mrs M discovered the forgery she brought an action to have a new CT issued to her free from the mortgage.
- Held:
 - The Privy Council held Mrs Ms name should be restored to the register and the mortgage though registered was invalid. The court could have been swayed by the plight of Mrs Messer and said that the protection which the statute gives is limited to those who actually derive title from and deal with a registered proprietor. By the doctrine of deferred indefeasibility a forged deed cannot confer good title but those who derive from it can by their registration pass a valid title to third parties generally considered to support the deferred indefeasibility approach.

Grgic v ANZ

- The son and his wife got a workmate Mr Francesco Sierra to attend to the bank ANZ and impersonate the appellant. The manager of the bank approved an overdraft of \$120k to the son and his wife, based on the surety of the appellant
- Sierra forged Grgic's signature on the mortgage
- The mortgage was witnessed by the bank

- The son requested more money be lent, which was approved, then defaulted
- The mortgage was registered and Grgic lost the appeal
- The court favored indefeasibility
- Fraud as against the registered owner, Grgic and against the registered proprietor, the bank
- The fact that the bank was careless, did not void its mortgage security

Young v Hoger

- The acts or omissions of the solicitor were more likely to found an honest, but careless belief that the mortgage was executed by Mr Hoger, rather than to found a willful abstention of inquiry.
- The circumstances involved one family and refinancing of an existing mortgage, the deed appeared to be executed by all parties witnessed by a justice of the peace
- The solicitor received 3 photocopied identity documents of Mr H but they were not certified
- None of the features proved actual dishonesty by Parker. Parker was evasive and disingenuous, but nothing in the conduct of Parker which justified a conclusion that he was guilty of actual dishonesty; that he actually had a suspicion that Mr Hoger's signature on the mortgage had been forged and that, having this suspicion, he abstained from further inquiry.

Against the Registrar of Titles:

Australian Guarantee Corporation v De Jager

- The mortgagee was not aware that the wife's signature on the instrument of mortgage was a forgery but employees' of the mortgagee were aware that her signature had not been duly attested
- The actions of the employees of the mortgagee constituted fraud within the meaning of Torrens
- The mortgagees title did not prevail over the wife's interest as joint proprietor of the land
- To lodge an instrument for registration in the knowledge that the attesting witness had not been present at execution must deprive the lodging party of an honest belief that it is a genuine document on which the registrar can properly act.

Against the holder of an unregistered interest:

Bourseguin v Stannard Bros Holdings Pty Ltd

- Satisfaction evidenced in writing as to terms of existing equitable interests was not enough to bind the purchaser to honour those interests
- A purchaser's entering into a contract of sale after receiving the communication that a vendor intended him to be bound by a specific equitable interest in relation to the property was enough to bind that purchaser to honor the equitable interest

Loke Yew v Port Swettenham Rubber Co Ltd;

- Example of fraud against someone with unregistered interest
- Eusope held large track of property Loke Yew had lease over portion of the property but unregistered
- Loke Yew did not have indefeasible title just indefeasible interest in the land
- Wanted to sell to another party and told them in negotiations that someone was staying there on a lease and wanted to continue
- PS through agent said fine we will make arrangements to stay on the property
- Glass prepared document containing statement which acknowledged Loke Yew's interest but did not provide substantial protection in fact for Loke Yew
- Eusope was satisfied and sold the property to PS

- PS registered their interest and sought to ignore LY and kick him off the land
- Court battle:
 - LY had unregistered interest
- Held:
 - PS registered fee simple subject to unregistered lease due to its agents fraud (Glass committed fraud by false representation about making way for LY)
 - LY held part of Eusope's land under unregistered lease (Eusope was the previous RO)
 - Eusope agreed to sell the entire land to PS, provided that PS make provision for LY's lease in the transfer document
 - Glass (PS's agent) prepared document containing statement which on face acknowledged LY's lease but provided no such protection in substance
 - PS registered transfer & sought to evict LY
- Held: PS's registered fee simple was subject to LY's unregistered lease due to its agent's fraud

2. Consider whether the fraud operated on the mind of the person intended to be defrauded (or would they have done the same thing anyway)?

Bank SA v Ferguson

- A mortgagor sought unsuccessfully to set aside the bank's registered mortgage on the grounds of fraud. An employee of the bank prior to granting of the mortgage by the mortgagor prepared a statement of position relating to the mortgagor's business proposal assets and value of land and then forged the mortgagor's signature on the statement. The document was internal.
- No evidence that Ferguson was misled as a consequence of the forgery or that he was induced in any way to do anything affected by his knowledge or lack of knowledge of the forgery. No evidence of intention to defraud. The forgery had no operative effect on the decision of Ferguson to enter into the mortgage
 - Held no statutory fraud – no fraud which operated on the mind of Ferguson
 - The same thing would have happened anyway with regard to Ferguson regardless of fraud
 - Mortgage anyway and sought anyway so forgery by the bank manager did not amount to statutory fraud and no exception to indefeasibility

3. If forged mortgage, then address LTA s185(1A) & s11A separately & independently of s 184(3)(b)

It can be hard to square the decisions dealing with actions by mortgagees which, although careless, seem to fall below actual fraud. In an attempt to deal with mortgage fraud, amendments have been made to the LTA which take effect on mortgages entered into or transferred after **6 February 2006**.

- New **s 185(1A)**: registered mortgagee's interest isn't indefeasible if the registered mortgage failed to comply with **s 11A** and was forged
- New **s 11A** requires mortgagee to take "reasonable steps" to ascertain mortgagor's true identity, to compile written record of such steps taken before lodging mortgage for registration, & to retain such record for 7 years. ie. ID and bank will not get indefeasibility if do not follow procedures
- New **s 185(5)**: requires mortgagee to **prove compliance**

Consequences of non-compliance with s 11A:

- loss of indefeasibility under **s 185(1A)**
- loss of compensation under **s 189(1)(ab)**

s 185(1A): registered mortgagee's interest is NOT indefeasible if the registered mortgage was forged, AND if mortgagee failed to comply with **s 11A(2)** re mortgagor's identity:

- **s 185(1A)(a)(i):** mortgagee failed to "take reasonable steps" to ensure the person who signed the mortgage instrument as mortgagor is identical with the current/pending RP of the mortgaged land – ie non-compliance with **s 11A(2)**
- **s 185(1A)(b):** mortgage instrument was signed other than by the current/pending RP of the mortgaged land – ie **forged** mortgage

s 11A also requires mortgagee to compile written record of reasonable steps taken before lodging mortgage for registration, & to retain such record for 7 years

- Note: 100 point ID check - [Land Title Manual](#)
- **s 185(5)** requires mortgagee to prove compliance with **s 11A**
- Mortgagee's consequences of non-compliance with **s 11A**:
- **loss of indefeasibility under s 185(1A)**
- loss of compensation under **s 189(1)(ab)**

4. Tentative conclusion on fraud issue

5. Consider in personam exception

6. Remedies

- Remember that **LTA s 187** doesn't apply to personal equity exception

If it finds fraud under **s 184**, the Supreme Court can make any order that it sees fit under **s 187**; which in almost all cases will be the reinstatement of the interest ousted by the fraud.

- Very strong remedy for fraud
- Remedy will be reinstatement of the defrauded party's interests is very common
- Court has full power

S 187 LTA

(1) If there has been fraud by the registered proprietor or section 185(1)(c), (d), (e), (f) or (g) or (1A) applies, the Supreme Court may make the order it considers just.

(2) Without limiting subsection (1), the Supreme Court may, by order, direct the registrar—

- (a) to cancel or correct the indefeasible title or other particulars in the freehold land register; or
- (b) to cancel, correct, execute or register an instrument; or
- (c) to create a new indefeasible title; or
- (d) to issue a new instrument; or
- (e) to do anything else.

Note also **section 188**, which provides that persons who have been deprived of an interest due to the fraud of 'another person', they are to be compensated by the state (which is what Mr Ggic Snr gets).

- Part of the Torrens system with indefeasibility – to reduce harshness – people who lose out by fraud are able to be compensated by the state
- Compensation can be given from the general fund – unfortunate for those who are attached to the house