

Week 2 Tutorial

Explanation of Statutory Fraud

- Unlike in Qld and NT, fraud is not defined in the Victorian legislation (TLA ss 42, 43)
- Courts have adopted a quite broad approach to fraud – *Assets Co Ltd v Mere Roihi*
- Actual fraud, personal dishonesty or moral turpitude lie at the heart of the fraud exception in ss.42 and 43
- Generally, a registered interest acquired with notice of prior unregistered interest is taken free from the prior equitable rights and is not fraud in the statutory sense – but this is subject to any personal rights of action available against the RP
- The crucial element of fraud in the statutory sense is actual dishonesty or moral turpitude on the part of the person taking the benefit of registration
- *Bahr v Nicolay* – Mason CJ and Dawson J (in minority) found in favour of statutory fraud where notice of the existence of a prior interest was coupled with an express assurance on the part of the registered proprietor to uphold it.
 - Here, the prior interest was an option to repurchase land at the expiration of a lease
 - It was held that the refusal on the part of RP to uphold the interest was fraudulent because it indicated that the RP acquired the title under false pretenses.
 - The circumstances indicated an active dishonesty that went beyond mere notification of the existence of a prior interest. Fraud is something more than disregard of right of which the person has notice.

Pyramid Building Society v Scorpion Hotels

- Hayne J summary of law on the meaning of fraud for the purposes of the express exception to indefeasibility
 - Registration cures defects in execution
 - Title to a registered interest not defeated on grounds of fraud if the RP of that interest was not party to the fraud
 - In s.42, “fraud” = actual dishonesty or moral turpitude: proof of dishonesty is essential and must be brought home to the person whose registered title is impeached (or a person acting on its behalf)

Attestation Cases As An Example of the principles in operation

- False attestation cases - where a solicitor for or employee of a person taking the benefit of registration (often a solicitor for a mortgagee or mortgagee’s employee) attests on a registered instrument that they saw the document signed in their presence, when this is false
- Note – s 87A of the TLA, electronic conveyancing and the new VOI requirements will severely curtail this fraud risk
 - witnessing of signatures to paper documents will no longer be a feature of conveyancing transactions in Victoria
- Examples of attestation:
 - “Signed by the signatory in my presence”
 - “I witnessed the affixing of the company seal to this document”
- To be an instance of fraud affecting an RP’s title, the person putting the document forward for registration must be shown to have knowledge of the false attestation or somehow be directly involved in it

AGC v De Jager [1984] VR 483

- A husband mortgaged his family home to AGC to secure finance. His wife’s signature was forged onto the mortgage.
- It was returned to AGC’s Preston office with her purported signature unwitnessed.
- No-one at AGC knew her signature was a forgery.

- A Mr French attended AGC's Preston office and signed the attestation clause to say he had witnessed her signature.
- He told an AGC employee he had not in fact witnessed it.
- AGC's employee nevertheless put the mortgage or allowed the mortgage to be put on the path to registration, knowing of the false attestation

Held:

- Per Tadmell J:
 - A forgery is a special case of fraud, but falls within the s.42 exception nonetheless
 - The facts disclose fraud in the circumstances surrounding registration of the mortgage within the sense of s.42, irrespective of whether French or AGC knew of the forgery
 - An employee or employees of AGC, acting in the course of their employment and authority, caused or allowed the mortgage to go forward for registration knowing its attestation was false.
 - This was a species of "wilfull blindness", of the kind referred to by the Privy Council in *Assets Co v Mere Roihi*. Suspicions of irregularity in execution were aroused.
 - AGC "abstained from making inquiries for fear of learning the truth"