

LAND LAW

MLL325

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TOPIC 4: STATUTORY EXCEPTIONS TO INDEFEASIBILITY

Fraud must be proved by showing that the alleged **fraudster's** actions involved five separate **elements**:

1. A **false** statement of a material fact/ failure to disclose material fact;
2. **Knowledge** on the part of the alleged fraudster that the statement is **untrue**;
3. **Intent** on the part of the fraudster **to deceive** the alleged victim;
4. Justifiable **reliance** by the alleged **victim** on the statement; and
5. **Injury** to the alleged victim as a result.

Express exceptions Statutory Fraud

Section 42(1) TLA (Vic.), the ‘paramouncy’ provision (*that also states the principle of indefeasibility*), states the fraud exception. Section 44 TLA (Vic.) also provides that a ‘certificate etc. is void for fraud’.

The precise meaning of fraud is unclear. The TLA does not define what ‘fraud’ is. The notice provision in **s43 TLA** helps to explain what fraud *is not*. Section 43 states that neither knowledge, nor actual or constructive notice of the existence of another interest in the land will, in itself, amount to fraud. Section 43 also provides that no person is required to investigate the validity of the title of the person from whom they take an interest.

<p>Transfer of Land Act 1958 (Vic) – Section 41 Certificate to be conclusive evidence of title</p>
<p>No folio of the Register under this Act shall be impeached or defeasible by reasons or on account of any informality or irregularity in any application or instrument or in any proceedings previous to the creation of the folio or the making of any recording on it; and every folio of the Register shall be received in all courts as evidence of the particulars recorded in it and all the recordings of those particulars in the Register, and shall be conclusive evidence that the person named in the folio as the proprietor of, or having any estate or interest in, or power to appoint or dispose of, the land described in the folio is seised or possessed of that estate or interest or has that power.</p>

<p>Transfer of Land Act 1958 (Vic) – Section 42 Estate of registered proprietor paramount</p>
<p>○ Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which 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</p> <p>○ whatsoever, except—</p> <p>(a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;</p> <p>(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.</p> <p>(3) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—</p> <p>(a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;</p> <p>(b) any rights subsisting under any adverse possession of the land;</p> <p>(c) any public rights of way;</p> <p>(d) any easements howsoever acquired subsisting over or upon or affecting the land;</p> <p>(e) the interest (but excluding any option to purchase) of a tenant in possession of the land;</p> <p>(f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-seven of the Local Government Act 1958, section 158 of the Water Act 1989 or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette—</p> <p>notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.</p>

<p>Transfer of Land Act 1958 (Vic) – Section 43 Persons dealing with registered proprietor not affected by notice</p>
<p>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 land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor there of was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual 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.</p>

Statutory Fraud

Fraud is an express exception to indefeasibility in all jurisdictions. In all states, apart from Queensland and the Northern Territory, fraud is not defined in the legislation other than to state that mere notice of existence of a prior interest does not, on itself constitute fraud: **Section 43 TLA (Vic)**.

The broader question of what does constitute fraud has been left out for judicial determination. Under general law, fraud has both legal and equitable manifestations. Common law fraud requires proof of deceit whereas equitable fraud can be committed wherever it is clear that an unfair consequence may arise.

Nocton v Lord Ashburton [1914]:

It was concluded that equitable fraud is not moral fraud in the ordinary sense, but a breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.

Assets Company Ltd v Mere Roihi [1905]:

Adopted a broader approach to the interpretation of fraud, an approach which was akin to equitable fraud. The Privy Council held that fraud will exist ‘in circumstances where a registered proprietor intends to deceive, where his or her suspicions were aroused or where he or she abstained from making inquiries for fear of learning the truth.’ However, where a registered proprietor honestly believes that a document, which is forged or improperly obtained, is genuine, no statutory fraud will be committed.

Loke Yew v Port Swettenham Rubber Co [1913] - Deliberate fraud

<p><i>Loke Yew v Port Swettenham Rubber Co [1913]:</i> Deliberate fraud</p>	
Facts:	<p>The PS Rubber Co purchased a large area of land from the registered proprietor, Eusope. Although not registered, Loke Yew was owner of part of the land earlier sold to him. Eusope only agreed to sell the whole of the land to the rubber company when he was given an assurance by the company that it would not disturb Loke Yew’s possession. Upon becoming the registered proprietor the rubber company asserted that it was entitled to the whole of the land claiming indefeasible title. Loke Yew sought relief.</p> <p>Loke Yew argued that the title of the rubber company gained by registration was defeasible by virtue of the fraud exception and that the register should be changed to reflect his interest.</p>
Issue:	<p>The Privy Council dealt with the issue of whether a registered proprietor, which had given an express assurance that it would not disturb the possessory title of an occupier following registration, would be acting fraudulently by subsequently refusing to uphold the assurance.</p>
Held:	<p>Held that formal transfer was obtained by deliberate fraud. On the evidence the court found that the rubber company made a misrepresentation which amounted to fraud.</p> <p>The Rubber Company had not mere knowledge of the of Loke Yew’s prior unregistered right. The statement by Glass that the right of Loke Yew would be protected, had been falsely and fraudulently made to induce Eusope to sign the transfer. There was a deliberate plan to deprive Loke Yew of land. The rubber company was ordered to execute a deed of transfer to Yew.</p>

In *Loke Yew v Port Swettenham Rubber Co* it was made clear that actual fraud will be committed where a registered proprietor fails to uphold an express assurance prior to registration. On the facts, the failure of the registered proprietor to uphold the assurance was treated as a part of a fraudulent scheme to acquire the land and the registered proprietors had been intentionally deceitful in their behaviour up to and beyond their registration.

Bahr v Nicolay (1988) - Attempt to defeat an unregistered interest

<i>Bahr v Nicolay (1988):</i> Attempt to defeat an unregistered interest	
Facts:	<p>The Bahrs agreed to sell their land to Nicolay. The contract of sale included an agreement by Nicolay to lease the property back to the Bahrs for three years and upon expiry of the lease to enter into a contract to resell the land to the Bahrs. Object was to fund development of land by Bahrs and for it to be an investment for Nicolay. Nicolay became the registered proprietor and sold the land to the Thompsons.</p> <p>The Thompson’s knew of the agreement between the Bahrs and Nicolay, and at Nicolay’s insistence, the contract of sale from Nicolay to the Thompsons contained an express acknowledgment of it. (At that moment on evidence they did not have the intention to deprive the Bahrs of title).</p> <p>After the Thompsons became registered, they acknowledged the rights of the Bahrs. When the Bahrs purported to exercise their option to repurchase, the Thompsons refused to honour their contractual promise, arguing that upon registration their title became indefeasible and could not be set aside merely because they had knowledge of the existence of prior title.</p> <p>Bahrs sued Nicolay for damages and sought an order for specific performance.</p>
Held:	<p>According to the court (Mason CJ and Dawson J) there is no fraud on the part of a 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.</p> <p>Fraud means actual fraud, dishonesty or some sort, not what is called constructive or equitable fraud. This does not mean that “all species of equitable fraud stand outside the statutory concept of fraud.” Actual fraud, personal dishonesty or moral turpitude lies at heart of statutory provisions. Fraud is not confined to fraud in obtaining transfer or in securing registration.</p> <p>Indefeasibility provision should be interpreted strictly and the exception to indefeasibility should be construed liberally. If an exception is to be made for fraud, why should the exception not embrace fraudulent conduct arising from the dishonest repudiation of a prior interest which the proprietor has acknowledged or agreed to recognise as a basis for obtaining title, as well as fraudulent conduct which enables him to obtain title or registration.</p> <p>According to the court there was no difference between a false undertaking which induced execution of transfer (in <i>Loke Yew</i>) and an honest undertaking given which induces execution of transfer and is subsequently repudiated for purposes of defeating the prior interest. Repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of transfer.</p> <p>The subsequent repudiation of a transferee of property of a limited beneficial interest in that property is fraudulent when the transferee took the property on the terms that the limited interest would be retained by the transferor. Mason CJ and Dawson J took the view that fraud can occur after registration by the dishonest repudiation of a prior interest which the registered proprietor has agreed to recognise as a basis for acquiring title.</p> <p>Majority (Wilson, Brennan and Toohey JJ) adopted the view that fraud under the Torrens legislation can only be constituted by dishonest conduct in the period leading up to registration</p> <p>Comment: the <i>Bahr</i> type situation is better covered with <i>in personam</i> exception and the extension of the fraud exception may be unnecessary</p>

Bahr v Nicolay indicates the preparedness of the court to find in favour of statutory fraud in circumstances where notice of the existence of a prior interest is coupled with an express assurance or acknowledgement on the part of the registered proprietor that the prior interest will be upheld

And granted that an exception is to be made for fraud why should the exception not embrace 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, as well as fraudulent conduct which enables him to obtain title or registration.

It will not however, constitute fraud, in the absence of any clandestine behaviour, to give proper notification that a legal obligation is at an end: *White City Tennis Club Ltd v John Alexander's Club Pty Ltd* [2008].

The statutory definition of fraud does, however include some aspects of equitable fraud. This idea was specifically endorsed by Mason CJ and Dawson J in *Bahr v Nicolay* where their Honours concluded that it was inappropriate to hold that 'all species of equitable fraud stand outside the concept of fraud.' Subsequent cases have upheld the inclusion of equitable fraud into statutory fraud.

Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd (2007):

It was concluded that there would be fraud if the designed object of a transfer was to cheat a person out of a known existing right or if there was a deliberate and dishonest trick causing an interest not to be registered; that such an act was dishonest and dishonesty could not be assumed solely to arise by reason of knowledge of an unregistered interest.

El-Kazzi v Kassoum [2009]:

Concluded that a contract which had been entered into on the same date as the transfer, with no negotiation between the parties on price, with the deposit clause struck out and the price defined by a very specific valuation some six months earlier, specified to be for stamp duty purposes and where the parties were closely related may have been 'colourable' but did not constitute a species of equitable fraud sufficient to attract statutory fraud.

HL (Qld) Pty Ltd v Jobera Pty Ltd [2009]:

Layton J concluded that the refusal by a registered mortgagee to uphold a priority agreement which had been entered into prior to registration, whereby the mortgagee had agreed to register a second mortgage before a first title mortgage, constituted statutory fraud.