

Problem Q Scaffold – Compensation under the Torrens system: Assurance Fund

A. ASSURANCE FUND

- **Typical situation in which compensation payable out of Torrens Assurance Fund:**
 - B forges signature of A (RP) on a transfer document which is then registered by the purchaser. The purchaser is not guilty of fraud, and therefore the purchaser takes indefeasible title in the land and A loses their interest in the land.
 - ⇒ Windeyer J in (**Diemasters**) recognised that this is not the only means by which compensation may become payable under the Act. (see below).

1. Circumstances in which compensation payable (s 129 RPA)

s 129(1) RPA – Circumstances in which compensation payable

- **s 129(1)** Any person who suffers loss or damage as a result of the operation of this Act (RPA), in respect of any land, where the loss or damage arises from:
 - (a) any act or omission of the R-G in the execution or performance of his or her functions or duties under this Act in relation to the land (including any such act or omission of the authorised operator); or
 - (b) **the registration (otherwise than under section 45E) of some other persons as proprietor of the land, or of any estate or interest in the land;** or
 - (c) any error, misdescription or omission in the Register in relation to the land; or
 - ...
 - (e) **the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud,**

is entitled to payment of compensation from the Torrens Assurance Fund.

N.B.

- Must be something under the Torrens system, regarding indefeasibility, which caused loss, in order to render that loss compensable under s 129 RPA.

- Re: s 129(1)(e), the fraud need not have been committed by the current RP of the land, just some other party.

SCAFFOLD:

- (1) “A party can **ONLY** get compensation under the Torrens Title Assurance Fund if they can bring their claim within one of the provisions in **s 129(1) RPA**. However, even if a party can do this, they still may be denied compensation if the R-G can successfully prove a defence under s 129(2) RPA.”
- (2) “In this case, [**apply facts to engage one of the factors in s 129(1) (usually (b) or (e))**]. Accordingly, [X] would prima facie be entitled to compensation under the Assurance Fund as per s 129(1)”.
- (3) [**Discuss whether any of the factors in s 129(2) are relevant on the facts**]:
 - Contributory negligence;
 - Fault of solicitor/agent who is compensable by professional indemnity insurance; or
 - Failed to mitigate loss/damage
- (4) [**Refer to limits on amounts recoverable – s 129A & 129B**]
- **Diemasters**
 - **Facts:** Company granted mortgage to mortgagee (bank), which is registered. Company sells land to purchaser (assumed to be innocent), and then passes on cheques to mortgagee re: outstanding amount owing under mortgage. Mortgagee executes discharge of mortgage and gives CT to company. However, bank cheques used to discharge mortgage bounced (due to fraud of third party).
 - Mortgagee finds out about fraud prior to purchaser registering interest, lodges caveat. Purchaser can’t get registered free of mortgage, so agrees to be registered subject to mortgage held by mortgagee (i.e. takes an encumbered fee simple).
 - Purchaser claims they’ve suffered loss by operation of the Act, the loss was caused by the fraud of the vendor and they’re therefore entitled to compensation.

- **Principle: Windeyer J found that partial extinguishment of registered interest (i.e. causing registration of encumbered fee simple) is compensable even if fraudster does not get on the register.**
- Windeyer J also found that even though this isn't the typical situation where compensation payable, the fact that the fraud caused the mortgagees interest to continue to subsist on the register (due to indefeasibility) rendered compensation.

s 129(2) RPA – Circumstances in which compensation not payable

- **s 129(2)** Compensation is not payable in relation to any loss or damage suffered by any person:
 - (a) to the extent to which the loss or damage **is a consequence of any act or omission by that person;** or
 - (b) to the extent to which the loss or damage:
 - ⇒ (i) **is a consequence of any fraudulent, willful or negligent act or omission by any solicitor,** licensed conveyancer, real estate agent or information broker; and
 - ⇒ (ii) **is compensable under an indemnity given by a professional indemnity insurer**
 - (c) to the extent to which that person has **failed to mitigate the loss or damage;**
or
 - ...

2. Limits on amounts recoverable

s 129A RPA – Limits on amount recoverable generally

- **s 129A** - The **total compensation that is payable under this Part,** is **limited to the market value of the land at the date on which compensation is awarded** to that person plus **any legal, valuation or other professional costs reasonably incurred by the person in making the claim.**

s 129B RPA – Limits on amount recoverable – fraudulent mortgage

- **s 129B** – Limits total compensation payable to an (innocent) registered mortgagee who claims against the assurance fund. The claim is limited to the market value of the land at the date on which compensation is payable to the mortgagee, less the amount secured by prior mortgages over the land.
 - **N.B.** provision seems directed to the R-G's practice of accepting a claim from the mortgagee so that the defrauded mortgagor is not evicted (by the mortgagee exercising their power of sale). Such an arrangement is generally acceptable to the mortgagee because it is easier.

B. OTHER INTERESTS RECORDED ON THE REGISTER

Scaffold

(1) When rights contained within contents of registered dealing (transfer) will be registered and thus binding on purchaser.

- a. (i) **s 42(1) RPA**: The indefeasible interest of a RP is subject to the statutory exception in s 42(1) RPA, which states that the RP will have an indefeasible interest subject to other interests recorded in the folio.
- b. (ii) In relation to assessing whether [X (e.g. purchaser)] will be bound by the [X rights] contained within [X transfer] recorded in the folio of the Register, it must be determined whether [X rights], forming the contents of the registered dealing, will also be considered as registered and thus binding. Two streams of reasoning in this respect were put forward by Barwick CJ and Windeyer J in **Bursill**.
 - i. **Barwick CJ** takes the view that if a transfer is registered and thus forms part of the Register, then all rights granted under that transfer will also be registered and thus binding on [X]. Accordingly, [**apply to facts**].
 - ii. **Windeyer J** queries what a person reasonably familiar with property law would do when they read the Register. Such a person reading the Register and learning of an encumbrance within a transfer will be taken to have constructive notice of the contents of the transfer, and thus any additional rights contained within.
- c. (iii) [**Conclude**, assessing likely result and whether it would be the same under the two tests above, before mentioning that Windeyer J view appears to have gained acceptance in later case of **Cihan**]

(2) When rights not reflected (but directly/indirectly identified by distinctive reference) in current version of the Register (however fully reflected in previous version), will be registered and thus binding on purchaser

- a. (i) **s 42(1) RPA**: The indefeasible interest of a RP is subject to the statutory exception in s 42(1) RPA, which states that the RP will have an indefeasible interest subject to other interests recorded in the folio.
- b. (ii) **s 42(2) RPA**: The indefeasible interest of a RP is subject to the statutory exception in s 42(2) RPA, which states that an interest in land recorded in the folio includes a reference to an interest recorded in a registered mortgage/charge/lease (i.e. a registered dealing), that may directly/indirectly identified from a distinctive reference in that folio.
- c. (iii) In relation to assessing whether [X (e.g. purchaser)] will be bound by the rights identified [directly/indirectly] by the distinctive reference in the folio, the reasoning in **Cihan** should be applied, whereby the court found that a notification (recording in the Register) will be taken to be sufficiently made if particulars explicitly stated are such as to engender in the mind of a reasonable reader generally familiar with property and land titles a need for further enquiry by resort to readily available records. The reasoning of the court in **Cihan** appears to adopt the view of Windeyer J
- d. (iv) [**Conclude**, assessing likely result]

1. When rights contained within contents of registered dealing (transfer) will be registered and thus binding on purchaser

- **s 42(1) RPA**
 - (1) “... the RP 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...**”
- **Bursill Enterprises v Berger Bros Trading** (Notice of contents of registered dealing)
 - **Barwick CJ view**: If a transfer is registered and forms part of the Register, then all rights granted under that transfer will also be registered.
 - **Held**: Purchaser here was not only bound by easement which was clearly described on the face of the Register, but was also bound by neighbours ownership interest in

the airspace not itself noted on the face of the Register (but contained within transfer creating easement).

- **Windeyer J view:** Must ask what a person reasonably familiar with property law would do when they read the Register. Such a reasonable person reading the Register and seeing right of way created by transfer would be assumed to read the transfer as it would be prudent to do so. If reasonable person would have learnt of encumbrance upon reading transfer, they are taken to have constructive notice of its contents (i.e. of the rights amounting to encumbrance). Rights will then be considered registered and binding on the purchaser.
 - **Held:** Reasonable person reading Register, having identified transfer creating right of way, will be assumed to have read transfer and thus have constructive notice of ownership rights over airspace.

2. When rights not reflected (but directly/indirectly identified by distinctive reference) in current version of the Register (however fully reflected in previous version), will be registered and thus binding on purchaser

- s 42(2) RPA
 - (2) ‘... 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 (i.e. a registered dealing) that may be directly or indirectly identified from a distinctive reference in that folio**’.
- Registrar-General v Cihan
 - **Principle:** A notification (recording in the Register) is sufficiently made if particulars explicitly stated are such as to engender in the mind of a reasonable reader generally familiar with property and land titles a need for further enquiry by resort to readily available records.
 - Decision in Cihan appears to approve the reasoning of Windeyer J in Bursill.

Registrar-General v Cihan

- **Facts:**
 - **2008 – Current folio of register** – Easement affecting the land shown so burdened in Vol 6451 Fol 53.
 - **1952 – CT Vol 6451 Fol 53** – included a notification that the land was subject to the ‘full and free liberty and licence’ for two named individuals and their heirs and assigns etc. to ‘drive, ride, operate and labor up and down to and fro’ over land marked on a plan of the CT, and a notation ‘Last Certificate Vol 1022 Fol 161’.
 - **1891 – CT Vol 1022 Fol 161** – contained a notification identical to the one above, except that it also identified the named persons as ‘the owners of the land adjoining the south eastern side of the servient land’.
- **Issue:** Parties agreed easement was created in 1882. Is the easement recorded in the current folio, or has it been omitted from the current folio and therefore enforceable under s 42(1)(a1) RPA?

Problem Q Scaffold – Rights in Personam Exception

A. PERSONAL EQUITIES/RIGHTS IN PERSONAM

Scaffold

- (1) **Intro:** In **Frazer v Walker**, the Privy Council made clear that indefeasibility will not prevent a purchaser bringing a claim in personam founded in law or equity against a RP, for such relief as a court acting personam may grant.
- a. Effectively, the rights in personam exception to indefeasibility will enforce personal claims against the RP arising out of the RP own's conduct (**Bahr**).
- (2) **Elements:** A claim in personam:
- a. (a) Must be based on a known cause of action in law or equity (**Grgic; Bahr**)
 - i. E.g. Breach of contract, deceit, misrepresentation, duress or breach of trust.
 - ii. Unconscionability requirement? – Preferred view in Aus that unconscionability is not a general requirement and will only be relevant where element of action asserted (**White v Tomasel**).
 - b. (b) Must be brought against a RP; and
 - c. (c) Can be based on actions taken before or after registration (**Bahr**) (Cf. fraud).
- (3) **In personam claim Example 1: Undertaking to be bound by unregistered interest?** → Taking an interest with notice of another unregistered interest is not enough to give rise to an in personam cause of action. However, one may be raised where additional factors indicate the purchaser's agreement to recognise and be bound by an unregistered interest (in personam exception will be raised via the imputation of a trust relationship – **Bahr**) → [**Apply to facts: does context + matrix of circumstances create strong imputation of trust relationship?**]
- a. Does it matter who representation/assurance is made to? – Personal equity may bind RP even where the assurance/representation is given, not to the person asserting the interest, but to a third party (as in **Snowlong – purchaser (became RP) agreed to take property subject to lease then reneged – lessee brought action despite assurance made to previous RP**).
- (4) **In personam claim Example 2: Breach of trust?**
- a. Knowing receipt of trust property – EXCEPT where the RP was guilty of ACTUAL FRAUD (i.e. actual dishonesty), the knowing receipt of trust property (i.e. the purchase of land with knowledge that it is subject to a trust) does not create in personam rights (**Farah Constructions**). In other words, third party purchaser will only be made a constructive trustee in circumstances where they engage in actual fraud (i.e. actual dishonesty).
 - i. The decision in (**Farah Construction**) arguably replaces the view expressed in the first limb of 'Barnes v Addy', which said that a person who takes a transfer of trust property knowing that the transfer is in breach of trust, holds the property subject to that trust.
 - b. Knowing assistance in breach of trust – Under the second limb to 'Barnes v Addy', a transfer in breach of trust can be set aside where a transferee participates in, or is treated as having participated in, the breach of trust.
 - i. In contrast to the first limb, this principle may be invoked despite registration of the transferee, since such a transferee is treated as fraudulent, and 'fraud' is a statutory exception to indefeasibility.
- When we cannot establish fraud, can attempt to argue rights in personam as an exception to indefeasibility.
 - The principle of indefeasibility 'in no way denies the right of P to bring against a RP a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant (**Frazer v Walker**)
 - Rights in personam exception to indefeasibility does not infringe the indefeasibility provisions on the basis that those provisions are designed to protect transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title (**Bahr**)

1. Requirements to bring a claim in personam

- **1. Claim must be based on a known cause of action in law or equity** (**Grgic v ANZ; Bahr v Nicolay**) Examples:
 - (a) Breach of contract/fiduciary duty, deceit, misrepresentation, mistake, unconscionable conduct or duress

- (b) RP's conduct must amount to breach of some obligation owed to the Plaintiff
- (c) Requirement of unconscionability? – Preferred view in Australia is that unconscionability is not a general requirement and will only be relevant where it is an element of the cause of action asserted (**White v Tomasel**)
- **2. Claim must be against person who is registered as proprietor**
- **3. Can be based on actions taken before or after registration**

2. Undertaking to be bound by unregistered interest

- **Further than notice, additional factors are required in order to give rise to an in personam right:**
Notice is not enough to raise a personal equity, however it will be raised where there are additional factors indicating the purchaser's agreement to recognise and be bound by an unregistered interest (**Bahr v Nicolay**)
- **Does it matter who representation/assurance is made to?** – Personal equity may bind RP even where the assurance/representation is given, not to the person asserting the interest, but to a third party (as in **Snowlong**)

Bahr v Nicolay (No 2) (Re: In Personam rights)

- **Principle:** Notice is not enough to raise a personal equity, however it will be raised where there are additional factors indicating the purchaser's agreement to recognise and be bound by an unregistered interest (in personam exception will be raised via the imputation of a trust relationship).
- **Facts:** B sold land to N who leased it back to B. Cl. 6 of the sale contract provided for the repurchase of the land by B at the expiration of the lease.
 - During the lease, N sold land to T → Cl. 4 of which provided that the purchaser (T) acknowledges that an agreement exists between B and N re: repurchase.
 - B attempts to exercise right of repurchase at expiration of lease, denied by T.
- **Held:**
 - **Mason CJ & Dawson J: Express Trust [23]**
 - Cl. 4 on its own would amount to no more than notice – BUT context and matrix of circumstances provides a strong inference/foundation for imputing a trust relationship (express).
 - The writing required in an express trust would be that constituted in cl. 4 of the acknowledgement.
 - **Wilson & Toohey JJ and Brennan J: Constructive Trust**
 - The consequence of the express acknowledgement of the right to resale and communications to them to that effect was to impose a constructive trust upon them – a personal equity.
 - This arose not because of notice, but because of their acceptance of a transfer on terms that they would be bound by the interest the appellant had in the land by reason of their contract with N.

Snowlong v Choe

- **Facts:** Restaurant leased for 5 years (unregistered by mistake) to C. s 42(1)(d) protects unregistered lease for 3 years or less. Landlord then sold to P1, and then to S. S knew C was in occupation.

- 3 months after completion, S accepted rent → meanwhile, C spent money renovating. The contract for purchase noted the existence of the lease, but the transfer did not. S wanted to eject C.
- Both purchasers had agreed to acknowledge and take property subject to the encumbrance.
- **Held: Trust created.**
 - P1 → Straight application of Bahr v Nicolay, following the decision of Wilson & Toohy JJ re: constructive trust.
 - S → Construing the contract in light of its express terms and in light of the fact that prior to its execution, the lessee's interest was, because of lack of registration, one at will only:
 - The purchaser, having acknowledged or agreed to recognise that the lessee had a lease for five years with two options for renewal, took title subject to an express trust on those terms.

3. Breach of trust

- **Knowing receipt of trust property** – EXCEPT where the RP was guilty of ACTUAL FRAUD (i.e. actual dishonesty), the knowing receipt of trust property (i.e. the purchase of land with knowledge that it is subject to a trust) does not create in personam rights (**Farah Constructions**). In other words, third party purchaser will only be made a constructive trustee in circumstances where they engage in actual fraud (i.e. actual dishonesty).
 - The decision in (Farah Construction) arguably replaces the view expressed in the first limb of 'Barnes v Addy', which said that a person who takes a transfer of trust property knowing that the transfer is in breach of trust, holds the property subject to that trust.
- **Knowing assistance in breach of trust** – Under the second limb to 'Barnes v Addy', a transfer in breach of trust can be set aside where a transferee participates in, or is treated as having participated in, the breach of trust.

In contrast to the first limb, this principle may be invoked despite registration of the transferee, since such a transferee is treated as fraudulent, and 'fraud' is a statutory exception to indefeasibility.

