

Topic 7- Exceptions to Indefeasibility

The TLA defines specific circumstances where the indefeasibility of the registered proprietor may be defeated. There are exceptions to this principle set out in TLA. Those exceptions include fraud, leases, wrong description of boundaries, adverse possession claims. s 42 and 44 TLA.

I. STATUTORY FRAUD

Fraud has been an exception to the indefeasibility principle. However, it is not defined in the legislation.

Background

- a) Mere notice of the existence of a prior interest does not of itself constitute fraud- s 43 TLA.
- b) Actual fraud will only render a registered title defeasible where the registered proprietor his or her agent has been privy to the fraud. As we have seen already. Fraud committed by a another party where the registered proprietor is not involved will not render the title defeasible: 43 TLA

Definition of fraud

The leading case is ***Assets Co Ltd v Mere Roihi* 1905 Privy Council**- Fraud means actual fraud, i.e. dishonesty of some sort. The fraud which must be proved in order to invalidate the title of a registered proprietor for value must be brought home to the person whose registered title is impeached or to his agents. The court continued the mere fact that he might have found out fraud if he had been more vigilant and made more enquiries, does not of itself prove fraud on its part. But, if it be shown he failed to make enquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him. This definition of fraud has been accepted in ***Farah Constructions Pty Ltd v Say-dee***- The high court said fraud meant moral turpitude, actual fraud.

Does notice of an unregistered instrument amount to fraud

- A purchaser under the general law who has notice of an earlier instrument holds subject to that interest. This principle applies under Old Law Land and DOES NOT apply to Torrens Title Land.

SUMMARY ON FRAUD

1. A person who acquires a registered interest as owner/ mortgagee through fraud obtains a defeasible or impeachable title, i.e. a title which may be set aside at the instance of the person defrauded.
2. In order for RP title to be set aside on fraud, the RP or their agent must have been privy to the fraud.
3. Fraud committed by the person from whom the RP derived title is irrelevant unless the current RP or his/ her agent was a part to the fraud, knew of it, or wilfully shut his/ her eyes to it.
4. Fraud ordinarily means that the guilty party honestly, wilfully violated the rights of the person entitled to the interest in land. In other words, fraudulent conduct is conduct tainted with a want of probity attracting grave moral blame/ dishonest conduct which involves moral turpitude.
5. Fraud must defeat or diminish the rights of the alleged defrauded party.
6. Fraud can consist of fraudulent misrepresentation (see *Loke Yew v Port Swettenham*).
7. Fraud may take the form of fraudulent misrepresentation to the Land Titles Office. For instance, by putting forward as genuine an instrument of transfer/ mortgagee that has been materially altered without authority or which had been fraudulently signed. On this point for instance, it is fraud if a bank manager without permission from a client adds another piece of land as a land that is mortgaged.
8. The conduct of Thompson in *Bahr v Nicolai* can also amount to fraud.

EXAM ANSWER ON FRAUD

1. In any exam question describe what indefeasibility is. Describe what fraud is.
2. State in the exam question the conduct which has alleged to have occurred which may constitute to fraud. Does it meet the tests which define fraud?
3. Was this alleged fraudulent conduct directly attributed to the registered proprietor (RP) either as an owner/ mortgagee whose title is now sought to be impeached. If so, the fraud exception is established and that person's title is declared to be indefeasible.
4. If not, can fraud be brought home to the RP. This can occur through the RP's actual knowledge of the fraud committed by the previous RP or can be brought home to the RP through his/ her constructive knowledge, i.e. the RP's suspicions were aroused and he/ she abstained from making further inquiries from fear of learning the truth.
5. If not, was fraud committed by the RP's agent.
6. If fraud could not be established under any of those particular heads, could not the in personam exception apply?

