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Fraud and Personal Equities Under the Queensland Torrens System

Abstract

The purpose of this paper is to ascertain the present behavioural boundaries beyond which a purchaser of an interest in land with knowledge of an equitable interest must not step, if he is to be able to acquire an indefeasible title by registration under the Real Property Act (1861) (Qld), and then to determine whether or not section 115(3)(a) of the proposed draft Real Property Act (1991) (Qld) has the potential to, and if so is likely to, significantly alter those boundaries. This will be achieved by an examination of the present Australian interpretation of the general concept of fraud under the Torrens system as defined by Gibbs J, and McDermid J, and by an examination of the recent attitude of the High Court of Australia and the Supreme Court of Queensland to claims in personam, founded in equity, under the Torrens system. Both examinations will consider the possible effect that section 115(3)(a) of the proposed draft Real Property Act (1991) (Qld) will have on the attitude of the courts.

Keywords

fraud, Real Property Act, Torrens statutes

Comments and Notes

FRAUD AND PERSONAL EQUITIES UNDER THE QUEENSLAND TORRENS SYSTEM

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Introduction

A system of 'title by registration',¹ without an exception for fraud, would be a source of gross injustice. It would be an incentive for dishonesty.² Conversely, if the exception of fraud set out in Torrens Statutes was interpreted as having its common law or equitable meaning, a primary purpose of those statutes would be defeated. Mere knowledge of an unregistered interest at the time of registration would be a bar to indefeasibility of title. The purchaser of Torrens title land, in this respect, would be in the same position as the purchaser of old system land.³

The tension between the need to preserve the acquirement of indefeasibility through registration, and the need to prevent that registration benefiting dishonest parties in the Torrens system, has made it difficult for courts to articulate the behavioural boundaries beyond which a purchaser with knowledge must not step if he is to be able to attain an indefeasible title through registration. When discussing the import of section 109 *Real Property Act* (1861) (Qld), Gibbs J, in *Friedman v Barret*⁴ noted:

This provision that a transferee shall not be affected by notice of an unregistered interest is quite inconsistent with the view that where there is notice of such an interest and nothing more it is fraud to take a transfer that will defeat the interest. In my opinion 'fraud in s 44 and s 109 of the *Real Property Act* of 1861 means actual dishonesty and not constructive fraud,...

1 *Breskvar v Wall* (1971) 126 CLR 376 per Barwick at 385.

2 Lane, 'Fraud and personal equities under the Torrens system' (1988) 62 ALJ 1036 at 1038.

3 Butt, 'Notice and fraud in the Torrens System: a comparative analysis' 13(3) (1978) University of WALR 354 at 376. This point is made by Butt in relation to the New Zealand courts' interpretation of fraud under the Torrens statute.

4 *Friedman v Barret* [1962] Qd R 498 at 512.

McDermid J, in the Alberta Court of Appeal decision in *Holt v Henry Singer*,⁵ when discussing the equivalent section of the Alberta *Land Titles Act*, noted:

This is not to say that (knowledge of an unregistered interest, coupled with knowledge that the unregistered interest will be defeated by registration of the transaction) is not fraud and that equity does not consider it a fraud. It is not a fraud only for the purposes of the section; to purchase an estate which the vendor does not own to the knowledge of the purchaser with the intention of depriving the equitable owner of it still remains a fraud. However it is a fraud which the legislature allows in order to maintain the integrity of the register under the land titles system.

These statements articulate a well established principle in relation to fraud under the Torrens legislation as it is applied by Australian courts: actual dishonesty on the part of a transferee will affect the indefeasibility of his title at the instance of the wronged party but mere knowledge that the registering of a title will destroy another's equitable interest is not in itself a bar to indefeasibility. The statements are, however, of minimal assistance to the task of locating the line that divides legitimate and illegitimate behaviour for the purpose of fraud under ss 44 and 109 of the *Real Property Act* (1861) (Qld).

This dividing line is made less distinct by the maintenance of the jurisdiction of the courts of law and equity under the Torrens system.⁶ Gibbs J's statement that fraud means actual dishonesty for the purposes of the *Real Property Act* (1861) (Qld), together with his statement that a transferee's title shall not be affected by mere notice of an unregistered interest, suggests that the equitable doctrine of fraud is not fraud for the purposes of the *Real Property Act* (1861) (Qld).⁷ The maintenance of equitable rights under the Torrens system, however, means that while equitable fraud that amounts to more than mere notice but less than actual dishonesty may not affect the indefeasibility of a registerer's title through the fraud exception, the same result may be achieved through an *in personam* action.

The meaning of fraud under the Torrens system was recently discussed by the High Court in *Bahr v Nicolay*.⁸ It was effectively implied by Mason C.J and Dawson J in that case that not all species of equitable fraud stand outside the statutory concept.⁹ It will later be submitted that this is a potential source of confusion and uncertainty in this area of the law. It will also be submitted that s 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) has the potential to persuade the majority of the High Court not to adopt this position.

5 *Holt, Renfrew & Co v Henry Siger Ltd* [1982] 4 WWR 481 at 490.

6 *Real Property Act* (1877) (Qld) s 51. See also: *Frazer v Walker* [1967] 1 AC 569 at 585, *Bahr v Nicolay* (No 2) (1988) CLR 604 at 673 and 653, and *Breskvar v Wall* (1971) 126 CLR 376 at 385.

7 See also pp 498 & 504. *Mills v Stockman* (1967) 116 CLR 61 at 78. *Bahr v Nicolay* (No 2) (1988) CLR 604 at 613 & 652-653. *Ramonde Bourseguin v Stennard Bros. Holdings Pty Ltd and ors* (1991) unreported QSCFC Vol 3 No 057 per McPherson SPJ at 15.

8 (No 2) (1988) CLR 604.

9 Above n 2 at 1037.

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The method of application of personal equity used by the rest of the court in *Bahr v Nicolay* led one writer to suggest that the implications of this decision on the principle of indefeasibility by registration could be 'very far reaching'.¹⁰ If this is true then s 115(3)(a) of the *Real Property Act* (1991) (Qld) has the potential to make significant changes to the current state of Queensland law in this area.

The purpose of this paper is to ascertain the present behavioural boundaries beyond which a purchaser of an interest in land with knowledge of an equitable interest must not step, if he is to be able to acquire an indefeasible title by registration under the *Real Property Act* (1861) (Qld), and then to determine whether or not section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) has the potential to, and if so is likely to, significantly alter those boundaries. This will be achieved by an examination of the present Australian interpretation of the general concept of fraud under the Torrens system as defined by Gibbs J¹¹ and McDermid J,¹² and by an examination of the recent attitude of the High Court of Australia and the Supreme Court of Queensland to claims *in personam*, founded in equity, under the Torrens system. Both examinations will consider the possible effect that section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) will have on the attitude of the courts.

The meaning of fraud

A primary purpose of the Torrens system is to save purchasers who are dealing with registered proprietors from the onerous task of investigating the history of the title and satisfying themselves of its validity.¹³ *Holt v Henry Singer*¹⁴ and the direct rejection by Gibbs J in *Friedman v Barret*¹⁵ of the notion that notice of an unregistered interest and nothing more is fraud for the purposes of ss 44 and 109 of the *Real Property Act* (1861) (Qld) are consistent with this purpose.

The description of fraud by Gibbs J as 'actual dishonesty and not constructive fraud' originates from *Assets Co v Mere Roihi*.¹⁶ There, fraud was defined for the purpose of the Torrens system as 'dishonesty of some sort, not what is called equitable or constructive fraud'. Further, it was stated that the 'dishonesty must be brought home to the person whose title is to be impeached or to his agents', and that willful blindness amounts to fraud. This

10 Lewis, 'How Good Is My Title? (After considering *Bahr v Nicolay* 1988 78 ALR 1)', *Australian Current Law*, (1988) 36057 at 36058.

11 Above n 5.

12 Above n 4.

13 *Bahr v Nicolay* (No 2) (1988) CLR 604 at 613, 652-653. *Ramonde Bourseguin v Stennard Bros. Holdings Pty Ltd and ors* (1991) unreported QSCFC Vol 3 No 057 per McPherson SPJ at 14. Hinde, 'Indefeasibility of Title Since *Frazer v Walker*', *The New Zealand Torrens Centennial Essays* (1971) 35.

14 Above n 4.

15 Above n 5.

16 [1905] AC 176 at 210.

definition was added to in *Waimiha Sawmilling v Waione Timber*,¹⁷ where the Privy Council stated that 'if the designed object of a transfer is to cheat a man of a known existing right', or if there is a 'deliberate dishonest trick causing an interest not to be registered' so as to fraudulently keep the register clear, then fraud will be established. In *Butler v Fairclough*¹⁸ it was stated that for there to be fraud, there must be some kind of 'moral turpitude' or 'personal dishonesty'. In *Stuart v Kingston*¹⁹ Starke J stated that there must be some 'consciously dishonest act that can be brought home' to the registered proprietor. He said that 'the imputation of fraud based on the refinements of notice has gone.' These kinds of general statements are reiterated by the courts again and again.²⁰ Judges are clearly reluctant to define fraud in a precise form for fear of limiting its scope.²¹ While this reluctance may be justified, the general principles that they iterate are not a very effective guide for the purpose of determining whether or not fraud has been committed in a particular fact situation.

The Australian courts have taken the position that the bona fide purchaser may proceed to register his own interest with total disregard of his knowledge of unregistered interests, and total disregard of the fact that his act of registration will defeat those interests.²² There is no requirement for the purchaser to give any consideration to the rights of the persons claiming an unregistered interest.²³ How much more than mere knowledge of an unregistered interest is required to establish fraud is uncertain.²⁴

It is clear that a transferee who achieves registration and then repudiates a pre-registration undertaking which he fraudulently gave to the proprietor in order to procure the transfer to himself in an unencumbered form has committed fraud.²⁵ Conversely, as a result of *Friedman v Barret*,²⁶ it appears that a transferee can: (i) register with notice of an unregistered interest, (ii) continue to allow the equitable interest holder to believe his interest is safe, (iii) accept the benefits from that holder's equitable interest for a significant period of time, and then terminate that holder's interest without being guilty of fraud under the Torrens system. In *Bahr v Nicolay* Mason CJ and Dawson J extended the accepted meaning of fraud under the Torrens statute in Australia to unconscionable conduct after registration but that conduct still related to the circumstances pursuant to which registration

17 *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106-7.

18 (1917) 23 CLR 78 per Isaacs J at 79.

19 (1923) 32 CLR 309 at 359.

20 For more recent High Court examples see: 1 at 394, and 9 at 614 and 630.

21 Butt, 'Notice and fraud in the Torrens System: a comparative analysis' University of WALR 13(3) (1978) 354 at 357.

22 Above n 8.

23 *R M Hosking Properties Pty Ltd v Barnes* [1971] SASR 100 at 103.

24 *Ramonde Bourseguin v Stennard Bros Holdings Pty Ltd and ors* (1991) unreported QSCFC Vol 3 No 057 per McPherson SPJ at 15.

25 *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491, as explained in *Bahr v Nicolay* (No 2) (1988) CLR 604 at 614-5, 631, 654.

26 [1962] Qd R 498.

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was achieved.²⁷ The willingness of Mason CJ and Dawson J to treat post-registration conduct of the registered proprietor as fraud in *Bahr v Nicolay* is a mild mixture of equity and the exception of fraud as traditionally interpreted in Australia for the purposes of Torrens legislation²⁸ but their position was not supported by the majority of the court. Justices Wilson and Toohey rejected the proposition that acts subsequent to registration could be held as fraud, and Brennan J did not even offer any comment on this point. *Bahr v Nicolay* is not authority for the proposition that repudiation of a contractual obligation or equitable obligation will constitute fraud under Torrens legislation in Australia.²⁹ Whether or not the full court of the High Court would support the position taken by Mason CJ and Dawson J in this case is uncertain.

Section 115(3)(A)

It is submitted that the inclusion of an equity arising from the act of the registered proprietor as an expressed exception to indefeasibility under section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) has the potential to clarify this uncertainty.

Under the indefeasibility sections of the *Real Property Act* (1861) (Qld),³⁰ the exception of fraud gives rise to an automatic loss of indefeasibility of the registered proprietor's title at the instance of the wronged party.³¹ On the other hand, the courts have the discretion to grant alternative remedies as they see fit under s 51 of the *Real Property Act* (1877) (Qld).³² The inclusion of an equity arising from the act of the registered proprietor as an automatic exception to that proprietor's indefeasible title under s 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) extinguishes this distinction. Thus, there would be no practical advantage in adopting the position of Mason CJ and Dawson J under the new legislation. To do so would only create confusion as to the correct principles to be applied as a result of inconsistency with precedent. The already existing basis for establishing fraud under a Torrens statute would be mixed with principles that were previously only used to establish an equitable right, and yet those same principles would still be used to establish equitable rights not related to fraud.³³

For these reasons it is submitted that the inclusion of equitable rights as an expressed exception to indefeasibility under s 115(3)(a) of the proposed draft

27 Above n 2.

28 Ibid at 1307.

29 Ibid at 1308.

30 Indefeasibility is spread out over eight sections in the 1861 Act: ss 44, 123, 33(4), 96, 7, 45(2), 109, 126.

31 See *Breskvar v Wall* (1971) 126 CLR 376, 383-386.

32 *Frazer v Walker* [1967] 1 AC 569 at 585, *Breskvar v Wall* (1971) 126 CLR 376 at 384, 385, *Bahr v Nicolay* (No 2) (1988) CLR 604 at 637.

33 See also: Lane above n 2.

Real Property Act (1991) (Qld) would encourage the rest of the High Court to reject the position taken by Mason CJ and Dawson J in *Bahr v Nicolay*. This would keep the concept of fraud under the Torrens system in Queensland consistent with past Australian cases, and would also keep the concept's ambit within relatively distinct boundaries. A fraudulent undertaking before registration that is repudiated after registration would be construed as fraud for the purposes of the statute but mere unconscionable conduct after registration would not.

This does not mean that there would be no remedy for a victim of unconscionable conduct that occurs after registration. It has been argued that *Friedman v Barret* was wrongly decided as a result of a failure to exhaust the possible in *personam* actions.³⁴ The defendants' title in *Bahr v Nicolay* was rendered defeasible as a result of rights arising in personal equity.

The potential scope of the equitable exception under s 115(3)(a) is very wide. The majority of the High Court in *Bahr v Nicolay* clearly accepted that despite there being no expressed acknowledgment by the defendants to be bound by an unregistered interest, and despite the fact that the holders of that interest were not an immediate party to the transaction,³⁵ expressed acknowledgement of the existence of the unregistered interest together with extrinsic evidence gave rise to the purchasers being subject to a constructive trust in favour of the unregistered interest holders. This inference by the court creates a further gloss on the concept of indefeasibility under the Torrens system which could be 'very far reaching'.³⁶ Given that, as a result of *Bahr v Nicolay*, a purchaser who has notice of an equitable interest does not have to commit actual fraud, expressly accept to be bound by an interest, or even deal with the equitable interest holder in order to lose his right to acquire an indefeasible title by registration, what would a registering purchaser with notice have to do in order to avoid the s 115(3)(a) exception? Would he have to expressly communicate his intention not to be bound to the vendor before registration?

Such an approach would be inconsistent with the judicially accepted philosophy of the Torrens system as a whole.³⁷ The Torrens system is 'not a system of registration of title but a system of title by registration'.³⁸ It is the duty of the unregistered interest holder who wishes to protect his interest to register or lodge a caveat.³⁹ There is no need for a registering purchaser to be placed under a duty of positive disclosure.

34 Robinson, 'Friedman v Barret - Wrongly decided?' (1984) December, Qld Law Society Journal 259.

35 Up until *Bahr v Nicolay* it was uncertain whether equities could exist between a registered proprietor and one who was not an immediate party to the transaction: see Lane above n 2.

36 Above n 11.

37 Above n 20 at 376 where the same phrase is used in a similar context.

38 Above n 1.

39 Above n 33.

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The actual facts of *Bahr v Nicolay*, and the subsequent treatment of the gloss in *Bourseguin*,⁴⁰ do not contradict this view. The facts of those cases demonstrate manifestations of the purchasers' intentions that require negligible judicial conjecture to infer actual intention. There are many circumstances in which it is very difficult to ascertain whether or not an equitable right has been created,⁴¹ and thus the gloss is unlikely to create dramatic change.

While the High Court's recent gloss on the indefeasibility principle does make it possible to argue that s 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) could be used to reduce drastically the permissible forms of behaviour of a purchaser who seeks an indefeasible title by registration, if that purchaser has notice of an unregistered interest, the circumstances in which that gloss has been used suggest that such a reduction is not likely to occur.

Conclusion

The decision in *Bahr v Nicolay* demonstrates the existence of a potential change in the approach taken by the High Court of Australia, that is, away from the orthodox view that equitable fraud is something that exists outside the Torrens statutory concept of fraud towards the view that some species of equitable fraud are compatible with it. Such a move is of little practical benefit to parties involved in land transactions and it is submitted that such a change would be undesirable given the confusion it could create. It is further submitted that section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) has the potential to prevent such a change.

Bahr v Nicolay also creates the potential for s 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) to be used to expand the scope of the personal equities exception under the Torrens system in Queensland. Such an expansion would be a serious departure from the orthodox application of Torrens statutes. It is a departure which the Australian courts have not manifested an intention to promote.

40 See above n 23.

41 Above n 11.