

Judicial Acceptance of Immediate Indefeasibility in Victoria

JENNY SCHULTZ*

The doctrine of indefeasibility is the lynch pin of the Torrens system of title. Without it the whole edifice that was erected in South Australia in 1858 and has replicated itself in many jurisdictions around the world would surely collapse. Indefeasibility of title is central to the Torrens system because the Torrens system 'is not a system of registration but a system of title by registration'.¹

A fundamental question confronting the courts has been whether to adopt the theory of deferred indefeasibility or immediate indefeasibility. Under the doctrine of deferred indefeasibility, if A registers an instrument which is forged or otherwise void on general law principles, he does not secure immunity from attack by a second person B, seeking to set aside the registration, even if A acted without fraud. Immunity from attack is only available to a third party C, who purchases in good faith from A and registers an instrument executed by him. In contrast, the doctrine of immediate indefeasibility confers a good title on A immediately he obtains registration of a transfer or other instrument, regardless of its invalidity. Further, if A registers a forged transfer, he is entitled to protection against action by the previous registered proprietor whose signature was forged to the transfer, provided of course that A acted without fraud and has given valuable consideration for the transfer.²

Several recent decisions in Victoria have reopened the debate as to the meaning of indefeasibility. In *Chasfld Pty Ltd v Taranto*³ Gray J upset the well established doctrine of immediate indefeasibility by finding in favour of the 1960's concept of deferred indefeasibility. Twelve months later in *Vassos v State Bank of South Australia*⁴ the decision of Hayne J reinforced the concept of immediate indefeasibility. As recently as December 1992, Smith J, presiding in *Eade v Vogiazopoulos*⁵ had the onerous task of deciding which of these opposing views he should adopt. Although his Honour found in favour of immediate indefeasibility his reasoning was not identical to that of Hayne J in *Vassos*.

* BA, LLB; Assistant Lecturer in Law, Monash University. The writer is indebted to her colleagues, Professor Marcia Neave and Mrs Joycec Tooher, for their valuable comments on the drafts of this paper.

¹ *Breskvar v Wall* (1971) 126 CLR 376, 385-6 per Barwick CJ.

² *Transfer of Land Act* 1958 (Vic) s 42.

³ [1991] 1 VR 225.

⁴ Unreported judgment of Hayne J, Supreme Court of Victoria, 5 August 1992.

⁵ Unreported judgment of Smith J, Supreme Court of Victoria, 22 December 1992.

THE EADE CASE

Mr and Mrs Vogiazopoulos were registered under the *Transfer of Land Act* 1958 (Vic) as proprietors of their family home. Mr Vogiazopoulos executed a mortgage over the property in favour of the plaintiff Eade, to finance the purchase of a business. Mr Vogiazopoulos forged his wife's signature to the original mortgage and to a later variation of the mortgage. The mortgage and the variation were registered but the mortgagors defaulted and the mortgagee commenced action to take possession of the property.⁶

One of the questions before the court was whether the female mortgagor's forged signature should divest the registered mortgagee of his security at the suit of the defrauded mortgagor, even though the mortgagee was innocent of fraud.⁷ The answer depended on whether the court favoured the principle of immediate or deferred indefeasibility. The defendants (the Vogiazopouloses and the Registrar of Titles⁸) relied upon the principle of deferred indefeasibility which postponed protection until the registration of a bona fide third party without notice of the fraud. They asserted that the *Transfer of Land Act* did not confer immediate indefeasibility on a mortgage which was tainted with fraud, regardless of whether the fraud was that of the registered proprietor. In contrast the plaintiff mortgagee submitted that because the mortgage and the variation of mortgage had been registered, the mortgagee's title was indefeasible unless the mortgagee had himself been a party to the fraud.

THE JUDGMENT

Smith J acknowledged that he was faced with a conflict of authority. On the one hand, if he were to follow the decision of Gray J in the case of *Chasfild Pty Ltd v Taranto* the registered mortgagee would be divested of his registered security at the suit of the defrauded Mrs Vogiazopoulos, even though the mortgagee was innocent of fraud. On the other hand, if he were to follow the decision of Hayne J in the case of *Vassos v The State Bank of South Australia*, then Mrs Vogiazopoulos could not challenge the mortgage and would be subject to its consequences.⁹

The decision of Gray J in *Chasfild* was founded on s 44(1) of the *Transfer of*

⁶ The facts of *Eade* are strongly reminiscent of those considered in the appeal to the Privy Council, from the decision of the New Zealand Court of Appeal in *Frazer v Walker* [1967] 1 AC 569.

⁷ The various parties also raised issues relating to agency, estoppel, negligence, in personam rights and the *Fair Trading Act* 1985 (Vic).

⁸ The Registrar of Titles was joined by Mrs Vogiazopoulos as a defendant because she sought compensation from him pursuant to s 110 of the *Transfer of Land Act* in the event that her counterclaims against the plaintiff were unsuccessful.

⁹ As Smith J stated on p 38 of his judgment:

on the facts I have found in this case, Gray, J. would have found that Mrs. Vogiazopoulos could challenge the validity of the mortgage and have the register rectified but Hayne, J. would have held that she could not.

Land Act.¹⁰ The key passage of his Honour's judgment is in the following words [emphasis added]:

In my opinion, the effect of the present Victorian provisions is that "fraud" in s 44(1) means fraud associated with the registration and that a proprietor who becomes registered in such circumstances, *even if innocent of fraud*, may be divested at the suit of a defrauded previous proprietor until there is a sale to a *bona fide* purchaser who becomes registered. In this connection, fraud includes forgery.¹¹

The essence of Justice Gray's judgment is that the term 'fraud' in s 44(1) has a wider meaning than that in s 42(1) and that s 44(1) qualifies s 42(1) rather than merely restates it. His Honour regarded s 44(1) as the paramountcy section. This is contrary to the traditional position where s 42(1) of the *Transfer of Land Act* was regarded as the paramountcy provision as it stated the principle of indefeasibility of title most positively.¹² According to Gray J in *Chasfield*, the Victorian legislation is different from that in other States due to amendments made to it in 1954 and as such the general principle of immediate indefeasibility as applied in the other Australian States is not applicable in Victoria.¹³

The proposition which emerges from Justice Gray's judgment is that a forged instrument will not be given statutory indefeasibility as between the immediate parties to the transaction even though the instrument is duly registered. It appears however that this principle does not apply to all void instruments and is only confined to cases involving a forgery or fraud. This leaves open the possibility that instruments void for some other reason may have the protection of immediate indefeasibility upon registration. In this respect it is too general to state that Justice Gray's decision stands for the proposition that immediate indefeasibility does not apply in Victoria because in effect his Honour has introduced a more narrow form of the deferred indefeasibility approach. His Honour's interpretation is significantly narrower than the traditional deferred indefeasibility approach¹⁴ in that it refers only to instruments which are procured through fraud or forgery and does not apply to instruments which are void for other reasons, for example, illegality.

Although Justice Gray's interpretation is in one sense narrower than the traditional deferred indefeasibility approach, it is also broader than the position at common law and in that sense broader than the deferred indefeasibility concept. At common law there remains a distinction between

¹⁰ The relevant provisions of that section are as follows [italics supplied]:

Any certificate of title . . . in the Register Book *procured or made by fraud* shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.

¹¹ [1991] 1 VLR 225, 235.

¹² See Harrison, 'Indefeasibility of Torrens Title' (1952) 2 UQLJ 206.

¹³ See G Teh, 'Deferred Indefeasibility of Title in Victoria' (1991) 17 Mon LR 77.

¹⁴ See *Gibbs v Messer* [1891] AC 248, where the Privy Council's broad statement of the deferred indefeasibility principle in effect applies to all void instruments and is not confined to cases involving a forgery. See also Justice Dixon's exposition in *Clements v Ellis* (1934) 51 CLR 217.

instruments which are void *ab initio* and those which are merely voidable.¹⁵ The principle behind the deferred indefeasibility approach was that an instrument that was void at common law would not be validated by registration, as the principle of *nemo dat qui non habet* in effect meant that there was no interest to register.¹⁶ Justice Gray's interpretation of s 44(1) goes further than the traditional concept of deferred indefeasibility by taking away protection for both void and voidable instruments procured by fraud or forgery and it is in this sense that his Honour's interpretation is broader than the traditional concept of deferred indefeasibility and also broader than the position at common law.

In *Vassos* Hayne J considered the reasons of Gray J in *Chasfield*, particularly the interpretation of s 44(1). Hayne J took the view that:

the words of s. 44(1) suggest that there must be established fraud by or on behalf of the party who seeks and obtains registration; otherwise how is it that the folio or the amendment is procured or made by fraud?¹⁷

His Honour acknowledged that while the word 'procured' suggests a degree of connection to registration beyond physically affecting the registration, it does not identify whose fraud is relevant. He believed the better view was that the phrase refers to an act that procures or makes the registration rather than one that procures or makes the instrument that is registered. Furthermore, his Honour compared s 44(1) with s 42, and commented that:

if s. 44(1) is to be read as avoiding entries on the register resulting from instruments in connection with which any of the parties acted fraudulently, it represents a significant inroad on the indefeasibility otherwise created by s. 42.¹⁸

His Honour further observed that Justice Gray's interpretation effectively rendered the reference to fraud in s 42 unnecessary, and therefore he disagreed with the position reached in *Chasfield*, that if s 44(1) is limited to a reference to fraud on the part of the registered proprietor it has no work to

¹⁵ At common law a person who by fraud procures a conveyance to himself may or may not acquire the legal title. If the fraud is such as to make the instrument of conveyance void *ab initio*, no title passes. This will be the case where the fraud consists of forgery, or where the circumstances make a plea of *non est factum* available. However where the instrument of conveyance is voidable, title will pass and will operate until the party entitled to rescind the contract exercises his right of rescission. For example where A executes a genuine transfer to X, but is induced to do so by a fraudulent representation by X, the legal title will pass to X and A will have merely an action for damages at law, or an equitable claim to a reconveyance by X. Until A elects to exercise his right to rescind the contract and have the property reconveyed to him, X will have title to the land.

¹⁶ In *Gibbs v Messer* [1891] AC 248, the Privy Council were of the opinion that a person registered by means of a forged instrument is not liable to attack only on the basis of fraud, but also on the basis that the instrument is a nullity and can pass no title. Lord Watson delivered the judgment of their Lordships and stated at 257–8 that:

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed.

¹⁷ *Supra* n 4, at 17.

¹⁸ *Supra* n 4, at 19.

do.¹⁹ Hayne J concluded that the better construction of s 44(1) is that it stated the consequences that flow from fraud of the kind referred to in s 42(1) and did not in fact qualify that section.²⁰

In *Eade*, Smith J analysed ss 42–44 of the *Transfer of Land Act* and also the decisions of *Frazer v Walker*,²¹ *Breskvar v Wall*,²² *Clements v Ellis*,²³ *Chasfield v Taranto* and *Vassos*. His Honour concluded that he agreed with Justice Hayne's decision in *Vassos* 'but not for precisely the same reasons.'²⁴ His Honour stated that:

In all the circumstances, it seems to me that a single judge of this Court should apply the reasoning of the High Court in *Breskvar v Wall* . . . Consequently, defeasibility or otherwise of the registered interest of Mr. Eade will turn on the meaning of the reference to "fraud" in the relevant sections — in particular, whether on the proper construction of the relevant sections, the registered interest of Mr. Eade may nonetheless be challenged by Mrs. Vogiazopoulos because of the fraud of Mr. Vogiazopoulos. It is necessary, therefore, to consider the meaning of the term in the relevant sections, ss 42, 43 and 44.²⁵

Smith J relied on the decision of the Privy Council in *Assets Co Ltd v Mere Roihi*²⁶ as authority for his conclusion that the reference to 'fraud' wherever it appears in ss 42, 43 and 44, should 'be interpreted as referring to fraud which can be brought home to the person obtaining registration whose registered interest is in question.'²⁷ This supported his conclusions that operative 'fraud' was limited to fraud by or on behalf of the purchaser or transferee whose title it is sought to impeach. Smith J noted that his 'conclusions result in s 44(2) having little or no operation where fraud by the registered purchaser is established. But it must be remembered that the present provisions (ss 42 to 44) were brought together in a revision of the Act in 1954 combining sections including ss 104, 179 and 247 of the 1928 Act. It is understandable that those responsible for the drafting would have retained the provision contained in s 44(2) relating to fraud even if it was unnecessary. If it had been removed, its

¹⁹ Hayne J stated at 19–20:

I consider that s. 44(1) has sensible work to do if it is seen as stating the consequences that follow as a result of excepting such cases from the otherwise general operation of s. 42(1).

²⁰ In the view of Hayne J at 20

s. 42(1) provides a general rule of indefeasibility, subject to an exception for cases of fraud on the part of the person making the registration or his agent, and s. 44(1) then deals expressly with the consequences that are to flow with respect to the register as between the person defrauded and parties to the fraud. Section 44(2) goes on to deal with the position of the bona fide purchaser from a person who has procured registration by fraud.

Section 44(2) ensures that a bona fide purchaser from a person who has procured registration by fraud is protected once registered.

²¹ [1967] 1 AC 569.

²² [1971] 126 CLR 376.

²³ (1934) 51 CLR 217.

²⁴ *Supra* n 4, at 49.

²⁵ *Supra* n 5, at 51–2.

²⁶ [1905] AC 176.

²⁷ *Supra* n 4, at 55.

omission would have provided fertile ground for argument.²⁸ Smith J concluded that 'to challenge the validity of the mortgage, Mrs. Vogiazopoulos must prove fraud on the part of Mr. Eade or his agents'²⁹ which could not be established in this case.

Smith J decided in favour of the concept of immediate indefeasibility and concluded that as the mortgagee had not been fraudulent himself, his title would not be defeated as a result of the fraud of another party who had been involved in the transaction unless the fraud could be brought home to the mortgagee.

Before leaving the question of the enforceability of the plaintiff's registered mortgage, Smith J also rejected Mrs Vogiazopoulos's argument, that she had rights in personam³⁰ that entitled her to have the mortgage redeemed, her signature being forged. Smith J followed the analysis of Hayne J in *Vassos* and decided that Mrs Vogiazopoulos could point to no more than the forging of her signatures and that something more is needed to found an in personam action of the kind spoken of in *Frazer v Walker*.³¹

Justice Smith's decision in this regard is once again inconsistent with Justice Gray's decision in *Chasfild*. In *Chasfild*, Gray J offered an alternative basis to the concept of deferred indefeasibility for his decision. In his Honour's view, the Tarantos were entitled to set aside Chasfild's registered mortgage pursuant to the in personam exception. His Honour based this conclusion on the fact that the Tarantos would have been able to rely on an action at law for ejectment if Chasfild had been in possession.³² It is submitted that his Honour was incorrect on this point. For an in personam claim to arise there must be some conduct of the registered proprietor, before or after

²⁸ *Supra* n 4, at 55-6.

²⁹ *Supra* n 4, at 56.

³⁰ Rights in personam (or 'personal equities') are an exception to indefeasibility. Equity will intervene to prevent a registered proprietor from setting up his own indefeasibility of title to defeat unregistered interests which he himself has created. In *Frazer v Walker* [1967] 1 AC 569, 585, the Privy Council stressed that the principle of indefeasibility of title 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant'.

³¹ The rights in personam exception to indefeasibility was given a similar analysis by the South Australian Full Court in *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425. The argument for the plaintiff in that case was based on the proposition that the in personam exception to indefeasibility could be invoked because it was unconscionable for the defendant to retain land once it was known that his purported acquisition was invalid. This argument was rejected on the ground that it would make the concept of immediate indefeasibility virtually meaningless if the courts were to regard mere retention of the land, after it becomes known that the instrument is void, as unconscionable, so as to give rise to an equitable claim in personam on the part of the previous registered owner to have the land retransferred.

³² Gray J stated at 235-6:

In a system of registration, any such [in personam] claim must be based upon the Act because only the registrar can restore the true owner to the register. In my opinion, such a claim is a claim *in personam* against the person registered under the forged instrument. Whether such a claim is a claim at law or in equity does not matter where, as here, the parties to the action are the parties to the forged instrument. There is, in my view, no question of competing equities in this case. The defendants' claim is a claim *in personam* under the statute.

registration, giving rise to a personal equity in another person.³³ Whilst there has been a trend in favour of extending the limits of the in personam exception,³⁴ it is submitted that there was little in the conduct of Chasfield which could give rise to such a personal equity. In this respect the treatment of the in personam exception by Hayne J in *Vassos* and Smith J in *Eade* is more in line with established principles.³⁵

IMPLICATIONS OF THE DECISION

The effect of Justice Smith's decision is to give momentum to a swing back in favor of immediate indefeasibility. This outcome is highly welcomed since a decision in favour of deferred indefeasibility has the potential to severely affect conveyancing practice by placing a heavier onus on solicitors acting for purchasers and mortgagees. Statutory declarations would be required from vendors and mortgagors to authenticate signatures on documents submitted for registration.³⁶

The arguments in favour of immediate indefeasibility depend on value judgments concerning the weight of conflicting policies. In the forgery situation the conflict for the courts has been to decide who should get title to the property, the forgery victim who was the previous registered proprietor or the new registered proprietor who is not fraudulent but who becomes registered as a result of the forgery. The issue is whether to protect the rare forgery victim at the price of disturbing other basic securities and functions of the registration system.³⁷ Security of title is undoubtedly a basic aim of the Torrens

³³ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

³⁴ See *Ibid*; *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32; P Butt, 'Fraud and Personal Equities under the Torrens System' (1988) 62 ALJ 1036.

³⁵ *Palais Parking Station Pty Ltd v Shea* 24 SASR 425; *Bahr v Nicolay (No. 2)* (1988) 164 CLR 204; *Contra Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32.

³⁶ R Sackville, 'The Torrens System — Some Thoughts on Indefeasibility and Priorities' (1973) 47 ALJ 526; C Croft, 'The Torrens System — Deferred Indefeasibility' 64 Law Inst J 238 (Apr 1990); cf W Taylor, 'Scotching *Frazer v Walker*' (1970) 44 ALJ 248.

³⁷ Cf Law Reform Commission of Victoria, 'The Torrens Register Book', Report No 12, November 1987, para 16 at 11–12. The Law Reform Commission was of the view that the result obtained under the immediate indefeasibility approach undermines community expectations of security of ownership. The rule affects the security of all titles by making them vulnerable to forgeries. The Commission stated at 11, that the result is:

at odds with ancient principles under which forgeries are legally ineffectual. In cases where the land has some special appeal to the owner arising out of long personal association, the result may be particularly unhappy. The party who loses the land is entitled to compensation. The question is which party should be given the land and which should be compensated. It seems more likely that compensation will be adequate for the innocent third party than for the person whose title is altered. Even so, cases may occur where considerations of adequacy of compensation would point in the other direction.

The Commission recommended that the present rule as it applies to forgery should be replaced with a well defined discretion in the Court to allocate the land and the compensation for the loss between the innocent parties. They suggested at 12 that:

the interest of a victim of forgery whose title is altered by registration of a forgery should prevail against an innocent third party whose interest is registered on the

system and a registered proprietor is insecure to the extent that his signature can be forged to a registrable instrument and his certificate of title can be obtained by the forger. Yet deferred indefeasibility potentially threatens the security of *all* title, since an innocent purchaser always runs the risk of having his title impeached on the ground that registration of his title was based on a void instrument.³⁸

Ultimately the paramount interest under the Torrens system is that of the purchaser in good faith. His interests and those of the community, in cheap and efficient conveyancing transactions are protected by minimising the required investigations of title and reducing the risk of being affected by anterior defects in title as opposed to future forgeries. The most convincing rationale for immediate indefeasibility is the proposition that no purchaser of Torrens system land should be required to make retrospective investigations of his vendor's title or inquiries that are expensive and time consuming. The deferred indefeasibility approach increases the cost and complexity of all conveyancing transactions as well as undermining security of title. In contrast the concept of immediate indefeasibility is attractive as it makes registration conclusive.

The concept of immediate indefeasibility gives a much greater degree of all round justice than the deferred indefeasibility approach. The reasons for this are two fold, first the purchaser keeps the property (or the mortgage) as registration validates the forged document, and secondly the owner who has been defrauded by the forged document gets compensation under the Torrens provisions.³⁹

Although immediate indefeasibility presently enjoys judicial acceptance in Victoria, its permanent acceptance is not guaranteed. It remains difficult to find a uniform rationale for its preference. Smith J himself stated that he did not follow precisely the same reasoning as Hayne J in *Vassos*.⁴⁰ After *Eade*

basis of the forgery. The Court should be entitled to reverse this result in the case of demonstrated hardship to the innocent third party.

The disadvantage of this approach lies in the lack of certainty and costs involved in removing that uncertainty in a particular case.

³⁸ R Sackville, 'The Torrens System — Some Thoughts on Indefeasibility and Priorities' (1973) 47 ALJ 526, 531.

³⁹ See W Taylor, 'Scotching *Frazer v Walker*' (1970) 44 ALJ 248, 253; *Vassos v State Bank of South Australia*, unreported judgment, Supreme Court of Victoria, 5 August 1992 and *Eade v Vogiazopoulos* unreported judgment, Supreme Court of Victoria, 22 December 1992.

⁴⁰ Smith J endorses the decision of Hayne J and the theory of immediate indefeasibility. Smith J did however have a problem with Hayne J's conclusions regarding the operation of s 44(2). In particular, his Honour made the following observations at 49:

A problem remains, however, in that, if s. 44(1) is restricted to situations where there is fraud on the part of the registered proprietor, s. 44(2) has no operation where fraud is in issue; for the registered proprietor who has been fraudulent could not satisfy the requirement of a bona fide purchaser for value. There would remain only a limited operation for the provision where errors were alleged.

This slight difference in opinion between Smith J and Hayne J as to the operation of s 44(2) however, has little practical significance. Their Honours both agree that there would need to be fraud on the part of the registered mortgagee or his agent before the mortgagor whose signature had been forged was entitled to orders rectifying the register and the certificate of title by deleting the entry of the mortgage.

there are still two differing views on the interpretation of the Victorian indefeasibility provisions. There is the view of Gray J in *Chasfild* which favors the concept of deferred indefeasibility and there is the view, held by Hayne J in *Vassos* and endorsed by Smith J in *Eade*, which supports the concept of immediate indefeasibility.⁴¹

CONCLUSION

Eade endorsed the concept of immediate indefeasibility and went some way towards ameliorating the confusion created by the decision in *Chasfild*, giving some welcome respite to the confused state of the law in Victoria regarding the concept of indefeasibility. As one of two recent decisions of the Supreme Court of Victoria to endorse the concept of immediate indefeasibility, the decision stands as an authoritative statement of the law. Smith J is to be commended for his endorsement of the concept of immediate indefeasibility as it is this concept which advances the aims of the Torrens system most effectively.⁴² The acceptance of the theory of immediate indefeasibility, with its emphasis on protection of the bona fide purchaser acting in reliance on the register, is an important progression.

⁴¹ See also *Coomber v Curry and Musumeci*, unreported judgment of Hayne J, Supreme Court of Victoria, 16 February 1993, where in an application for an interlocutory injunction, Hayne J endorses his own decision in *Vassos* and the decision of Smith J in *Eade*.

⁴² See Hinde, 'The Future of the Torrens System in New Zealand' in Northey (ed), *The A. G. Davis Essays in Law* (London, Butterworths, 1965), 78 where Professor Hinde refers to three main objects of the Torrens system:

The first is to provide a register from which persons who propose to deal with land can discover all the facts relative to the title . . . The second object is to ensure that a person dealing with land which is subject to the system is not adversely affected by any infirmities in his vendor's title which do not appear on the register, thus saving the difficulty and expense of going behind the register to investigate the title. Thirdly, the Torrens system aims to provide a guarantee by the State that the picture presented by the register-book is true and complete. If this turns out to not be the case, compensation is to be paid to any person who suffers loss either through the land being made subject to the system or else through the register not disclosing all the facts relevant to the title.