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Abstract

[revised paper] 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

FRAUD AND PERSONAL EQUITIES UNDER THE QUEENSLAND TORRENS SYSTEM

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Introduction

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 or she 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 concept of fraud under the Torrens System, 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 of an interest in land who are dealing with registered proprietors from the onerous task of investigating the history of the title and satisfying themselves of its validity.¹ Pursuant to this purpose, it has been well established in Australian jurisdictions that actual dishonesty on the part of a transferee will affect the indefeasibility of his or her title at the instance of the wronged party through the fraud exception under section 44 of the *Real Property Act* (1861) (Qld), but that mere knowledge that the registering of a title will destroy another's equitable interest is not in itself a bar to indefeasibility.²

1 *Bahr v Nicolay (No 2)* (1988) CLR 604 at 613 & 652-3; *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.

2 *Stuart v Kingston* (1924) 34 CLR 394; *Friedman v Barrett* [1962] Qd R 498 at 504 and 512; *Mills v Stokman* (1967) 116 CLR 61 at 78; *Bahr v Nicolay (No 2)* (1988) CLR 604 at 613 & 652-3, *Ramonde Bourseguin v Stennard Bros Holdings Pty Ltd and ors* (1991) unreported QSCFC Vol 3 No 057 per McPherson SPJ at 15. For the Queensland jurisdiction, section 109 of *Real Property Act (1861)* (Qld) provides statutory protection of the indefeasibility of the title of a purchaser with knowledge that the registering of his or her title will destroy another's equitable interest.

The concept that fraud under the Torrens System means something more than registering with the knowledge that doing so will destroy another's equitable interest originates from *Assets Co v Mere Roihi*.³ 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 wilful blindness amounts to fraud. This definition was added to in *Waimiha Sawmilling v Waione Timber*,⁴ 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*⁵ it was stated that for there to be fraud, there must be some kind of 'moral turpitude' or 'personal dishonesty'. In *Stuart v Kingston*⁶ 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.⁷ Judges are clearly reluctant to define fraud in a precise form for fear of limiting its scope.⁸ While this reluctance may be justified, the general principles which judges reiterate 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 or her own interest with total disregard of his or her knowledge of unregistered interests, and total disregard of the fact that his or her act of registration will defeat those interests.⁹ There is no requirement for the purchaser to give any consideration to the rights of the persons claiming an unregistered interest.¹⁰ How much more than mere knowledge of an unregistered interest is required to establish fraud is uncertain.¹¹ It is clear that a transferee who achieves registration and then repudiates a pre-registration undertaking which he or she fraudulently gave to the proprietor in order to procure the transfer to himself or herself in an unencumbered form has committed fraud.¹² Conversely, as a result of *Friedman v Barrett*,¹³ it appears as though a transferee can register with

3 [1905] AC 176 at 210.

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

5 (1917) 23 CLR 78 per Isaacs J at 79.

6 (1923) 32 CLR 309 at 359.

7 For more recent High Court examples see: *Breskvar v Wall* (1971) 126 CLR 376 at 394, and *Bahr* above n 1 at 614 & 630.

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

9 *Stuart v Kingston* (1924) 34 CLR 394; *Friedman* above n 1 at 504 and 512; *Mills* above n 2 at 78; *Bahr* above n 1 at 613 & 652-3, *Ramonde* above n 2 at 15.

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

11 *Ramonde* above n 2 at 15.

12 *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491, as explained in *Bahr* above n 1 at 614-5, 631, 654.

13 [1962] Qd R 498.

notice of an unregistered interest, continue to allow the equitable interest holder to believe his or her interest is safe, 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 or subject to a claim in personam under the Torrens system.¹⁴ Note, however, that one may challenge this claim by arguing that the reason that the acts of the landlord in *Friedman v Barrett* were not construed as fraud by the court was because the tenant's interest was terminable at will. The court held that while section 11 of the *Real Property Act* (1877) (Qld) protects an unregistered three year lease, it does not protect the options to renew under that lease.¹⁵ Thus it can be argued that the court found the landlord's title to be indefeasible because his behaviour in no way implied an acceptance of the purported exercising of the unregistered option to renew, it merely implied acceptance of the tenant's right to stay on as a weekly tenant.¹⁶

The Effect of *Bahr v Nicolay*

The decision in *Bahr v Nicolay*¹⁷ demonstrates the existence of a potential swing in the High Court of Australia 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. Chief Justice Mason and Justice Dawson extended the accepted meaning of fraud under the Torrens statute to unconscionable conduct after registration.¹⁸ Their willingness to treat post-registration conduct of the registered proprietor as fraud is a mild mixing of equity and the exception of fraud as traditionally interpreted in Australia for the purposes of Torrens legislation.¹⁹ Their position, however, 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 chose not to comment because he had already found that an in personam remedy was available. Therefore *Bahr v Nicolay* is not authority for the proposition that repudiation of a contractual obligation or equitable obligation subject to registration will constitute fraud under Torrens legislation in Australia.²⁰ Whether or not today's full court of the High Court would support the position taken by Mason CJ and Dawson J in this case is uncertain.

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

15 *Friedman* above n 2 at pp 503, 510.

16 *Ibid* per Mansfield at 505 and Gibbs at 513.

17 *Bahr* above n 1.

18 One should note, however, that the unconscionable conduct was still related to the circumstances pursuant to which registration was achieved; namely refusing to honour the equitable interest after manifesting an intention to accept it prior to registration. See *Bahr* above note 1 at 616-7.

19 Lane, 'Fraud and personal equities under the Torrens system' (1988) 62 Australian Law Journal, 1036 at 1307.

20 *Ibid* at 1308.

A more significant aspect of the *Bahr v Nicolay* decision for the purpose of this paper is the majority of the High Court's treatment of the in personam exception. Section 51 of the *Real Property Act* (1877) (QLD) states that nothing in the Real Property Acts take away or affect the jurisdiction of the courts of law and equity. This means that a registered proprietor's interest will still be defeasible at the instance of an equitable interest holder if that equitable interest is created as a result of the acts of the registered proprietor, regardless of whether those acts occur before or after registration.²¹ The majority of the High Court in *Bahr v Nicolay* impliedly accepted that a purchaser can be bound to honour an unregistered interest without expressly acknowledging his agreement, even if the interest holder is not an immediate party to the transaction.²² This aspect of the majority's judgment led one writer to suggest that the implications of the decision on the principle of indefeasibility by registration under the Torrens system could be 'very far reaching'.²³ It is now arguable, as a result of *Bahr v Nicolay*, that 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. Does this mean that a registering purchaser with notice now has to expressly communicate his or her intention not to be bound in order to avoid the in personam exception?

Such an approach would be inconsistent with the judicially accepted philosophy of the Torrens system as a whole. The Torrens system is 'not a system of registration of title but a system of title by registration'.²⁴ It is the duty of the unregistered interest holder who wishes to protect his or her interest to register his interest or lodge a caveat.²⁵ There is no need for a registering purchaser to be placed under a duty of positive disclosure.

The facts of *Bahr v Nicolay* do not contradict this view. In *Bahr v Nicolay* the contract of sale entered into between the vendor, Nicolay, and the purchasers, Mr and Mrs Thompson, contained a clause acknowledging the existence of an equitable interest held by the Bahrs, a third party. Such an acknowledgment in itself does not bind a purchaser to honour the third party's equitable rights.²⁶ In this case, however, the equitable interest was an agreement between Nicolay and the Bahrs maintaining Bahrs' right to repurchase the relevant property. The Thompsons knew that if the Nicolay sold the property without binding them to recognise this equitable interest, then Nicolay would have been in breach of a prior contract affecting the land.

21 *Bahr* above n 1 at 613.

22 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 19.

23 Lewis, 'How Good Is My Title? (After considering *Bahr v Nicolay*, High Court 14.5.88, 78 ALR 1)', *Australian Current Law*, (1988) 36057 at 36058.

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

25 *Ibid.*

26 *Ramonde* above n 2 at 17, and per Ryan J at 7.

From this Brennan J concluded that by signing the contract which contained the acknowledgment clause, the Thompsons were contractually agreeing to be bound by the Bahr's equitable rights.²⁷ Brennan J went on to say that even if this finding was incorrect, the documentary evidence of two letters received by the Bahr's solicitors from the purchasers after registration which expressed an understanding that the third party's interest was to be honoured, together with oral evidence which clearly demonstrated the purchasers' awareness, prior to signing the written contract, that the vendor intended the purchasers to be bound to honour the third party's equitable interest, was enough to establish that there was a collateral unwritten contract entered into at the same time as the written contract which bound the purchasers.²⁸ Justices Wilson and Toohey relied on the same extrinsic evidence to find that the purchasers became subject to a constructive trust in favour of the Bahrs when they entered the contract of sale.²⁹

Justice Brennan's primary finding, that the signing of the contract coupled with the Thompsons' behaviour prior to registration was enough to deem acceptance of the equitable interest by the Thompsons, and the imputation of a constructive trust by Wilson J and Dawson J, means that the majority of the High Court in *Bahr v Nicolay* accepted that a purchaser can be obligated to honour an equitable interest even if he has not expressly agreed to do so.³⁰ This does not mean, however, that purchasers with notice are now burdened with the responsibility of having to take positive steps to ensure that they are not bound by equitable interests that they have knowledge of. In contrast to *Bahr v Nicolay*, it is often very difficult to ascertain whether or not an equitable right has been created,³¹ and thus it is submitted that the effect of the decision on the concept of indefeasibility is unlikely to create a significant reduction in the permissible forms of behaviour a purchaser with notice of an unregistered interest who is seeking an indefeasible title by registration may engage in.

This submission is supported by the case of *Bourseguin*,³² in which the implications of *Bahr v Nicolay* were considered. There it was held that satisfaction evidenced in writing as to the terms of existing equitable interests was not enough to bind the purchaser to honour those interests.³³ Thus it is clear that the onus is still on the equitable interest holder to assert his or her rights by lodging a caveat or by registration, rather than on the purchaser to take onerous steps to ensure that the indefeasibility of his or her title by registration will not be defeated by unregistered interests.³⁴ In a similar fashion to *Bahr v Nicolay*, it was held in *Bourseguin* that a

27 *Bahr* above n 2 at 647-8.

28 *Ibid* at 651-2.

29 *Ibid* at 638.

30 Contrast with *Friedman* above n 2.

31 See above n 23 at 36058.

32 *Ramonde* above n 2.

33 *Ibid* per McPherson at 17, and per Ryan J at 7.

34 *Ibid* above n 2 per McPherson SPJ at 19.

purchaser's entering into a contract of sale after receiving the communication that a vendor intended him to be bound by a specific equitable interest in relation to the property was enough to bind that purchaser to honour the equitable interest.

So while a superficial reading of *Bahr v Nicolay* may lead one to conclude that the court's treatment of the in personam exception has the potential to greatly expand the scope of that exception, a closer reading reveals that the case is essentially governed by the principle that a purchaser cannot 'make a mental reservation to reject but nevertheless continue acting as if he were proceeding to settle subject to a condition tendered'.³⁵

Perhaps the most important aspect of *Bahr v Nicolay* is that it helps to clarify the uncertainty created by *Friedman v Barrett* about what is, and what is not, a manifestation of intention by a purchaser with notice to honour the equitable interest of a third party.

The Effect of the proposed draft Real Property Act (1991) (Qld)

The proposed draft *Real Property Act* (1991) (Qld) is a proposed act which has been drafted at the instance of the Queensland Law Reform Commission. It purports to consolidate the Real Property Acts in Queensland into one Act. The purpose of the draft is not to change the substance of the current legislation, but rather to solve the problems with its form.³⁶ The Commission has attempted to clarify the ambiguities, correct the deficiencies, simplify the procedures and delete the outdated terms and provisions of the current *Real Property Acts*.³⁷

Section 115 of the proposed draft *Real Property Act* (1991) (Qld) consolidates the indefeasibility sections of the current legislation³⁸ into one section. Under section 115(3)(a), 'a registered proprietor of an estate or interest in land does not obtain the benefit of' an indefeasible title under 'section 115(1) in respect to an equity arising from the act of that registered proprietor'.

It is submitted that the inclusion of the words 'an equity arising from the act of the registered proprietor', as an express exception to indefeasibility under the indefeasibility section has the potential to clarify the uncertainty created by *Bahr v Nicolay* as to the meaning of fraud under the Torrens system. Under the indefeasibility sections of the *Real Property Act* (1861)

35 Ibid.

36 Preece, 'Reform of the Torrens System Legislation in Queensland' (1992) 12 Qld Lawyer 212 at 229.

37 Ibid.

38 The concept of indefeasibility, or more specifically the exceptions thereto are generally contained in eight sections under the 1861 Act: ss 44, 123, 33(4), 96, 7, 45(2), 109, 126.

(Qld),³⁹ 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.⁴⁰ On the other hand, courts have the discretion to grant alternative remedies as they see fit, such as damages⁴¹ or the imposition of a trust,⁴² when acting in personam under section 51 of the *Real Property Act* (1877) (Qld).⁴³ It is submitted that the inclusion of, 'an equity arising from the act of the registered proprietor', as an automatic exception to that proprietor's indefeasible title under section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) extinguishes this distinction. If this submission is correct, then there would be no practical advantage in adopting the position taken by Mason CJ and Dawson J in *Bahr v Nicolay* that unconscionable conduct by the registered proprietor subsequent to registration can constitute fraud under the new legislation. To do so would create inconsistency with precedent, and confusion as to the correct principles to be applied.⁴⁴ For these reasons it is submitted that the inclusion of the in personam exception as an express exception to indefeasibility under section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld) would encourage a court to reject Mason CJ's and Dawson J's position. This would keep the concept of fraud under the Torrens system in Queensland consistent with past Australian cases, and 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 of course does not mean that there would be no remedy for a victim of unconscionable conduct that occurs after registration. The registered proprietor's title may still be rendered defeasible as a result of rights arising in personam.⁴⁵

Conclusion

The decision in *Bahr v Nicolay* demonstrates the existence of a potential swing in the High Court of Australia 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 the actual

39 Ibid

40 See *Breskvar* above n 7 at 376, 383-6.

41 *Bahr* above note 1 at 657. See also Robinson, 'Friedman v Barrett - Wrongly decided?' (1984) December, Qld Law Society Journal 259 at 263.

42 *Bahr* above n 1 at 638.

43 *Frazer v Walker* [1967] 1 AC 569 at 585; *Breskvar v Wall* (1971) 126 CLR 376 at 384-5; *Bahr* above n 1 at 637.

44 Lane, 'Fraud and personal equities under the Torrens system' (1988) 62 Australian Law Journal, 1036 at 1038.

45 *Frazer* above n 43 at 585, *Breskvar* above n 7 at 384-5, *Bahr* above n 1 at 637. Robinson, 'Friedman v Barrett - Wrongly decided?' (1984) December, Qld Law Society Journal 259.

parties involved in land transactions, and thus it is submitted that it 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 courts from adopting this view.

It is arguable that the decision in *Bahr v Nicolay* also creates the potential for section 51 *Real Property Act* (1877) (Qld), and consequently section 115(3)(a) of the proposed draft *Real Property Act* (1991) (Qld), to be used to greatly expand the scope of the personal equities exception under the Torrens system in Queensland. Such an expansion would create a serious departure from the orthodox application of Torrens statutes. It is a departure which the High Court in *Bahr v Nicolay* did not manifest an intention to promote.