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**PETER BATES
MASSEY UNIVERSITY JULY 2015**

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**THE LAW COMMISSION'S
SUGGESTIONS FOR
LEGISLATIVE REFORM:
THE FRAUD EXCEPTION TO
INDEFEASIBILITY**

**A New Land Transfer Act, June 2010, Wellington, Report 116,
The Law Commission in conjunction with LINZ (334 pages but
see chapters: 2,3 and 4) See: www.lawcom.govt.nz**

INTRODUCTION

PETER BATES

Bates Forensic Valuation Limited – Director and Reg Valuer:

- ❖ Forensic real estate valuations, expert evidence, expert determination and peer review (see www.bates.net.nz).

Baker Law - Barrister, Solicitor and Arbitrator:

- ❖ commercial law, wills, trusts, property law, asset protection;
- ❖ consulting solicitor (to assist an existing litigation team), and;
- ❖ valuation arbitration.

I do not act as Valuer (impartial) and Lawyer (advocate) in the same matter as these are different roles and undertaken by different entities.

I do not speak on behalf of LINZ or the Law Commission.

LEGAL SYSTEM CONTEXT

There is no single agreed definition of the rule of law. Emeritus Professor Geoffrey Walker, has written in his defining work on the rule of law in Australia: ‘...most of the content of the rule of law can be summed up in two points:

- (1) that the people (including, one should add, the government) should be ruled by the law and obey it and**
- (2) that the law should be such that people will be able (and, one should add, willing) to be guided by it.’**

– Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy*, (1st Ed., 1988)

Can New Zealand’s fraud exception to indefeasibility:

- ❖ apply equally and consistently (not arbitrarily)?
- ❖ be accessed by all and known to all?
- ❖ logical, fair and reasonable?
- ❖ can we expect to know the outcome?
- ❖ can parties and advisors be guided by this law?

COMPETING AND BALANCING FACTORS

- ❖ Fixed written legislation vs interpretation
- ❖ Adaptability of Judge made common law – particular facts and context?
- ❖ Can all things be defined (fraud, dishonestly, wrongfully or moral turpitude)?
- ❖ On-going development of the law?
- ❖ Consider similar systems (Australia = strict judicial interpretation or Canada = expressly legislated)
- ❖ What is the best system for New Zealand?

LAND TRANSFER ACT 1952

S182 Purchaser from registered proprietor not affected by notice

Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

LAND TRANSFER ACT 1952

S62 Estate of registered proprietor paramount

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of [Part 1](#) of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, ***except in case of fraud***, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—

- (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
- (b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
- (c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

LAND TRANSFER ACT 1952

Since the LC review, Tipping J, in *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433, [152] (re ss62 and 182)

“[I]t is implicit in the structure and purpose of the [LTA] as a whole that a registered proprietor who ***becomes registered without fraud*** takes free of any interest which has not been notified on the register, either by registration or by caveat, including interests which are not capable of registration”

see discussion re ss62 and 182 in NZ Land Law 2nd Ed Bennion, Brown, Thomas and Toomey p 128.

TYPES OF FRAUD

- ❖ Fraud against a previous registered proprietor
- ❖ Fraud against the holder of an unregistered interest
- ❖ Supervening fraud (?)

NZ Land Law 2nd Ed, p66 – 96 has a good discussion (at 2.4, 2.5.04, 2.5.05 and 2.5.12 especially)

TYPE 1

Fraud against a previous registered proprietor

- ❖ If A has been deprived of his or her estate or interest through an act of deception, and B (the person who has committed the act) is still registered as the proprietor, B's title is not indefeasible and A can recover possession.
- ❖ However, if C (a bona fide purchaser or mortgagee for value) has become registered, A loses his or her right to recover the estate or interest. A's remedy comprises a proceeding against the Crown for the recovery of damages under the compensation provisions of the Act.
- ❖ E.g. *Heron v Broadbent* (1919) – NSW equivalent of LTA s183.

TYPE 2

Fraud against the holder of an unregistered interest

- ❖ D holds an unregistered interest in land X. E has become registered proprietor of land X. D wishes to attack E's registered title on the ground that E is trying to defeat D's unregistered interest.
- ❖ This category is more complicated. It involves a difficult notice provision (s182) and its relationship with the equitable doctrine of notice.
- ❖ Actual and full knowledge is an element of fraud (or wilful blindness).
- ❖ Mere knowledge is not enough – but what is?

TYPE 2

Fraud against the holder of an unregistered interest

- ❖ “Duty of an honest man” test – *Assets Co Ltd v Mere Roihi* and *Waimiha Sawmilling Co Ltd v Waione Timber*.
- ❖ “If the designed object of a transfer be to cheat a man of a known existing right” – *Waimiha Sawmilling* .
- ❖ “Vexed question of what factors must be present beyond mere knowledge” – NZ Land Law 2nd Ed P76.
- ❖ Australian Courts stricter than NZ.

TYPE 3 – OR IS IT?

Supervening fraud (?)

- ❖ Date and timing of transfer and fraud (logical?)
- ❖ Different decisions re ss62 and 182

“The Act is not clear on whether fraud must occur before contract or before registration, or whether it is possible for a dishonest act of an already registered proprietor to be fraudulent, making their previously indefeasible act defeasible. “ – LC

LAW COMMISSIONS RECOMMENDATIONS

See handout of the 25
recommendations, which include
remedies

(pages 4 and 5 of the LC's *A New Land
Transfer Act*)

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ANY QUESTIONS?

