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THE FRAUD EXCEPTION TO INDEFEASIBILITY

AND

THE LAND TRANSFER BILL



INTRODUCTION & BACKGROUND

- ❖ **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**
- ❖ **The Law Commission's Recommendations (see pages 4 and 5 of the LC's *A New Land Transfer Act*) can be seen at the above website or from the links page of www.bates.net.nz**
- ❖ **Land Transfer Bill now at the Second Reading in The House of Representatives – some major changes afoot!**

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?
- ❖ be considered logical, fair and reasonable?
- ❖ provide an expectable outcome?
- ❖ provide guidance to parties and advisors?

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

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

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

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.

EXISTING TYPES OF LAND TRANSFER 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. “ – The Law Commission

TWO EASY PRINCIPLES

❖ The “mirror” principle:

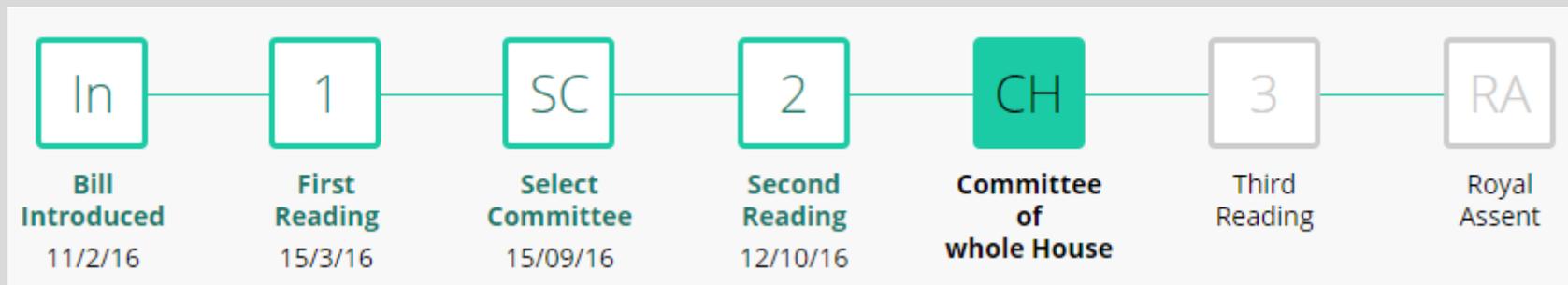
The land rights are / reflect what the title says.

❖ The “curtain” principle:

Parties and advisors do not need to draw back the curtain to see what else has gone on elsewhere or before the title was as it is on the register.

ENTER THE LAND TRANSFER BILL ('LTB')

Progress of the Bill



LTB CLAUSE 51: TITLE BY REGISTRATION

- (1) On registration under this Act of a person as the owner of an estate or interest in land, the person obtains a title to the estate or interest that **cannot be set aside [my emphasis]**.
- (2) The title of the registered owner is free from estates and interests in the land that—
 - (a) are not registered or noted on the register; or
 - (b) are not capable of being registered or noted on the register.
- (3) Despite subsections (1) and (2), the title of the person registered as owner of the estate or interest is subject to—
 - (a) the exceptions and limitations in sections **52 to 57A, subparts 1 and 3 of Part 4, and section 203**; and
 - (b) **any enactment other than this Act that overrides or limits the title.**
- (4) Subsections (1) and (2) apply whether or not the registered owner acquired the estate or interest—
 - (a) for valuable consideration; or
 - (b) from a fictitious person.
- (5) Nothing in this section affects the *in personam* jurisdiction of the court.

LTB CL 56: EXCEPTIONS AND LIMITATIONS

- (1) The title of the registered owner to an estate or interest in land is subject to the following exceptions and limitations:**
 - (a) in a case where the title of the estate or interest of the registered owner is acquired **through fraud** on the part of the registered owner or the registered owner's agent:
 - (b) an estate or interest registered or noted on the record of title at the time of registration:
 - (c) the estate or interest of a person having a valid claim to the same estate or interest under a prior record of title:
 - (d) the estate or interest of another registered owner that has been included in the record of title as a result of an incorrect description of area or boundaries:
 - (e) an easement omitted from, or incorrectly described in, the record of title regardless of whether the easement was created before or after the land was brought under this Act.
- (2) Nothing in this section limits section 56.**

LTB CLAUSE 6: THE MEANING OF FRAUD

- (1) For the purpose of this Act, other than subpart 3 of Part 2, **fraud** means forgery or other dishonest conduct by the registered owner or the registered owner's agent in acquiring a registered estate or interest in land.
- (2) For the purposes of subsection (1), the **fraud** must be against -
 - (a) the registered owner of an estate or interest in land; or
 - (b) the owner of an unregistered interest, if the registered owner or registered owner's agent,—
 - (i) in acquiring the estate or interest had actual knowledge of, or was wilfully blind to, the existence of the unregistered interest; and
 - (ii) intended at the time of registration of the estate or interest that the registration would defeat the unregistered interest.
- (3) For the purpose of subpart 3 of Part 2, **fraud** means forgery or other dishonest conduct by any person.
- (4) The equitable doctrine of constructive notice does not apply for the purposes of deciding whether conduct is fraudulent.

LTB CL57 COURT MAY MAKE ORDER ONLY IN CASES OF MANIFEST INJUSTICE

- (1)** The court may make an order cancelling the registration of person B only if it is satisfied that it would be manifestly unjust for person B to remain the registered owner of the estate or interest.
- (2)** For the purpose of subsection (1), the existence of forgery or other dishonest conduct does not, of itself, constitute manifest injustice.
- (3)** An order under this section may be made only if the court is satisfied that in the circumstances the injustice could not properly be addressed by compensation or damages, whether under subpart 3 or otherwise. [and see over...]

LTB CL57 COURT MAY MAKE ORDER ONLY IN CASES OF MANIFEST INJUSTICE

- (4) In determining whether to make an order, the court may take into account—
- (a) the circumstances of the acquisition by person B of the estate or interest; and
 - (b) failure by person B to comply with any statutory power or authority in acquiring the estate or interest; and
 - (c) if the estate or interest is in Māori freehold land, failure by a person to comply with Te Ture Whenua Maori Act 1993; and
 - (d) the identity of the person in actual occupation of the land; and
 - (e) the nature of the estate or interest, for example, whether it is an estate in fee simple or a mortgage; and
 - (f) the length of time person A and person B have owned or occupied the land; and
Land Transfer Bill Part 2 cl 57 39
 - (g) the nature of any improvements made to the land by either person A or person B; and
 - (h) the use to which the land has been put by either person A or person B; and
 - (i) any special characteristics of the land and their significance for either person A or person B; and
 - (j) the conduct of person A and person B in relation to the acquisition of the estate or interest; and
 - (k) any other circumstances that the court thinks relevant.

...MORE...

CI 57 (5): The court may make an order under this section on any conditions that the court thinks fit (for example, an order relating to possession of the land).

57A: Court must not make order if estate or interest transferred to third person:

The court must not make an order under section 57 if person B has transferred the estate or interest to a third person, that third person acting in good faith.

There are other provisions... mortgage issues etc...

IS THIS REALLY AN IMPROVEMENT?

Is the out come of the law predictable?

How do the mirror and curtain principles fair?

CI51 (3) (b): “any enactment other than this Act that overrides or limits the title.”

Note: Canterbury Property Boundaries and Related Matters Act 2016 s8(4)(b) “despite any rule of law” – since 30 August 2016 (one day after assent). So, if land moved by earthquake onto your land– do you no-longer have title to the land space, even if your title is the same and your land has not moved?

What if it were your land that had been taken?

What do you get for your state guaranteed, “compensation”?

In effect is this analogous to the Public Works Act 1981 principles for compensation?

Does this really just mean that the Crown doesn't have to pay out to underpin the Torrens title system ?

Is this unprincipled or reasonable allocative efficiency ? If so, for whom?

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**WELL THAT MAKES IT ALL MUCH
EASIER DOESN'T IT?**

ANY QUESTIONS?

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