Deferred Indefeasibility of Title in Victoria?

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THE BACKGROUND

As is well-known to students of Property Law, the concept of indefeasibility of title is central to the Torrens system of registration. In Victoria, it is embodied in section 42(1) of the *Transfer of Land Act* 1958.[1] The key provisions of this section are as follows [emphasis added]:

> 'Notwithstanding the existence in any other person of any estate or interest . . . which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, *except in case of fraud*, hold such land subject to such encumbrances as are notified on the . . . certificate of title but absolutely free from all other encumbrances whatsoever, except . . .'

There are similar paramountcy sections in the Torrens legislation of every other State and in the Territories.[2] Although exceptions to this principle differ radically in State legislation the above provisions constitute the common core principle.

Before the late 1960s, the concept was that of *deferred* indefeasibility[3] as expounded in two leading cases emanating from Victoria.[4] Since the Privy Council opinion in *Frazer* v *Walker*[5] and the decision of the High Court in *Breskvar* v *Wall*,[6] the trend changed. It has since been generally accepted that, with certain exceptions, registration of an interest confers upon the transferee an *immediately* indefeasible title to that interest.[7] Provided that such a registered transferee is innocent of and unconnected with any wrongdoing it matters not that the registration had been a result of fraud or other wrongdoing by some other party.[8]

This concept has been solidly accepted for some 30 years in the Australian States.[9] However, the relevant legislation in the Northern Territory and in

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1 See also, s 77(4), *Transfer of Land Act* 1958 (Vic).

2 See ss 63 & 68, *Transfer of Land Act* 1893–1972 (WA); s 58, *Real Property Ordinance* 1925 (ACT); ss 33(5) & 44, *Real Property Act* 1861–1988 (Qld); s 42(1), *Real Property Act* 1900 (NSW); s 69, *Real Property Act* 1886 (NT); s 69, *Real Property Act* 1886–1975 (SA); s 40, *Real Property Act* 1862 (Tas).

3 For an excellent statement of the concept, see *Wicklow Enterprises* v *Doysal* (1986) 45 SASR 247, 257 (O'Loughlin J).

4 *Gibbs* v *Messer* [1891] AC 248; *Clements* v *Ellis* (1934) 51 CLR 217.

5 [1967] 1 AC 569.

6 (1971) 126 CLR 376.

7 *Tyre Marketers (Aust) Ltd* v *Martin Alstergren Pty Ltd* (1989) V Conv R 54-335.

8 *Assets Co Ltd* v *Mere Roihi* [1905] AC 176; *Bahr* v *Nicolay* (1988) 164 CLR 604.

9 See eg, *Travinto Nominees Pty Ltd* v *Vlattas* (1973) 129 CLR 1; *Palais Parking Station Pty Ltd* v *Shea* (1980) 24 SASR 425; *Medical Benefits Fund of Australia Ltd* v *Fisher* [1984] 1 *Qd R* 606; *Re Eastdoro Pty Ltd* [1900] 1 *Qd R* 424.

South Australia have significantly different provisions.[10] They allow a limited operation for the concept of deferred indefeasibility. As O'Loughlin J in *Wicklow Enterprises Pty Ltd* v *Doysal Pty Ltd*[11] said, with regard to the South Australian legislation, the old concept continues to apply where a certificate or other instrument of title has been obtained from a person under some legal disability. By that his Honour meant some legal incapacity such as insanity, infancy and bankruptcy.[12]

There was not a hint that the general principle in Victoria was any different from that in the other States. On the contrary, observations made in *Breskvar* v *Wall*[13] indicate that the legislative provisions in Victoria were similar to those considered by the High Court with regard to the legislation in Queensland. However, like a proverbial cat set amongst pigeons, the decision of the Supreme Court of Victoria in *Chasfild Pty Ltd* v *Taranto*[14] has upset that long-held assumption.

Gray J's decision in *Chasfild* dealt with two significant issues. The first was whether a mortgagee, innocent of any fraud or other wrongdoing, obtains an indefeasible title upon registration of an instrument of mortgage forged by a third party unconnected with the mortgagee. The second was whether the fact situation fell within the *in personam* exception to an indefeasible title simply by virtue of the mortgage being forged. This paper is primarily concerned with the first issue. It deals with the question whether Victorian property lawyers are now to re-organise their conveyancing practice following that decision.[15] The second issue is dealt with summarily towards the end of this paper as it is incidental to the main principle of indefeasibility.

CHASFILD v TARANTO: THE FACTS

The facts of the case may be simply put as follows. The Tarantos were market retailers who owned a house in Lalor. Through Usai, a relative, they were attracted to an investment scheme which at the time seemed very attractive to relatively unsophisticated investors. They agreed to invest $10,000 for a year

[10] *Real Property Act* 1886 (SA); *Real Property Act* 1886 (NT). The relevant provisions of section 69 of the South Australian Act are identical with those in s 69(II) of the Northern Territory Act. They provide: 'The title of every registered proprietor of land shall . . . be absolute and indefeasible, subject only to the following qualifications . . . (II), In the case of a certificate or other instrument of title obtained by forgery or by means of an insufficient power of attorney or from a person under some legal disability, in which case the certificate or other instrument of title shall be void: Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate or other instrument of title was obtained by any person through whom he claims from a person under disability, or by any of the means aforesaid.'

[11] (1986) 45 SASR 247. See generally, R Sackville & M Neave, *Property Law: Cases and Materials* (4 ed, Sydney, Butterworths, 1988) p 436.

[12] Id 261. See, A P Moore, 'Interpretation of the *Real Property Act*' (1988) 11 *Adel LR* 405.

[13] (1971) 126 CLR 376, 386 (Barwick CJ), 396 (Menzies J), 405 (Walsh J).

[14] (1990) V Conv R 54-367; [1991] 1 VLR 225.

[15] C Croft, 'The Torrens System — Deferred Indefeasibility' 64 *Law Inst J* 238 (Apr 1990).

with D'Aprano, a solicitor. The Tarantos really had no cash in invest. But that was to be no deterrent. As part of the scheme they only had to use the duplicate of title to their home as security for a loan to finance the 'investment'. The scheme enabled them to receive $3,600 a quarter from which they had to pay out $2,250 as interest.[16] The net result was that they would end up with $450 a month. The moneys were paid to D'Aprano, presumably held on a trust account for them. It looked like a rather attractive investment scheme for someone who really has no money to invest. However, as subsequent events showed, D'Aprano had connections with Joe Talia, a less than scrupulous person who operated a network of companies. The investment was the 'bait' to pull them into a multi-million dollar scam created by Joe Talia and his cohorts.

The Tarantos experienced some difficulty in retrieving their certificate of title after the initial loan period. They eventually got it through their son, Antonio, whom they had given a power of attorney whilst they were overseas. Antonio was thereafter approached by the relative, Usai, about making a further investment. Antonio said his parents would only borrow the money from a bank or similar institution. He was then told to see a Joe Talia who would select a bank from which money could be borrowed. At Talia's office, Antonio handed over to him the duplicate certificate of title after being told by Talia that a bank would be selected for the loan. Some time later — presumably at Talia's suggestion — Antonio subsequently went to a branch of the State Bank to fill in a loan application. Much later, a property valuer appeared at the Lalor home to check out the property. Further down the track, Antonio made inquiries about the loan but was told it had not been processed. Thereafter, he made many visits and phone enquiries to Talia, Usai and D'Aprano but these proved fruitless.

Some time after the Tarantos' return from overseas in September 1987 they received a demand for repayment of their loan by Chasfild Pty Ltd. No doubt they must have been unamused by that. Nor was there further joy when it was thereafter followed by a demand for possession of their Lalor home. They counterclaimed for an order to have the register rectified by the removal of Chasfild's registered interest.

When the tale of woe was fully unfolded it became clear that Chasfild Pty Ltd was a family trustee company of Charles Fildes which had invested $500,000 with Bill Acceptance Corporation and the Talia group of companies. The money was to be lent to the Talia group on short term first mortgages at 30%. The securities were to be properties of Joe Talia's 'friends and relatives'. On 8th September 1987, the Tarantos' duplicate title was offered as security to the company for a loan of $100,000, repayable by 8th November 1987. Chasfild's solicitor searched the register and handed over the money in return for the the duplicate title and a mortgage document. Unknown to the company, someone had forged the Tarantos' signatures on the mortgage document. Registration of the mortgage was effected on 18th September

[16] The reported facts of the case did not indicate how the principal in the loan was to be repaid.

1987. There was no evidence that Chasfild Pty Ltd or its solicitor was associated with the forgery. On these facts, therefore, the specific legal issue raised was whether Chasfild's registered interest was indefeasible with the result that the Tarantos' fee simple title would become subject to its registered mortgage.

THE DECISION

What makes Gray J's decision interesting was his application of the indefeasibility doctrine. In his learned view, Chasfild's registered interest was defeasible by the Tarantos. This was notwithstanding that Chasfild's conduct was not regarded as in any way fraudulent. On that basis, the Tarantos were held entitled to the rectification of their registered title with the deletion of Chasfild's mortgage. Gray J founded his decision on s 44(1) of the *Transfer of Land Act*. 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.'

The key passage of Gray J's judgment is in the following words [emphasis added]:[17]

> '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.'

IMPLICATIONS OF THE DECISION

The implications of Gray J's decision may be mapped out in terms of what it actually stands for. In the context of his decision the concept of indefeasibility may be stated in the following propositions:

(i) Where a transfer of an interest has been properly executed and lodged for registration the transferee, upon registration and in the absence of fraud, becomes entitled to an immediately indefeasible title.

(ii) The registered transferee gets an immediately indefeasible title upon registration even where a transfer of an interest has been defective for any reason other than fraud.[18]

(iii) Where a transfer has been effected by forgery or other fraud, registration

[17] (1990) V Conv R 54-367, 64, 585; [1991] 1 VLR 225, 235.

[18] See eg *Tyre Marketers (Australia) Ltd* v *Martin Alstergren Pty Ltd* (1989) V Conv R 54-335. Cf *Travinto Nominees Pty Ltd* v *Vlattas* (1973) 129 CLR 1.

will not give the transferee an indefeasible title under s 42(1). Instead, it comes within the fraud exception as stated in s 44(1). This principle applies regardless of whether the tranferee is innocent of the fraud.

(iv) Where a transferee has become a registered proprietor in consequence of a forged transfer, the victim of the forged transfer has an *in personam* claim against the registered transferee. The innocent party may set aside the registration despite the fact that the registered transferee is innocent of the forgery.

The first proposition does not contradict any principle under the established line of authorities. It applies equally to the registration of any other interest such as a mortgage in *Chasfild*. The second is again no different from that established by the authorities — *Chasfild* has no application to other situations than those involving fraud. The third, however, is a restatement of the law. It plainly contradicts the accepted concept of an immediately indefeasible title. However, even if correct, it should at most apply only to Victoria, if *Chasfild* is founded on what Gray J identified as 'unique' provisions in its Torrens legislation.[19] On the other hand, the decision may have a wider application in so far as there are similar provisions in some of the Torrens legislation in the other States. The fourth proposition is also a contradiction of established law.

In policy terms the decision in *Chasfild* would be well received by the Victorian Law Reform Commission. One of its better known proposals for the reform of this branch of the law had been that the old concept of deferred indefeasibility should be restored.[20] Gray J's decision is almost as though it had been based on the reform recommended by the Commission. However, whether it is compatible with the underlying policies of the Torrens system of registration may be another matter. As students of property law are aware, the facilitation of transactions is the most important underlying objective of the registration system.[21] *Chasfild* detracts from this objective. It may be that the Victorian legislature has, since 1954, introduced significant amendments to the *Transfer of Land Act* to emphasise a new underlying policy. This is obviously what had occurred in the obviously different legislative provisions in South Australia and in the Northern Territory.[22] If this were so, Gray J's decision could possibly be regarded as properly based on such a new underlying policy. On the other hand, however, the fact remains that there are, at present, common roots in the Australian States and it is arguable that there should be uniformity in all the States with regards to such a fundamental principle.[23] To that extent, such a departure in both the Victorian and South Australian States and in the Northern Territory is less than desirable.

The main significance of the *Chasfild* decision lies in its impact on the

[19] (1990) V Conv R 54-367, 64, 584, col 2; [1991] 1 VLR 225, 233.

[20] 'The Torrens Register Book', Victorian Law Reform Commission, Report No 12, November 1987, p viii; p 12, para 17.

[21] R Sackville, 'The Torrens System — Some Thoughts on Indefeasibility and Prorities' (1973 47 ALJ 526; cf W Taylor, 'Scotching *Frazer* v *Walker*' (1970) 44 ALJ 248.

[22] *Real Property Act* 1886, section 69(II); *Wicklow Enterprises* v *Doysal* (1986) 45 SASR 247.

[23] P Butt, 'A Uniform Torrens Title Code?' (1991) 65 ALJ 348.

accepted law and practice. It would mean the legal profession in Victoria has been labouring on the wrong assumptions for some 30 years. In real terms, it would make transactions precarious. It is likely to cause transferees to be more hesitant about parting with their money in exchange for a transfer which may turn out to be a result of forgery or other fraud. In this context it is thus important to determine whether the decision was incorrectly decided. As Gray J himself acknowledged, *Chasfild* is in conflict with a formidable line of decisions.[24] Its authority as a binding precedent must thus depend on the soundness of his Honour's reasoning process. A careful analysis of his Honour's judgment is accordingly called for in view of its potential significance.

AN ANALYSIS OF THE DECISION

Three identifiable considerations may be picked out in the judgment as providing the major bases for his Honour's view. They may be better appreciated by bearing in mind the provisions of s 44(1) of the *Transfer of Land Act* 1958 and seeing them in the context of its relationship with s 42(1) of the same Act. As indicated earlier, until *Chasfild*, s 42(1) has been unreservedly regarded as constituting the paramountcy section spelling out generally the idefeasibility of a registered title.[25] Correspondingly, s 44(1) is regarded as a subsidiary provision dealing with the effect of fraud referred to in s 42(1).

The first basis of Gray J's judgment is that amendments made to the Victorian legislation in 1954 made the general principle in Victoria different from that in the other Australian States.[26] The second basis is his Honour's reliance on the presumption that the term 'fraud' in s 44(1) has a wider meaning than that in s 42(1). The third is founded on the view that the construction and application of s 44(1) given by his Honour qualifies s 42(1) rather than merely restates it.

The view taken in this paper is that the decision is incorrect on all three bases. It is also arguably incorrect when considered side by side with the construction that the High Court in *Breskvar* v *Wall*[27] had given to the equivalent paramountcy section common to all Torrens legislation in Australia. In applying s 44(1) rather than s 42(1) of the Act to the facts in *Chasfild*, his Honour in effect put the proverbial cart before the horse. The following is an attempt to show why *Chasfild* should not be followed.

[24] (1990) V Conv R 54-367, 64, 584; [1991] 1 VLR 225, 232–3.
[25] See generally, R Sackville & M Neave, *Property Law: Cases and Materials*, op cit 391–3.
[26] This is obviously with the exception of the South Australian legislation, as seen in *Wicklow* supra, and the identical provisions in the Northern Territory legislation: see above, n 10.
[27] (1971) 126 CLR 376.

1. Is Victorian legislation different?

The view that Victorian legislation is different from those in the other States is a key point in Gray J's decision. In effect, his Honour regarded s 44(1) as the paramountcy section. According to his Honour, it all lies in what happened in 1954. The Victorian provisions were initially substantially similar to the New Zealand legislation applied by the Privy Council in *Frazer* v *Walker*[28] and to the Queensland provisions applied in *Breskvar* v *Wall*.[29] On the facts in *Chasfild* that meant immediate indefeasibility would be the applicable principle in Victoria and *Breskvar* v *Wall* would stand as a decisive authority in favour of the plaintiff. However, his Honour thought amendments to the Victorian legislation in 1954 brought about a significant change of the law. In his Honour's learned opinion s 44(1) of that Act warranted a different application of the principle of indefeasibility in Victoria.[30]

There are five considerations to suggest that Gray J may be incorrect in saying the Victorian provisions are different.

(a) *Are they new provisions?*

The first and most significant consideration lies in the issue whether s 44(1) contains such new provisions. It is respectfully submitted that a close look at the relevant legislative provisions before and after 1954 may provide a different answer to that suggested by Gray J. Prior to the amendments in 1954, there were three sections of the *Transfer of Land Act* 1928 (Vic) requiring detailed consideration in the present context. As will be seen below, they were less than perfect examples of legislative drafting and partly explain why the 1954 amendments were called for.

The first is section 104 which focussed attention on the effect of fraud as between the parties. It provided as follows:

> 'Any certificate of title ... procured or made by fraud shall be void as against all parties or privies to such fraud.'

As Gray J noted, these provisions contained a drafting error in that they purported to render the registered certificate void as against 'all parties'.[31] It was meant to deal only with the relationship between the party defrauded and the party responsible for the fraud or his privy.

The next section is 244. These provisions focussed attention on the circumstances when a previous registered proprietor became entitled to defeat the title of the current registered proprietor as a result of fraud. They were worded as follows:

> 'No action of ejectment or other action for the recovery of land shall lie or be sustained against the person registered as proprietor thereof under the

[28] [1967] 1 AC 569.
[29] (1971) 126 CLR 376.
[30] (1990) V Conv R 54-367, 64, 585; [1991] 1 VLR 225, 234. The section is identical with s 44(1) of the *Transfer of Land Act* 1958.
[31] (1990) V Conv R 54-367, 64, 584; [1991] 1 VR 225, 233–4, citing *Votes and Proceedings of the Legislative Assembly* Session 1954–55, Vol 1, p 911.

provisions of this Act, except in any of the following cases (that is to say):

. . .

(IV) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.'

But the words 'through fraud' were ambiguous in that they could be read to cover only those situations where the registered transferee was himself, or through his privy, guilty of fraud. Alternatively, they could have a wider application. They could cover any situation where the transferee had been innocent of the fraud. However, the case law established that they would apply only to the former situation.[32]

The next relevant section is 247. These provisions dealt with one situation, viz, where the registered transferee subsequently disposed of the interest to another party who then became the new registered proprietor. They provided as follows:

'Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or to an action for recovery of damages as aforesaid or for deprivation of the estate or interest in respect to which he is registered as proprietor any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.'

In such a case the section made it clear that the third party's registration was indefeasible regardless of the fact that there had been a fraud in the registration of his predecessor's title.

All the above provisions were repealed by the 1954 Act. They were replaced by s 44 of that Act which remain in the consolidated Act of 1958. They provided as follows:

'(1). Any certificate of title or entry alteration removal or cancellation 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.
(2). But nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of land on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsover.'

[32] *Assets Co Ltd* v *Mere Roihi* [1905] AC 176. Cf *Australian Guarantee Corporation Ltd* v *De Jager* [1984] VR 483.

There is no doubt about the origin of the current s 44(2). As Gray J acknowledged, it is the counterpart of s 247 of the 1928 Act.[33] There are equivalent provisions in other State legislation.[34]

But has s 44(1) changed the law? The answer to this may be seen in its features. It deals with the relatively rare situation where fraud affects the transaction. Attention is first focussed on the effect that fraud has on the title of the registered transferee. It then deals with the relationship between the defrauded and the current registered proprietor. It says the former may set aside the title of the latter. The section is thus similar in effect to the antecedent provisions in ss 104 and 244 of the 1928 Act as previously outlined. It is arguably no more than a redraft and consolidation of the main provisions in these sections of the 1928 Act. Seen in this way the 1954 amendments did not change the law, or in any event, to such an extent as to justify Gray J's departure from the established line of authorities.

Another way to test the issue is to see whether s 44(1) is 'unique' as Gray J believed. There is certainly no identically-worded provision in Torrens legislation in the other Australian States. It is unique in that sense. However, there are equivalently-worded provisions in other State legislation. Thus s 125 of Tasmania's *Real Property Act* 1862 contains the following relevant provisions:

> '(1) Any person deprived of land, or of any estate or interest in and —
> (a) in consequence of fraud; . . . may bring and prosecute an action for the recovery of damages.
> (2) Such action shall —
> (b) . . . be brought and prosecuted against the person —
> (iii) who acquired title to the estate or interest in question through such fraud . . .'

These provisions differ from those in s 44(1) of the Victorian provisions in two ways. They do not render a registered title void as against the person defrauded. Besides, the innocent party is only allowed to claim damages from the other party. However, they are similar in that their function is to spell out the remedy available to the innocent party in such an event.

In South Australia, s 69 of the *Real Property Act* 1886–1975 says the title of a registered proprietor is not absolute in a number of situations, one of which is as follows:

> '(I) in the case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act:'

Identically-worded provisions are also to be found in s 69 of the *Real Property Act* 1886 in the Northern Territory. Again, just as in the Tasmanian provisions, they are similar to s 44(1) of the Victorian Act in that they deal with the rights and remedies of a defrauded party as against the party who became registered through fraud.

[33] (1990) V Conv R 54-367, 64, 584; [1991] 1 VLR 225, 233.
[34] See eg *Real Property Act* 1990 (NSW), s 135; *Real Property Act* 1861–1988 (Qld), s 126; see also, *Land Transfer Act* 1952 (NZ), s 183.

In New South Wales s 124(1) of the *Real Property Act* 1900 in effect says proceedings may be brought against a person registered as proprietor in:

> '(d) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.'

Again, the above provisions are like s 44(1) of the Victorian Act in that they deal with the remedy available to an innocent party who has been defrauded by someone registered through fraud. They do make it reasonably clear that such remedy is only available where the registered proprietor is himself fraudulent or privy to the fraud.

It is true that none of the provisions in these other State legislation are like s 44(1) of the *Transfer of Land Act* in Victoria in providing that fraud makes the registered title void as against the person defrauded. But, like s 44(1), they all deal with the relationship between the registered proprietor and the person defrauded. They are all concerned with showing that the innocent party may sue to recover the land, or damages as the case may be, and that the party affected by fraud cannot use registration as a defence. They thus arguably indicate that s 44(1) as construed above is far from being 'unique' to Victoria.

Apart from the above, there are four other factors which may tend to weaken Gray J's view that the Victorian legislation is so radically different.

(b) *Lack of historical evidence*

Very little explanation may be found in Parliamentary debates and similar materials to show why the amendments had been made.[35] Whatever such historical material there is available does not support his Honour's view. This paucity of evidence arguably suggests it is unlikely such a significant change in the law could have been made by the legislature as suggested by his Honour.

(c) *Failure to deal with paramountcy section*

His Honour did not refer to s 72 of the 1928 Act.[36] As that was the main provision spelling out the concept of indefeasibility of title such omission may be regarded as significant. The section had been substantially re-enacted into s 42(1) of the 1954 Act. It is identical with s 42(1) of the consolidated 1958 Act. That in turn was similar to the provisions in other State Torrens legislation upon which the concept of immediate indefeasibility had been founded.[37] One would have thought that this is so important that it had to be

[35] See *Votes and Proceedings of the Legislative Assembly, Session* 1954–55, vol 1, p 911, referred to by Gray J (1990) V Conv R 54-367, 64, 584.

[36] However, his Honour did cite s 42(1) as a key provision of the current Act: (1990) V Conv R 54-367, 64, 580; [1991] 1 VLR 225, 228.

[37] See n 2.

considered together with the other sections reviewed by his Honour. The omission to do so may thus be regarded as further weakening his Honour's view of the law.

(d) *Contradiction of leading decisions*

His Honour's view is at variance with that expressed by the High Court and the Privy Council.[38] As previously indicated, passages in the High Court decision in *Breskvar* v *Wall*[39] show that, although there are significant variations in each State legislation, the Court regarded the legislative provisions in various States as essentially similar in their formulation of the concept of indefeasibility.[40] In particular, Barwick CJ made the following observations with regards to the Victorian provisions:[41]

> 'I have thus referred under the description, the Torrens system, to the various Acts of the States of the Commonwealth which provide for comparable systems of title by registration though these Acts are all not in identical terms and some do contain significant variations . . .
> It follows, in my opinion, from the provisions of the Victorian Act which are counterpart to those of the Act to which I have referred and from the decisions of the Privy Council in *Frazer* v. *Walker* and in *Assets Co Ltd* v. *Mere Roihi* on comparable sections of the New Zealand Act that the appeal of the registered proprietor in the case of *Clements* v. *Ellis* ought to have been allowed.'

These passages suggest that the learned judge examined the Victorian statutory provisions in the course of his learned judgment. To that extent, it could be assumed that his Honour looked at the post-1954 provisions rather than those before that critical period.

(e) *Time frame anomaly*

The final matter to be taken into account is the relevant time frame in the historical development of the concept of indefeasibility. It arguably shows a gap in Gray J's reasoning process in so far as it is founded on historical perspectives. As earlier indicated, the prevailing concept was that expressed by the Privy Council in *Gibbs* v *Messer*[42] and by the High Court in *Clements* v *Ellis*,[43] both being Victorian cases. It was then the concept of *deferred* indefeasibility. The concept was founded on the relevant provisions of the 1928 Act as previously discussed. This view of the concept remained unchanged in 1954. In other words, contrary to what Gray J concluded, the amendments introduced by the 1954 Act could not have changed the principle of indefeasibility. The concept of immediate indefeasibility came about only in the

[38] *Frazer* v *Walker* [1967] 1 AC 569.
[39] (1971) 126 CLR 376, 386 (Barwick CJ), 396 (Menzies J), 405 (Walsh J).
[40] This is of course qualified by different legislative provisions in South Australia and Northern Territory: see n 10.
[41] (1971) 126 CLR 376, 386. Citations omitted.
[42] [1891] AC 248.
[43] (1934) 51 CLR 217.

1960s, after *Frazer* v *Walker*[44] and *Breskvar* v *Wall*.[45] Gray J's decision would only make historical sense if the amendments in the Victorian legislation had occurred *after* these two leading decisions had been made. As it is, if Gray J were correct in his assumptions, s 44(1) of the 1954 Act must be regarded as re-expressing the then current view of s 42(1), viz that indefeasibility meant *deferred* indefeasibility. His Honour's view would indeed mean s 44(1) would be a mere duplication of s 42(1).

On the above considerations it is submitted that Gray J was incorrect when he assumed the Victorian provisions of the *Transfer of Land Act* entitled him to regard the concept of indefeasibility in Victoria as being different from that in the other States.[46]

2. Should a wider meaning be given to the concept of fraud in s 44(1)?

His Honour's application of the expression 'fraud' in s 44(1) is the next major factor to be considered. As his Honour saw it, the issue was whether the term was to be limited to fraud on the part of the person making the registration or his agent. He noted this had been so regarded with respect to s 42(1).[47] However, his Honour took a different view of s 44(1) and gave the following basis for his approach:

> 'Unless 'fraud' in s 44(1) is given a wider interpretation, it would appear that s 44(1) is merely a pointless repetition. But the presumption must be to the contrary.'

His Honour then referred to an observation by Viscount Simon in *Hill* v *William Hill (Park Lane) Ltd*[48] in support of the above view.

Does it necessarily follow that s 44(1) would be a pointless repetition unless given the construction suggested by Gray J? It is arguable that this is not so. The section may be read in a way highly consistent with s 42(1). Unlike s 42(1) which says when a transferee's title is indefeasible, s 44(1) focusses attention on the relationship of the parties in the event of fraud occurring within s 42(1).[49] In that situation s 44(1) says, in the relationship between the defrauded party and the fraudulent transferee, the former may set aside the registration and have his name restored on the register. This construction of s 44(1) could hardly be regarded as a 'pointless repetition' of s 42(1). In fact, it would be highly complementary to those provisions. On that basis, there would be lesser justification for Gray J giving a different interpretation to the word 'fraud' in that section.

Another basis of his Honour's view was that certain expressions in s 44(1)

[44] [1967] 1 AC 569.
[45] (1971) 126 CLR 376.
[46] Account must of course be taken with regards to the effect of s 69(II) of the *Real Property Act* 1886 (SA) as discussed in *Wicklow Enterprises Pty Ltd* v *Doysal Pty Ltd* (1986) 45 SASR 247.
[47] *Assets Co* v *Mere Roihi* [1905] AC 176, 210.
[48] [1949] AC 530, 546–7.
[49] See also, AJ Bradbrook, SV MacCallum & AP Moore, *Australian Real Property Law*, (Sydney, Law Book Co, 1991) p 146.

support his belief that the section covers wider transfers than those covered in s 42(1). His Honour put it in the following words:

> 'The next thing to be noticed [about s 44(1)] is the expression 'procured or made by fraud'. One of the common meanings of 'procure' is 'to bring about'. When one finds the word 'procured' used in a way distinct from 'made' it suggests a degree of connection to the registration beyond that of physically effecting the registration.'

The words 'to bring about' could be meant to cover fraud by the registered tranferee himself. Correspondingly, the word 'procured' could be regarded as intended to cover fraud brought about by an agent of his. These words are meant to show that the section is intended to cover both situations. Thus they could be read only to indicate section 44(1) applies to both when the fraud is perpetuated by the transferee himself and also where it is brought about by an agent or other person associated with him. On the other hand, they could also be read widely, viz, to mean the section operates when, as in the facts of the case, the registered transferee is innocent and neither he nor his agent has anything to do with the fraud. One may ask how it is that Gray J concluded these words operated widely so as to cover the latter situation.

In any event, does it *necessarily* follow, as inferred by Gray J, that the term 'fraud' in s 44(1) has a wider meaning than the concept of fraud in s 42(1)? An objection that may be raised to such a conclusion is that the wider concept of fraud would not fit in with the narrower concept in s 42(1). As will be argued below, an incompatibility between the two main provisions would thereby inevitably arise. Such a consideration would suggest that Gray J's view cannot be supported.

3 Does Gray's decision qualify s 42(1)?

Gray J regarded his reading of s 44(1) as compatible with what he acknowledged to be the 'key' section, viz s 42(1). To quote his Honour's words:

> 'The construction of s 44(1) that I prefer means that s 44(1) qualifies s 42(1) rather than merely restates it.'

However, his Honour did not elaborate on how he regarded such construction of s 44(1) as a mere qualification of the indefeasibility section. Nor did he examine its implications on the relationship between the two sections. This omission is rather curious as his Honour had earlier acknowledged that his concept of fraud in s 44(1) is far wider than that given to the same concept in s 42(1).[50] It is an acknowledgement that a potential incompatibility arises from such construction of s 44(1). In short, the omission to consider the implications of the two sections is arguably an unfortunate omission.

The concept of fraud cannot seriously be regarded as having two different meanings in these two closely interrelated sections. It would be absurd if it were so. This is especially when fraud is an exception merely referred to in

[50] (1990) *V Conv R* 54-367, 64, 585; [1991] 1 VLR 225, 234.

s 42(1) with its implications elaborated upon in s 44(1). On Gray J's construction of s 44(1), 'fraud' in s 42(1) must now be taken to cover situations where the transferee is himself innocent of any fraud or other wrongdoing. It is to that extent incompatible with the concept of fraud in s 42(1) as understood in expositions by the Privy Council in *Frazer* v *Walker* and by the High Court in *Breskvar* v *Wall*. His Honour's reading of s 44(1) cannot thus be said to 'qualify' the provisions of s 42(1). It contradicts them. His decisions may be open to challenge on this further ground.

4. The *in personam* alternative

Gray J offered an alternative basis for his decision in the event that he were incorrect on his application of section 44(1). In his Honour's view, the Tarantos were entitled to set aside Chasfild's registered mortgage as they had an *in personam* claim to that effect. The foundation of this view is in the following passage where his Honour was referring to an action in ejectment which he thought the Tarantos would be entitled to if the plaintiff had been in possession of the property:[51]

> 'In a system of registration, any such 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.'

With the greatest of respect, nothing in the above passage nor any other part of his Honour's judgment provides any justification for the view taken. Nor is there anything much in the circumstances of the case which could be said to have given rise to an *in personam* claim by the Tarantos.

It is arguable that his Honour was incorrect in deciding the facts of the case gave rise to an *in personam* claim. For such a claim to arise, there must be some conduct of the registered proprietor, before or after registration, giving rise to a personal equity in another person.[52] There has to be something constituting an equitable fraud. As Mahoney JA put it in *Logue* v *Shoalhaven Shire Council*:[53]

> 'Equitable fraud is not limited to conscious wrong-doing or overreaching. In the final analysis, it depends upon whether what has happened, in the context in which it has happened, appears to the judicial conscience . . . as so unconscientious that it should not be allowed to stand.'

It appears the underlying rationale of the equity is no different from that in similar equities, viz, the registered proprietor who has created an obligation

[51] (1990) *V Conv R* 54-367, 64, 586; [1991] 1 VLR 225, 235–6.
[52] *Bahr* v *Nicolay* (1988) 164 CLR 638, 281 (per Wilson & Toohey JJ).
[53] [1979] 1 NSWLR 537, 555.

to another should not be allowed to shelter behind the registration to avoid his obligation.[54]

Was there such conduct on the part of the plaintiff in *Chasfild*? Before it could be bound, two elements must be present. First, in the circumstances of the case, there would have to be some dealing between Chasfild and the Tarantos. There must be some contract, trust, implied promise or assurance that Chasfild must have entered into or made with the Tarantos either directly or through some third party.[55] Second, the circumstances must be such that its conscience would be bound and it would be inequitable for Chasfild to rely on its registration to deny its conscience.[56]

There was nothing in the case which may be said to give rise to such a personal equity.[57] His Honour's statement that 'the parties to the action are parties to the forgery' points at most to the presence of the first element. Even assuming that to be so, however, the second could not be said to exist in the circumstances. Chasfild was an innocent party, arguably no less so than the Tarantos; its conscience was unaffected. On the established facts there was little in Chasfild's conduct which could be equated with the type of situations which had been regarded as giving rise to such an *in personam* claim.[58] At most, a case could be put that Chasfild's solicitor, in dealing with a mortgage in which the person providing the security was not the person receiving the funds, might have rendered Chasfild's registration subject to an *in personam* claim.[59] But this somewhat unusual incautious conduct by Chasfild's solicitor was not offered as a basis for his Honour's decision.

It is true that, at present, the limits of the *in personam* exception have yet to be settled.[60] There appears to be a widening of the circumstances for its application. For example, the High Court in *Bahr* v *Nicolay*[61] has shown that notice of the claimant's interest coupled with an undertaking to another party to hold an interest purchased subject to the claimant's rights may be sufficient in some circumstances to give rise to such a claim. However, the central element remains essential — there must be some unconscionable conduct or sharp practice on the part of the registered proprietor or its agent. An *in personam* claim cannot arise, for example, from a mere procedural defect leading to registration.[62] In so far as there was no unconscionability in Chasfild's con-

[54] See eg *Barry* v *Heider* (1914) 19 CLR 197, 213 (per Isaacs J).

[55] See generally, LL Stevens, 'The In Personam Exceptions to the Principle of Indefeasibility' (1969) 1 *Auck Univ LR* 29; Bradbrook, MacCallum & Moore, op cit paras 5.68–5.72.

[56] *Bahr* v *Nicolay* (1988) 164 CLR 204; *Majestic Homes Pty Ltd* v *Wise* [1978] Qd R 225.

[57] See generally, Sackville & Neave, op cit paras 7.115–7.118.

[58] *Logue* v *Shoalhaven Shire Council* [1979] 1 NSWLR 537; *Bahr* v *Nicolay* (1988) 164 CLR 204. Contra *Gosper* v *Mercantile Mutual Life Insurance Co Ltd*, NSW Sup Ct (Equity), Cohen J, 24/7/90, unreported.

[59] (1990) V Conv R 54-367, 64, 580; [1991] 1 VLR 225, 227–8.

[60] Compare *State Bank of New South Wales* v *Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398; *Palais Parking Station Pty Ltd* v *Shea* (1980) 20 SASR 425; P Butt, 'Fraud and Personal Equities under the Torrens System', (1988) 62 ALJ 1036.

[61] (1988) 164 CLR 604.

[62] *Tyre Marketers (Australia) Ltd* v *Martin Alstergren Pty Ltd* (1989) V Conv R 54-335, 64, 184; cf see Mahoney AJ in *Logue v Shoalhaven Shire Council* [1979] NSWLR 537.

duct, this part of Gray J's decision could hardly be supported on this ground.

By way of passing it is worth noting that unlike his Honour's treatment of the main indefeasibility issue, the *in personam* issue was relatively lightly treated. For example, none of the well-known decisions on this exception were discussed or even referred to in his Honour's judgment.

CONCLUSION

Chasfild revisited the old concept of deferred indefeasibility of title. It is diametrically opposed to the established concept of immediate indefeasibility. The decision is incorrectly based on the wrong provisions, viz s 44(1) of the *Transfer of Land Act* 1958. In any event, Gray J's interpretation of that section is not convincing. In particular, it is incorrect both to see the section as changing the law and to regard it as unique. The decision nullifies the effect of what has always been regarded as the paramountcy provisions, viz, s 42(1) of the Act. It also contradicts leading authorities on the concept.

The court's application of the *in personam* exception in just as controversial. It is not founded on existing authorities. It is either incorrect or, at most, a radical extension of the principle which could make nonsense of the indefeasibility principle.

Nevertheless, *Chasfild* cannot be ignored. As a decision of the Supreme Court of Victoria it stands as an authoritative statement of the law. Until rejected by a subsequent court, however, the decision is a source of some confusion about the state of the law. It thus has significant impact on the legal profession in Victoria. No doubt, in view of its controversial standing, property lawyers look forward to an authoritative clarification of the principle at the soonest possible time. However, fraudulent transactions as illustrated by that case are relatively rare. It may be some time in the future before the Supreme Court of Victoria can have another chance to deal so directly with the issue. It is thus a matter for regret that the plaintiff did not appeal against Gray J's decision.