

National Australia Bank Limited v Maher and Section 44(1) of the Transfer of Land Act 1958 (Vic)

JOYCE G TOOHER*

The conclusiveness of the Torrens register is measured by the indefeasibility of a registered title and the concept of indefeasibility of title in Torrens legislation is based on a set of provisions rather than one definitive section.¹ In 1991, the decision of a single judge in the Victorian Supreme Court² revived the controversy as to the effect of these provisions and whether the indefeasibility of title under the Torrens system of land titles meant immediate or deferred indefeasibility upon registration. The arguments are centred on the consequences following the registration of an instrument which is void for forgery or some other reason.³ In such a case, is A, the innocent registered proprietor, immune from attack by B, who seeks to set aside the registration? Does A acquire an indefeasible title immediately upon registration or is indefeasibility deferred such that A's registration remains open to attack and immunity is deferred in favour of registration by C, C being a third party purchaser from A who acts in good faith?⁴ Deferred indefeasibility was rejected by the High Court in *Breskvar v Wall*⁵ in 1972 and this effectively settled the issue. The key which reopened the debate in Victoria in 1991 was the decision of Gray J in *Chasfild Pty Ltd v Taranto*.⁶ The decision supports the theory of deferred indefeasibility where an instrument is void for fraud or forgery because of the interpretation Gray J placed on s 44(1) of the *Transfer of Land Act 1958 (Vic)*. Although judges in two subsequent Victorian cases declined to follow the decision of Gray J, the matter remains unresolved.⁷

Most recently, in *National Australia Bank Limited v Maher*,⁸ the Supreme Court of Victoria considered the effect of s 44(1) of the Victorian Act and had the opportunity to clarify the position. Unfortunately, the decision of the Full

* Senior Lecturer in Law, Monash University. The writer wishes to thank her colleague Mr Bryan Dwyer for his valuable comments on an earlier draft of this paper.

¹ See ss 42, 43 and 44 of the *Transfer of Land Act 1958 (Vic)*.

² Gray J in *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225.

³ For example, in *Breskvar v Wall* (1971) 126 CLR 376 the instrument was void under s 53(5) of the *Stamps Act 1894 (Qld)*.

⁴ See A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law* (1991) 137 ff; R Stein and M Stone, *Torrens Title*, (1991); and S Robinson, *Transfer of Land in Victoria* (1979).

⁵ (1971) 126 CLR 376.

⁶ [1991] 1 VR 225.

⁷ In *Vassos & Pettinatos v State Bank of South Australia* [1993] 2 VR 316, Hayne J declined to follow the decision of Gray J in *Chasfild Pty Ltd v Taranto* [1991] 1 VR 225. The decision of Hayne J has since been followed by Smith J in *Eade v Vogiazopoulos* (1993) Vic Conv R ¶54-458. Hayne J adopted the same position in *Coomber v Curry* (1993) 16 V Conv R ¶54-464. A single judge of a Supreme Court will generally, for the sake of consistency, follow a decision handed down by another judge of the same Court although there is no strict obligation to do so.

⁸ [1995] 1 VR 318.

Court⁹ constituted by Fullagar, Southwell and Ormiston JJ might well have added more doubt to the operation of this provision. Admittedly, the precise issue that arose in *Chasfild* did not fall squarely within the facts of *National Australia Bank Limited v Maher*, although the facts and other findings are central to understanding how the s 44(1) issue arose. Nevertheless, the Full Court's treatment of s 44(1) of the *Transfer of Land Act 1958* (Vic) is considered in this casenote.

THE BACKGROUND TO SECTION 44(1) OF THE *TRANSFER OF LAND ACT 1958* (Vic) PRIOR TO *NATIONAL AUSTRALIA BANK LIMITED v MAHER*

The relationship between s 44(1) and s 42(1) of the *Transfer of Land Act 1958* (Vic) underlies the renewed controversy between deferred and immediate indefeasibility. Judicial preference for a concept of immediate indefeasibility is primarily based on the assumption that a provision in a Torrens statute that is expressed in similar terms to s 42(1) is the core legislative provision dealing with indefeasibility of title. Section 42(1), when read in conjunction with ss 40, 41, 42(2), 43 and 44, confirms that, except in the case of fraud, registration which results from a void instrument is effective according to the terms of registration.¹⁰ The relevant parts of s 42(1) are:

The registered proprietor of land shall, except in the case of fraud, hold the land subject to ... [various exceptions] ... but absolutely free from all other interests or encumbrances.

It is generally accepted¹¹ that the 'fraud' referred to in s 42(1) means fraud brought home to the registered proprietor.¹² Thus registration will not confer indefeasibility on a registered proprietor who has obtained registration by fraud.

Section 44(1) of the *Transfer of Land Act 1958* (Vic) reads as follows:

Any folio of the Register or amendment to the Register 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.

Until *Chasfild* it was generally assumed that the effect of s 44(1) of the Victorian Torrens Act, was the same as under comparable Torrens system

⁹ The Full Court of the Supreme Court of Victoria ceased to exist on 7 June 1995 when the *Constitution (Court of Appeal) Act 1994* (Vic) commenced operation. This Act inserts a new s 75A in the *Constitution Act 1975* (Vic) to divide the Supreme Court of Victoria into two divisions: the Court of Appeal and the Trial Division. It also, *inter alia*, repeals ss 8 and 9 of the *Supreme Court Act 1986* (Vic) which concerned the operation of the Full Court.

¹⁰ This interpretation also implies that a provision such as s 44(1) complements, rather than qualifies, the core provision s 42(1).

¹¹ This was the conclusion reached by Smith J in *Eade v Vogiazopoulos* (1993) Vic Conv R ¶54-458, 65, 377 after his Honour had examined the authorities. Gray J also took this view in *Chasfild Pty Ltd v Taranto* [1991] VR 225, 234-5.

¹² *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210.

legislation in most of the other Commonwealth jurisdictions despite differences in the precise wording of the legislation.¹³ However, it has since been agreed that s 44(1), introduced in 1954, is a provision unique to Victoria¹⁴ and the contentious issue which has emerged since *Chasfild* relates to the meaning of the 'fraud' in s 44(1). In *Chasfild*, Gray J, expressed the view that s 44(1) would be a pointless repetition of s 42(1) unless it was given a wider meaning which embraced fraud (which includes forgery) associated with registration, regardless of whether such fraud had been brought home to the registered proprietor. A proprietor who obtained registration without any fraud or knowledge 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.¹⁵ Thus, the registered title of an innocent proprietor is defeasible. This interpretation inevitably results in deferring indefeasibility of title upon registration of a forged or fraudulent instrument. Gray J, reinforced this interpretation by adding that the phrase 'procured or made by fraud' used in s 44(1) introduced 'a degree of connection to registration beyond that of physically effecting registration'.

Before *Chasfild*, it was generally accepted that 'fraud' had a consistent meaning in ss 42, 43 and 44. Thus the phrase registration 'procured or made by fraud' referred to registration by a party who obtained registration through their own fraud. Under s 44(1) such a registration was void (and consequently such a proprietor could be divested of registration at the suit of the defrauded previous proprietor unless there was a sale to a bona fide purchaser who became registered).¹⁶ However, Gray J, took the view that s 44(1) qualified s 42(1), rather than complementing it, and thus any registration which is made or procured by fraud, irrespective of the innocence or guilt of the registered proprietor, is void.¹⁷ Undoubtedly, this interpretation of s 44(1) is plausible.¹⁸

¹³ Although in *Vassos v State Bank of South Australia* [1993] 2 VR 316, 328, Hayne J took the view that the position under s 69II of the *Real Property Act* 1886 (SA) was very different.

¹⁴ *Vassos v State Bank of South Australia* [1993] 2 VR 316, 324 per Hayne J. Nevertheless, while s 44(1) was unique to Victoria, it was one of a series of provisions. The series of provisions had close equivalents in other jurisdictions and these had been judicially considered, eg in *Breskvar v Wall* (1971) 126 CLR 376. Also, Smith J in *Eade v Vogiazopoulos* (1993) Vic Conv R 954-458, 65, 378 points out that s 44(1) can be traced back to s 15 of the *Transfer of Land Act* 1914 (Vic) and originally to s 129 of the *Real Property Act* 1862 (Vic) such that s 44(1) and its predecessors were derived from s 200 of the *Land Transfer Act* 1885 (NZ).

¹⁵ *Chasfild Pty Ltd v Taranto* [1991] VR 225, 235.

¹⁶ See also s 44(2) of the *Transfer of Land Act* 1958.

¹⁷ For a fuller account and critique of the rationale and developments relating to s 44(1), see G Teh, 'Deferred Indefeasibility of Title in Victoria' (1991) 17 *Mon L R* 77; and J Schultz, 'Judicial Acceptance of Immediate Indefeasibility in Victoria' (1993) 19 *Mon L R* 326.

¹⁸ Writing in 1979, Dr Robinson suggested that s 44(1) might not otherwise serve any purpose. It could not be justified on the basis that it changed the common law, because at common law a contract is voidable where fraud is established. The right to avoid the contract is exercisable against the defrauder for the recovery of the property until a third party without notice of the rights of the defrauded party acquires a title to that property. See S Robinson, *Transfer of Land in Victoria* (1979) 208.

A number of cases have rejected this interpretation of s 44(1).¹⁹ In *Vassos*,²⁰ Hayne J emphasised that s 44(1) could not be construed in isolation, but as one provision in a series of provisions. Furthermore, in deciding whether any folio of the Register or any amendment to the Register has been procured or made by fraud, the issue was not merely what is meant by fraud, but whose fraud is relevant. According to Hayne J, the relevant fraud was not the fraud of a third party, but the fraud of the party who seeks and obtains registration. His Honour relied on the actual words of s 44(1) stating, 'otherwise how is it that the folio or the amendment is procured or made by fraud?'²¹ While Hayne J conceded that the word 'procured' might suggest a degree of connection to the registration beyond physically effecting registration, it did not produce the wider result proposed in *Chasfield* because it did not identify whose fraud is relevant. The phrase 'procured or made by fraud' points to an act of fraud that procures registration, not an act of fraud that procures the instrument. However, Hayne J did not rest his conclusion on this interpretation. His Honour turned to the context of surrounding provisions to explain the relationship between s 42(1) and s 44(1). Hayne J stated:

If s 44(1) is to be read as avoiding entries on the register resulting from instruments in connection with which any of the parties has acted fraudulently, it represents a significant inroad on the indefeasibility otherwise created by s 42. Moreover, reading the section in this way would render the limitation on the exception to the operation of s 42 to cases of fraud by the party seeking registration an unnecessary limitation.... I consider that s 44(1) has sensible work to do if it is seen as stating the consequences that follow as a result of excepting such cases from the otherwise general operation of s 42(1). On this reading s 42(1) provides a general rule of indefeasibility, subject to an exception for cases of fraud on the part of the person making the registration or his agent, and s 44(1) then deals expressly with the consequences that are to flow with respect to the register as between the persons defrauded and parties to the fraud.²²

This interpretation is also plausible, especially if the closing words of s 44(1) 'and no party or privy to the fraud shall take any benefit therefrom' are regarded as a clear indication that only fraud of the registered proprietor is sufficient to impeach the registered title.²³ Likewise, it is quite plausible that s 44(1) does overlap with s 42(1) for the understandable reason that it is an example of the piecemeal amendments to the *Transfer of Land Act*.²⁴

Attempts to explain the relationship or overlap between s 42(1) and s 44(1) purely in terms of the construction of words contained in the provisions is not particularly useful. A fundamental philosophy underlying the principle of indefeasibility is that the Register is reliable and registered titles are neither historical nor derivative. As judges and commentators have noted, the *Chasfield* view thwarts the philosophy behind the indefeasibility provisions of

¹⁹ See fn 7 supra.

²⁰ [1993] 2 VR 316, 327.

²¹ *Id* 326.

²² *Id* 327.

²³ S Robinson, *op cit* (fn 4) 208; and Bradbrook et al, *op cit* (fn 4) 146.

²⁴ This is also the view of Bradbrook et al, *loc cit*.

Torrens legislation.²⁵ The integrity of the Torrens system is better preserved by the theory of immediate indefeasibility which generally supports this notion and dispenses with retrospective investigations while simultaneously promoting public reliance on the Register. Thus the relationship between the two legislative provisions should be explicable on the basis that s 42(1) sets out the substantive rule which denies indefeasibility to a fraudulent registered proprietor but s 44(1) provides the victim of the fraud with a cause of action against the fraudulent registered proprietor to avoid the effects of the fraudulent registration. Section 44(1) therefore plays a necessary, but nevertheless ancillary role to s 42(1), the core provision.

FACTS OF *NATIONAL AUSTRALIA BANK LIMITED v MAHER*

The dispute concerned three Torrens title parcels of land of which Mr Maher (M) was sole registered proprietor. The properties involved were a Clayton property (the matrimonial home) together with Lot 4 and Lot 6 at Buchan. The National Australia Bank (the Bank) was registered first mortgagee in respect of all three properties. M defaulted in repayments and became bankrupt. The Bank obtained judgment for possession of the properties but was stopped from auctioning the Clayton property when M's wife (the respondent) obtained an interim injunction only hours before the scheduled auction.

The respondent subsequently commenced an action in the County Court against M, the Bank and the Registrar of Land Titles claiming she had an equitable interest in the mortgaged properties, which she claimed were held on a resulting trust by M for the respondent and M jointly. She also claimed a remedial constructive trust on the basis that M had acted unconscionably in mortgaging the Clayton land without her knowledge or consent. At a relatively late stage during the 20 day trial in the County Court, the respondent successfully introduced a claim that the title particulars of the Buchan lots had been added to the instrument of mortgage subsequent to the execution of the mortgage instrument containing only the title particulars regarding the Clayton property. The trial judge concluded that the Bank manager had, without M's knowledge or consent, added the title particulars of the Buchan lots after M had signed the instrument of mortgage. Accordingly, the respondent argued that the Bank's registration was void as against her since it had been procured by fraud by virtue of s 44 (1) of the *Transfer of Land Act 1958* (Vic).

²⁵ See fn 20, supra.

DECISION IN THE COUNTY COURT

The trial judge found that in respect of each property, a resulting trust arose in favour of the respondent which entitled her to an undivided one half share as tenant in common of each of the three properties. The trial judge also found that the mortgage had been procured by fraud within s 44(1) of the *Transfer of Land Act* 1958 (Vic) and was therefore void as against the respondent because the Bank's manager had, without M's knowledge or consent, added the particulars of the Buchan properties to the mortgage instrument after M had signed the document which was ultimately presented for registration.²⁶ The Registrar of Titles was directed to amend the register by cancelling the memorandum of mortgage registered upon each of the three titles and amending the Certificates of Title so that the respondent was entitled to an undivided one half share of the fee simple estate as a tenant in common with M.

APPEAL TO THE FULL COURT OF THE SUPREME COURT OF VICTORIA

One ironic but presumably intentional consequence²⁷ of the order made by the trial judge was that even though the respondent obtained judgment, one of the 'losing' defendants, M (or at least his unsecured creditors), stood to enjoy a windfall because the registered mortgages invalidated under s 44(1) would be removed against his title as well as the respondents. However, the Bank appealed to the Full Court of the Supreme Court of Victoria. The Bank conceded that by reason of Mrs Maher's contribution to the purchase price of the Clayton property, there was a resulting trust in her favour regarding that property to the extent of 20 per cent of the value of the property but argued that she had no further interest in either of the two Buchan properties. The Bank also challenged the respondent's standing to impeach the mortgage between itself and M in so far as it subsisted over M's interest in the three properties. The Bank further claimed that the finding of fraud against the bank manager did not affect the Bank because it did not fraudulently register the mortgage within the meaning of s 44(1) of *Transfer of Land Act* 1958 (Vic). Counsel for the Bank contended the meaning of 'procured by fraud' in s 44(1) did not cover the fraud of its agent, the bank manager, because the Bank, without knowing of the fraud of its agent, procured the registration. Accordingly, registration by the Bank as an innocent principal was not a registration 'procured by fraud' for the purposes of s 44(1).

²⁶ There had only been one instrument of mortgage and the forged insertion of the title particulars to the Buchan properties therefore affected the registered mortgage over the Clayton property because the instrument of mortgage was regarded as indivisible for the purposes of s 44 of the *Transfer of Land Act* 1958 (Vic).

²⁷ From the point of view of Mr and Mrs Maher.

DECISION OF THE FULL COURT

A unanimous Full Court allowed the appeal in part. The respondent was entitled to a one fifth share of the fee simple interest as tenant in common in the Clayton land and a 15 per cent undivided interest in the fee simple as tenant in common in Lot 6 at Buchan and was entitled to such orders as were necessary to enable registration of these entitlements. She had no proprietary interest in Lot 4 at Buchan. The respondent's entitlements, however, could not operate to deprive the Bank of its legal interest as first mortgagee over M's interest in the three parcels of land.

Resulting Trusts

The Full Court examined the available evidence and concluded some of the fact findings of the trial judge could not be supported on the available evidence. It further concluded that the respondent had contributed her time and labour to the improvement and maintenance of each of the properties but had only made a direct financial contribution of twenty per cent of the purchase price of the Clayton property and fifteen percent of purchase price of Lot 6 at Buchan.

The Court relied on the principle enunciated in *Calverley v Green*²⁸ that if A and B contribute *unequally* to the purchase price of land which is put into A's name alone, in the absence of a presumption of advancement or an express or implied agreement as to ownership of the property being purchased, A and B take entitlements in the property proportionate to their unequal contributions under a resulting trust. Further, in the absence of circumstances giving rise to a constructive trust, and in the absence of any question of estoppel, evidence of labour or expenditure by one spouse, B, upon the property of the other spouse, A, does not entitle B to a claim in A's property. There was no question of estoppel nor any grounds to support a constructive trust and accordingly, the respondent had an equitable interest in the Clayton property and Lot 6 at Buchan proportionate to her contribution and no interest in Lot 4 at Buchan.

Constructive Trust

The respondent argued that M's conduct in mortgaging the Clayton land without her consent was unconscionable and required equitable intervention by way of constructive trust. The Full Court held that M could not be said to be guilty of unconscionable conduct unless it was shown that he had, in the knowledge or belief that the respondent had an equitable interest, deceitfully withheld from the Bank relevant information concerning the respondent's interest. As this was not the case, this argument failed.

The Court's answer to the respondent's claim suggests that as a general proposition, the conduct of B, the legal owner of Blackacre, in mortgaging Blackacre to C and deliberately failing to disclose to C that A has an equitable

²⁸ (1984) 155 CLR 242.

interest in Blackacre, is unconscionable and gives rise to equitable intervention against both B and C by way of constructive trust. As a general proposition, this approach has problems. First, it seems to ignore one of the basic priority rules governing equitable interests in land, namely, that such rights are binding on all persons except a bona fide purchaser of the legal estate for value without notice of those equitable rights.²⁹ Under this rule, A's rights are defeated if C buys in good faith without notice of A's interest. Under Torrens legislation, registration by C will have a similar effect unless one of the exceptions to indefeasibility applies. If C had no notice of A's prior equitable interest, then it is difficult to see how the fraud exception would apply.³⁰ Secondly, it is difficult to see what purpose is served by raising a remedial constructive trust if C did not have notice of A's interest. A's position is not improved by introducing a constructive trust under which A obtains a beneficial, ie equitable interest, since C's registered title is unassailable unless C's behaviour preceding registration gives rise to an *in personam* claim by A.³¹

The Court's findings relating to s 44(1) of the *Transfer of Land Act 1958* (Vic)

The respondent contended that the registration of the Bank as mortgagee was 'procured ... by fraud' within the meaning of s 44(1) of the *Transfer of Land Act 1958* (Vic). As well as contesting this, the Bank argued that the respondent had no standing to relieve M's (her husband's) interest of the burden of the Bank's registered mortgage against the three properties. The Court agreed with the respondent by finding that registration of the Bank's mortgage was 'procured ... by fraud' under s 44(1) of the *Transfer of Land Act 1958*. The Court also agreed with the Bank's claim that the respondent had no standing to relieve M's interest of the Bank's registered mortgage in the properties. This might account for the unusual terms of the Court Order which required a number of steps.

First, in respect of the Clayton property and Lot 6 at Buchan, M was required to transfer a legal interest, subject to the Bank's mortgage, to the respondent commensurate with her equitable interest. Second, since the Bank's mortgage was procured by fraud it would be void as against the respondent and the respondent was entitled to require the Bank to discharge the mortgage over each of her newly acquired titles. Third, M was then required to grant a new mortgage to the Bank affecting only his residual interest in each of the properties. In this way, the respondent's equitable

²⁹ See *In re Nisbet and Pott's Contract* [1906] 1 Ch 386.

³⁰ See s 42(1) of the *Transfer of Land Act 1958* which provides that the registered proprietor of land, except in the case of fraud, takes free of all encumbrances (this would include equitable interests) unless they are notified. Section 42(2) also enumerates other exceptions referred to as 'paramount interests'. Section 43 specifically states that 'notice' does not amount to fraud.

³¹ The conclusiveness of the register does not protect the registered proprietor from claims *in personam*, founded in law or equity which a plaintiff may bring against the registered proprietor: *Frazer v Walker* [1967] 1 AC 569, 585.

interest could not be said to have relieved M's share of the burden of the registered mortgages. The Court based these steps on the operation of s 44(1) of the *Transfer of Land Act 1958* (Vic). In practical terms, the net effect was to prevent the Bank from selling an unencumbered fee simple estate regarding the Clayton property and Lot 6 at Buchan, thus obliging it to pay the respondent a proportionate equivalent of the relevant proceeds if the respondent was prepared to sell her interest. If she was not, the Bank faced the invidious prospect of finding a buyer of an 80 per cent share as tenant in common in the Clayton property and an 85 per cent share as tenant in common in Lot 6 at Buchan.

SECTION 44(1) OF THE TRANSFER OF LAND ACT 1958 (Vic) AFTER NATIONAL AUSTRALIA BANK LIMITED v MAHER

The Court's findings based on s 44(1) are dealt with above. The implications of these findings are considered under this heading.

The first major issue concerns the meaning of fraud under s 44(1). The Bank argued that its registration was not 'procured ... by fraud' because the Bank, not knowing of the bank manager's forgery, procured the registration by the hand of an individual (a courier or titles clerk) who also did not know of the forgeries. This argument is rather tenuous as it limits the 'fraud' referred to in s 44(1) to fraud connected with the physical process of registration.³² It is not surprising that the Court did not accept this argument. The Court held that the Bank's registration could be avoided because registration of the mortgage was 'procured by the fraud of the Bank's employee in the course of carrying on the Bank's business.'³³ However, Fullagar J, who delivered the judgment, went on to say:

It is to be noticed that s 44 describes the register by reference to what has happened to the register, and it does not refer to the fraud of any particular person; all that is required is that fraud shall have caused or brought about the state of the register.³⁴

The quoted statement is *obiter* in that it was not necessary to the decision because on the facts the Bank was held to be affected by the fraud of its employee bank manager. His Honour's dicta could merely be a rejection of the Bank's argument that registration was not 'procured ... by fraud' within s 44(1) because neither the Bank itself, nor the individual who effected registration, knew of the bank manager's forgery. The Bank's contention assumes the phrase 'procured ... by fraud' in s 44(1) means fraud committed during the physical act of registration. Fullagar J's remark could be read as extending the temporal focus beyond the act of registration to include registration of an

³² The Bank had a great deal to lose. It was appealing against a decision which had rendered pyrrhic the bank's successful suit for possession of three mortgaged properties against a bankrupt M.

³³ [1995] 1 VR 318, 333.

³⁴ *Ibid.*

instrument which was created by forgery or with fraudulent intent. Thus the quoted statement could be a response tied to the particular facts of the case.

Alternatively, the statement is open to the much broader interpretation that the Bank's registered mortgage could have been avoided even if a third party with no connection to the Bank had committed the forgery. If this is correct, then the Full Court has made an unfortunate statement supporting a theory of deferred indefeasibility. The Full Court appears to have adopted the same approach as Gray J in *Chasfild* because both views suggest that the registered title of an innocent proprietor is defeasible where there has been fraud associated with the registration. Furthermore, it is possible that the Full Court has specifically rejected the alternative view 'that there must be established fraud by or on behalf of the party who seeks and obtains registration.'³⁵ However, the correct interpretation is obscured because the real significance of the Full Court statement has been left to speculation.

The second major issue concerns which persons are entitled to relief by virtue of the operation of s 44(1). The Full Court understood the words 'any person defrauded or sought to be defrauded thereby' in s 44(1) as meaning that s 44 is concerned 'with the rights of persons on the register ... and not with the rights of persons whose interests are purely equitable, such as the [respondent's]'.³⁶ This suggests that the only persons who might benefit by the avoidance of a registration 'procured or made by fraud' must themselves be registered. The order of the Court which enabled the respondent to become registered before the Bank's registered mortgage could be avoided is consistent with the suggestion made. The Court reasoned that since the respondent was entitled to be put on the register in respect of her interests this would characterise her as a person defrauded by the fraudulent procurement of the registered mortgagee (the Bank). With respect, the Court's statement that only registered parties may benefit from s 44(1) is unsatisfactory for a number of reasons.

First, the statement is misleading in that it suggests that only current registered proprietors may rely on s 44(1). In fact, the Full Court by allowing the respondent to be protected by s 44(1) extended protection to a person entitled to be registered as proprietor. This is consistent with the authorities. The plaintiffs in the leading cases are invariably persons who have lost registration or been denied registration through a fraudulent registration. For example, in *Breskvar v Wall*,³⁷ the Breskvars were defrauded former registered proprietors who were seeking to regain a registered fee simple interest. The reason they failed to regain registration as proprietors was that their interest was postponed to that of a later bona fide third party purchaser because they had (albeit unwittingly) armed the fraudulent party with the means to create the later interest. Had the third party not become involved, there was no doubt that the Breskvars would have succeeded against the current registered

³⁵ *Vassos v State Bank of South Australia* [1993] 2 VR 316, 326.

³⁶ [1995] 1 VR 318, 333.

³⁷ *Breskvar v Wall* (1971) 126 CLR 376.

proprietor who was found to be fraudulent. Furthermore, the High Court classified the interest held by the Breskvars as an equitable interest although it was, arguably, merely an equity raised by the first fraudulent transaction. Therefore, the protection under s 44(1) does extend to persons with equitable interests.

A second difficulty with the Full Court's statement is based on practical implications. The range of persons intended to benefit by the operation of s 44(1) would be reduced considerably if only registered parties could rely on s 44(1). It would render the provision unusable by parties who would most likely need it. This is especially significant because the Torrens system of land titles is a statutory scheme under which title and interests pertaining to land depend on registration and the state of the Torrens register.

Thirdly, if s 44(1) were to apply in the manner suggested by the Full Court, the symbiotic relationship between s 42(1) and s 44(1) whereby the latter plays an ancillary role to the former would virtually disappear. Unfortunately, this position would appear to reject the view of Hayne J and Smith J discussed above.³⁸

Finally, according to the terms of s 44(1) the respondent should have succeeded against the Bank without having to become registered first. The Court might have assumed that had the respondent not become registered through the process ordered by the Court, she may not have been able to enforce her interest in each of the two properties (a prior equitable interest under a resulting trust) against the Bank's registered mortgage. The entitlement to become registered proprietor as a tenant in common with her husband was actionable against M, her husband, as trustee of the properties, but not against the Bank. The registration of the Bank's mortgage, became avoidable by a party 'defrauded or sought to be defrauded thereby' and the Bank remained registered mortgagee until legal action was taken to avoid the registration. A successful action against the Bank required the respondent to be a person 'defrauded or sought to be defrauded thereby' by the Bank's registration. Presumably this means that a party relying on s 44(1) must establish that they are directly, or indirectly, a victim of the registered proprietor's fraud. The Court was quite willing to treat the respondent as a person defrauded after she became registered. However, she was a person defrauded before she became registered. She need not have become registered to gain a remedy. For example, in relation to the Clayton property, the Court order could have permitted the Bank to proceed with the sale of the premises subject to the Bank holding 20 per cent of the proceeds of the sale of this property on trust for the respondent. Furthermore, once the registration of the Bank's mortgage had been avoided under s 44(1), the matter could have been decided as a priority issue between unregistered interests in Torrens land. In the light of the prevalence of equitable doctrines in this area and the fraudulent conduct of the Bank, it is arguable that the respondent would have succeeded against the later interest of the Bank.³⁹

³⁸ See p 177 supra.

³⁹ See *Heid v Reliance Finance Corporation* (1983) 154 CLR 326.

It is disappointing to note that a further opportunity for removing the outstanding uncertainty regarding s 44(1) was lost when the High Court of Australia refused Mrs Maher's application for special leave to appeal from the Full Court's decision.⁴⁰

⁴⁰ The grounds given were that: (1) the relevant principles relating to resulting and constructive trusts have been expounded in earlier High Court decisions; and (2) the difficulty in analysing the insufficient facts presented in evidence. It is interesting to note that Mrs Maher, the respondent (and not the National Australia Bank) was the applicant for special leave to appeal.