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INTERPRETATION OF THE REAL PROPERTY ACT

South Australia's only salt water baths used to exist a short distance from the Henley jetty. The local council has spent considerable sums on the develoment of the civic square in front of the jetty but the maintenance of the baths was neglected and ultimately the cost of upgrading the baths was used to justify their demolition. Many of the buildings in the vicinity have similarly received only minimal care — care particularly needed to counteract the ravages of salt-laden winds. Commonly dwellings have been occupied by tenants and their ownership has been the subject of speculative endeavour. That speculation has required finance often from outside established sources. Endeavours at the margin sometimes fail. That failure can present the courts with the task of unravelling complex and suspect relationships.

The case of *Wicklow Enterprises Pty Ltd* v *Doysal Pty Ltd*[1] derives from this background. The case itself involved a Supreme Court hearing before Legoe J on an interlocutory application, an appeal to the Full Court and a retrial before O'Loughlin J. That retrial produced a key witness whose existence had been doubted and identity unknown at the first hearing. That witness was brought it seems literally screaming or at least retorting vituperatively. The desire for mystery seems to have extended even to the reports as O'Loughlin J's decision was not reported in the Law Society Judgment Scheme but is finally available in the South Australian State Reports. The decision represents the most forceful and cohesive analysis in the past twenty years in South Australia of the principles relevant to the fraud and forgery exceptions to indefeasibility of title under the Real Property Act 1886 (SA).

A short distance south of the Henley jetty stands the Del Monte private hotel — a solid and impressive building recently acquired by Japanese interests for tourist promotion. Further south adjacent to the private hotel stand several dwellings. These dwellings produced economic battles over their development and legal battles relating to the propriety of the conduct of the persons involved in the economic battles. One of the legal battles was *Wicklow* v *Doysal*. The case related to the dwelling at 199 The Esplanade. This dwelling was purchased in 1972 by a person using the name Peter Eric Hansen. On 4th February 1982 Hansen contracted to sell the land on which the dwelling stood for $48,850 and ultimately Wicklow Enterprises Pty Ltd was nominated as the purchaser. Wicklow required finance for the purchase and a loan of $35,000 was obtained from a person using the name Walter Raymond Kramer. This loan was secured by a registered mortgage over the property. No payments were ever made under this mortgage. A notice of default was served and on 23rd June 1983 the property was sold by Kramer pursuant to the mortgagee's power of sale to Doysal Pty Ltd for $44,600.

At the first hearing Legoe J concluded that Hansen and Kramer were the same person but that person was not discoverable. The Full Court granted a rehearing on the ground that Hansen/Kramer had been found and was in fact a person whose correct name was Frank Mossell.

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1 (1986) 45 SASR 247.

Speculation is prompted as to the impact a national identity card would have on such manoeuvrings! Mossell appeared before O'Loughlin J and gave evidence not always in the best of temper. Mossell's intended victim had been neither Wicklow nor Doysal but the Federal Commissioner of Taxation. His discovery and appearance apparently cost him $130,000 in contributions to national revenue. Wicklow had not been aware of the true identity of the mortgagee but was not disadvantaged in entering the mortgage transaction by its belief that Hansen and Kramer were two persons.

Wicklow's dealings subsequent to entry into the purchase and mortgage were not free of difficulty. Ian Hainsworth Kirkman was a director of and substantial shareholder in Wicklow. Kirkman, through Wicklow and another company had purchased the Del Monte private hotel and five adjacent properties (including 199). His intention was to undertake or set up a redevelopment of the properties. He arranged finance from a company Insurpak Pty Ltd. That company was granted security over the properties including apparently an unregistered second mortgage over 199. A director and secretary of Insurpak was a person whose true name was Smith. Smith had regular dealings with Kirkman. These dealings disclosed that Kirkman and through him Wicklow were in financial difficulties. These difficulties led to the failure to make any payments under the first mortgage over 199. But in addition Kirkman/Wicklow's only contact point for the apparent mortgagee Kramer was an Unley post office box number. In April 1983 the notice of default was received by Kirkman/Wicklow and a copy of the notice was forwarded to Smith. Kirkman indicated to Smith a desire to negotiate some deal concerning the property but complained of an inability to contact Kramer. Smith however succeeded in contacting Kramer and negotiated a mortgagee sale to Doysal Pty Ltd, a corporation of which Smith was a director and shareholder. Kramer demanded a price to cover his costs; that price was above Smith's valuation but it was met. The land was transferred to Doysal.

The proceedings sought declarations that the mortgage from Wicklow to Kramer and the transfer pursuant to the mortgagee sale from Kramer to Doysal were void and orders for the retransfer of the land to Wicklow.

Wicklow sought to argue that *Gibbs* v *Messer*[2] established a principle that dealings by a non-existent person were nullities and that therefore the mortgage to and transfer by Kramer were nullities because Kramer was a non-existent person. Alternatively Wicklow argued that under s69(II)[3] of the Real Property Act the mortgage to and transfer by Kramer

2 [1891] AC 248.

3 This subsection provides:

> '69.The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the original certificate of such land, 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 instrumenbt 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 title from a person under disability, or by any of the means aforesaid . . .'

on the one hand were forgeries and on the other hand to and from a person under a legal disability and did not confer a good title upon Doysal.

There is considerable argument that the use of the name Kramer was not similar to the use of the name Cameron by the fraudulent party in *Gibbs* v *Messer*. In that case the name Cameron was used to describe a person who appeared to be an individual having a separate and independent existence from the fraudulent party. On the other hand the name Kramer was used merely to disguise the identity of the mortgagee and this was more in the nature of an alias. Thus it could be asserted that Kramer was not a non-existent person. A simpler point was relied upon by O'Loughlin J to dispose of the *Gibbs* v *Messer* and forgery arguments. He pointed out that the false name was not used with any intent to defraud Wicklow. Wicklow was largely indifferent to the identity of the mortgagee. The intent to defraud is an essential element of forgery. Therefore O'Loughlin J concluded that the principle of *Gibbs* v *Messer* (if any, and whatever it might be) did not apply and the forgery exception did not apply. Furthermore he concluded that the act of a forger is not the act of a person under a legal disability and the legal disability exception did not apply.

However Doysal's title was held to be defeasible on the ground of fraud. The argument for fraud arose from Smith's involvement as director and secretary of Insurpak, the creditor of Wicklow and as a director and shareholder of Doysal. Smith knew of the service of the Notice of Default under the Kramer mortgage. He also knew that Kirkman/Wicklow were engaged in serious negotiations for the sale of all properties on the Esplanade.

The argument for Doysal against the existence of fraud was that Wicklow was a mortgagor in default, the property was on the market and anyone was entitled to purchase the property. Moreover Smith/Insurpak had a particular interest in keeping the properties on the Esplanade in friendly hands to facilitate a later group deal. Smith managed to contact the mortgagor where Kirkman/Wicklow could not but that contact reflected business skill by Smith.

O'Loughlin J concluded that Smith deliberately and vindictively set about to deal with Kramer and did not disclose to Kirkman/Wicklow the whereabouts of Kramer or Smith's contact with Kramer. Smith was a person who had continuous contact with Kirkman/Wicklow and attended a meeting to discuss means of salvaging the Esplanade properties. In these circumstances the withholding of information went beyond cold-blooded, hard-headed commercialism and amounted to a designed cheating and thus fraud.

Although the judgment does not proclaim any new definition of fraud, it emphasises the elasticity of the concept and the application of the concept to the facts should provoke interest.

The findings as to a lack of intent to defraud by the mortgagee Kramer and the inapplicability of the person under a legal disability description to a forger meant that O'Loughlin J did not have to express any view as to the interpretation of s69(II) of the Real Property Act. The temptation however proved irresistible and the analysis of the subsection is probably the most significant part of the judgment.

The subsection provides an exception to the indefeasibility of a

registered proprietor's title

> '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 a 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 title from a person under a disability, or by any of the means aforesaid.'

The last seven words in the subsection cause difficulties. Their use is similar to the use of the words 'et cetera'. They make reading the section cumbersome. But they also add an ambiguity.

O'Loughlin J read the proviso as if it were expressed:

> '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 of title was obtained
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> (a) by any person through whom he claims title from a person under a disability
>
> or (b) by forgery
>
> or (c) by means of an insufficient power of attorney.'

It is equally possible to read the section as if it were expressed:

> '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 of title was obtained by any person through whom he claims title
>
> (a) from a person under a disability
>
> or (b) by forgery
>
> or (c) by means of an insufficient power of attorney.'

Linguistically the problem is the scope of the disjunctive 'or'. In terms of overall meaning O'Loughlin J reads the section to state that a certificate of title obtained by forgery is void provided that a certificate of title obtained by forgery by a registered proprietor who has taken bona fide for valuable consideration is valid. The alternative states that a certificate of title obtained by forgery is void provided that a certificate of title obtained by a registered proprietor who has taken bona fide for valuable consideration and who claims title from someone who has obtained title by forgery is valid.

As O'Loughlin J points out the argument involves the continued application in South Australia of the theory of deferred indefeasibility. It is now beyond argument that apart from *in personam* claims the title of a registered proprietor is not subject to any implied exceptions. But s69(II) is an express exception and the issue is as to its proper construction. O'Loughlin J acknowledges that his reading produces deferred indefeasibility where title is obtained from a person under a legal disability but immediate indefeasibility is obtained by forgery or by means of an insufficient power of attorney. The alternative reading produces deferred indefeasibility where title is obtained by forgery or by means of an insufficient power of attorney as well as cases where title is obtained from a person under a legal disability.

Section 69(II) was introduced as part of a general consolidation of the Real Property Act in 1886. The source of the subsection is not revealed

in the Parliamentary Debates. It appears that the subsection was inserted as an afterthought to the original Bill which had been introduced in 1885. The explanation of the subsection does tend to support deferred indefeasibility in cases of forgery:

> 'Subsection 2 related to titles obtained by forgery or legal disability. A man who obtained a title by means of forgery would have a title which could be defeated by the person whose name was forged. This was right, because the person whose signature was forged had no means of protecting himself, whilst the person who took the forged signature had the opportunity of satisfying himself of its genuineness. Any certificate under those circumstances would not convey the title. It was necessary to protect innocent persons who had no means of tracing deception, and therefore any one purchasing bona fide from the person who held a forged certificate would have his title upheld notwithstanding the forgery. Under this subsection there would be no certificate of title which might not be ultimately challenged either immediately or in the remote future, if it were transmitted by means of a forged instrument. Therefore he thought they had taken the proper course to protect any honest man who accepted a title having no reason to suppose there was any thing wrong with it.'[4]

Prior to the revision of the Real Property Act an extensive review of the Act had been undertaken by a Commission[4a] appointed by the Chief Secretary. That Commission reported in 1873 and no acknowledgement of its work is made in the 1886 debates. The *Report* does deal with the policy arguments in forgery cases. It favours deferred indefeasibility in forgery cases in terms similar to those advanced a century later in the article 'Scotching *Frazer v Walker*'.[5] The *Report* states

> '67. The question of the mode of dealing with titles obtained by means of forgery is one of very great difficulty. We have carefully considered the evidence given before the Royal Commissioners in England, in addition to the evidence taken by us, and we have by a majority decided that even where the purchaser was at the time of the purchase ignorant of the forgery, the transfer should be voidable so far as he and volunteers under him are concerned; but a subsequent purchaser for value should retain the land, and the defrauded proprietor should receive compensation out of the Assurance Fund.
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> A purchaser ought to be bound to see that the transaction with himself is regular in every respect; but ought not be bound to see that the previous registered proprietor obtained his title *bona fide*, because he is not required to look behind the certificate of title.'[6]

The Commission's suggested amendment (Clause 40) was unambiguous. There should be an exception to the indefeasibility of title in the case

4 SA Parl, *Debates* (1886) 142 per the Attorney-General, Hon JW Downer.

4a South Australia, Commission Appointed to Inquire into the Intestacy, Real Property and Testamentary Causes Acts (Ingleby, Chairman) *Report* (1873).

5 Taylor, 'Scotching *Frazer* v *Walker*' (1970) 44 ALJ 248.

6 Above n 4a at 13.

of 'A certificate of title or other instrument obtained by forgery, although the proprietor at the time was ignorant of such forgery'.[7] The proviso was also clearer though it set the stage for the current amalgamation of situations.

> 'Provided always, that the title of a purchaser for valuable consideration shall not be defeasible on the ground that a certificate of title was obtained by any persons under whom he claims title by means of fraud or forgery, or that a certificate of title or other instrument was obtained by any person under whom he claims title by means of an insufficient power of attorney, or from an infant, married woman under disability, or insane person.'[8]

The history points in favour of deferred indefeasibility in forgery cases. The overall coherence of the operative part of the subsection and the proviso also points towards deferred indefeasibility. Moreover the interpretation adopted by O'Loughlin J leaves very little scope for s69(11) in forgery cases. By definition persons who forge instruments in their own favour are fraudulent and caught by s69(1). They are the only persons caught by the forgery provisions of s69(11) as interpreted. The impact of s69(11) is that their title is void rather than voidable — a consequence of greatest significance for unregistered purchasers from the forger who will obtain no interest rather than an equitable interest. But the current in favour of immediate indefeasibility has, as recognised by O'Loughlin J, tended to be overpowering. That current does have its origins however in the language of legislation based on pre-1886 versions of the Real Property Act and has not been strongly supported by analysis of policy considerations.

Wicklow v *Doysal* continues a consistent pattern of critical consideration by the South Australian Supreme Court of the principles embodied in the Real Property Act 1886. Whatever conclusion is reached about its interpretation of the meaning of fraud and the protection for registered proprietors claiming under forged instruments, the case is a most valuable addition to the analysis of the issues. Over the past twenty years the Supreme Court has provided much guidance as to the principles embodied in the Act. An attempted resume of significant points to be drawn from decisions reported in the South Australian State Reports may assist use of that material.

1) No rights accrue by virtue of adverse possession against a registered proprietor save for the ability to make an application under Part VIIA: *Re Ellen Kay*.[9]

2) Contracting with actual knowledge of the existence of an unregistered interest does not constitute fraud: *RM Hosking Properties Pty Ltd* v *Barnes*[10] though contracting as part of a conspiracy to defeat the holder of an unregistered interest is fraud: *Ovenden* v *Palyaris Constructions Pty Ltd*.[11]

3) Where a registered proprietor challenges a caveat, a prima facie case

7 Ibid xxxix.
8 Ibid.
9 [1969] SASR 1.
10 [1971] SASR 100.
11 (1975) 11 SASR 65.

is sufficient to justify retention of the caveat pending legal proceedings: *Galvasteel Pty Ltd* v *Monterey Building Pty Ltd*.[12]

4) An option to renew in a registered lease is protected against the holder of a subsequent registered interest: *Mercantile Credits Ltd* v *Shell Company of Australia Ltd*.[13]

5) The holder of an unregistered interest is deemed to know of and be subject to an interest ascertainable by reasonable inquiry as to the occupation of land: *Taddeo* v *Catalano*.[14]

6) A caveat must accurately state the factual basis on which the claim to an interest is based and cannot do more than seek to protect the caveator's interest: *Caravan and General Finance Ltd* v *Clearview Developments Pty Ltd*.[15]

7) A registered mortgagee is a proprietor of an interest in land and thus entitled to the protection of s69: *Zafiropoulos* v *Recchi*.[16]

8) The doctrine of accretion applies for Torrens System land and to leasehold estates in Crown Land held in perpetuity: *Southern Centre of Theosophy, Inc* v *The State of South Australia*.[17]

9) A restrictive covenant will not run with the land unless the document creating the interest identifies the land benefitted: *Clem Smith Nominees Pty Ltd* v *Farrelly*.[18]

10) A restrictive covenant attached to a registered rent-charge is unlikely to be enforceable against a subsequent bona fide registered proprietor of the land burdened: *Clem Smith Nominees Pty Ltd* v *Farrelly* per Bray CJ because of s 97 Real Property Act which apparently restricts to the original parties the enforceability of covenants other than that to pay the sums secured; per Zelling J because the covenant is not itself registered.

11) The assertion of a non-existent right to acquire compulsorily does not give rise to an equity against a registered proprietor who has made the assertion: *Palais Parking Station Pty Ltd* v *Sheia*.[19]

12) The rights of way entered on the certificate of title of the dominant and servient tenements before 18 November 1881 did not require an application under The Rights of Way Act 1881 and are enforceable under s87 of the Real Property Act against subsequent registered proprietors of the servient tenement: *Bond & Leitch* v *Delfab Investments Pty Ltd*[20]

13) A bona fide registered proprietor purchasing from a registered mortgagee is not subject to claims of the mortgagor as to lack of

12 (1974) 10 SASR 176.
13 (1975) 11 SASR 409. Affirmed on appeal by the High Court of Australia (1976) 136 CLR 326.
14 (1975) 11 SASR 492. The subsequent holder in that case was found to have deliberately refrained from making inquiries.
15 (1976) 15 SASR 404.
16 (1978) 18 SASR 5.
17 (1978) 19 SASR 389. On appeal the Privy Council rejected the Full Court's application of the doctrine to the facts; the Torrens System issue was assumed: [1982] AC 706.
18 (1978) 20 SASR 227.
19 (1980) 24 SASR 421. Users of the Adelaide Law School cannot help but observe the continued presence of the Palais Parking Station. This presence results from a settlement reached during the course of appellate proceedings in the High Court.
20 (1980) 26 SASR 462.

proper notice to the mortgage of the sale: *Emerald Securities Pty Ltd* v *Tee Zed Enterprises Pty Ltd.*[21]

14) An unregistered purchaser from a registered mortgagee is entitled to exercise the powers of a mortgagee conferred by the Real Property Act: *Caretta Stud Nominees Pty Ltd* v *White.*[22]

15) The holder of an interest protected by a conditional caveat can enforce that interest against a subsequent registered proprietor who agreed to take subject to that interest: *Coles KMA Ltd* v *Sword Nominees Pty Ltd.*[23] The conditional caveat would therefore seem to offer more effective protection for a restrictive convenant than the technique of incorporation in a registered rent-charge left in much doubt by the decision in *Clem Smith.*

21 (1981) 28 SASR 214.
22 (1982) 29 SASR 597.
23 (1986) 44 SASR 120. The decision affirmed the earlier holding on this point of Olsson J in *Andrews* v *South Australian Superannuation Fund* (1985) 124 LSJS 153.