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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

SC No. 41 of 1989

BETWEEN:

COLIN WAYNE HINDS and SUSAN JOAN HINDS
Plaintiffs

AND:

HORST UELLENDAHL and FROUKJE UELLENDAHL
First Defendant

AND:

AMPHORA PTY. LIMITED
Second Defendant

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 15 December 1992)

The application

On 7 December the Summons of 8 July 1992 taken out by the Second Defendant (herein "Amphora") came on for hearing before me. By that Summons Amphora sought the following relief:-

1.An order for the removal of Caveat No.213892 entered in Register Book Volume 185 Folio 125.

2.Costs.

This was an application under Rule 22.08(1) for summary judgment, on the basis that the plaintiffs had no defence to Amphora's Counterclaim under s191(iv) of the Real Property Act (herein "the Act") that the caveat be removed. It was common ground that the application should be determined on the same

basis as an application by a plaintiff for summary judgment under Rule 22.02(1). The plaintiffs were entitled under Rule 22.08(2) to show cause under Rule 22.04(1), and obtain leave to defend the counterclaim if they could satisfy the Court that there was a question of fact or law, or of fact and law, which "ought to be tried", or that "for some other reason" there should be a trial of the counterclaim; see Rule 22.06(1)(b). If there appeared to be any reasonable ground to support the plaintiffs' lodging of the caveat, some fairly arguable point giving rise to a triable issue, Amphora's application had to fail. In other words, it was for Amphora to show that this was a clear case of the plaintiffs having no defence to its claim for removal of the caveat. Consonant with this approach, the plaintiffs should have leave to defend, if a difficult question of law were raised; but if the point was ultimately seen to be clear and unarguable, leave to defend should be refused.

No point was taken by either party as to the sufficiency of the supporting affidavits.

After hearing argument I granted the orders sought by Amphora, stating that I would publish the reasons therefor in due course. I now do so.

The facts pleaded

Various paragraphs of the plaintiffs' Amended Statement of Claim alleging fraud against Amphora were struck out by the Master on 20 February 1992. The general case sought to be made by the plaintiffs is set out by the Chief Justice at pp1-3 of his judgment of 19 May 1992, dismissing an appeal from the Master's decision, viz:-

> "The plaintiffs allege that, on or about 20 July 1988, they entered into a contract with the first defendants to purchase certain land from the first defendants. At that time the first defendants were not the registered proprietors of the land but had signed a contract with a third party [the Australian National Railways Commission] to purchase the land. That contract involved the payment of an initial deposit and the subsequent payment of the balance; upon which the first defendants would become the registered proprietors.

The contract between the plaintiffs and the first defendants

provided that the plaintiffs would pay those monies to the third party as they fell due, and when the first defendants became the registered proprietors they would then transfer their interest to the plaintiffs. In the meantime the first defendants acknowledged that they would hold their interest in the land as trustees for the plaintiffs.

The statement of claim alleges that the plaintiffs paid the initial deposit to the third party. It is not pleaded that they paid the balance owing to the third party, but it is pleaded that they were at all material times ready, willing and able to perform their obligation under their contract with the defendants.

It is then pleaded that, on 9 September 1988, the first defendants became the registered proprietors pursuant to the contract with the third party. The statement of claim alleges that the first defendants, upon becoming registered as proprietors, immediately - the statement of claim puts it as within 42 seconds of registration - transferred their title in the land to the second defendant, a company [Amphora].

The statement of claim then proceeds to allege a breach of contract and a breach of trust by the first defendants against the plaintiffs."

It is clear that by virtue of ss69 and 70 of the Act, once Amphora was registered as proprietor of the land on 9 September 1988, its title became absolute and indefeasible and prevailed; and the plaintiffs could then no longer set up their prior equitable interest (as purchasers from the first defendants) against Amphora, unless they could draw themselves within one of the eight qualifications upon indefeasibility in s69 of the Act, or within s71(v). The qualifications included actual fraud on the part of Amphora against the plaintiffs (s69(I)); and s71(v) protected the right of a cestui que trust where the registered proprietor was a constructive trustee. Apart from the provisions of the Act, case law showed that Amphora would be bound in personam by any personal obligation to the plaintiffs, the effect of which was that it held the land as constructive trustee for the plaintiffs.

In the result, by their Further Amended Statement of Claim handed up on 7 December, the plaintiffs no longer allege fraud on the part of Amphora. The plaintiffs now allege in

para12 that the first defendants had agreed to sell the subject land to them, and meanwhile, pending transfer, would hold the land in trust for them. They allege that Amphora knew or ought to have known of that agreement, and thus of the plaintiffs' interest in the land. They allege in para11 that the first defendants transferred the land to Amphora in breach of trust; and in para12.7(a) that Amphora, by taking the transfer knowing (or in circumstances where it should have known) of the agreement between the plaintiffs and the first defendants, and the plaintiffs' interest in the land, was a party to the breach of trust by the first defendants.

By its Counterclaim of 4 April 1989 Amphora sought the relief it now seeks in its summons of 8 July 1992. The caveat in question had been lodged by the plaintiffs on 13 February 1989, some 5 months after the transfer by the first defendants to Amphora was registered on the title on 9 September 1988, and some 6 months after the plaintiffs had entered into a formal written contract on 8 August with the first defendants to purchase the land, their contract of 20 July 1988 having been oral.

It can be seen that the plaintiffs seek to support their caveat on the basis that on the facts pleaded Amphora as the current registered proprietor was party to a breach of trust when acquiring title to the land, in that it purchased the land either knowing or when it should have known of the facts alleged above. The plaintiffs contend that by virtue of its acquisition with such actual or constructive knowledge Amphora thereby holds title to the land as a constructive trustee for them.

It is clear from the pleadings - and in my view it is important - that Amphora has neither acknowledged that the plaintiffs had an interest in the land prior to their own, nor undertaken by any means to hold its title to the land subject to the plaintiffs' rights.

The submissions by Amphora

In summary, Mr Reeves of counsel for Amphora relied on the indefeasibility provisions of the Act. He submitted that

the effect of the registration of the transfer by which Amphora became the registered proprietor of the land was to extinguish any prior unregistered interest of the plaintiffs which, but for that registration, would have conflicted with or encumbered Amphora's interest, unless the plaintiffs' interest fell within one of the statutory exceptions. I accept that general proposition; see for example *Leros Pty Ltd v Terara Pty Ltd* (1992) 66 ALJR 399. Mr Reeves submitted that the plaintiffs' interest did not fall within any of the statutory exceptions, and that they had no enforceable claim in personam of the type recognized in *Frazer v Walker* [1967] A.C. 569.

The plaintiffs' 'show cause' submissions

Mr Coulehan of counsel for the plaintiffs relied on *Galvasteel Pty Ltd v Monterey Building Proprietary Limited* [1974] 10 SASR 176, to support his submission that the plaintiffs had a caveatable interest in the land. It is clear from that authority, and indeed from consistent case-law over the last 350 years since *Daire v Beversham* (1661) Nels 76; 21 ER793, including *Legione v Hateley* [1982-83] 152 CLR 406 at 423, 429, 445-9 and 456-8, that as purchasers under a contract of sale the plaintiffs had thereafter a caveatable interest in the land. If their contract of sale of 8 August with the first defendants was valid, the first defendants as vendors became thereafter, in equity, constructive trustees for the plaintiffs of their interest in the land sold, the beneficial ownership therein passing to the plaintiffs. Such a constructive trust has special characteristics but the Act nowhere provides that such equitable interests form no part of the Torrens system. These rights, however, must be protected by caveat, not by notification - see *Wolfson v Registrar-General (NSW)* [1934] 51 CLR 300 at 308, and *Lapin v Abigail* [1930] 44 CLR 166 at 205, per Dixon J.

A caveat acts as an injunction to the Registrar-General to prevent registration of dealings with the land unless the caveator consents in writing - s191(iii) of the Act. I note that in this case no caveat was lodged by the plaintiffs until after the title had been transferred on

9 September to Amphora by the first defendants. Despite Mr Coulehan's submission to the contrary, I see no reason why the plaintiffs could not have lodged a caveat after they entered into a contract with the first defendants on 8 August and prior to the first defendants being registered on the title on 9 September. Section 191 of the Act is wide in scope, and contemplates that:-

> "- - - any person claiming to be interested - - in equity, whether under an agreement, - - or otherwise howsoever in any land, may lodge a caveat - - -."

In other words, it is not essential that a caveator, claiming an equitable interest, should derive title immediately from the current registered proprietor. The facts should be set out in the caveat to show the caveator's right to forbid any dealing by the registered proprietor. In the present case the plaintiffs' interest was caveatable at least by 8 August 1988 when their contract with the first defendants was reduced to writing, their equitable interest being in existence as the first defendants had earlier entered into a contract to purchase the land from the Commission. At that stage, 8 August, the Commission as registered proprietor held as constructive trustee for the first defendants who, in turn, held their interest as constructive trustees for the plaintiffs.

Mr Coulehan next submitted that the plaintiffs retained their equitable interest in the land, even after Amphora had become the registered proprietor on 9 September. The basis of this submission was that, as indicated in the Further Amended Statement of Claim, Amphora was alleged to be a party to the first defendants' breach of trust. This contention, it will be recalled, was founded in turn on the contention that Amphora had acquired title to the land on 9 September knowing (or in circumstances where it should have known) that the plaintiffs already had an interest in the land by virtue of their contract of 8 August 1988 with the first defendants. In Mr Coulehan's submission, the legal result of this alleged factual situation (taken as a datum for the purposes of this application) was that Amphora held the land in trust for the plaintiffs as a

constructive trustee; and this trust was not affected by the indefeasibility provisions of the Act, because the personal rights of the plaintiffs as beneficiaries under that constructive trust could be enforced against the registered proprietor Amphora as constructive trustee, as indicated by *Frazer v Walker* (supra).

To support these submissions, Mr Coulehan relied in particular on *Consul Development Pty Ltd v D.P.C. Estates Pty Ltd* [1975] 132 CLR 373 and *Bahr v Nicolay* [1987-88] 164 CLR 604. I turn to examine those authorities.

In *Consul*, the manager of D.P.C., Grey, in clear breach of his fiduciary duty to D.P.C., recommended to the principal of Consul, Clowes, that Consul purchase certain properties; he entered into an agreement with Clowes to share equally in any profits or losses arising from those purchases. Consul bought the properties. On learning of this transaction, D.P.C. claimed that Consul held the properties in trust for it. This is a very different factual situation to the present case. The High Court held that Consul was not a constructive trustee of the properties for D.P.C.. Barwick CJ and Stephen J considered that a stranger to a trust does not become a constructive trustee merely because he acts as agent for a trustee, unless he receives part of the trust property or assists, with actual knowledge, in a dishonest and fraudulent design on the part of the trustee; this is based on the principle enunciated by Lord Selborne L.C. in *Barnes v Addy* (1874) 9 Ch.App. 244.

Mr Coulehan relied in particular on the words emphasized below in an extract from the judgment of McTiernan J, dissenting, at p378:-

> "The next relevant principle is that a person who participates in the fraudulent conduct of a person in a fiduciary position of the character already described holds any property he acquires thereby in trust for the person to whom the fiduciary duty was owed. The classical statement of this principle is that of Lord Selborne L.C. in *Barnes v Addy* (1874) 9 Ch.App. 244 at p251:-
>
> "It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable

> construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.

Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust."

The extension of responsibility to which the Lord Chancellor there referred is one which has been recognized and acted upon with no narrow understanding of what constitutes "actually participating in any fraudulent conduct" (emphasis mine)

His Honour stressed the importance of the Grey/Clowes agreement to share the profits, in concluding that Clowes as principal of Consul knew that Grey was acting improperly. At p386 his Honour said:-

"In my opinion the arm of equity is not to be foreshortened to make it incapable of dealing with underhand transactions entered into by persons in a fiduciary capacity with the encouragement of those who stand to gain from such conduct. In their historic task of preventing the retention of gains made through disloyalty courts of equity have, I think, concentrated upon a careful supervision of dealings by an agent who prefers his interest to his duty. It is, I think, sufficient to warrant equitable relief against a third person that he has undermined the loyalty of an agent with a fiduciary obligation. This is what I think Consul did here by making the deals with Grey which led to the acknowledgment of 19th June 1968." (emphasis mine)

I note that it is not suggested here that Amphora "undermined the loyalty" of the first defendants. The majority in *Bahr*

concluded that on the facts Clowes was not shown to have known of Grey's improper conduct.

Gibbs J said at pp395-6:-

"It is now possible to consider the case against Consul. Clowes owed no fiduciary duty to D.P.C. and any fiduciary duty which he may have owed to his employer Walton [the principal of D.P.C.] was not broken by his taking part in the purchase of the properties: his employment did not extend to finding properties for purchase and no conflict between his interest and his duty to Walton was involved if he acquired a property for himself. A fortiori Consul had no fiduciary duty to D.P.C. or Walton or any of the Walton companies. The principle upon which it is now sought to make Consul liable is that stated by Lord Selborne L.C. in *Barnes v Addy* (1864) 9 Ch.App. 244, pp251-252:

> "Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

Although in this passage Lord Selborne speaks of dishonesty and fraud it is clear that the principle extends to the case "where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant": *Soar v Ashwell* [1893] 2 Q.B. 390, at pp396-397; *Lee v Sankey* (1872) K.R. 15 Eq.204 at p211; and in *In re Blundell; Blundell v Blundell* (1880) 40 Ch.D.370, at p381. All these authorities, however, are dealing with trustees and trust property in the strict sense and the question is whether the principle applies to impose liability on strangers who knowingly participate in a breach of fiduciary duty committed by a person who is not a trustee or is at most a constructive trustee. In *Selangor United Rubber Estates Ltd v Cradock [No.3]* [1968] 1 W.L.R. 1555, Ungoed-Thomas J held that directors of a company should be regarded as holding on trust any moneys of

the company under their control and that agents of the directors who received moneys of the company in circumstances that showed that they assisted "with knowledge in a dishonest and fraudulent design" on the part of the directors were liable as constructive trustees. He held that what is "dishonest and fraudulent" for this purpose has to be judged according to "the plain principles of a court of equity" [1968] 1 W.L.R. at pp1580-1582. After an exhaustive discussion of the question what knowledge is required to satisfy the test stated in *Barnes v Addy* (1874) 9 Ch.App.244, he expressed his conclusions on that matter as follows [1968] 1 W.L.R. at p1590:

"The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on inquiry, which the stranger failed to make, whether it was being committed. Acts in the circumstances normal in the honest conduct of affairs do not indicate such a misapplication, though compatible with it. And answers to inquiries are prima facie to be presumed to be honest ..."

This decision was followed by Brightman J in *Karak Rubber Co. Ltd. v Burden* [1972] 1 W.L.R. 602." (emphasis mine)

Stephen J, with whose analysis and reasons Barwick CJ agreed, said at p408:-

"Absent, then, both actual knowledge and calculated abstention from enquiry, Consul will only be liable as a constructive trustee if recourse may be had to the doctrine of constructive notice and if, by that means, Clowes, and through him Consul, may nevertheless be treated as if they had that knowledge of Grey's breach of fiduciary duty which they in fact lacked.

That proof of knowledge is essential is not in doubt; Consul has not intermeddled with any trust property so as to make itself a trustee de son tort and without proof of knowledge no remedy will lie against it for participation in the dishonest scheme of the fiduciary, Grey. The applicable principle is that enunciated by Lord Selborne in *Barnes v Addy* (1874) 9 Ch.App.244. Strangers to a trust may have extended to them the responsibility imposed by equity upon trustees if they make themselves trustees de son tort or are "actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust" (1874) 9 Ch.App. 244 at p251. But strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers unless they "receive and become chargeable with some part of the

trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees" (1874) 9 Ch.App. 244 at pp251-252.

- - - Lord Selborne contemplated that a necessary ingredient of this liability as constructive trustee was the existence of "fraud and dishonesty" on the part of the stranger, "of knowledge or suspicion on his part of an improper or dishonest design in the transaction" (1874) 9 Ch.App. 244 at p252. (emphasis mine)

His Honour referred to the opinions in the Court of Appeal in *Carl-Zeiss-Stiftung v Herbert Smith Pty Ltd [No.2]* [1969] 2 Ch.276 as to the requirement that a stranger, to become a constructive trustee, must have knowingly assisted in a trustee's dishonest and fraudulent act, and as to the knowledge which this required. In *Carl-Zeiss-Stiftung* it was held that a solicitor acting honestly in his capacity as solicitor for his client was in no different position from any other agent acting for his principal and was not to have imputed to him knowledge of a trust merely because, in acting for his client, he knew that it was claimed against his client that there was a trust; such knowledge could not be notice of a trust, and the solicitor was not accountable as a constructive trustee to the cestui que trust. Sachs L.J. at pp296-8 said:-

(p296)"- - - no stranger can become a constructive trustee merely because he is made aware of a disputed claim the validity of which he cannot properly assess.

- - -

(p297) - - - knowledge of the existence of a trust depends on knowledge first of the relevant facts and next of the law applicable to that set of facts.

- - -

(p298) - - - <u>a further element has to be proved</u>, at any rate in a case such as the present one. <u>That element is one of dishonesty or of consciously acting improperly</u>, as opposed to an innocent failure to make what a court may later decide to have been proper inquiry." (emphasis mine)

Edmund Davies L.J. said at p301:-

"The concept of "want of probity" appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts - - - the authorities appear to show that nothing short of it

will do. Not even gross negligence will suffice."

In *Bahr v Nicolay* (supra), a case from Western Australia, the facts as set out in the headnote at p604 are as follows:-

"In order to raise funds to develop his land, the registered proprietor [B] sold it to another [N] who leased it back to him for three years. The contract provided that upon the expiration of the lease the vendor [B] would enter into a contract to repurchase the land for $45,000 payable by a deposit of 10 percent and the balance within thirty days. The land was subsequently sold [by N] under a contract which contained a provision by which the purchaser [T] acknowledged the existence of the repurchase provision of the earlier contract [between B and N]. The purchaser [T] became registered as proprietor. He then told the original owner [B] that he "recognized" the repurchase clause and would agree to sell [him] the land [to B] for $45,000 with a deposit of 10 percent. The original owner [B] later paid the deposit, but the registered proprietor [T] refused to sell the land [to him]."

Again, the facts are different to those of the present case, though both are cases of 'knowing receipt'; here, Amphora never "recognized" the plaintiffs' purchase, and never agreed to sell the land to the plaintiffs at the price they had agreed with the first defendants to pay, or at all. In *Bahr*, it was held that the original owner B was entitled to specific performance of the repurchase agreement, against T. Wilson, Brennan and Toohey JJ considered that by taking a transfer, knowing of and accepting an obligation to resell to B, T had become subject to a constructive trust in favour of B. This appears to accord with the approach of Edmund Davies L.J. in *Carl-Zeiss-Stiftung* at p381, that in a case of a 'knowing receipt', the recipient is liable if with want of probity he had actual or constructive knowledge that the payor was misapplying trust money, and that the transfer to him was in breach of trust. The 'want of probity' is an essential element; in *Bahr*, it lay in the registered proprietor [T] having accepted an obligation to resell to B. No such factor appears in this case.

Section 68 and 134 of the Transfer of Land Act 1893 (WA) are akin in their effect to ss69 and 70, and 186 and 187

respectively of the Act. Dealing with ss68 and 134, Mason CJ and Dawson J said at p613:-

"Sections 68 and 134 give expression to, and at the same time qualify, the principle of indefeasibility of title which is the foundation of the Torrens system of title. As the Judicial Committee observed in *Gibbs v Messer* [1891] A,C, 248 at p254:-

"The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity."

Neither the two sections nor the principle of indefeasibility precludes a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself: *Breskvar v Wall* (1974) 126 C.L.R. 376 at pp384-385. Thus, an equity against a registered proprietor arising out of a transaction taking place after he became registered as proprietor may be enforced against him: *Barry v Heider* (1914) 19 C.L.R. 197. So also with an equity arising from conduct of the registered proprietor before registration (*Logue v Shoalhaven Shire Council* [1979] 1 N.S.W.L.R. 537 at p563, so long as the recognition and enforcement of that equity involves no conflict with ss68 and 134. Provided that this qualification is observed, the recognition and enforcement of such an equity is consistent with the principle of indefeasibility and the protection which it gives to those who deal with the registered proprietor on the faith of the register." (emphasis mine)

At p629 Wilson and Toohey JJ said:-

"Although the second respondents take their stand on the provisions of the Transfer of Land Act 1893 (W.A.) ("the Act"), it is useful to note the position of the parties divorced from those provisions. The second respondents were certainly purchasers with notice of

the appellants' equitable interest in the land and, as such, they took their legal estate subject to that interest. The authorities relating to unregistered estates are noted in Voumard, Sale of Land in Victoria, 4th ed. (1986), pp423-424, n.44. However the real question is - having registered their interest under the provisions of the Act, did the second respondents acquire a title which was indefeasible in the sense that it was no longer open to attack by the appellants? The question may be further refined by asking - having regard to ss68 and 134 of the Act, was there in any relevant sense fraud on the part of the second respondents? Unless there was such fraud, the second respondents hold their title free of any interest the appellants have by reason of cl.6 , subject to any claim in personam that may lie against the second respondents. That is a matter to which we shall turn later in these reasons". (emphasis mine)

It will be recalled that fraud is no longer alleged against Amphora; the question is one of whether there is a claim in personam. At pp637-9 their Honours said:

"It is nearly a century since, in *Gibbs v Messer* [1891] A.C. 248, at p254, the Privy Council described the Torrens system in these terms:

"The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

That statement still stands as an exposition of the nature and purpose of the Torrens system, though "bona fide" must be equated with "in the absence of fraud", and "indefeasibility" is a word that does not appear in all the Torrens statutes of this country.

Nevertheless, in accepting the general principle of indefeasibility of title, the Privy Council in *Frazer v Walker* [1967] A.C. 569 at p585 made it clear that

"this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant".

Sir Garfield Barwick, who was a member of the Privy Council in *Frazer v Walker*, commented in *Breskvar v Wall* (1971) 126 C.L.R. at pp384-385:

"Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon the acts of the registered proprietor himself. These may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title."

This vulnerability on the part of the registered proprietor is not inconsistent with the concept of indefeasibility. The certificate of title is conclusive. If amended by order of a court it is, as Barwick CJ pointed out, "conclusive of the new particulars it contains" (1971) 126 C.L.R. at p385.

Returning to *Frazer v Walker*, the Privy Council said [1967] 1 A.C. at p585 of claims in personam:

"The principle must always remain paramount that those actions which fall within the prohibition of ss62 and 63 may not be maintained."

The reference to ss62 and 63 is a reference to the Land Transfer Act 1952 (N.Z.), roughly corresponding with ss68 and 199 of the Act. The point being made by the Privy Council is that the indefeasibility provisions of the Act may not be circumvented. But, equally, they do not protect a registered proprietor from the consequences of his own actions where those actions give rise to a personal equity in another. Such an equity may arise from conduct of the registered proprietor after registration: *Barry v Heider* (1914) 19 C.L.R. 197. And we agree with Mahoney J.A. in *Logue v Shoalhaven Shire Council* [1979] 1 N.S.W.L.R. 537 at p563 that it may arise from conduct of the registered proprietor before registration.

The evidence leads irresistibly to the following conclusions. The second respondents understood through their agent Mr Callard that the first respondent would not sell lot 340 unless they agreed to be bound by the obligation in cl.6 which required the first respondent to resell to the appellants. The second respondents bought lot 340 on the understanding common to vendor and purchasers that they were so bound and cl.4 was included to give effect

to that understanding. Clause 4 may have been, of itself, insufficient for that purpose but the second respondents' letter of 6 January 1982 and their two offers of 8 January 1982 put beyond doubt their acknowledgment of their obligation to the appellants.

By taking a transfer of lot 340 on that basis, and the appellants' interest under cl.6 constituting an equitable interest in the land, the second respondents became subject to a constructive trust in favour of the appellants; *Lyus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044; [1982] 2 All E.R. 953; *Binions v Evans* [1972] Ch.359 at p368. If it be the position that the appellants' interest under cl.6 fell short of an equitable estate, they none the less had a personal equity enforceable against the second respondents. In either case ss68 and 134 of the Act would not preclude the enforcement of the estate or equity because both arise, not by virtue of notice of them by the second respondents, but because of their acceptance of a transfer on terms that they would be bound by the interest the appellants had in the land by reason of their contract with the first respondent. (emphasis mine)

I stress, in particular, the sentence last emphasized; that clearly was not the position in this case.

Brennan J said in *Barh* at pp653-5:

"However, the title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to that interest. Equity will compel him to perform his obligation. In *Barry v Heider* (1914) 19 C.L.R. 197, at p213, Isaacs J said of the Land Transfer Acts:

"They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them".

In *Frazer v Walker* [1967] 1 A.C. 569 at p585, the Privy Council said that the principle of indefeasibility "in no way

denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant".

- - - [The indefeasibility] provisions are designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title. In *Loke Yew v Port Swettenham Rubber Co. Ltd.* [1913] A.C. 491, at pp504-505, Lord Moulton gave an example of a case where equity would enforce the terms on which a transfer was taken. He said:

"Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entires in the register or the correction of existing entires it can order the necessary acts to be done accordingly."

By contrast, *Waimiha Sawmilling Co. v Waione Timber Co.* [1926] A.C. 101 was a case where the purchaser had notice of a claim to an unregistered interest but had given no undertaking to be bound by it. That case illustrates the proposition that where a transferee has purchased with mere notice of an unregistered interest, registration of the transfer to him does defeat the unregistered interest, but *Waimiha Sawmilling Co. v Waione Timber Co.* does not suggest that a registered proprietor who has purchased on terms that his title will be subject to an unregistered interest is able to defeat that interest upon the registration of his transfer.

A registered proprietor who has undertaken that his transfer should be subject to an unregistered interest and who repudiates the unregistered interest when his transfer is registered is, in equity's eye, acting fraudulently and he may be compelled to honour the unregistered interest. A means by which equity prevents the fraud is by imposing a constructive trust on the purchaser when he repudiates the unregistered interest. That is not to say that the registration of the transfer to such a proprietor is affected by such fraud as may defeat the registered title: the fraud which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title. The principles are stated in *Bannister v Bannister* [1948] 2 All E.R. 133 and *Lyus*

v Prowsa Developments Ltd [1982] 1 W.L.R. 1044; [1982] 2 All E.R. 953. In *Bannister* [1948] 2 All E.R. at p136, Scott L.J. said:

"It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another."

In *Lyus v Prowsa Developments Ltd* land was sold by a bank, as mortgagee exercising a power of sale, subject to, but with the benefit of, a prior agreement to sell made between the mortgagor and the plaintiffs. The bank had consented to but was not bound by the plaintiff's contract. The purchaser from the bank (and a sub-purchaser) who was subject to the same obligation was held to take its interest subject to a constructive trust for the plaintiffs. Though a statutory provision similar to s68 of the Act was relied on, Dillon J found that although there is no fraud merely in relying on legal rights conferred by statute, there was fraud in a purchaser's "reneging on a positive stipulation in favour of the plaintiffs in the bargain under with the [purchaser] acquired the land" [1982] 1 W.L.R. at p1054; [1982] 2 All E.R. at p962.

Therefore, although a purchaser who secures registration of a transfer of the fee simple merely with notice of a third party's right to purchase acquires on registration of his transfer a title freed of any obligation to the third party which equity would otherwise impose, a purchaser who has undertaken - whether by contract or by collateral undertaking - to hold his title subject to a third party's right to purchase remains bound by his undertaking after registration of his transfer. If he should repudiate the third party's right to purchase, equity imposes a constructive trust so that the registered proprietor holds his title on trust for the third party to the extent of the third party's interest." (emphasis mine)

As indicated later, I consider this last paragraph points to the answer to Amphora's application to remove the caveat. At p656 his Honour said:-

"As the Thompsons not only had notice of the Bahrs' interest but had undertaken that their title would be subject to the Bahrs' interest, they cannot rely on the Property Law Act, the Statute of Frauds or the [Transfer of Lands] Act to avoid honouring their undertaking. As a contractual undertaking, it can be enforced by Nicolay to whom it was given. As the Bahrs' interest was created by an antecedent agreement pursuant to which Nicolay was bound to enforce the Thompsons' undertaking to honour the Bahrs' interest, there can be no reason for denying the Bahrs' standing to enforce the undertaking against the Thompsons directly in a suit in which Nicolay is a party: *Snelling v John G. Snelling Ltd.* [1973] Q.B. 87, at p99. Moreover, the constructive trust on which the Thompsons hold their title is a trust to give effect to the Bahrs' interest. As beneficiaries of that trust, the Bahrs may enforce their interest against their trustee directly: *Neale v Willis* (1968) 19 P.&C.R. 836 and cf. *Hersey v Giblett* (1854) 18 Beav. 174 [52 E.R. 69]. The Bahrs are therefore entitled to enforce their right of purchase directly against the Thompsons. They do not thereby impeach the registration of the transfer to the Thompsons. Nor does the T.L.A. present a bar to the enforcement of the undertaking, though (to adopt what Barwick CJ said in *Breskvar v Wall* (1972) 126 C.L.R. at p385, the terminal point of a decree enforcing the undertaking might be an order directing the Thompsons to divest themselves wholly of the estate vested in them by that registration." (emphasis mine)

Conclusions

Sections 186 and 187 of the Act respectively provide:-

186. "No person contracting or dealing with, or taking or proposing to take a transfer - - from the registered proprietor of any estate or interest in land, shall be - - in any manner concerned to inquire into - - the circumstances under, or the consideration for, which such registered proprietor or any previous registered proprietor of such estate or interest is or was registered, or to see to the application of the purchase-money, nor be affected by notice direct or constructive of any trust or unregistered interest, any law or equity to the contrary notwithstanding.

187. Section 186 shall not protect any person who has acted fraudulently or been a party to fraud, but the

> contracting, or dealing, or taking, or proposing to take a transfer or other instrument as aforesaid, with actual knowledge of any trust, charge, or unregistered instrument, shall not of itself be imputed as fraud." (emphasis mine)

The Torrens system introduced a new code of law, in relation to registered land. *Barry v Heider* (supra) shows that if the first defendants, in breach of their contract with the plaintiffs, transferred the land to Amphora for value, the plaintiffs now have no claim in equity against Amphora, because that company, unless it was party to the fraud, (and absent any enforceable claim in personam against it) obtains upon registration an indefeasible title. See the cases cited by Isaacs J at pp213-4.

Frazer v Walker (supra) shows that registration confers on Amphora as registered proprietor an indefeasible title to its interest unless it is subject to a claim in personam at the suit of the plaintiffs, founded in law or equity, arising out of the transaction pursuant to which it became registered, for such relief as a Court acting in personam may grant.

Putting the matter the other way, if Amphora acted without fraud and gave valuable consideration, and is not subject to any such claim in personam, its title to the land is indefeasible by virtue of the Act.

For the purposes of this application Amphora is assumed to have the knowledge alleged in the Further Amended Statement of Claim. No want of probity is alleged against Amphora; it is not suggested that it acted dishonestly or that it consciously acted improperly. What is alleged against Amphora is that it purchased the property and became the registered proprietor while knowing, or when it ought to have known, of the plaintiffs' prior contract with the first defendants; it is alleged that this made it party to the first defendants' breach of trust. These are the totality of matters on which the plaintiffs base their claim, the "matters depending upon the acts of the registered proprietor himself", as Barwick CJ put it in *Breskvar v Wall* (supra) at pp384-5. It

is akin to the factual situation in *Waimiha Sawmilling Co.* (supra). It is not suggested that Amphora ever undertook to hold its title subject to the plaintiffs' rights, or to be bound by their interests. It is not suggested that there was any positive stipulation in the plaintiffs' favour in the bargain by which Amphora acquired the land from the first defendants. Nor is it alleged that Amphora actually assisted in a dishonest or fraudulent design on the part of the first defendants to the injury of the plaintiffs, when buying the land.

Mere knowledge of the plaintiffs' contract is not knowledge which would indicate to an honest and reasonable man that some such dishonest or fraudulent design was being committed, or would put him on enquiry whether it was being committed. In any event, the concluding words of s186 of the Act, above, make it clear that Amphora's title is not affected by that notice. The actions alleged against Amphora are not such as to give rise to a personal equity in the plaintiffs against Amphora, which had not entered into any "conscientious obligation", to use the language of Isaacs J in *Barry v Heider* (supra) at p213, or created an "interest which burdened his own title", to use the language of Brennan J in *Bahr* (supra), at p653.

In that factual situation, I consider it is clear that Amphora does not hold title as a constructive trustee for the plaintiffs. I consider that the decision on this application is determined by the observations of Brennan J at pp653-5 of *Bahr*, set out above. As the plaintiffs have no personal rights against Amphora of the type on which they rely (that is, as beneficiaries against a constructive trustee) the indefeasibility provisions of the Real Property Act apply in full force, and Amphora holds its title clear of the interests of the plaintiffs, though it is to be taken, for the purposes of its application, to have had prior notice of those interests. To enforce the interests of the plaintiffs against Amphora, in this situation, would involve a direct conflict with the indefeasibility provisions of the Act. This cannot be allowed,

as the Privy Council made clear in *Frazer v Walker* (supra) at p585. The concept of indefeasibility of title is central to the system of registration instituted by the Torrens system.

Accordingly, the caveat must be removed. For these reasons, I so ordered on 7 December. I also ordered that Amphora have its costs of its Summons of 8 July, and certified for counsel in terms of R63.72(9)(a).

The result may be unfortunate, from the plaintiffs' point of view. I consider, however, that the remedy lay within the plaintiffs' own hands; they should have lodged a caveat as soon as possible after 8 August 1988, forbidding the registration by the Commission of any dealing with the land. That was the prudent course of conduct. See s191(iii) of the Act, and *Leros Pty Ltd v Terara Pty Ltd* (supra). The catastrophic consequence of not caveating was spelled out by Mason CJ, Dawson and McHugh JJ in *Leros Pty Ltd* at p404, as follows:-

"Although the failure to lodge a caveat may not result in a loss of priority in a competition between conflicting equitable interests, such a failure will, as previously explained, result in the destruction of the equitable interest as soon as registration of an inconsistent dealing constitutes the registration of a subsequent proprietor who takes free from the prior unregistered equitable interest. In this respect there is a distinction between a competition between unregistered equitable interests and a competition between a prior unregistered equitable interest and a subsequently registered estate or interest in the land. In the second case, the prior unregistered interest is defeated so that the contractual right on which that interest depends, though enforceable against the party who created it, is not enforceable as against the third party who becomes registered as the proprietor of the inconsistent estate or interest." (emphasis mine)

And so it was here.

I note that during the hearing on 7 December I ordered that the name of the second defendant in this litigation be changed from "Allora Pty Limited" to "Amphora Pty Limited", as the company has changed its name.

Finally, I turn to a further question of costs which was raised at the hearing on 7 December. Mr Reeves sought an order that Amphora now have the costs of its counterclaim. He submitted that the counterclaim gave rise to a single issue which was wholly discrete from the other issues raised by the parties in the action, and Amphora had been wholly successful on that issue. Mr Coulehan submitted that the question of the costs of the counterclaim should not be decided until the action had been determined. I said at the time that I would rule on this question of costs when publishing these reasons; I now do so. I consider that Mr Reeves' application should succeed. A counterclaim simply avoids the need to bring a separate action to secure the relief sought by the defendant; see R10.02(1). It has its own life; see Rules 10.05 and 10.08. Here Amphora has succeeded on the only issue raised by the counterclaim; it should have judgment thereon (which it has obtained by its Summons of 8 July), together with costs; that is to say, it should recover those costs which are solely referable to the counterclaim.

Order accordingly.

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