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THE DUEL BETWEEN IMMEDIATE AND DEFERRED INDEFEASIBILITY

The aim of this article is to explore the re-emergence of the theory of deferred indefeasibility in the state of Victoria in Australia and then determine which of the two theories makes more sense economically.

PART 1

NONE of the jurisdictions in Australia have Torrens land legislation that provides for deferred indefeasibility like that provided for in section 340(2) of the Malaysia National Land Code 1965.[1] Indefeasibility of title is a term widely used by the Courts to describe the immunity obtained by the registered proprietor.[2] It is the tussle between the two competing theories – immediate and deferred – that has of late once again occupied the minds of the judiciary in Australia.

For some considerable time in Australia the theory of immediate indefeasibility has been widely accepted but when the bubbling of a heated property market puts strains on the law and fraud intervenes, the competing theory of deferred indefeasibility surfaces once more. This article will explore this trend but will be confined to examining the re-emergence of the doctrine of deferred indefeasibility in the state of Victoria in Australia.

I. BACKGROUND

Before the case of *Frazer* v *Walker*[3] in the 1960s there was considerable support for the notion of deferred indefeasibility. The Privy Council in *Gibbs* v *Messer*[4] a decision on appeal from the Supreme Court of Victoria supported the idea of deferred indefeasibility. Lord Watson said:

1 See Teo, "Deferred Indefeasibity of Title and Interests" (1997) 1 SJICL 140.
2 See, *eg*, the Privy Council in *Frazer* v *Walker* [1967] 1 AC 569; [1967] 1 All ER 649.
3 *Supra*, note 2.
4 *Gibbs* v *Messer* [1891] AC 248.

> those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.[5]

Although the decision is capable of being interpreted in a number of different ways, it does seem to say that a purchaser cannot acquire an indefeasible title unless he or she has dealt with the registered proprietor. Thus, in the case of forgery, one does not deal with the registered proprietor. Therefore one cannot obtain a good title through a forgery.

The issue of the relationship between the notice provisions and the indefeasibility provisions raised its head once again in Victoria in the landmark case of *Ellis* v *Clements*.[6] The facts of the case are as follows: Mrs Holmes was the registered proprietor of land which was subject to a mortgage to Ellis; she sold the land to Clements on the basis of giving a clear title. The estate agent upon receipt of the purchase price retained an amount sufficient to discharge the mortgage and gave the balance to Mrs Holmes. Instead of paying off the mortgage the estate agent kept the money and forged a discharge. Subsequently the duplicate certificate of title (valid), the transfer (valid) and the discharge of the mortgage (invalid) were lodged at the Titles Office for registration. After discovery of the fraud, Ellis brought an action against Clements and the Registrar of Titles seeking, amongst other things, the cancellation of the discharge of the mortgage. Lowe J of the Supreme Court of Victoria decided that the registration of Clements was not indefeasible since Clements had not relied upon the register – he merely expected that it would be altered in a certain way.

The matter went on appeal to the High Court of Australia[7] but it was equally divided on the issue and thus the decision of Lowe J stood.

The decision of Dixon J of the High Court was particularly influential and for thirty years or so established the idea of deferred indefeasibility, that is to say, that registration pursuant to a void instrument does not confer indefeasibility. Dixon J took the view that the notice section in the Victorian Torrens legislation (now section 43 Transfer of Land Act 1958 (Vic)) prevailed over the indefeasibility section (now section 42). For a person

5 *Ibid*, at 255.
6 *Ellis* v *Clements* [1934] VLR 54.
7 *Clements* v *Ellis* (1934) 51 CLR; 23 ALR 62.

to gain an indefeasible title that person must have dealt with the previous owner on the basis of the register. Clements dealt with Holmes before the discharge was registered. Dixon J said

> the justification for destroying an existing legal estate or interest, which has already been duly established upon the register is found only in the necessity of protecting those who subsequently deal in good faith and for value in a manner which, upon its face, the register appears to authorise, and who then obtains registration.[8]

Such was the prestige of Sir Owen Dixon that his judgment was widely regarded as establishing the doctrine that a void instrument cannot confer indefeasibility.[9]

However the case of *Frazer* v *Walker and Radomski*[10] decided by the Privy Council put this asunder and established without much doubt the principle of immediate indefeasibility. The idea of immediate indefeasibility was further confirmed by the High Court of Australia in *Breskvar* v *Wall.*[11] Thus in Victoria for nearly three decades the principle of immediate indefeasibility was regarded as being the order of the day.

8 *Ibid*, at 237 (CLR); at 235 (ALR).

9 Cases that followed the idea of deferred indefeasibility include *Coras* v *Webb* [1942] QSR 66; *Davies* v *Ryan* [1951] VLR 283; *Caldwell* v *Rural Bank of New South Wales* (1951) 53 SR(NSW) 415.

10 *Frazer* v *Walker and Radomski* [1967] 1 AC 569; [1967] 1 All ER 649. It is interesting to note that in the state of New South Wales in Australia the act dealing with Torrens title land, the Real Property Act 1900 (NSW), was amended to give effect to the decision. S 35 provides

> Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages [under s 126], or to ...proceedings or action for the recovery of land, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the plea that his vendor or mortgagor may have been registered as proprietor, or procured the registration of the transfer to such purchaser or mortgagee through fraud or error, *or under any void or voidable instrument*, or may have derived from or through a person registered as proprietor through fraud or error, o*r under any void or voidable instrument.*

The italicised words were introduced by an amending act in 1970 to remove any ambiguity and to more clearly reflect the decision of the Privy Council in *Frazer* v *Walker.*

11 *Breskvar* v *Wall* (1971) 126 CLR 376; [1972] ALR 205.

II. The Challenge to Immediate Indefeasibility

The case in the state of Victoria that challenged the supremacy of the doctrine of immediate indefeasibility was the case of *Chasfield Pty Ltd* v *Taranto*.[12]

In the *Chasfield* case a rogue tricked Mr and Mrs Taranto into giving up their certificate of title by telling them he could raise a loan on the security of title to invest the money on their behalf at thirty per cent. The rogue and a solicitor, having obtained the duplicate certificate of title, forged the Taranto's signature on a mortgage to the plaintiff (the mortgagee) and used the ill gotten money for their own use. The mortgagee, the plaintiff, was completely ignorant of the fraud and lodged the mortgage for registration. When the mortgagee attempted to enforce the mortgage the Tarantos applied to the court for the mortgage to be removed and were successful.

It is apposite to set out the relevant sections of the Transfer of Land Act 1958 (Vic)

(bold added by the author) that have been the subject of litigation

> 42 (1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, *except in case of fraud*, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except –
>
> (a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
>
> (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

[12] *Chasfield Pty Ltd* v *Taranto* (1991) 1 VR 225. There have been challenges in other states in Australia to the doctrine of immediate indefeasibility: see, for example, in regard to South Australia *Wicklow Enterprises Pty Ltd* v *Doysal Pty Ltd* 45 SASR 247, *Rogers* v *Resi-Statewide Corp Ltd* (1991) 101 ALR 377 (1986); and Moore, "Interpretation of the Real Property Act" (1988) 11 Adelaide Law Review 405; in regard to New South Wales see *Mercantile Mutual Life Insurance Co Ltd* v *Gosper* (1991) 25 NSWLR 32 (arguably more about the *in personam* exception to indefeasibility – see also Butt, "Indefeasibility and Sleights of Hand" (1992) 66 ALJ 596).

> 43 *Except in the case of fraud* no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.
>
> 44 (1) 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*
>
> (2) But nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any *bona fide* purchaser for valuable consideration of land on the ground that the proprietor through or under whom he claims was registered as proprietor *through fraud* or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

Gray J boldly decided not to follow *Frazer* v *Walker* since it was based upon New Zealand decisions and declined to follow the High Court decision in *Breskvar* v *Wall* since it was based on Queensland legislation. He based his decision mainly on the terms of section 44. He argued that this section was introduced to give effect to Dixon J's views in *Clements* v *Ellis* which supported the concept of deferred indefeasibility and that there was no exact counterpart elsewhere in Australia. Gray J said:

> In my opinion the effect of the present Victorian provisions is that 'fraud' in section 44(1) means fraud associated with the registration and that a proprietor who becomes registered in such circumstances, even if innocent of the fraud, may be divested at the suit of a defrauded previous proprietor or until there is a sale to a *bona fide* purchaser who becomes registered. In this connection fraud includes forgery.[13]

[13] *Ibid*, at 235.

This case was widely criticised in terms of its own logic.[14]

His decision not to follow *Breskvar* v *Wall* would appear to be dubious since the High Court of Australia viewed the different states' Torrens legislation as being fundamentally similar. Indeed Barwick CJ of the High Court in *Breskvar* v *Wall* stated:

> I have thus referred under the description, the Torrens system, to the various Acts of the States of the Commonwealth which provide for comparable systems of title by registration though these Acts are all not in identical terms and some do contain significant variations ... If follows, in my opinion, from the provisions of the Victorian Act which are counterpart to those of the Act to which I have referred and from the decisions of the Privy Council in *Frazer* v *Walker* and in *Assets Co Ltd* v *Mere Roihi* on comparable sections of the New Zealand Act that the appeal of the registered proprietor in the case of *Clements* v *Ellis* ought to have been allowed.[15]

This suggests that in terms of the indefeasibility concept his Honour did not see much difference between the Queensland legislation and the Victorian legislation (assuming he was looking at the post 1954 Victorian provisions).

Secondly Gray J in the *Chasfield* case took the view that section 44(1) qualified section 42(1) rather than merely restating it. His concept of fraud in section 44(1) is wider than the concept of fraud in section 42(1)[16] if one accepts the Privy Council view of fraud in *Frazer* v *Walker* and the High Court's decision in *Breskvar* v *Wall* (which, of course, Gray J did not regard as being binding). He argued that 'fraud' in section 44(1) warranted a different interpretation than 'fraud' in section 42(1) because otherwise it was 'merely a pointless repetition'.

However, it could be argued that section 44(1) complements section 42(1). Section 42(1), so it could be argued, establishes 'fraud' in a narrow sense of the fraud exception to immediate indefeasibility whereas section 44(1) 'fraud' is referring to the rights between the defrauded person and the

[14] See, *eg*, Teh, "The Deferred Indefeasibility of Title in Victoria?" (1991) 17 Mon ULR 77; Butt, "Shaking the Foundations"(1991) 65 ALJ 611; MacCallum, "Return to Immediate Indefeasibility of Title"(1992) 66 Law Institute Journal 970; Wikrama-Nayake, "Immediate and Deferred Indefeasibility"(1993) 67 Law Institute Journal 393.

[15] *Supra*, note 11, at 386 (CLR).

[16] *Supra*, note 12, at 234.

fraudulent registered proprietor. It spells out the remedy for the defrauded party. In this sense it could be argued that section 44(1) is not otiose or 'pointless repetition'.

Thirdly, he seems to argue that the introduction of section 44(1) brought about some change to the fundamental concept of indefeasibility at the time. In his view the section 44(1) 'fraud' was referring to deferred indefeasibility, but that was the accepted notion at the time! It is also doubtful whether section 44(1) is unique – other states have similar provisions.[17]

In short this was a decision of a single judge of the Supreme Court of Victoria but was widely criticised.

III. Rebuttals of the Chasfield Case (Deferred Indefeasibility) by Single Judges of the Supreme Court of Victoria

Shortly afterwards in 1992, Smith J of the Supreme Court of Victoria had the opportunity of choosing between immediate and deferred indefeasibility in the case of *Eade* v *Vogiazopoulos & Ors.*[18]

In this case Eade had lent money to Mr and Mrs Vogiazopoulos in return obtaining a mortgage over the latter's family home as security. There was a default in repayments and Eade, the mortgagee, sought possession. Mrs Vogiazopoulos defended the action on the basis that she had not signed the mortgage and a subsequent variation; nor had she authorised her husband to do so on her behalf. The court found that on the facts her version of events was true.

[17] Thus s 125 of Tasmania's Real Property Act 1862 contains the following relevant provisions:
'(1) Any person deprived of land, or of any estate or interest in and –
in consequence of fraud; ... may bring and prosecute an action for the recovery of damages.
(2) Such action shall – ... be brought and prosecuted against the person –
(iii) who acquired title to the estate or interest in question through such fraud ...'
In South Australia, s 69 of the Real Property Act 1886 – 1975 says
'(I) in the case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act:'
Identically worded provisions are also to be found in s 69 of the Real Property Act 1886 in the Northern Territory.
In New South Wales s 124(1) of the Real Property Act 1900 in effect says proceedings may be brought against a person registered as proprietor in:
'(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud.'

[18] *Eade* v *Vogiazopoulos & Ors* (1993) V Conv R 64, 357.

The mortgagee sought to rely on *Breskvar* v *Wall* where the High Court rejected Dixon's views in *Clements* v *Ellis* which favoured deferred indefeasibility. Although the legislation in the *Breskvar* case was that of Queensland, the Victorian legislation of 1928 was almost identical. Therefore Smith J as a single judge of the Supreme Court of Victoria felt constrained to apply the reasoning of the High Court in *Breskvar* v *Wall*. In his view whether the mortgage could remain on the register depended on the meaning of 'fraud' in section 42 of the Transfer of Land Act 1958 (Vic).

Smith J decided that 'fraud' in section 42 is referring to fraud by or on behalf of the person obtaining registration. The reference to 'fraud' in section 43 should also be limited to fraud by or on behalf of the purchaser or transferee whose title it is sought to impeach. In a similar vein, he decided that 'fraud' in section 44(1) and (2) should be limited to fraud on the part of the registered proprietor. Although admitting that the High Court in *Breskvar* v *Wall* did not expressly deal with the question of 'fraud' it was implicit in the judgment that 'the references to the fraudulent signature provisions did not themselves introduce deferred indefeasibility unless fraud could be brought home to the registered proprietor whose title it is sought to impeach.'[19]

Since Mrs Vogiazopoulos was not able to prove fraud by Mr Eade, the mortgagee, or his agents, the mortgage could not be successfully challenged on that basis. Mrs Vogiazopoulos also attempted to argue that she had rights *in personam* that entitled her to have the mortgage redeemed, her signature having been forged. Smith J rejected this argument.

Thus this was a decision by a single judge of the Supreme Court of Victoria that firmly rejected the notion of deferred indefeasibility that had been resurrected by Gray J in the *Chasfield* case.

Another case by a single judge of the Supreme Court of Victoria that challenged the correctness of the applicability of deferred indefeasibility as raised in *Chasfield*'s case was the decision of Hayne J in *Vassos and Another* v *State Bank of South Australia and Another*.[20]

Peter Vassos and his daughter, Anne, and his son Tommy were the registered proprietors as tenants in common of land in Melbourne over which there was a registered mortgage to Sandhurst Trustees Ltd to secure a loan of $130,000. Peter told his son he wanted to refinance the property and wanted to borrow $130,000 to repay Sandhurst Trustees. Tommy obtained a loan from the State Bank of South Australia and a substitute mortgage in favour of the bank and guarantee in its favour of $500,000. The signatures

[19] *Ibid*, at para 65, 379.
[20] *Vassos and Another* v *State Bank of South Australia and Another* [1993] 2 VR 316.

of Peter Vassos and his daughter were forged on both of the documents. They therefore sought a declaration under section 44(1) of the Transfer of Land Act 1958 that the bank's title was defective because of the forgery. The bank was not a party to the fraud nor did it have any knowledge of it when it registered its mortgage.

The plaintiff sought to rely on the *Chasfield* case where it was held that 'fraud' in section 44(1) means fraud associated with the registration and that a proprietor's interest even if innocent may be removed at the behest of the defrauded prior owner, unless there is a subsequent sale to a *bona fide* purchaser who becomes registered. Hayne J rejected the view that 'fraud' referred to in section 44(1) could be the fraud of someone other than the person whose title has been registered. He was of the view that section 44(1) is referring to fraud by or on behalf of the person who has obtained registration. In his view section 42(1) establishes a general rule of indefeasibility subject to an exception where fraud has been by the person (or agent) who has become registered.

In his opinion section 44(1) does not qualify section 42(1) and Gray J in the *Chasfield* case was wrong in interpreting section 44(1) as extending fraud beyond the exception envisaged by section 42 to resurrect the discarded principle of deferred indefeasibility.

On the use of the expressions 'immediate indefeasibility' and 'deferred indefeasibility' he said:

> those are no more than convenient shorthand expressions generally describing the effect of provisions of Torrens title legislation; they are not in any relevant sense principles from which conclusions can be drawn about the proper construction of the legislation. Further, I consider it equally important to recall that none of the Torrens title legislation to which I have been referred provides for absolute indefeasibility of title. Each of the statutes provides for circumstances in which a registered title may be defeated or qualified. Accordingly, although a policy in favour of immediate indefeasibility is to be discerned in the legislation, that policy is not absolute.[21]

The plaintiffs also tried to argue that they had a right in equity enforceable by *in personam* action to have the transaction reversed. However Hayne J found that the mere fact that the plaintiffs had not signed the mortgage did not confer upon them a right *in personam* to have the transaction reversed.

[21] *Ibid*, at 322.

Yet another case that came before a single judge of the Supreme Court of Victoria that touched on the issue of indefeasibility was *Australia Bank* v *Maher*.[22]

National Australia Bank (NAB) had a registered first mortgage over three separate properties of which Mr Maher was the sole registered proprietor – a property in Clayton (a suburb of Melbourne) and another two properties at Buchan (a provincial town in Victoria). Upon default by Mr Maher in repayments, the mortgagee, NAB, obtained possession of the properties and sought to exercise its power of sale. The registered proprietor's wife obtained an injunction to stop the sale, claiming that the properties were held in trust for her.

At first instance, one of the arguments raised by Mrs Maher was that the bank manager had added the title particulars of the two Buchan properties after the mortgage had been signed by Mr Maher. Mrs Maher argued that this amounted to fraud under section 44(1) of the Transfer of Land Act 1958 (Vic) and the trial judge, after finding that a resulting trust arose in favour of Mrs Maher, upheld her contention. The bank appealed to the Full Court of the Supreme Court of Victoria.

The Full Court held that the mortgage was procured by fraud within the meaning of section 44(1) of the Transfer of Land Act 1958. The Court rejected the notion that the bank was not bound by the actions of its employee. Fullager J said:

> It is to be noticed that section 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 the fraud shall have caused or brought about the state of the register.[23]

This sentence is somewhat strange since it seems to suggest that if someone unconnected with the bank forged the signature then the registered mortgage could have been avoided. If this is what Fullager J meant then this supports the theory of deferred indefeasibility; that is, the defrauded proprietor can have the registration set aside, no matter who is responsible for the forgery. It is improbable that this is what his Honour meant. It is more likely that he was merely rejecting the bank's argument that it did not know about its employee's fraud. The judge's comments are strictly *obiter* since the judge found that the bank was bound by the actions of its employees.

[22] *Australia Bank* v *Maher* [1995] 1 VR 318.
[23] *Ibid*, at 333.

The next important case regarding indefeasibility was a judgment by Nathan J of the Supreme Court of Victoria in *Pyramid Building Society (in liq)* v *Scorpion Hotels Pty Ltd*.[24]

The facts of the case were that four colleagues bought a guest house in Queenscliff in 1986. A company, Scorpion Hotels Pty Ltd, bought the building and owned it as trustee pursuant to a unit trust. A majority of the shares in the company and the units in the unit trust were owned by Lewis. Lewis appears to have been the moving force in the venture and his wife eventually became the manageress of the business. A mortgage for bridging purposes to buy the property was executed in favour of the National Australia Bank. There were no problems with this mortgage. The other colleagues were to then contribute $50,000 – the understanding was that when this happened the mortgage would be discharged. The others were disgruntled with Lewis and in 1989 they were experiencing financial difficulties and wanted to sell the guest house. Around this time it was discovered that the mortgage to National Australia Bank (NAB) had not been discharged. Lewis, for his part, wanted to buy out the interests of the others. With this in mind Lewis unilaterally appointed his wife as a director of Scorpion Hotels Pty Ltd (the other directors were not at the company meeting and there was not a quorum) and caused a mortgage to be sealed by the company in favour of Pyramid Building Society (Pyramid). Lewis' wife purported to attest the company seal on the mortgage document as a director. Pyramid's solicitor, prior to settlement, had executed a company search to see if there were any relevant company charges. He did not search to determine who the directors were. Had he done so, he would have discovered that Lewis' wife was not a director. Moreover, Pyramid's solicitor did not examine the fax which transmitted the charge/encumbrance search to see who were named as the directors.

The 'dilemma' that Nathan J in the *Scorpion* case faced was this. Having found that the lender (Pyramid) could not rely on the statutory curative assumptions of company law in regard to company signatures and that therefore the mortgage was invalidly signed, did registration of the mortgage and the concept of immediate indefeasibility mean that Pyramid still had an enforceable mortgage?

In an earlier important New South Wales Court of Appeal decision in regard to the meaning of the statutory curative assumptions in regard to company signatures, *Bank of New Zealand* v *Fiberi Pty Ltd,*[25] relief in respect of the mortgage was not sought, both sides apparently accepting indefea-

[24] *Pyramid Building Society (in liquidation)* v *Scorpion Hotels Pty Ltd* (1996) 136 ALR 166.
[25] *Bank of New Zealand* v *Fiberi Pty Ltd* (1994) 12 ACLC 48.

sibility. The matter seems to have been fought out on the basis that if the guarantees were not binding on Fiberi then nothing became payable and there was therefore no default under the mortgage.

Nathan J's approach to the issue was to say that the fraud exception to indefeasibility in section 42 of the Transfer of Land Act 1958 (Vic) applied and that therefore the lender did not obtain the benefits of immediate indefeasibility. The fraud he found consisted of the wilful blindness or reckless indifference by Pyramid's solicitor (the agent of Pyramid and therefore of Pyramid itself) to the truth of the instrument which it had registered at the Titles Office.

Such a dubious interpretation of fraud had at least a certain symmetry about it: why should a lender still be able to obtain benefits under a mortgage that was invalidly signed, especially if, as Nathan J found, the lender should have known that it was invalidly signed?

The matter went to the Court of Appeal, Supreme Court of Victoria *Pyramid Building Society (in liquidation)* v *Scorpion Hotels Pty Ltd*.[26]

The Court of Appeal established a number of important points.

The Court of Appeal took the opportunity to bury the decision in *Chasfield Pty Ltd* v *Taranto* which had sought to revive the notion of deferred indefeasibility. The Court of Appeal rejected the notion of deferred indefeasibility and reaffirmed the primacy of the doctrine of immediate indefeasibility. Hayne JA said:

> In *Vassos* v *State Bank of South Australia* [1993] 2 VR 3161 I held that the title obtained by a mortgagee on registration under the Transfer of Land Act of a forged instrument of mortgage cannot be defeated on grounds of fraud if the mortgagee was not party or privy to the fraud. In so doing, I declined to follow the contrary decision of Gray J in *Chasfield Pty Ltd* v *Taranto* [1991] 1 VR 225....I said in *Vassos*, and I remain of the view, that *Chasfield* departed from a clear stream of authority of ultimate appellate courts and, therefore, should not be followed.[27]

The other judges agreed with this view.

The Court of Appeal also reaffirmed a long line of cases that 'fraud' in section 42 means actual dishonesty or moral turpitude. The court said registering an instrument which the registering party knows to be forged amounts to fraud. But the 'fraud' of Pyramid, so it was contended and

[26] *Pyramid Building Society (in liquidation)* v *Scorpion Hotels Pty Ltd* [1998] 1 VR 188.
[27] *Ibid*, at 191.

accepted by Nathan J, was a reckless 'indifference to the truth of the document which is tendered for registration'.[28] But this did not amount to fraud in the Court of Appeal's opinion. The fact that Pyramid's solicitor might have found out the fraud if he had enquired further did not in itself establish fraud. The Court of Appeal pointed out the enquiry for fraud is an enquiry 'for actual dishonesty not for want of due care'.[29]

This case is important since immediate indefeasibility was confirmed by the Court of Appeal.

IV. Reaffirmation of Immediate Indefeasibility: Sixty-fourth Throne Pty Ltd and Horvath

The case of *Macquarie Bank Ltd* v *Sixty-Fourth Throne Pty Ltd*[30] essentially involved a mortgage to Macquarie Bank upon which the signatures on the alteration to a company seal were apparently forged by the son-in-law of a Dr Pincus and his wife, who were the directors of Sixty-Fourth Throne Pty Ltd. The plaintiff company was a trustee of Torrens title land and Dr Pincus and his wife were the sole beneficiaries of the trust. In what has been described by one of the judges when the case went on appeal as 'a disgraceful tale of mismanagement by Macquarie'[31] and its agents, the solicitors, none of this was noticed despite company searches which revealed the true situation. Hedigan J, the trial judge declined to find fraud on the part of the bank and reaffirmed the principle of immediate indefeasibility as exemplified in the *Vassos* case. However, Hedigan J was of the view that the plaintiff company had a claim *in personam* that would entitle it to have the mortgage set aside, the *in personam* claim being based upon the unconscionable conduct of the bank and that it was in 'knowing receipt' of trust property and therefore became a constructive trustee.

On appeal to the Court of Appeal of the Supreme Court the majority (Winneke P and Tadgell JA) rejected the claim *in personam* based upon *Barclay's Bank Plc* v *O'Brien*[32]and the second basis for such a claim, namely, that the bank had become a constructive trustee based on *Barnes* v *Addy*.[33]

Ashley AJA, in the minority, saw no reason to restrict the *in personam* exception in order to preserve the principle of indefeasibility.[34] He thus

[28] *Ibid*, at 193.
[29] *Ibid*, at 194.
[30] M*acquarie Bank Ltd* v *Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.
[31] *Ibid*, at 170 *per* Ashley A J A.
[32] *Barclay's Bank Plc* v *O'Brien* [1994] 1 AC 180.
[33] *Barnes* v *Addy* (1874) LR 9 Ch App 244.
[34] *Supra*, note 30, at 162.

found that there was an *in personam* claim based upon the *Barclays Bank* principle. He was therefore of the view in regard to the constructive trustee argument that "...(Macquaries) officers and agent, did not heed the clearest possible indications that it might very well be that trust property was being dealt with to the detriment of the trust."[35]

Despite these differences, all three judges of the Court of Appeal accepted the idea of immediate indefeasibility.

In *Commonwealth Bank of Australia* v *Horvath*[36] the lender was given a mortgage over a property by a minor and his parents. The minor argued that he was not liable under the mortgage because section 49 of the Supreme Court Act 1986 (Vic) – based upon the English Infants Relief Act 1874 – makes loans to minors void *ab initio*; and that, therefore the mortgage securing the loan was void. At first instance O'Bryan J held that although the loan contract was not capable of being enforced against the minor it was not devoid of all legal effect. He held that in the absence of fraud and *in personam* rights, the mortgagee obtained an indefeasible interest. In arriving at this conclusion he relied upon *Frazer* v *Walker* and he also cited and approved *Vassos* v *State Bank of South Australia* which upheld the principle "that an indefeasible title can be acquired by virtue of a void transfer"[37] in the absence of fraud or some other statutory ground of exception.

O'Bryan J also favoured an alternative argument that the mortgagee could be subrogated to a lien in favour of the vendor.[38] This is rather curious since, having accepted that the mortgage was indefeasible, it would not seem to have been necessary for him to have entertained this alternative claim for relief.

The case went on appeal to the Court of Appeal, Supreme Court of Victoria, *Gabor Horvath Junior* v *Commonwealth Bank of Australia*[39] where Tadgell JA was of the view that the doctrine of deferred indefeasibility had been buried. He said:

35 *Supra*, note 30, at 170.

36 *Commonwealth Bank of Australia* v *Horvath* (1996) ANZ Conv R 501.

37 *Supra*, note 20, at 324.

38 The alternative argument about the unpaid vendor's lien to which the mortgagee could have been subrogated is beyond the scope of this article but on this point see Chong, "Resurrecting the Vendor's lien: *Commonwealth Bank of Australia* v *Horvath*" (1998) 6 Australian Property Law Journal 61.

39 *Gabor Horvath Junior* v *Commonwealth Bank of Australia* no 9168 of 1994 judgment 30/9/98 unreported decision of the Court of Appeal, Supreme Court of Victoria available on the internet at http://www.austlii.edu.au .

> As is well-known, the so-called doctrine of deferred indefeasibility was rendered at least moribund by the decision of the Judicial Committee in *Frazer* v *Walker* [1967] 1 AC 569. It has since been dealt its quietus in this country by decisions of the High Court. In *Breskvar* v *Wall* (1971) 126 CLR 376, the opinion of Dixon J in *Clements* v *Ellis* that the dissenting judgment of Salmond J in *Boyd* v *Mayor of Wellington* was to be preferred to those of the majority was repudiated by Barwick CJ at 386, by Walsh, J at 406 and by Gibbs J at 412-3. That view was confirmed in *Bahr* v *Nicolay* [No 2] (1987) 164 CLR 604. These decisions have been repeatedly applied in recent years by intermediate courts of appeal, the most recent (so far as I know) being *Macquarie Bank Ltd* v *Sixty-Fourth Throne Pty Ltd*, unreported, CA (Vic) 28 October 1997, where the other recent decisions are mentioned; and the High Court has lately re-inforced *Bahr* v *Nicolay* [No 2] in *Bank of South Australia Ltd* v *Ferguson* (1998) 151 ALR 729; 72 ALJR 551. Accordingly the judgment in *Coras*, illuminating in many respects though it is, must be regarded as having been overtaken to the extent that it accepted the view of Dixon J in *Clements* v *Ellis*.[40]

Further on he concluded that:

> A contract to sell an estate or interest in Torrens title land, made by the registered proprietor who is a minor, will have immediate effect; and, fraud aside, registration of a transfer of the estate or interest sold will confer on the transferee, as against the minor, an indefeasible title unless the minor can resist the effect of registration by reference to some claim at law or in equity which binds the transferee.[41]

Ormiston JA likewise reaffirmed immediate indefeasibility when he said:

> Whatever may have been the position before such registration, the legislature must be treated, subject to the presently irrelevant exceptions as to fraud and the like, as having given an immediately indefeasible title in the land to the respondent bank as mortgagee unless the relief provision should prevail as being relevantly inconsistent.[42]

[40] *Ibid*, at para 13.
[41] *Ibid*, at para 16.
[42] *Ibid*, at para 34.

Further on he said:

> Once registered, however, the mortgage took on the characteristics and had the effect of a duly executed mortgage, not because of its original contractual effects, but because as a matter of policy the Act created an immediately indefeasible interest in the land by way of mortgage in favour of the respondent.[43]

Phillips JA acknowledged the supremacy of immediate indefeasibility:[44]

> For a time it was considered that a registered proprietor taking title by virtue of an instrument which was void might not himself take advantage of the indefeasibility provisions of the statute (and the decision of Philp J in *Coras* v *Webb* and *Hoare* owes much to that point of view). But that view no longer prevails.[45]

However, Phillips JA expressed some regret for the passing of the doctrine of deferred indefeasibility and said:

> In *Mercantile Mutual Life Ins Co Ltd* v *Gosper* (1991) 25 NSWLR 32 at 44-46 Mahoney JA offered, I think, some resistance to the passing of the doctrine of deferred indefeasibility, in a passage to which his Honour later referred in *Story* v *Advance Bank of Australia Ltd* (1993) 31 NSWLR 722 at 739-40. If Mahoney JA was in truth regretting the passing of that doctrine, it is a view with which, if I may say so, I have some sympathy; for the doctrine of immediate indefeasibility appears to me to cast a heavy burden upon a registered proprietor to protect the title against the possibility of fraud without always according him or her a sufficient means for doing so. After all, the ways of the fraudster are infinite and varied and are the more likely to be effective the less they can reasonably be anticipated. In contrast, the means of protecting the title are necessarily limited and the most usual, that of personally keeping the duplicate certificate in safe custody, may not even be available if that document must for the time being be kept by another. The doctrine of deferred indefeasibility might be thought to have been well-suited for a case under section 49; for upon attaining adulthood an infant could then assert the claim to defeat a title registered

[43] *Ibid*, at para 37.
[44] *Ibid*, at para 65.
[45] *Ibid*, at para 37.

adversely during infancy, subject only to the rights of any third parties which have intervened in the meantime. But the doctrine of immediate indefeasibility is now so firmly entrenched that the question what effect section 49 might have after registration of the mortgage in this case must be determined in the context of that doctrine.[46]

PART 2

WHICH IS BETTER: IMMEDIATE OR DEFERRED INDEFEASIBILITY?

There is now no doubt that in the state of Victoria that the doctrine of immediate indefeasibility is once again firmly entrenched. Nevertheless, it is worthwhile recalling that the doctrine of immediate indefeasibility is one of relatively recent origin and that the doctrine of deferred indefeasibility received support from some of the most eminent jurists.[47]

I. ARGUMENTS AGAINST IMMEDIATE INDEFEASIBILITY

Some of the arguments against the doctrine of immediate indefeasibility (and therefore in favour of deferred indefeasibility) are as follows:[48]

1. *The extensive provisions of the law relating to signatures are put to nought by the doctrine of immediate indefeasibility*

Most of the cases relating to immediate indefeasibility involve *forgeries* on the written document (mortgage, discharge, transfer). Where forgeries are concerned the general stance of the law is to say that they are ineffective. Even a holder in due course of a negotiable instrument cannot obtain a good title to a negotiable instrument if there has been a forgery on the instrument unless there is an issue of estoppel against the person whose signature has been forged or unless that person has ratified the forgery.[49]

Similarly a forgery on a bill of lading (one of the few documents of title to goods) will mean that the taker, albeit innocent, takes subject to defects in title. In other words, where transfer of title depends on written

[46] *Ibid*, at para 85.

[47] See, *eg*, Salmond J, the dissenting judge of the New Zealand Supreme Court in *Boyd* v *Mayor, etc, of Wellington* [1924] NZLR 1124 and Dixon J in *Clements* v *Ellis* (1934) 51 CLR 376.

[48] See, *eg*, Warrington Taylor, "Scotching *Frazer* v *Walker*" (1970) 44 ALJ 248.

[49] See s 29 Bills of Exchange Act 1909 (Cth) and s 32 Cheques Act 1986 (Cth).

instrument, title will not pass even though the situation may involve an exception to the *nemo dat* rule. The principle of immediate indefeasibility would seem to be at odds with the general legal principle that forgeries are ineffectual. Under the principle of immediate indefeasibility the innocent mortgagee or purchaser if registered does obtain a good title and defeats the original owner, even though signature on the mortgage or transfer is forged.

2. *The threat to the registered proprietor posed by immediate indefeasibility*

The holder of a certificate of title is always subject to the possibility that it may be stolen or lost and that an innocent successor in title will prevail even though the signature is forged. Thus it is argued the doctrine of immediate indefeasibility puts all title holders at risk since they can be defeated by a purchaser or encumbrancer who becomes registered.

The principle of immediate indefeasibility means that the registered proprietor must safeguard the duplicate certificate of title with utmost care. The registered proprietor's situation is perhaps vulnerable enough to warrant lodging a caveat to safeguard his or her ownership.[50] The fact that a registered proprietor should have to even contemplate this demonstrates the vulnerability of Torrens title ownership with the doctrine of immediate indefeasibility. Thus it is argued that the protection of the *bona fide* purchaser for value or encumbrancer goes too far with the principle of immediate indefeasibility.

If the registered proprietor loses out because of the operation of immediate indefeasibility and makes a claim against the Consolidated Fund, could it be suggested that a registered proprietor who fails to register a caveat as protection against the effects of the principle of immediate indefeasibility is negligent? Probably not. In *Addicott* v *Williams*[51] a single judge of the Supreme Court ruled that the action of the registered proprietor who gave the duplicate certificate of title to her daughter in-law which allowed her son to adversely affect her title under the doctrine of immediate indefeasibility was not in itself negligence.

[50] See *J & H Just (Holdings) Pty Ltd* v *Bank of NSW* (1971) 125 CLR 546. Here it was held that a registered proprietor can lodge a caveat without further proof of claims to the land. In *Sinclair* v *Hope Investments Pty Ltd* [1982] 2 NSWLR 870, in contrast, it was suggested that registered ownership in itself would not support a caveat.

[51] *Addicott* v *Williams* (1963) V ConvR 54-054.

3. *The doctrine favours the careless searcher*

Even judges seem to feel uncomfortable with the fact that the doctrine of immediate indefeasibility seems to favour the careless searcher. The trial judge, Nathan J, in *Pyramid Building Society (in liq)* v *Scorpion Hotels* obviously had difficulty with the fact that the mortgagee *via* its agent, the solicitor, had been careless in the extreme; and, was prepared to hold (erroneously as the Court of Appeal subsequently found) that this negligence fell within the fraud exception to indefeasibility.

All three judges in *Macquarie Bank Ltd* v *Sixty-Fourth Throne Pty Ltd*[52] were, however, prepared to find that wilful blindness could fall within the fraud exception and was something different from negligence and even recklessness. Tadgell JA said:

> The appellant's case was that, at most, its solicitors were careless, and that mere carelessness cannot amount to fraud. As a general or sweeping statement this may be true enough, but it is too general and too sweeping to be of much utility. A negligently made false representation, if made with reckless indifference to its truth or falsity may very well be fraudulent. Similarly, to abstain deliberately from reasonable enquiry for fear of what the enquiry will reveal, to choose to shut one's eyes to the obvious – to assume a state of "wilful blindness" – or otherwise to generate a state of contrived ignorance, may of course be dishonest. It has been well said that wilful blindness – deliberately turning a blind eye to obvious or obviously ascertainable facts – is akin to fraud: *eg, Lego Aust Ltd* v *Paraggio* (1993) 44 FCR 151, 171..... Lodgment of the mortgage for registration by the appellant with actual knowledge by its servants or agents of the forgery, or lodgment for registration in ignorance of the forgery that was attributable only to wilful blindness or wilful and reckless failure to enquire, in the sense I have mentioned, would be fraud or akin to it.[53]

Ashley AJA said:

> It was contended for Sixty Fourth Throne that Macquarie's conduct was sufficiently reckless to amount to fraud or dishonesty. But insofar as recklessness could amount to statutory fraud it must mean, I think, a reckless indifference to consideration of a relevant matter – this again

[52] *Supra*, note 30.
[53] *Supra*, note 30, at 143/4.

> importing something with a flavour of dishonesty rather than mere negligence.[54]

In short before someone is denied the benefit of immediate indefeasibility it must be demonstrated that dishonesty or something close to it is involved. Therefore with the immediate indefeasibility theory carelessness bears no sanction since the careless searcher can gain a good title.

4. *The doctrine validates unlawful actions*

The practical upshot of the *Horvath* case was that the bank was able to exercise its rights as mortgagee against the land mortgaged to it by the infant and his parents by dint of the doctrine of immediate indefeasibility. True, the contract was not enforceable against the appellant due to section 49 of the Supreme Court Act 1986 (Vic). This seems on the face of it to defeat the purpose of section 49. Phillips JA partially came to the conclusion that section 49 did not override the effect of immediate indefeasibility because to do otherwise would be to give effect to the doctrine of deferred indefeasibility. Asking rhetorically, what would the result be if section 49 overrode sectons 42 and 43 of the Transfer of Land Act 1958(Vic), he said:

> How then could the bank transfer title to another; how could a transferee from the bank justify title? As one cannot nowadays allow that the transferee from the bank gains title when the bank does not merely because the bank dealt directly with the infant (for that would seem to resort to the discredited doctrine of deferred indefeasibility), it seems necessary if the subsequent transferee is to have title to recognise that that result flows in favour of the bank also. It cannot be concluded, then, that section 49 prevails over either section 42 or section 43.[55]

Thus, the bank was able effectively to enforce payment against the appellant.[56]

The cases are replete with instances of unlawful actions being effectively validated by the doctrine of immediate indefeasibility. In the case of forgeries the registration of a forged instrument can create obligations which did not

[54] *Supra*, note 30, at 159.
[55] *Supra*, note 39, at para 83.
[56] Phillips JA seems to have, however, countenanced the possibility that the common law right of an infant to repudiate a transaction in regard to land still survives registration. On the facts he was of the view that it was too late for him to repudiate it.

exist before: see, for example, *Frazer* v *Walker,*[57] *Mayer* v *Coe,*[58] *PT* v *Maradona Pty Ltd.*[59]

Registration, however, of an interest by dint of a forged instrument would not seem to mean that the person whose signature has been forged will be liable on the personal covenants. His or her liability will be limited to the extent of the registered interest. In *Grgic* v *ANZ Banking Group*[60] an impostor was introduced by an established customer (borrower) as his father. The impostor had the duplicate certificate of title and other documents relating to some Torrens land. The rogue signed a mortgage to the bank which was duly witnessed by a bank officer and subsequently registered. The defrauded real father then unsuccessfully sought to have the register amended. One of the issues that arose was whether the father was liable on the personal covenants.

On this the appeal justices (Power JA, agreed to by Meagher and Handley JJA) said:

> In the circumstances, therefore, it seems to me that there ought also to be made a declaration, that notwithstanding that the subject property stands charged with the moneys secured by the bank's mortgage, Mr Grgic Snr is not liable to the ANZ on the personal covenants contained in that mortgage.[61]

Accordingly, the father's liability was limited to the value of the mortgaged land. In short the concept of the conclusive register does not deem the person whose signature has been forged as having actually signed the instrument.

5. *The cost argument*

The argument in favour of immediate indefeasibility, namely, that it reduces transaction costs is a weak one since the cost of satisfying oneself as to the identity and validity of signatures is a small price to pay for the comfort of certainty of title.

In Australia the Financial Transactions Reports Act 1988 (Cth) requires financial institutions to satisfy themselves as to the identity of customers when opening up new accounts or adding signatures to existing accounts.

[57] *Supra*, note 2.
[58] *Mayer* v *Coe* (1969) 89 WN (Pt 1) (NSW) 497.
[59] *PT* v *Maradona Pty Ltd* (1992) 25 NSWLR 643.
[60] *Grgic* v *ANZ Banking Group* (1994) 33 NSWLR 202.
[61] *Ibid*, at 211.

A 'verification' procedure must be complied with by the financial institution. It has been described in the following terms:

> The verification procedure consists of certain checks on the identity of the signatory which are intended to establish the person's identity. Documents produced by the intending signatory are assigned scores. The total score must total at least 100 points in order that the proposed signatory is taken to be properly identified.[62]

It would seem appropriate to apply such identification procedures to verify the identity of the person signing mortgages and this would probably not add a great deal to the cost. Indeed, many financial institutions now utilise such a procedure.

II. Arguments in Favour of Immediate Indefeasibility

Arguments in favour of immediate indefeasibility are as follows:[63]

1. *Reduction in the cost of investigating title*

One of the claims of the Torrens system was that it avoided the lengthy searches associated with the general land law system and would therefore reduce legal costs.[64] It is also claimed that the doctrine of immediate indefeasibility is less costly since one does not have to satisfy oneself as to the identity of the transferor and that the signature is not a forgery. As one learned writer put it:

> Ultimately the most convincing rationale for immediate indefeasibility lies in the proposition that no purchaser of Torrens system land should be required to investigate the history of his vendor's title or to make inquiries that are burdensome or difficult. Any other view increases the cost and complexity of all conveyancing transactions, as well as detracting from the goal of security of title.[65]

62 AL Tyree, *Banking Law in Australia* (3rd ed, 1998) at 23.

63 See, *eg*, Sackville, "The Torrens System-Some thoughts on Indefeasibility and Priorities"(1973) 47 ALJ 526.

64 R Stein, "Principles Aims & Hopes of Title By Registration" (1983) 9 Adelaide Law Rev 267 at 273.

65 *Supra*, note 63, at 531-2.

2. *All innocent purchasers/mortgagees are assured of obtaining a good title*

As long as a purchaser or mortgagee has not been a party to forgery or dishonestly ignored the forgery he or she will obtain an indefeasible title with the doctrine of immediate indefeasibility. Security of title is thus upheld. With deferred indefeasibility the innocent purchaser or mortgagee is always subject to his or her registration being reversed on the basis that the instrument is void.

3. *Guarding the duplicate certificate of title against rogues is less onerous and costly than having to satisfy oneself as to the identity of and validity of signature of a vendor or a mortgagor*

Some of the cases involving forgery suggest that the registered proprietors have been careless with the duplicate certificate of title. To safeguard a duplicate certificate of title is not difficult or costly. Most banks offer safeguard facilities at a modest fee. In this context one has to ask whether having a duplicate certificate of title is really necessary? Some states in Australia do not have a duplicate certificate of title.[66] Given that many cases involve the rogue obtaining the duplicate certificate of title and thereby being able to perpetrate the fraud this would seem to be a sensible solution.

Other cases show that the registered proprietors have been naive or gullible. One has to therefore ask, who should pay the cost of such carelessness or gullibility, the innocent party who has registered his or her interest or the culpable party?

III. Economic Analysis

Having set out the principal and often-debated arguments favouring each of immediate and deferred indefeasibility, it is appropriate to consider the relative merits of each doctrine by applying economic analysis.

Economic analysis of law is a relatively modern approach, with strong roots at the University of Chicago in the 1960's.[67] The approach has a growing

66 See, *eg*, s 81 of the Transfer of Land Act 1893 (WA).

67 R Epstein, "Law and Economics: Its Glorious Past and Cloudy Future" (1997) 64 University of Chicago Law Review 1167.

68 RA Posner, "Some Uses and Abuses of Economics in Law" (1979) University of Chicago Law Review 281; RD Baird, "The Future of law and Economics: Looking Forward" (1997) 64 University of Chicago Law Review 1129.

69 See, *eg*, M Nussbaum, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics" (1997) 64 University of Chicago Law Review 1197.

number of followers,[68] but is certainly not without critics.[69] Economic analysis allows us to look at the law from another perspective. In the words of an American judge and academic:

> Economics is the study of rational behaviour in the face of scarcity.... The legal system, too is about coping with scarcity. If there were an abundance of every good thing, there would be no need for law... If there is scarcity, law cannot be understood apart from economic thought.[70]

Certainly, the cases about indefeasibility are dealing with scarcity – a particular interest in land that will, under the relevant type of indefeasibility, be declared to belong to one only of the affected parties. Economic analysis can be used in a positive way – to explain the current law along economic lines, or in a normative sense – to prescribe the law as it should be, again in economic terms. In trying to apply economic analysis to determine which of deferred or immediate indefeasibility carries stronger economic justification, both a positive and a normative or prescriptive approach is required.

Economists variously examine concepts such as value, utility, and efficiency.[71] It is the concept of efficiency that is most widely used in economic analysis of law[72] and that will be used in this article. To quote Jules Coleman, an American academic:

> Whether the new law and economics is restricted to model theoretical applications or whether instead it is advanced as an explanatory or normative discipline, its central organising idea is that of economic efficiency.[73]

There are a number of economic definitions of efficiency, two key tests being 'Pareto superiority' and 'Kaldor-Hicks efficiency'.[74] It is worth outlining those tests at this point.

Pareto superiority requires that both parties are made at least as well

[70] FH Easterbrook, "The Inevitability of Law and Economics" (1989) 1 Legal Education Review 1.

[71] See, *eg*, R Posner, *Economic Analysis of Law* 4th ed (1992).

[72] For a broad discussion on the merits of efficiency as a fundamental criterion in economic analysis of law, see generally, "Symposium on Efficiency as a Legal Concern" (1980) 8 Hoffstra Law Review 485.

[73] J Coleman, "Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law" (1980) 68 California Law Review 221.

[74] *Ibid*, at 222.

off, in the sense that a Pareto-superior transaction is one that renders at least one person better off and no person(s) worse off.[75] Obviously, very few rules or doctrines would really create a Pareto superior effect, as most rules and doctrines would have some detrimental effect on some person(s), even if it is merely a rise in prices or added costs of insurance.

As an alternative model, the Kaldor-Hicks model of efficiency examines whether the transaction results in a net overall benefit, so that the combined benefits to the parties involved do not exceed the resulting (net) detriment to any third parties adversely affected by the transaction.[76]

Perhaps a clearer understanding of the different models can be gained by considering them in application to the potential change caused by a particular legal rule. The rule would be Pareto superior if, when compared with the situation without the rule in place, the rule caused no-one any adverse change and caused at least one party a beneficial change. This can be contrasted to the Kaldor-Hicks model, which allows both beneficial and adverse changes to be caused by the new rule, but requires there to be a net beneficial change for the new rule to be efficient. Both models of efficiency will be applied at various stages of this analysis.

As for comparing the efficiency of immediate and deferred indefeasibility, the authors believe that the key to the problem lies in first examining the efficiency of the indefeasibility concept in itself. This is particularly important as many of the logical arguments 'against immediate indefeasibility' stated above, are also arguments against deferred indefeasibility. For example, the argument that 'immediate indefeasibility wrongly overrides the existing law of signatures' is really an argument against indefeasibility *per se*, as both immediate and deferred indefeasibility allow an innocent purchaser in a subsequent transaction to gain better title than an earlier transferor. Before comparing the relative efficiency of immediate and deferred indefeasibility, therefore, it is necessary to put the dilemma into context by first ascertaining the economic rationale behind indefeasibility of title. With this in mind, the remainder of this article will first analyse the indefeasibility concept before moving to a comparison of the two theories.

IV. Efficiency of the Indefeasibility Concept

One of the clear aims of the Torrens system of land regulation was to establish a central registry of interests in land in order to simplify the proof of rights

[75] Other key tests are 'Pareto optimisation' and 'wealth maximisation'. For detailed explanation of the different notions of efficiency, see J Coleman, "Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law" (1980) 68 California Law Review 221.

[76] *Supra*, note 71, at 13.

in property. Hence, interests in land are lodged for registration or noting on the relevant title and the register is available for public search. To ensure effective operation of the registration system, the law then recognises the supremacy of registered interests (subject to a limited number of "paramount interest" exceptions).[77] Any parties interested in acquiring an interest in Torrens land can search the register and rely upon the accuracy thereof.

By prescribing the indefeasibility of registered interests in Torrens land, there is a reduction in transaction costs as the purchaser does not have to conduct exhaustive enquiries into the vendor's chain of title. The concept of indefeasibility of title therefore minimises transaction costs that might otherwise have prevented a consensual exchange of the land or at least have led the exchange to be less efficient for the parties involved.

To apply economic analysis to the indefeasibility concept, one must look at the entire picture, considering the effects of indefeasibility on society as a whole. Without a rule of indefeasibility, there would be little confidence in the Torrens registration system of interests in land. Further, there would be dramatically increased compliance and enforcement costs to ensure registration of transfers, without the sanction of losing priority, and an increase in the residual harm caused by non-compliance (non-registration of interests). The cost of registration would itself be an additional transaction cost with no obvious benefit.

Considering the alternatives, without a system of ownership by registration, society would need to revert to a system of either proving ownership of land by possession or by an unbroken chain of title documents as is required for general law land. The former concept is of little use to security interests in land, while the latter involves higher transaction costs for potential transfers of interest and higher administration costs in maintaining the system.

The indefeasibility rule achieves certainty for transferees, and hence eliminates the problems associated with making decisions under uncertainty. Without an indefeasibility rule, the risks involved in land purchase would be extremely high. Given our capitalist society, including the status of land as a key asset for individuals, society as a whole benefits from indefeasibility in that it achieves the high level of certainty required for decisions about land purchase to be made by average members of society. Thus the aggregate well-being of all individuals in our society appears to be enhanced by the of indefeasibility rule. Applying the Kaldor-Hicks test, this rule appears to be efficient in that the overall (net) benefit to society and registered interest-holders outweighs the detriment suffered by the holders of unregistered but registrable interests. Thus, indefeasibility of title appears to be justified

[77] Transfer of Land Act 1958 (Vic) s 42(2).

on economic grounds.

V. Efficiency of Indefeasibility Where Fraud is Involved

While the indefeasibility concept has so far been justified in relation to a system of ownership by registration, what about where fraud is involved in the chain somewhere? In these circumstances people may be deprived of their interest in land through a fraudulent, non-consensual transfer, in favour of a later innocent transferee. Thus, the concept of indefeasibility of title here has a detrimental effect on the defrauded former owner of the relevant interest in the land.

This is essentially the trade-off for benefits of reducing prospective purchasers' information costs under the rule of indefeasibility of title. Without a rule of indefeasibility, in the event of a fraudulently executed transfer, the defrauded previous property-holder would retain their interest in the land, while the innocent transferee must rely on a possible non-proprietary right to compensation. However, under the indefeasibility rules, it is the innocent (registered) transferee who retains the property, while the defrauded previous property-holder is left only with a potential claim for compensation under the Transfer of Land Act 1958 (Vic).

Of course, sections 42-44 of the Transfer of Land Act 1958 (Vic) contain exceptions to indefeasibility in the case of fraud. It is these sections that have led to the competing theories of immediate and deferred indefeasibility which have battled for judicial preference as described above. The fraud exception and the two competing indefeasibility theories only affect parties affected by the fraudulent transaction. Once subsequent transactions are registered, the transferee relying on the Register gains the benefit of indefeasibility even under the theory of deferred indefeasibility. Hence, the Transfer of Land Act 1958 (Vic) largely overrides the common law principle of *nemo dat* in favour of indefeasibility of title. If immediate indefeasibility applies, the non-consensual transferor has no opportunity to use the 'fraud' exception to the rule if the registered transferee is innocent, however a narrow window of opportunity would exist if the deferred indefeasibility theory were applied.

VI. Comparison of Immediate and Deferred Indefeasibility

In attempting to determine which of these theories is more efficient, it must first be noted that each of the two competing indefeasibility theories clearly benefit one of the parties concerned over the other. Under immediate indefeasibility, the current innocent registered interest-holder prevails, while under deferred indefeasibility it is the earlier registered interest-holder who is restored. Obviously, therefore, neither theory theories makes both parties at least as well off as they would have been without the relevant indefeasibility

rule, and hence neither theory can be justified on Pareto-efficiency grounds.

Returning to the Kaldor-Hicks concept of efficiency, one needs to weigh up the relevant benefits and detriment to all parties – non-consensual transferors, transferees and society in general – under each of the indefeasibility theories.

Under immediate indefeasibility, there can be complete confidence in the system of title by registration for any transferee innocent of any fraud in the transaction. This carries the benefits of minimising transaction costs for transferees and also the public welfare benefits discussed above. The trade-off is, of course that all current owners of property are subject to the risk of losing their rights in that property in a non-consensual transfer, without any right to take action even where the transaction is discovered before a subsequent transfer occurs.

Conversely, deferred indefeasibility of title reduces the risk of current property owners losing their interest through a non-consensual transfer by essentially giving them time to discover the transaction and to regain title before a subsequent transfer occurs. However, the trade-off is that society would lose the benefits of indefeasibility associated with certainty as any prospective transferee would bear the risk that their transaction may involve some fraud and hence would not gain indefeasibility upon registration.

As for much economic analysis, comparison of the two competing indefeasibility theories essentially reduces to the question of 'who can best bear the risk?'. Under immediate indefeasibility, the current owner bears the risk of losing their property, whereas it is the transferee who bears the risk under deferred indefeasibility.

Assuming the current owner and the transferee are equally risk-averse, one needs to examine whether either party can reduce their risk (and at what costs). Under immediate indefeasibility, a current owner could reduce their risk by ensuring safe-keeping of the duplicate Certificate of Title (and the Duplicate Mortgage in the case of a mortgagee). This minimises the chance of fraudulent transactions occurring. However, the transferee could also reduce their risk by conducting investigations into the purported transferors in an attempt to identify any fraud. This would increase the chances of detecting any fraud and help minimise the risks to an innocent transferee that otherwise exist under deferred indefeasibility. It appears that the costs to the current owner in reducing their risk by validating the *bona fides* of people to whom they allow access to the title documents would usually be cheaper than the costs of transferees in validating identities of signatories. Thus, it seems that current owners are in fact usually best placed to reduce the risks in the most cost effective way, and therefore that immediate indefeasibility is more efficient than deferred indefeasibility.

However, given the extent of possible duplicity and forgery, it seems apparent that neither party is able to completely avoid the relevant risk involved by taking the above action. Therefore, in addition to the costs

involved in risk-reduction, consideration must also be given to whether either party is in a better position to bear the ultimate price of the risk should the fraud still occur. While some readers may have sympathy for the typical family facing the risk of losing their major asset, and there may also be a general perception that any bank involved is more able to bear both risk-reduction costs and any costs in ultimate deprivation of their interest, such sympathetic feelings have no role in economic analysis. Furthermore, closer consideration of the possible scenarios reveals that any combination of parties is possible. The sympathy-endearing family may be the non-consensual transferor, and a bank may be the transferee as was the case in both *Chasfield's* case[78] (deferred indefeasibility applied) and *Vassos'* case[79] (immediate indefeasibility applied)), or the sympathy-endearing 'family' may just as likely be the transferee, while the non-consensual transferor is another 'family' or even a mortgagee under a fraudulent discharge of mortgage (as was the successful mortgagee in *Ellis'* case[80] under deferred indefeasibility).

While the concept of a means-tested immediate/deferred indefeasibility rule may appeal to those with a strong sense of equity, current and potential owners of land in Victoria need a rule that is certain and universal in application. It would be totally unworkable to suggest different rules for different parties or circumstances. Since there can be no general conclusions as to whether a non-consensual transferor or an innocent transferee can best bear the costs of being deprived of their interest in the land, we must revert to considering which party can best bear the risk. One must recall the considerable benefits to society arising from the indefeasibility concept, and add to this the general rule that it is less costly for owners to safeguard their title documents than for prospective transferees to gather enough information to rule out fraud. With these considerations in mind, the authors contend that it is in the interests of society as a whole for the risk be borne by current owners as potential non-consensual transferors rather than innocent transferees. Hence, while indefeasibility is not absolute (registered proprietors who are parties to the fraud are excluded), application of the immediate indefeasibility theory appears to be more strongly justified on economic grounds than deferred indefeasibility.

VII. Does the Assurance Fund Affect the Argument?

As a final matter, the authors note that in considering the relative economic merits of immediate and deferred indefeasibility, so far only a brief reference

[78] *Supra*, note 12.
[79] *Supra*, note 20.
[80] *Supra*, note 6.

has been made to the Consolidated Fund. The Transfer of Land Act 1958 (Vic)[81] provides an opportunity for innocent victims of fraudulent registered transfers to lodge a claim against the assurance fund, and to this extent, it may be inaccurate to omit this from the equation involving the parties' risks under deferred and immediate indefeasibility. However, in the state of Victoria, the position in regard to compensation is far from satisfactory. In Victoria no indemnity is payable from the assurance fund where the "claimant, his solicitor or agent caused or substantially contributed to the loss by fraud neglect or wilful default".[82] This puts the victim at a considerable disadvantage and the uncertain availability of compensation somewhat clouds the issue of assessing the superiority of either doctrine.

Since the concept of indefeasibility appears to be mainly justified in terms of the net benefits to society, then it seems obvious that society as a whole should compensate the innocent victim. The advantages to society from the existence of the indefeasibility concept itself, as discussed above, outweigh the potential cost to society in compensating the victims of the occasional case of loss of title through fraudulently executed registered transfers. If adequate compensation were available to the victims, then indefeasibility would satisfy both the Pareto and Kaldor-Hicks tests of efficency. Bearing in mind the difficulty in calculating the true value (in terms of utility) of the proprietary interest to the 'victim' concerned, the existence of such compensation could perhaps tip the balance towards deferred indefeasibility being more efficient than immediate indefeasibility.[83]

However, the question of whether this right to indemnity under the Transfer of Land Act 1958 (Vic) is too narrow is an issue beyond the scope of this article. Given the wording used in section 110, the question still comes down to which of the parties can best bear the risk; here, the risk of needing to make a claim against the assurance fund for possibly unavailable or inadequate 'compensation'.

VIII. Conclusion

The competing theories of deferred and immediate indefeasibility have had a long and complex duel for judicial application in Victoria. Considering the most recent cases, immediate indefeasibility certainly seems to be strongly

[81] Section 110.

[82] Transfer of Land Act 1958 (Vic) s 110(3)(2).

[83] See Law Reform Commission of Victoria, Report No 12: The Torrens Register Book, 1987 para 16. The Victorian Law Reform Commission's recommendation that deferred indefeasibility should predominate was based upon the premise that monetary compensation would always be available to the innocent transferee.

winning the 'battle' at present. However, there is always the possibility that deferred indefeasibility may once again be 'raised from the dead', whether by the judiciary or by parliament.

In this article, the authors canvassed the legal and economic arguments for each theory. While the legal arguments perhaps seemed to weigh more strongly against immediate indefeasibility, many of those argument could be raised almost equally against deferred indefeasibility too. However, the purpose of this article was not to determine whether indefeasibility of title should exist at all, but rather, given that it exists, which of the two competing versions was more strongly justifiable. Applying economic analysis to the problem, leads the authors to conclude that indefeasibility of title for land under the Torrens system can be economically justified on efficiency grounds, and it is the theory of immediate indefeasibility rather than that of deferred indefeasibility that carries the stronger economic justification.

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