

unenforceable but not void by some rule of law. Since the original promissory notes were void and raised no liability to repay, the subsequent promise to pay them was not supported by good consideration. The promise acknowledged nothing. This is to be contrasted with the case where a promise to pay a statute-barred debt (for example one for which the limitation period has run) acknowledges something of substance. In the former the defect is substantive. There is simply no debt. In the latter case the defect is merely procedural. The debt exists, but it cannot be enforced.

It would seem logically that in both cases the promise to pay is supported only by a moral consideration. Nevertheless the perjorative (to traditional lawyers) epithet 'moral consideration' is applicable only to the first category—debts which are void. If this were allowed as consideration there is logically no reason why any bare promise should not be enforced. As Lord Denman C.J. commented:³⁷

Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The decision in *Sharp v. Ellis*³⁸ seems, with respect, manifestly correct in point of principle and authority, yet His Honour sympathised with the unsuccessful applicant.³⁹ In *Pillans v. Van Mierop*,⁴⁰ Lord Mansfield contended that in 'commercial cases among merchants, the want of consideration is not an objection'.⁴¹ Wilmut J. stated that a written agreement did not require consideration to support it.⁴² Is there any reason why this should not be the law? The United Kingdom Law Revision Committee recommended that written agreements be made enforceable irrespective of consideration.⁴³ Meritorious claims should not be defeated by highly technical rules depending on such fine spun distinctions as between void and voidable agreements.

M. F. MACNAMARA

BRESKVAR AND ANOTHER v. WALL AND OTHERS¹

*Torrens system—Registration in fraud of transferor—Transfer void—
Indefeasibility of title—Certificate as conclusive evidence of title—
Priority between equitable interests.*

This is a unanimous decision by the High Court of Australia approving the Privy Council decision in *Frazer v. Walker*.² B, the registered proprietor of land, had obtained a loan of money from P. As security, he had given to P a signed memorandum of transfer and the certificate of title for the land. The memorandum of transfer was void under section 53(5) of The Stamps Act 1894 (Qld), which provides that any instrument of conveyance or transfer shall be void and inoperative 'unless the name of the purchaser or transferee is written therein in ink at the time of the execution thereof'. P, in fraud of

³⁷ *Eastwood v. Kenyon* (1840) 11 Ad. & E. 438, 450.

³⁸ [1972] V.R. 137.

³⁹ *Ibid.* 146.

⁴⁰ (1765) Burr. 1663.

⁴¹ *Ibid.* 1669.

⁴² *Ibid.* 1670-1.

⁴³ United Kingdom Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (1937) Cmd 5449, para. 50(2).

¹ (1972) 46 A.L.J.R. 68. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.

² [1967] 1 A.C. 569.

B, filled in W's name on the transfer and registered him as owner. W, who was a party to the fraud, sold the land to A Company. However, before A lodged its transfer for registration, B discovered the fraud and lodged a *caveat*. The case came before the High Court on appeal from the Supreme Court of Queensland where B had sought a declaration of right and orders for the cancellation of a dealing registered under The Real Property Acts 1861-1963 (Qld) and an amendment of the relevant certificate of title. The Supreme Court of Queensland held in favour of A, ordering B to remove the caveat.

There was no doubt that B had an equitable right to have the void transfer set aside and to have his name restored to the Register as against the fraudulent W—although the Court did not attempt to characterize this as either an equitable interest or a mere equity. Thus, it was not called upon to discuss the difficulties caused by the judgments of Kitto J. and Taylor J. in *Latec Investments Ltd v. Hotel Terrigal Pty Ltd (In Liq.)*³ However, in this case Their Honours had to decide whether W had acquired a fee simple interest by registration. If not, he obviously could not pass any interest to A.

The Court relied on the Privy Council decision in *Frazer v. Walker*⁴ in preference to the judgment of Dixon J. in *Clement v. Ellis*.⁵ Their Honours found that registration of his title by W conclusively passed the fee simple despite the fact that the transfer by which he obtained title was void due to the provisions of The Stamps Act 1894 (Qld).

This decision has moved the High Court into alignment with the New South Wales' Supreme Court which had already in *Mayer v. Coe*⁶ and *Ratcliffe v. Watters*,⁷ accepted and applied the decision in *Frazer v. Walker*.⁸ Barwick C.J., in fact, expressly approved the Supreme Court decisions.⁹

The High Court's adoption of the so-called 'doctrine of immediate indefeasibility of registered title', is interesting because the Privy Council decision in favour of immediate indefeasibility could have been distinguished as *obiter dicta* since the case in question could have been decided on the deferred indefeasibility principle.¹⁰ Also, the High Court went further than did the Privy Council in *Frazer v. Walker*,¹¹ where there was no question of fraud on the part of the mortgagees who had obtained registration on the forged mortgage document. In the present case, the person whose registered title the court finds to be indefeasible was a party to the fraud. Further, although the person relying on the indefeasibility of a registered title is an unregistered third party to whom W has purported to pass his interest, the High Court had no difficulty in extending *Frazer v. Walker*¹² to cover this situation. It is true that this would seem to be a logical extension of the immediate indefeasibility of a registered title, but both this point and the fact that W was a party to the fraud could have offered the High Court grounds to distinguish *Frazer v. Walker*,¹³ had they been so inclined.

It is notable that only Menzies J. mentioned *Gibbs v. Messer*¹⁴ and then only to distinguish it on the grounds that there the so-called registered pro-

³ (1965) 113 C.L.R. 265, 271, 279.

⁵ (1934) 51 C.L.R. 217.

⁷ [1969] 2 N.S.W.R. 146.

⁹ (1972) 46 A.L.J.R. 68, 71.

¹⁰ For a full discussion of the principles of immediate and deferred indefeasibility see Woodman, 'The Torrens System in N.S.W.: 100 Years of Indefeasibility of Title' (1970) 44 *Australian Law Journal* 96.

¹¹ [1967] 1 A.C. 569.

¹³ *Ibid.*

⁴ *Ibid.*

⁶ (1968) 88 W.N. (N.S.W.) 549.

⁸ [1967] 1 A.C. 569.

¹² *Ibid.*

¹⁴ [1891] A.C. 248.

prietor was a fictitious person. The Privy Council in *Gibbs v. Messer*¹⁵ had refused to recognize the conclusiveness of a registered title which had been acquired through a forged transfer and Their Lordships expressly stated that their decision did not depend on the fraudulently registered title being in the name of a fictitious person.¹⁶ However, despite the High Court's reluctance to discuss the case, Their Honours' decision allowing a third person to rely on the conclusiveness of a fraudulently registered title must abrogate the effect in Australia of the decision in *Gibbs v. Messer*.¹⁷

Despite his non-registration of title, A was a *bona fide* purchaser without notice. The High Court, with the exception of Menzies J., relied on *Barry v. Heider*¹⁸ to find that A had acquired an equitable right by virtue of his purchase. Menzies J. took the view that although the void transfer followed by W's fraudulent registration of his title, made W a 'registered proprietor', this did not necessarily give him the right to pass even an equitable interest to A. This view is open to criticism on the ground that the idea of a registered proprietorship without the means of passing a title to a third party runs counter to the whole concept of registration under the Torrens System; one may well be excused for questioning the point of a registered title if it is necessary to look beyond it in order to determine whether the registered proprietor is capable of passing a title in the land. However, while leaving open the position in other States, Menzies J. relied on section 48 of The Real Property Act 1877 (Qld) (a section peculiar to Queensland which confers a right of registration on anyone claiming through a registered proprietor) to find that A did have a right to registration in this case.

Thus, confronted with equitable rights in both B and A, the Court was faced with the dilemma as to which equitable right was to prevail. With little hesitation the Court, once again with the exception of Menzies J., relied on *Abigail v. Lapin*¹⁹ to find that A's interest should prevail. Since B had put W in the position of being able to register his title, on which A was induced to rely, the Court held that B's equitable interest should be postponed to that of A. Menzies J., although arriving at the same conclusion, relied on the fact that B, in executing the transfer in blank, was in breach of The Stamps Act 1894 (Qld). His Honour reasoned that it was, in fact, B's breach of law that enabled W to register his title.

It is interesting to note that, with the possible exception of Menzies J., who relied so heavily on the statutory provisions peculiar to Queensland, Their Honours would have reached the same result had the action arisen in any other Australian State.

This decision in favour of the immediate indefeasibility of a registered title acquired by a void transfer, even if the transferee is fraudulent, goes far in establishing the Torrens system of land registration as 'not a registration of title but a system of title by registration'.²⁰ As Windeyer J. points out,²¹ this is the way that Torrens himself stated the basic idea of his scheme. The person defrauded of his title is still left with his equitable right as against the fraudulent registered proprietor, but the *bona fide* purchaser who relies on the registered title is protected.

At last, it seems, registration spells certainty!

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¹⁵ *Ibid.*

¹⁷ *Ibid.* 257.

¹⁹ [1934] A.C. 491.

²⁰ (1972) 46 A.L.J.R. 68, 70 (*per* Barwick C.J.).

²¹ *Ibid.* 76.

¹⁶ *Ibid.*

¹⁸ (1914) 19 C.L.R. 197.