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The Fraud Exception to Indefeasibility of Title: Applying Section 203 of the Land Titles Act

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Cases Considered:

Hall v. Tieken Estate, 2008 ABQB 646

The land registration system used in Alberta is established by the *Land Titles Act*, R.S.A. 2000, c. L-4 and based on the Torrens system. Under this system, the provincial government has custody of all titles, plans and other documents related to interests in land and responsibility for the accuracy of all land titles information registered or filed with it. In a jurisdiction with a Torrens system, the government guarantees that a person named as the owner in the register established and maintained by the government has a title that is subject only to encumbrances and exceptions registered against that title and to enumerated statutory exceptions. Basically, a person's title is free of adverse claims unless those claims are mentioned on their title. Their title is "indefeasible." There are, of course, exceptions to indefeasible title in a Torrens system. Fraud is one of those exceptions, and it was the exception in issue in this case. In general, if you participate or collude in fraud, you do not have an indefeasible title.

In 1989, Marathon Realty Co. Ltd. sold the NW ¼-15-49-W5 to Wayne and Brenda Cooper. That quarter section did not include the mines and minerals. Neither did it include the lessor's interest under certain surface rights leases. There was one well on the quarter section and Marathon kept for itself for 25 years its interest in surface rights leases it had entered into as lesssor. In other words, Marathon retained the right to receive rent payments under the surface rights leases until 2014. Marathon filed a caveat against the title to the quarter section claiming an interest as lessor under surface rights leases, for the purpose of protecting their interest.

Two years later, in 1991, Marathon sold its interest under the surface leases to John Tieken. For unknown reasons, Marathon did not transfer their caveat to Tieken as they could have done under section 136 of the *Land Titles Act*. Instead, Marathon discharged the caveat it had filed as it no longer had an interest in the quarter section. Tieken has since died, but either he or his estate received the rent payments under the surface leases since 1991.

In 2001, Brett Douglas Hall and Joan Marie Hall entered into an agreement to purchase the quarter section from the Coopers. That agreement specified what the Halls were buying in the following terms:

> "For the property in Alsike, Alberta subject to the reservations and exceptions appearing in the existing Certificate of Title or being described in Schedule ___ in which Schedule ___ shall constitute part of this agreement."

There was no Schedule and so the Halls were buying the quarter section subject only to the reservations and exceptions on the existing title. There was no caveat on the title warning that someone else was entitled to the surface lease rent payments; Marathon's caveat had been discharged 10 years earlier and Tieken had not filed his own caveat.

The Halls did not receive the surface lease payments after title to the quarter section was registered in their names in 2001. Tieken or the Tieken Estate continued to receive the rent instead. The Halls therefore sued Tieken's Estate and Penn West Petroleum, the lessee who had been paying the rent. The Halls sued for a declaration that they were the persons entitled to the surface lease rent payments and for an order requiring that all the rent that had been paid to Tieken or his Estate since 2002 be paid to them.

On the facts as stated to this point, the Hall's application is a certain winner. As set out at the beginning of this post, in Alberta persons who purchase land get an indefeasible title. The Halls purchased the quarter section subject only to the exceptions noted on its title; there was no caveat or other notice on that title warning that someone else claimed the surface lease rent payments. The indefeasible title the Halls got therefore included the right to receive the rent for the surface leases.

As also already noted, however, there are exceptions to the indefeasibility of title rule. The exception the Tieken Estate argued in this case was the fraud exception.

Brett Hall had met with the seller, Brenda Cooper, twice before he and his wife purchased the quarter section. The real estate agent was present at that first meeting. Mr. Hall admitted that the real estate agent had told him that the lease payments from the surface rights lease for the one well on the property were being paid to someone other than the Coopers. That appears to have been the only discussion about the surface lease rent payments the Halls had with anyone.

The Tieken Estate argued that the circumstances of the Halls' purchase from the Coopers amounted to fraud under section 203 of the *Land Titles Act*. The Halls were told the rent payments were going to a third party and not the Coopers. Their silence in light of that knowledge was, according to the Tieken Estate, fraud. If the Halls did participate or collude in fraud, then the Halls would be bound by the Marathon assignment to Tieken and would not be entitled to the rent payments.

The issue Mr. Justice John J. Gill had to decide was whether the Halls or the Tieken Estate were entitled to the surface lease rent payments. The answer to this question depended upon whether or not the Halls had participated or colluded in fraud.

Section 203(2) and (3) of the *Land Titles Act* provides as follows (emphasis added):

> 203 (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,
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> > (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
> >
> > (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

The leading case on the interpretation of section 203 and the meaning of the fraud exception to indefeasibility is *Holt Renfrew &Co. v. Henry Singer Ltd*., (1982), 37 A.R. 90, 20 Alta. L. R. (2d) 97, a decision of the Alberta Court of Appeal. Justice Gill did not, however, refer directly to the *Holt Renfrew* case. Instead, he relied upon the decision of Mr. Justice Franz Slatter (prior to his elevation to the Court of Appeal) in *Darnley v. Tennant*, 2006 ABQB 575, which in turn relied upon *Holt Renfrew*. It is true that the *Holt Renfrew* case is a difficult one to make sense out of, in part because each of the five judges delivered a written judgment. However, all five judges in *Holt Renfrew* agreed on the interpretation of section 203 and the meaning of the fraud exception and it is the authority on the point.

In *Holt Renfrew*, the Alberta Court of Appeal was unanimous that knowledge of an unregistered interest plus knowledge that the unregistered interest will be defeated by registration of your interest is not enough to constitute fraud under section 203. There must be "something more." In other words, Hall could know about Tieken's assignment of rent payments, know that it was not protected by a caveat and know that registration of the transfer of the title into their names would defeat Tieken's assignment of rent and still not be guilty of fraud under section 203. They could even intend to defeat Tieken's interest by registering their own title and it still would not be fraud for the purposes of section 203. It is not fraud for the Halls to take advantage of Tieken's failure to caveat his interest in the quarter section.

Given the test for fraud in section 203, as interpreted by the Alberta Court of Appeal in *Holt Renfrew*, it is obvious that the Halls' conduct did not reach the level required. It is not even clear that the Halls knew of Tieken's entitlement to the surface lease rent payments. Indeed, it is not clear they knew anyone was entitled to them in any formal sense. They merely knew that a third party was receiving the rent payments and the Coopers were not.

This case is therefore a straightforward application of the *Holt Renfrew* interpretation of section 203 of the *Land Titles Act*. It is unremarkable except for two relatively minor points. First, counsel cited or Justice Gill relied upon a Queen's Bench decision from a different context, rather than the Alberta Court of Appeal decision in *Holt Renfrew*. Was the doctrine of precedent abolished when I wasn't looking? The case Justice Gill relied upon, *Darnley v. Tennant*, involved an application to discharge a caveat which purported to protect a right under a Letter of Intent to purchase a portion of the land in the title against which the caveat was filed at some time in the future. The issue was whether the caveat was valid. Justice Slatter only discussed section 203 as confirmation of the general principle that a title can be defeated by fraud.

Second, Justice Gill held (at para. 27) that there was evidence that the Halls "had knowledge of an unregistered interest ie: [sic] that a third party was receiving payments under the surface leases." How does being told by a real estate agent that the surface lease rental income was being paid to someone else amount to knowledge of an unregistered interest, especially for a non-lawyer? In the evidence quoted by Justice Gill (at para. 12) , Mr. Hall was asked "did the real estate agent for the vendor only mention one time that the surface lease rental income did not come with the property?" and he replied "She did not say it didn't come. She said it was being paid to someone else." There is nothing in the judgment to indicate Mr. Hall's account was disputed.

Despite the use of a questionable authority and the extension of an admission, the conclusion reached in this case was the right one. Justice Gill correctly concluded that even if the Halls had knowledge of the unregistered interest, and even if they combined that with knowledge that registration would defeat that interest, the Halls did not participate or collude in fraud under section 203. There was no additional conduct by the Halls that would amount to "something more." Unless there is a lot more to the facts than Justice Gill set out, there is no conduct on the part of the Halls that comes anywhere close to fraud, whether under section 203 of the *Land Titles Act* or not.