TORRENS TITLE I: INDEFEASIBILITY AND EXCEPTIONS

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RELEVANT SECTIONS OF THE REAL PROPERTY ACT 1900 (NSW)

41 Dealings not effectual until recorded in Register

(1) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.

(2) (Repealed)

42 Estate of registered proprietor paramount

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

(a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,

(a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,

(b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land,
• The problem with Old System Title and the requirement of proof of good root of title via a chain of documents is that it renders the title inherently vulnerable to challenge. *The chain is only as good as its weakest link.*

• Establishing good root of title made dealings in old system land very costly. Sir Robert Torrens drove the reform for a new land registration system.
• Torrens proposed a system based on 3 principles:
  ➢ Mirror principle – register reflects the state of the title.
  ➢ Curtain principle – curtain of indefeasibility falls and you cannot go behind the curtain to attack someone’s title.
  ➢ Insurance principle – means by which innocent persons who suffered a loss as a result of the Torrens system could be compensated.

• The legislation which implemented the Torrens reforms was the Real Property Act 1862 (came into effect on 1 January 1863).

• Land registered under the Act is referred to as “Torrens Title”. Crown grants since this time have been Torrens Title.

• The Act also made provisions for the conversion of Old System Land into Torrens Title Land.

Features of the Torrens System

• In Breskvar v Wall, Barwick CJ said “the Torrens system is not a system of registration of Title but a system of title by registration.”

• With Torrens Title, there is not title UNTIL registration takes place. “Settlement” is the term used in the Torrens system to refer to completion of a sale.

• Under the Torrens system, we speak of “registered” and “unregistered” interests rather than legal and equitable interests.

• The purpose of the Torrens system is to enable a purchaser acquiring an interest in land to rely simply on the register maintained by the Land Titles Office.

• If the register records V as the owner or registered proprietor of the fee-simple in land, the purchaser P is able to rely on that without concerning himself with how V obtained the title.

• When P obtains registration of his or her interest, he/she obtains an INDEFEASIBLE TITLE (a title which, subject to certain exceptions, is unable to be defeated even when there is some defect in title prior to registration).

• The register established under s31B of the Real Property Act 1900 (NSW) comprises of a “Folio” under s32(1) which is the document which describes the land, describes the estate or interest in the land (e.g. fee-simple, life estate), describes the proprietor of the estate and particulars of all other interests effecting the land (e.g. leases, mortgages, easements etc).

• The Certificate of Title is essentially a duplicate of the folio for a specific parcel of land and must be produced for any dealing with the land required by s38(1). If you want to register any dealings with Torrens Title land, you must have the Certificate of Title. The term “duplicate Certificate of Title” means THE Certificate of Title (i.e. a copy of what is on the folio).

• A Dealing (s3) is any instrument other than a grant or caveat which is registrable or capable of being made registrable under the provisions of this Act, or in respect of which any recording in the Register is by this or any other Act or any Act of the Parliament of the Commonwealth required or permitted to be made.

• The importance of Registration stems from s41(1) which states:

  “No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.”

Indefeasibility

• Relevant section of the Real Property Act 1900 (NSW) is s42(1):

  “Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other
estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded." (i.e. unregistered interests).

- The protection afforded by s42(1) is not confined to the registered proprietor of the fee-simple in schedule 1 of the folio, it also extends to registered proprietors of interests recorded in schedule 2 (e.g. registered mortgage, registered lease).
- The effect of s42(1) is supported by s43 which states that a person who, in the absence of fraud, becomes the registered proprietor need not inquire how the person he/she is dealing with became registered. They are also NOT affected by notice, direct or indirect, of any trust or unregistered interest as such notice is NOT for the purpose of s43 considered fraud.
- The protection afforded by s43 is limited and only arises once you have become registered (IAC (Finance) Pty Ltd v Courtenay).

• If a person receives notice of an interest or should have known of an interest and has not yet become the registered proprietor, their interest may be defeated.
• Once registered however, under s43, the person's interest CANNOT be defeated merely because they received notice of an interest or should have known of an interest.
• Note the obvious difference to the purchaser of a legal estate of Old System Land. If they knew or should have known about a prior equitable interest, they would take their interest subject to that equitable interest.

**Deferred or Immediate Indefeasibility**

- **DEFERRED INDEFEASIBILITY** – if an instrument is registered that is void (e.g. forged), you would not secure immunity from the true owner of the property seeking to set aside your registration even if you knew nothing of the fraud.
- Immunity would only be available to any person to whom you sold the land who purchased in good faith and registered the instrument executed by you.
- **IMMEDIATE INDEFEASIBILITY** – good title is conferred on you immediately on registration of the forged transfer or other instrument regardless of its invalidity.

**Gibbs v Messer** – (Deferred Indefeasibility) - The facts of the case are as follows:
- Messer was the registered proprietor of Torrens Title land and left her Certificate of Title with her Solicitor for safe keeping.
- The Solicitor forged Messer’s signature on a transfer to Hugh Cameron (a fictitious person) and then registered the transfer.
- The Solicitor then prepared a mortgage from Cameron to the McIntire’s as security for a loan to Cameron. The McIntire’s then registered this mortgage but the Solicitor absconded with the money loaned to the non-existent Hugh Cameron.
- Messer then applies for the McIntire’s mortgage to be removed from the register.
- The Privy Council found in favour of Messer saying that the protection afforded by the Torrens Title legislation was confined to those who actually deal with the registered proprietor whose name is on the register.

Thus if you are dealing with a forger, you are NOT dealing with the registered proprietor.

**Frazer v Walker & Radomski** – later case – Privy Council preferred the doctrine of immediate indefeasibility. This case firmly established that the predominant section of the Real Property Act is s42 which point to the notion of immediate indefeasibility. The facts are as follows:
- In this case Mr & Mrs Frazer were the registered proprietors of Torrens Title land. Mrs Frazer borrowed money from the Radomski’s and as security gave them a mortgage and forged her husband’s signature on the mortgage.
- Radomski’s then registered the mortgage and Mrs Frazer defaulted on the loan. The Radomski’s exercised their power of sale under the mortgage and the property was sold to the Mr Walker who became the registered proprietor.
Mr Walker sought to have the Frazer’s removed from the property but Mr Frazer after realising what had occurred sought to have both the mortgage and the Radomski’s interest in the property removed from the register.

- The court found in favour of Mr Walker and indicated that the Torrens Title legislation was to be interpreted as supporting immediate indefeasibility.
- Note however that the court did not have to approve the doctrine of immediate indefeasibility to find in favour of Mr Walker as he HAD dealt with the registered proprietors of the mortgage, the Radomski’s. He hadn’t dealt with Mrs Frazer, the forger so the court COULD have relied on deferred indefeasibility but instead chose to affirm the doctrine of immediate indefeasibility.

**Breskvar v Wall** – (Immediate Indefeasibility) – the facts of the case are as follows:

- Breskvar’s were registered proprietors of Torrens Title land and gave a Mr Peatree their duplicate Certificate of Title (the only Certificate of Title in circulation) and a transfer signed by them as transferors.
- On the transfer that the Breskvar’s gave to Peatree, they left the name of the transferee blank as security for a loan to them (to avoid stamp duty on a mortgage document).
- Mr Peatree inserts the name of his grandson Mr Wall as the transferee who then becomes the registered proprietor. Mr Wall then enters into a contract to sell the property to Alban Pty Ltd.
- The Breskvar’s realise what has happened and lodge a caveat to prevent Alban Pty Ltd from registering its transfer.

- The court finds that on registration Wall becomes the registered proprietor however his title is defeasible because he participated in the fraud that enabled him to get the title.
- Even though Wall’s title is defeasible, upon registration the Breskvar’s cease to be the registered proprietors. (see Justice Menzies on pg64 of Module 2 Course Materials).
- Court says the Breskvar’s now have the ability to impeach Wall’s title which becomes a contest with the equitable interest of Alban Pty Ltd (because they have exchanged but the sale hasn’t been completed). This is a contest of two unregistered interests.
- The Torrens system is a system of title by registration NOT registration of title (see Barwick CJ, pg61 Course Materials). It is possible to obtain indefeasible title by registration of a void instrument.
- The courts support Immediate Indefeasibility (which has almost universal acceptance in Australia) over Deferred Indefeasibility however Frazer v Walker & Radomski did not expressly overrule Gibbs v Messer and nor did Breskvar v Wall.
- Rather than overrule Gibbs v Messer the Courts in Australia have tended to confine it to its facts, that is, where you are dealing with a fictitious person.
- A person who is not party to the fraud resulting in a forgery who has registered their interest has an indefeasible title. Cases that confirm a forged instrument does not preclude to operation of the doctrine of indefeasibility include:
  - **Mayer v Coe**
  - **MMI v Gosper**
- Forged instruments can also defeat indefeasible interests in land. The interests of a registered mortgagee will be extinguished by a forged discharge of mortgage (**Schultz v Corwill Properties Pty Ltd**).

**What attracts Indefeasibility?**

- **Mercantile Credit Ltd v Shell Co of Australia** – whether an option to renew the lease (contained within the lease) was indefeasible given the registration of the head lease.
- The Court found that the term of an instrument or dealing will attract indefeasibility provisions of the Torrens Title legislation as long as it relates to the interest in the land and in this case the option to renew the lease was held to be indefeasible.
- s129(1) of **Real Property Act 1900** (NSW) gives a person a remedy against loss or damage suffered from the operation of the Act however s129(2) lists a number of exceptions.
129  Circumstances in which compensation payable

(1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:

(a) any act or omission of the Registrar-General in the execution or performance of his or her functions or duties under this Act in relation to the land, or

(b) the registration (otherwise than under section 45E) of some other person as proprietor of the land, or of any estate or interest in the land, or

(c) any error, misdescription or omission in the Register in relation to the land, or

(d) the land having been brought under the provisions of this Act, or

(e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud, or

(f) an error or omission in an official search in relation to the land,

is entitled to payment of compensation from the Torrens Assurance Fund.

Exceptions to Indefeasibility

1. Fraud
   - A registered title is defeasible for Fraud
   - Must relate to the current state of title, fraud by a predecessor does not affect the title of the present registered proprietor
   - Two situations arise, the first is where the present proprietor has become registered, where the previous proprietor has been defrauded out of their registered interest, the law is clear – unless the fraud can be brought home to the present registered proprietor or agents, the present tile is immediately indefeasible
   - Second, is where the present registered proprietor has become registered in the face of an unregistered interest and claims to rely on their registered title to defeat the unregistered interest
   - Fraud is not defined in act, determined by the court, good definition in Assets Co LTD v Mere Roihi – wilful blindness to the presence of fraud (an abstention from enquiry for fear of learning the truth) is tantamount to actual fraud
     o There has to be wilful blindness to a fraud NOT just wilful blindness to the fact that someone else may hold an unregistered interest. In fact s43 of the Real Property Act says notice of an unregistered interest is NOT fraud for the purposes of s42.
   - The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest
   - Fraud brought home to the registered proprietor – a registered title is not defeasible for fraud where the fraud is exercised without the registered proprietors’ knowledge, by some for whose actions the register proprietor is not responsible
     o The fraud has to be committed by the person whose title you seek to impeach. The person making the claim to the land must be the victim of the fraud.
   - Latec Investments v Hotel Terrigal – in this case the subsidiary company (Southern Hotels) knew the mortgagee sale was fraudulent and thus their title as the new registered proprietor was defeasible.
   - Fraud in the context of TT means actual; fraud, moral turpitude, or something more than mere disregard of right of which the person sough to be affected had notice
   - To be an exception to indefeasibility doctrine, fraud must generally occur up to the time of registration (before the registered proprietor acquired the registered interest). In Bahr v Nicolay (No 2), post registration conduct by the registered proprietor may be considered on the issue of whether there is fraud by the registered proprietor. This approach was endorsed in Snowlong Pty Ltd v Choe but later rejected in Conlan v Registrar of Titles.
• **Fraud and Notice**
  • Section 43 (1) - (1) 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 registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct 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.
    - Appears to remove equitable notions of fraud from the Torrens System
  • S 82 – forbids notice of trusts to be recorded in the register, except in certain limited circumstances
  • S43 implies that notice, coupled with other factors, may be treated as fraud
  • In Aus, it is not fraud to purchase with notice of an unregistered interests (such as a lease or mortgage) and then, on becoming register proprietor, to invoke indefeasibility of title to defeat that unregistered interest
  • Adversely, it is fraud for a purchaser to refuse to recognise and unregistered interest where the purchase has taken not merely with notice of the interest but having given an assurance or acknowledgement that it will be preserved
  • Fraud by Agent – where the registered proprietor has become registered through the agents’ fraudulent activity, the agents authority binds the principal as to make the title indefeasible for fraud. However it is not defeasible unless the proprietor is infected by it or complicit in it
    - A test is where there is a connection between the task of the agent and the materialisation of the risk inherent in the task
    - Where the agent has knowledge of the existence of fraud, the agents knowledge is imputed to the principal
      - Exceptions exist where the fraud is of the agent

2. **In Personam Exception**
  • While registration of an interest may extinguish other unregistered interests personal rights of action can still survive – sometimes called “personal equities”.
  • The In Personam exception is based on personal claims against the registered proprietor (arising out of their conduct) which, if successful, will require the registered proprietor to divest him/herself of his/her registered interest, either in whole or in part, in favour of the claimant.
  • The personal rights are not confined to those based on equitable claims, common law claims are also recognised.
  • *Grgetic v ANZ Banking Group Ltd* – Court ruled that in personam claims could only be based on known legal causes of action or equitable causes of action.
    - A plaintiff cannot assert a right in personam unless the circumstances give rise to a known legal or equitable cause of action enforceable against the registered proprietor of the interest in question
    - A persons mere neglect in failing to discover the rights or interest of others does not create a personal equity enforceable by those others
  • If a registered proprietor contracts to sell land and the contract is capable of being specifically enforced (thus the registered proprietor becomes constructive trustee and purchaser has an equitable interest) then the registered proprietor CANNOT defend the action for specific performance on that basis that his/her title is indefeasible.
  • If a registered proprietor is a trustee, they cannot deny the beneficiary’s rights by claiming that he/she has an indefeasible title.
  • *Bahr v Nicolay (No 2)* – The facts of the case are as follows:
Bahr’s had licence of crown land in Western Australia and on the building of commercial premises were able to transform the licence into a crown grant and thus become the proprietors of the land.

To finance the building of the commercial premises, the Bahr’s entered into an agreement with Nicolay who was to purchase the property, grant Bahr’s a 3 year lease and then sell the property to them at the end of the 3 years.

Nicolay became the registered proprietor but then sold the land to Thompson who knew of the arrangement between Bahr & Nicolay, he expressly acknowledged this. Thompson confirmed in writing to the Bahr’s that he was required to sell the property back to them.

Later Thompson changed his mind and sought to rely on the register to defeat the claim to the land from the Bahr’s. Dishonest conduct by Thompson was found to have occurred AFTER he became the registered proprietor.

Thompson argued that he merely had notice of the Bahr’s interest and was not a party to the agreement to resell.

• Unanimously, the High Court found that Thompson did NOT have an indefeasible title.
• As Thompson had expressly acknowledged the Bahr’s rights in the contract and in a written letter to them after registration, all members of the court found in favour of the Bahr’s concerning the In Personam exception.
• Wilson & Toohey JJ thought that the undertaking to respect the Bahr’s claim made Thompson the constructive trustee. Mason CJ and Dawson J said the “matrix” of circumstances were sufficient to establish an intention to create an express trust. Brennan J thought that the acknowledgement of the Bahr’s rights in the contract between Nicolay and Thomson gave rise to a collateral contract.
• The conclusion of all judgements is that it was the actions of the registered proprietor himself which gave rise to the In Personam exception.

**MMI v Gosper** – The facts of the case are as follows:

- Mrs Gosper was the registered proprietor of land subject to a mortgage to Mercantile Mutual. Mr Gosper borrowed money from Mercantile Mutual and it was agreed that the loan would be secured by a variation of the existing mortgage over Mrs Gosper’s property.
- Mr Gosper forged his wife’s signature and arranged for a loan from MMI to himself. The security for the loan was by way of another variation of mortgage over Mrs Gosper’s property.
- After her husband’s death Mrs Gosper discovered what had happened. Mrs Gosper sought to have the mortgage discharged for the payment of the original $265,000 (amount of debt she knew about).
- MMI said it had registered the mortgage without fraud as the fraud was on the part of Mr Gosper and they were not implicated so they were entitled to indefeasibility.

The NSWCA held by majority that the mortgage was defeasible on the basis of an In Personam exception as MMI used the Certificate of Title to register the forged variation of mortgage without Mrs Gosper’s authority.

- This case is often criticised as MMI had no knowledge of the fraud and the personal equity Mrs Gosper relied on was not based on any known equitable or legal cause of action. The court did NOT find the bank had breached a fiduciary duty to Mrs Gosper.

**Story v Advance Bank** - Court of Appeal had to consider *in personam* exceptions in the context of a mortgage granted by a corporation to a bank, where the corporation was a ‘family’ company operated by Mr & Mrs Story. The facts are as follows:

- The loan was to Mr Story only with the mortgage being over land owned by the corporation.
- Mr Story forged his wife’s signature on the mortgage documents and Mrs Story claimed an *in personam* exception against the bank on the basis that the bank failed to make appropriate inquiries to determine that Mrs Story had indeed executed the mortgage.

The Court of Appeal ruled against Mrs Story with Gleeson CJ (Cripps J agreeing) stating that even if the bank had not made adequate inquiries of what was going on in the corporation “that does not produce the result that it is against conscience for the bank to rely upon its statutory rights” to an indefeasible title as to the mortgage.