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1. Torrens I: Indefeasibility and Exceptions

1.1 The essential features of Torrens Title

1.1.1 The Nature of Torrens Title

The fundamental concept of Torrens Title is that a person interested in dealing with a specific property may consult the Torrens Title Register and be satisfied without further inquiry, as to who is the owner of the property and as to have interests in the property.

The ***Real Property Act 1862 (NSW)*** introduced Torrens Title in NSW, and was replaced by the ***Real Property Act 1900 (NSW)***.

Under the Act, the Registrar-General shall cause a Register to be maintained for the purpose of the Act: **s 31B**:

- First schedule – name of the current registered proprietor – vendors name previously recorded and where purchaser's name, upon registration is recorded
- Second schedule - all other interests to property, interests which are capable of registration – mortgage, leases, restrictive covenants and easements.

1.1.2 Exchange of Contracts

It is usual conveyancing practice for the vendor to prepare a contract for sale of land, with a counterpart contract. The original is executed by the vendor and handed to the purchaser at exchange. The counterpart is executed by the purchaser and handed to the vendor at exchange.

It is conveyancing practice for a purchaser to pay a deposit at the time of exchange. However, exchange takes place when the original contract for sale of land and its counterpart are exchanged (not the payment of any deposit).

Upon the exchange of contracts, a purchaser obtains an unregistrable, equitable interest in the property.

- This simply means that the purchaser is entitled to go to the Supreme Court of NSW, Equity Division, to seek an order for the equitable remedy of specific performance of the contract.
 - The Vendor is entitled to obtain an order for specific performance against the purchaser. Both parties are bound by their contract.

The interest acquired by a purchaser on exchange of contracts is only an equitable interest insofar as the purchaser is entitled to the equitable remedy of specific performance to compel performance of the contract: **Tanwar Enterprise v Cauchi [2003]**

Upon completion or settlement, it is the time when the vendor delivers to the purchaser an executed transfer of the property being sold. It is conveyancing practice for the purchaser to simultaneously hand over to the vendor a bank cheque for the balance of the proceeds of sale owed by the purchaser to the vendor. It is normal practice for the vendor to hand to the purchaser not only an executed transfer but also the certificate of title.

- The delivery of these documents will then enable the purchaser to ultimately become registered

1.1.3 Lodgement in Registerable form

Purchaser should immediately lodge transfer, along with CT. When lodged it must be in registerable form – with correct first and second schedule

- Incorrect names on the new transfer will be rejected
- Cannot register a transfer that is not subject to easements or leases, if in fact it is subject to these dealings in the second schedule

Once the dealing has been lodged, the transfer will be registered. Registration should occur within 24 hours of Lodgement assuming the dealing is in registrable form.

1.2 Indefeasibility of Title

Torrens Title has been described as a system 'title by registration': **Breskvar v Wall (1971)**.

There are 3 sections of the *Real Property Act*, which are fundamental to the creation of Torrens Title in NSW. They are **ss 41, 42 & 43 Real Property Act 1900 (NSW)**. They provide:

Section 41 provides that a person obtains title by registration. In **Commonwealth v NSW (1980)**, the court observed that: 'it is not the parties who effectively transfer the land but it is the State that does so'

S 42 states that the title received at registration is indefeasible (not subject to being lost, annulled, or overturned).

Mayer v Coe (1968) (NSW)

Facts

Mrs Mayer had left her certificate of title with her solicitor for safekeeping. Unknown to Mrs Mayer, her solicitor forged her signature on a mortgage in favour of the equally innocent Mr Coe, who, believing that he was lending money to Mrs Mayer by way of first mortgage security, advanced the money to the solicitor Mrs Mayer.

The solicitor misappropriated the money and used it for his own purpose. After the mortgage in favour of Mr Coe was registered, Mrs Mayer became aware of what happened.

Held

The court concluded that because Mr Coe had obtained registration, and because Mr Coe was not a party to any fraudulent activity by Mrs Mayer's solicitor, Mr Coe was entitled to 'indefeasibility' immediately upon registration, even though he had obtained registration by lodging a forged mortgage. The fraud didn't matter because Coe was innocent (unaware of it). The agent was working outside what Mayer asked for – thus the fraud was not incumbent on the victim (Mayer)

Authority

Under Torrens Title, upon registration, a person who neither fraudulent nor the beneficiary of a fraud carried out on their behalf, is entitled to rely on **s 42 RPA** and assert indefeasibility of title, even though the dealings which they become registered was a forgery or otherwise procured by fraud.

The court observed that once Mr Coe obtained registration, under Torrens Title, his interest in Mrs Mayer's property had acquired the quality of 'indefeasibility'.

Authority

Once an interest is registered, that person has indefeasibility: **Mayer v Coe; ss 41 and 42 RPA**.

S 43 Real Property Act

S 43 RPA provides that, in the absence of fraud, a person who is taking an interest in a property under the provision of the act is to assume the correctness of the Register.

- Such a person does not need to be concerned as to whether or not the person who is registered is entitled to do so.

Deferred indefeasibility

The concept of '*deferred indefeasibility*' means that a person who registers a void dealing does not personally acquire indefeasibility in relation to the dealings registered. This was favoured in **Gibbs v Messer [1891]** and approved by 2 of 4 HC judges in **Clements v Ellis (1934)** (now rejected).

Immediate indefeasibility preferred

Frazer v Walker [1967], expressed a preference for 'immediate indefeasibility'. Thereafter in NSW, the courts expressed preference for the '*immediate indefeasibility*' approach: **Mayer v Coe (1968)**; **Schultz v Corwill (1969)**; **Story v Advance Bank (1993)**. The HC also gave obiter dictum approval to the 'immediate indefeasibility' approach in **Breskvar v Wall (1971)**.

Authority: This means, that upon registration, a person get "immediate" indefeasibility. **Mayer v Coe (1968)**; **Schultz v Corwill (1969)**; **Story v Advance Bank (1993)**.

It follows that indefeasibility, as used in **s 42** of the act, means *immediate indefeasibility*.