

Real Property Law
Autumn Semester 2007

Torrens Title: Indefeasibility of title and exceptions

Torrens Title

- In NSW there are two systems of land ownership- Old System Title and Torrens Title.
- Torrens Title now governs about 99% of the land in the state.
- This system of title allows ownership to derive from being registered, as opposed to the Old System where land was owned by the Crown and then the Crown would distribute the land by selling it.
- 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 who has interests in the property.**
- The Real Property Act 1862 introduced Torrens Title into New South Wales. That Act was then replaced by the **Real Property Act 1900.**
- **Under s 31B, the Registrar- General is obliged to create a separate folio or a certificate of title for each parcel of land that is governed by the Real Property Act.**
- **In the first schedule is entered the name of the current registered proprietor- where the vendor's name was previously recorded and where the purchaser's name, upon registration, is recorded.**
- **All other registered interests with respect to a particular property will be recorded in the Second Schedule. Interests which are capable of registration in the Second Schedule, include mortgages, leases, restrictive covenants and easements. Those in the First Schedule are subject to all interests in the Second Schedule.**
- **Torrens Title has been described as a system of 'title by registration' by Sir Garfield Barwick in the High Court case of Breskvar v Wall (1971)- He stated that "The Torrens system...is not a system of registration of title but a system of title by registration."**

Time line in Torrens Title

a) Exchange of contracts-

It is usual conveyancing practice for the vendor to prepare a contract for sale of land together with a counterpart contract. The original is executed by the vendor and handed to the purchaser at exchange (i.e. a 10% deposit). Exchange takes place when the original contract for sale of land and its counterpart are exchanged, as distinct from the payment of any deposit.

Upon exchange, a purchaser obtains an unregistrable equitable interest in the property (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).

It is this entitlement to obtain an order for specific performance that gives the purchaser an unregistrable equitable interest in the property from exchange of contracts (compelling the other party to complete the contract). The vendor is also entitled to this order- both parties are bound by their contract.

b) Settlement of the contract-

This is the time when the vendor delivers to the purchaser an executed transfer of the property being sold. **The purchaser will then simultaneously hand over to the vendor a bank cheque or cheques for the balance of the proceeds of sale owed by the purchaser to the vendor. The vendor will also hand over a certificate of title.** The delivery of these documents will enable the purchaser ultimately to become registered. Six to eight weeks after exchange, the parties will settle.

c) Lodgement in registrable form-

A purchaser then immediately lodges the transfer accompanied by the certificate of title, with the registrar general. A dealing when lodged must be in registrable form- i.e. the name of the transferor in a transfer must be identical to the name of **the registered proprietor in the First Schedule.**

A dealing is not considered to be in registrable form when:

- The name of the mortgagor in a mortgage, or the name of the lessor in a lease does not coincide. Eg. The registered proprietor might be 'Mary Smith', but in the transfer she is lodged for registration as "Mary Ann Smith", the register may be declined.
- A transfer is lodged for registration which is not expressed to be subject to, for example a registered lease or easement, in circumstances where such a lease or easement is registered in the Second Schedule of the certificate of title. Until the transfer is remedied by expressly stating that it is subject to the said lease or subject to the said easement, the Registrar- General will decline to register the transfer.

d) Registration of the transfer-

Once the dealing has been lodged, the transfer will be registered. The vendor's name will be removed from the register and is replaced by the purchaser's. After all certificates of Title in NSW are recorded electronically, registration should occur within 24 hours of lodgment, assuming the dealing is in registrable form.

Indefeasibility of title

The register is basic to the Real Property Act-

S 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.

The Commonwealth v NSW (1980) -

Isaacs and Rich JJ "It is not the parties who effectively transfer the land but it is the State that does so, and in certain cases more fully than the party could."

S 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...

The title received at registration is indefeasible

Mayer v Coe (1968) –

Mrs. Mayer left her certificate of title with her solicitor for safekeeping. The solicitor forged Mayer's signature on a mortgage in favour of the equally innocent Mr. Coe. He believed that he was lending money to Mayer by way of first mortgage security, advanced the money to the solicitor. The solicitor misappropriated the money and used it for his own purposes. After the mortgage in favour of Mr. Coe was registered, Mrs. Mayer became aware of what had happened. It was concluded that because **Mr. Coe had obtained registration, and because he was not a party to any fraudulent activity by Mayer's solicitor, Mr. Coe was entitled to 'indefeasibility' immediately upon registration, even though he had not obtained registration by lodging a forged mortgage.**

NOTE:

Under Torrens Title, upon registration, a person who is neither fraudulent nor the beneficiary of a fraud carried out on their behalf is entitled to rely on s 42 of the Real Property Act 1900 and assert indefeasibility of title, even though the dealing by which they became registered was a forgery or otherwise procured by fraud.

S 43 Purchaser from registered proprietor not to be affected by notice

(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.

This section of the Act provides that in the absence of fraud, a person who is taking an interest in a particular property under the provisions of the Real Property Act 1900 is to assume the correctness of the register when dealing with the registered proprietor of any estate or interest in the property. Such a person does not need to be concerned as to whether or not the person who is registered was entitled so to be.

