

TOPIC 6: INDEAFESIBILITY IN THE TORRENS SYSTEM

Indefeasibility of title

- Under Torrens, indefeasible title means that at the time of registration, the registered proprietor of an interest in land receives unassailable rights to the land in respect of which they are registered

Meaning of “indefeasible title”

- The Torrens system operates upon the fundamental principle that registration confers an “indefeasible title”
 - **Indefeasible: must be registered**
- Indefeasibility of title is the **immunity** from attack by an adverse claim to the land which the registered proprietor enjoys
 - Upon registration of an interest it automatically acquires **statutory protection**
 - The technical meaning of indefeasibility is **indestructibility or inability to be made invalid**
- A registered holder will not be affected by the **doctrine of notice** and the **nemo dat non habent rule**
- It does not mean that the registered interest is completely indestructible:
 - (a) the security that the Torrens system provides is not **absolute**: all registered interest holder will take subject to those **encumbrances which have already been**, or which may in the future be registered on the title;
 - (b) a registered interest holder is fully capable of alienating his or her interest and, once a subsequent transfer of the interest is registered the subsequent registration will **defeat** the prior registration; and
 - (c) the indefeasibility of title conferred upon a registered interest holder is subject to an extensive range of statutory and non-statutory **exceptions** in all states

Paramountcy Provisions

- The statutory provisions which, in combination, have conferred the indefeasible status upon a registered interest holder are known as the “paramountcy provisions.” In TLA (Vic):
 - S 40: effect of registration;
 - S 41: certificates of title are **conclusive** evidence of title;
 - S 42: **conferral** of indefeasible title upon registration;
 - S 43: abolition of the **doctrine of notice**; and
 - S 44: the effect of **fraud**

- Paramountcy provisions represent the core of the Torrens legislative provisions in each State
- Provisions basically provides three forms of **protection**:
 - Priority over unregistered rights;
 - Protects registered proprietors from the effect of notice; and
 - Protection from interference with possession
- Privy Council in case of *Frazer v Walker*: “it is these sections [42-44] which, together....confer upon the registered proprietor what has come to be called ‘indefeasibility of title’. The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The conception is central in the system of registration”

Meaning of section 40(1):

Section 40: Instrument no effectual until registered
 s 40(1): “Subject to this Act no instrument until registered as in this Act provided shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature”.

- **Strict reading: no interest can exist prior to registration**
- Unregistered interest do exist under TS - other provisions in statute recognises unregistered interests
- Registered interest is subject to covenants/conditions in instrument or prescribed by the TLA or implied in a similar instrument

Section 40(2)
 “Every instrument when registered shall be of the same efficacy as if under seal and shall be as valid and effectual to all intents and purposes as a deed duly executed and acknowledged or other appropriate form of document.”
 Registered instrument is regarded as a deed

Meaning of section 41:

S 41: Certificate to be conclusive evidence of title

No folio of the Register under this Act shall be impeached or defeasible by reasons or on account of any informality or irregularity in any application or instrument or in any proceedings previous to the creation of the folio or the making of any recording on it; and every folio of the Register shall be received in all courts as **evidence** of the particulars recorded in it and all the recordings of those particulars in the Register, and **shall be conclusive evidence** that the **person** named in the folio as the proprietor of, or having any estate or interest in, or power to appoint or dispose of, the land described in the folio is seised or possessed of that estate or interest or has that power

- Prior irregularities does not make present title indefeasible
- **Section 41**, the evidentiary provision, sets out every Crown grant or certificate of title is to operate as **conclusive evidence of the proprietorship existing** in a particular folio of land
- **Section 41** endorses the fact that Registrar provides conclusive evidence of title
- Prospective purchasers can rely upon the accuracy of the register

Meaning of section 42(1)

S 42: Estate of registered proprietor paramount

S 42(1): "Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land **subject** to such **encumbrances** as are recorded on the relevant folio of the Register but absolutely **free** from **all other encumbrances** whatsoever, except—

- a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
- b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

• **General rule of indefeasibility**

- The effect of **s 42(1)** may be summarised as follows, namely that:
 - the registered proprietor acquires a **guaranteed statutory title** and will only be subject to those encumbrances actually recorded on the folio of the Register
 - Registered proprietor is free from other encumbrances (except **s 42(2)**)
 - **Registered interest takes priority**

- **Section 42(1)(a)-(b)** must be considered as exceptions:
 - **S42(1)(a)** – indefeasible title is not given where there is a certificate in existence over the same piece of land (the first certificate takes priority)
 - **S42(1)(b)** – indefeasibility not given if land is given wrong description

Meaning of section 42(2)

Section 42(2)

Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered **instrument shall be subject to**—

- (a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;
- (b) any rights subsisting under any adverse possession of the land;
- (c) any public rights of way;
- (d) any easements howsoever acquired subsisting over or upon or affecting the land;
- (e) the interest (but excluding any option to purchase) of a tenant in possession of the land;
- (f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-seven of the **Local Government Act 1958**, section 158 of the **Water Act 1989** or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette

notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register

- **Section 42(2)** provides a further exception to the primacy of the registered proprietor's title as established in **section 42(1)**
- Where an interest is classified under sub **sections (a)-(f)**, it is described as a **paramount interest** and all registered interests must take subject to paramount interests
- Paramount interests are exceptions to indefeasibility of registered title
- Paramount interests remain enforceable against all registered interest holders despite the fact that they have not been registered/recorded on the folio