

## Topic 6: Indefeasibility in the Torrens System

The Torrens system operates upon the fundamental principle that registration confers an 'indefeasible title'. The term is not actually used within the legislation, but it is a term which has a strong foundation in the Torrens system.

- The courts have used a variety of phrases to describe this quality of the registered title, including 'unimpeachable' (*Assets Co Ltd v Mere Roihi*), 'unexaminable' (*Boyd v Mayor of Wellington*) and 'conclusive'; *Clements v Ellis*.
- (i) Difference between torrens and deeds registration system: under DRS it did confer upon different forms of title, and if you were registered you had a higher priority than those who were not registered or who registered at a later date.
  - The term has been more or less incorporated through the insertion of the so called 'paramountcy' provisions. The 'paramountcy' provisions are the provisions which set out the most positive statement of indefeasibility.
    - If there is a defect in the way you acquire the title, once its established that you have registered your interest then your title has indefeasibility and creates a new good title. Assuming the certain statutory and non-statutory exceptions not applying.

In Victoria the paramountcy provision provides that, notwithstanding the existence of any other person of any estate or interest which, but for this Act may be held to have priority, the registered proprietor of any estate or interest in the land shall, except in the case of fraud and subject to other various exceptions, hold the land, estate or interest subject only to the encumbrances, estates or interests recorded in the folio in the Register; s42(1) TLA.

### Torrens System Objectives

Registration under the Torrens system has three basic objectives, namely to:

- Provide a register from which persons who proposes to deal with land can discover all the facts relevant to the title;
- Ensure that a person dealing with land which is registered is not adversely affected by any defects in the vendor's title which do not appear on the register;
- Guarantee the conclusiveness of the register and to provide adequate compensation to any person who suffers loss as a result of this guarantee
- Once registered a title holder acquires 'indefeasibility' of title whereby they gain a conclusive title subject to other interests registered on that title and established statutory and non-statutory exceptions.

### Meaning of 'Indefeasible Title'

The fundamental principle of Torrens is that registration confers an "indefeasible title".

- It means that at the time of registration, the registered proprietor of an interest in law receives unassailable (indestructible) rights to the land in respect of which they are registered.

### **General Rule**

Upon registration under the Torrens system, an interest holder cannot have his or her interest defeated by an unregistered interest, even where the interest holder register with notice of the existence of the unregistered interest.

## Exceptions

- I. The security that the Torrens system provides is not absolute: all registered interest holders will take subject to those encumbrances which have already been, or which may in the future be registered on the title;
- II. 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
- III. 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.

Indefeasibility under the Torrens system is a relative concept: it refers to the fact that if a title is examined or attacked at a given point of time, it cannot be defeated or annulled.

### *Paramountcy Provisions – s42 & s43*

The statutory provisions which, in combination, have conferred the indefeasible status upon a registered interest holder are known as the ‘paramountcy provisions’:

#### *Section 40(1) – Effect of Registration*

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Meaning: Sets out where capable of being registered, the benefits of registration will not be conferred until the instrument is actually registered.

- Sets out that the benefits of registration shall not be conferred upon an instrument creating, extinguishing, or passing an estate or interest in land until that instrument is registered.
- **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-**
  - (i) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
  - (ii) 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.

#### *Section 41 – Certificates of Title are Conclusive Evidence of Title*

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Meaning: Certificate of title is to operate as conclusive evidence of the proprietorship existing in a particular folio of land.

- This will be the case even where it is alleged that an informality or irregularity in an application, instrument or proceedings existed prior to the creation of the folio.

### Section 42(1) – Conferral of Indefeasible Title upon Registration

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**Meaning:** The registered proprietor of property or an interest therein shall, except in the case of fraud, hold the land subject only to the impediments noted on the register and those specifically preserved by the Statute.

- **Effect:** may be summarised as follows, namely that:
  - (i) Once registered, the registered proprietor will have priority over the land despite the existence of other interests;
  - (ii) The registered proprietor will only be subject to those encumbrances actually noted on the register and the encumbrances set out in sub-ss (a) and (b); and
  - (iii) Fraud will vitiate the priority of a registered proprietor.

(1) 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 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.

- **The provision ensures that a registered holder acquires a guaranteed statutory title, subject only to other registered encumbrances and established statutory and non-statutory exceptions.**
- The indefeasibility of registered title refers to the fact that every time the title is registered, it is recreated anew and acquires a greater level of registered protection than it would have otherwise received in its unregistered form.
- Barwick CJ in *Breskvar v Wall (1971)* at 385-6 made the following comments:
  - **“The Torrens system of registered title of which the Act is a form is not a system of registration of title, but a system of title by registration.** That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.
    - What his saying is that the torrens system of registration is not an administrative registration system, but rather a system of title by registration which allows for title to be created by registering an interest in land.

- Registration of title effectively creates a new 'indefensible' title founded upon the conditions underlying the registration.
- In *Tara Shire Council v Garner* [2003] Atkinson J noted that:

"As consequences of indefeasibility, purchasers of land are able to rely upon the details of the register to confirm that the person from whom they are purchasing has the capacity to transfer the land. In addition, indefeasibility permits registered proprietors to hold the land with certainty that their title cannot be impugned by actions taken in relation to the land by a previous owner. "

### Section 42(2) – Paramount Interest Exceptions

Further provides exception to primacy of the registered proprietor's title as established in s42 (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.
  - (i) Paramount interests operate as an exception to the indefeasibility of registered title & remain enforceable against all registered interest holders, despite the fact that they have not themselves been registered on a particular land folio.

### Section 43 – Abolition of the Doctrine of Notice

The purpose of s 43 is to abolish the Common Law Doctrine of Notice.

- Meaning: As soon as a purchase is registered, the purchaser will take free from any outstanding unregistered interest, even if he or she has notice of its existence prior to registration.
  - (i) In terms of s 43, mere knowledge that a prior interest existed will be insufficient to constitute such fraud.
    - "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 land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual 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."

### Section 44 – The Effect of Fraud

s54 sets out expressly that any transaction which is procured or made by fraud shall be void as against the person defrauded.

- The meaning of this is such that it qualifies the effect of s 44(1) by noting that nothing in the Act is to be read so as to deprive a bona fide purchaser for valuable consideration of an estate or interest.
  - (i) On the wording of s 44(2), it seems that, even where the proprietor from whom the *bona fide* purchaser received the estate is proven to have been registered through fraud, the title of the *bona fide* purchaser will not be invalidated.

### Combined meaning of s 44(1) and (2)

- The combined effect of s 44(1) and (2) can be summarised as follows:
  - (i) Any registration of title shall be void as against any person who has been defrauded, and no party who is a subject to the fraud shall receive the benefit of registration.
  - (ii) The court will uphold the registration, even if acquired by fraud, if voiding the registration has the effect of interfering with an interest acquired by a *bona fide* third party purchaser.

### *The debate between immediate and deferred indefeasibility*

Immediate and deferred indefeasibility relates to the interpretation of fraud

- It relates to the point in time at which the benefit of indefeasibility is extended to a registered proprietor.
  - (i) **Immediate indefeasibility (courts prefer this approach):** suggests that it must be the registered proprietor that has committed the fraud, which means they still have indefeasibility of title. **Fraser v Walker**
  - (ii) **Deferred Indefeasibility:** Any element of fraud in the transactions, will taint the indefeasibility of the registered proprietor. **Gibbs v Messer**

The essence of the controversy over deferring indefeasibility has been whether registration of an instrument that is void is capable of passing a good title to the registered proprietor.

### IMMEDIATE INDEFEASIBILITY

Upon registration, registered holder immediately acquires protection of registration, subject to statutory fraud which they themselves may have committed

- *Fraser v Walker (Privy Council)* → rejected deferred indefeasibility and endorsed an 'immediate' indefeasibility interpretation

### DEFERRED INDEFEASIBILITY

Upon registration, registered holder immediately acquires protection of registration, subject to any statutory fraud in overall transaction even if it is not brought home to registered holder specifically

- *Gibbs v Messer (Privy Council)* → appears to endorse deferred indefeasibility; indefeasibility is deferred in circumstances where transaction creating registration is tainted by fraud
  - CAN BE SEEN AS UNUSUAL EXCEPTION: registered proprietors may only claim protection of indefeasibility where it is established that they took title from a real person

*Breskvar v Wall (High Court)* → Torrens system is a system of title by registration, not a system of registration of title. Thus, each title effectively confers a new title subject to any encumbrances and established exceptions. Approves immediate indefeasibility

*Mercantile Credits v Shell Co* → scope of protection given by registration extends to include all associated interests. Thus, a registered lease will protect all properly created and attached covenants including options to renew because Act deals with 'registrable instruments'