

# Topic Three – The Principle of Indefeasibility

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## The Principle of Indefeasibility

Core meaning of indefeasibility is security. A registered owner's title is indefeasible in two senses, as it cannot be set aside on the ground that he was not entitled to it (except in case of fraud), nor it is not subject to any prior interests (other than known categories of exceptions).

Once interest is registered, it attracts immediate indefeasibility despite any invalidity in the transfer. (**Breskvar cf. Gibbs**) The RP will take interest free from any encumbrances unless an exception to indefeasibility applies: **s 42 TLA**.

### Key Provisions in the TLA

#### Sterility Provision

**s 40**: Title is only conferred by registration of instruments; the instruments themselves don't confer title.

#### Conclusive Evidence Provision

**s 41**: Every folio (CoT) is conclusive evidence of the particulars recorded in it. It is conclusive evidence that the RP is the person named on the folio.

#### Paramount/Indefeasibility Provision

**s 42 (1)**: RP shall, except in case of fraud, hold land *subject to encumbrances* recorded on the folio of Register but free from all other encumbrances.

**S 42 (2)**: Land which is included in any folio of the Register or registered instrument shall be subject to a *range of exceptions*.

- a) Reservations, exceptions, conditions or powers of Crown Grant
- b) Rights subsisting under adverse possession
- c) Public rights of way
- d) Easements
- e) Interests (except option to purchase) of tenant in possession
- f) Unpaid land tax, unpaid rates or other charges.

#### Notice Provision

**s 43**: No person dealing with the RP is affected by notice, actual or constructive of any trust or unregistered interest. The knowledge or notice of such trust or unregistered shall not be imputed as fraud.

#### Purchaser Protection

**s 44**: Any amendments to register procured by fraud shall be void as against the person defrauded, and no party privy shall take any benefit.

- **(2)** Protects bona fide purchasers for value without notice.

## Immediate and Deferred Indefeasibility

### Immediate Indefeasibility (Breskvar v Wall)

- Good title conferred immediately on registration, curing any fraud, so long as wasn't fraudster doing so.
- Any other finding suggests purchaser has to go behind the Register.
- Prevailing doctrine in Australia since **Frazer; Breskvar**.

### Deferred Indefeasibility (Gibbs v Messer)

- Title of a purchaser who registers a forged instrument is defeasible.
- However, if *before title is set aside*, he passes instrument to a subsequent purchaser who *registers in good faith*, their title is indefeasible.
- Indefeasibility 'deferred' until later purchaser registers without fraud.

### Impact on Competing Interests

- Registered v Registered:
  - Priority to the first interest lodged for registration **(s 34(1))**
    - Registrar has power to register instruments in order that gives effect to *party's intentions*.
- Registered v Unregistered
  - RP has title free of unregistered interests unless exception **(s 42)**
- Unregistered v Unregistered
  - Issue resolved according to priority rules.

## The Scope of Indefeasibility

However, per **Mercantile**, just because a document has been registered doesn't give indefeasibility to every right it creates. Indefeasibility is only attached to covenants which are '*intimately connected with*' the interest, with personal covenants never gaining indefeasibility.

### Leases

- A *right to renew a registered lease* is intimately connected to the estate of the lessee and thus attracts the quality of indefeasibility. **(Mercantile)**
- In contrast, an *option to purchase the land* is a separate and independent covenant that does not attract the benefits of indefeasibility because it does not concern the tenancy not its terms.
- Only *specifically enforceable covenants* are indefeasible **Mercantile per Barwick CJ** (cf. illegal covenants)

## Mortgages

### Two Types

- Traditional Mortgage – The mortgage specifies the amount loaned and contains an acknowledgement that the money has been advanced.
  - Prima facie evidence of debt
  - Sufficient evidence of payment of loan
- All Moneys Mortgage – Mortgage secures money generally owing from time to time and relies on off-register documents to give rise to the debt.
  - Controversy over whether the covenant to repay (integral to the security interest) attracts benefits of indefeasibility, as the Off Register Loan Agreement is not registered on title.

### Concerns

- Does the protection of indefeasibility extend:
  - To the covenants of a “traditional” mortgage?
  - To covenants in collateral loan agreement ‘all-moneys mortgage’?
  - To the *personal covenant to repay* so that it can be enforced when the value of the property is insufficient to cover the debt?
    - NSW: Registration of a fraudulent mortgage is effective to charge the land with the debt, but does not make the registered owner personally liable for a shortfall: **Grigic**
    - Victoria: Registration of a fraudulent mortgage validates the covenant to pay and therefore makes the landowner personally liable: **Pyramid**
- Currently, this area of law is unsettled in Victoria, and is now impacted by specific provisions of the TLA that render a mortgage defeasible if certain identity verification procedures are not followed (*See Topic 4*).