

Torrens System vs General Law System of Title Summary

Deeds Registration System:

- Old system – established a centralised register with the specific aim of recording instruments or dealings over old title land.

Aim:

- Reduce the risk that a purchaser might acquire an interest in land without knowledge of an earlier inconsistent interest.

Old Title Land:

- Does not come within the application of the Torrens system because it was issued by the Crown prior to the introduction of the Torrens system and it has been converted to Torrens title land.
 - o To verify ownership, it is necessary to trace, in a complete and unbroken chain, all the land transactions which have affected the land since the time of the initial Crown grant.
 - The relevant rule for determining the quality of a vendor's title was "nemo dat non quod habet" [one cannot give what one does not have].
 - Thus, any defect in the vendor's title meant the purchaser would acquire only a defective title – or, if any of the instruments in the chain of deeds was void for any reason, the purchaser would obtain no title at all.
 - This meant that general law title was derivative and historical – each owner's title in the chain depended on every former owner having had good title and every instrument of conveyance having been valid and enforceable.
 - Chain includes all deeds creating interests in the land along the way
 - ❖ Deeds of conveyance: vendor to purchaser
 - ❖ Deeds of mortgage: mortgagor to mortgagee
 - ❖ Deeds of reconveyance: mortgagee to mortgagor
 - ❖ Deeds of grant (easements covenant etc)
 - ❖ Deeds of lease
 - Examples of defects:
 - ❖ A prior encumbrance created otherwise than by a deed in the chain
 - ❖ A forged deed of conveyance/mortgage/reconveyance
 - ❖ A vendor/mortgagor/mortgagee without title (EG: On insolvency title to the insolvent party's property vests in the trustee in bankruptcy or liquidator, as the case may be)
 - ❖ A court order vesting the property in someone else (EG: An order of a matrimonial court)
 - o The English courts developed a rule that it was acceptable to search back to a documentary starting point of not less than 60 years = good root of title.
 - In Victoria it is only necessary to search back 30 years.
- In Victoria, the deeds registration system was deactivated in 1999 and since then, it has not been possible to register an old title document.

Searches Required:

- Careful inspection of each deed to ensure the land description is identical from Crown Grant to last deed in the chain.
- Some earlier deeds may have severed the original crown allotment into two smaller parcels, and started a new sub-chain: in such cases a Covenant to Produce requires the vendor and its successors to produce the older part of the chain on request – this Covenant to Produce will have to be enforced, and the older part of the chain inspected at the place where it is located.
- Careful inspection to ensure each deed is executed.

- Company searches to ensure any company vendor/mortgagor/mortgagee in past deeds properly affixed its seal.
- Bankruptcy searches on each earlier vendor.
- Court searches to ensure no vesting orders against any vendor.

Intervention of Equity:

- Purchaser for value without notice of a prior *equitable* interest affecting a vendor's title took legal title to the vendor's land free from the equitable interest.
- Notice could be actual notice or constructive notice.
- Limited value in ameliorating the "nemo dat" principle.
- Only applied to prior equitable interests.
- If a vendor had no title to give at all, or if the deed of conveyance was void as a forgery, or if there was a prior legal encumbrance affecting the vendor's title, then the purchaser for value without notice still acquired no title, or only a defective title.

Registration of Deeds:

- Until 1999, memorials of deeds affecting interests in general law land in Victoria could be registered with the Registrar General under Part I of the Property Law Act 1958
- This register can be searched to help purchasers identify whether deeds were missing from the vendor's chain
- This is registration of title: Registration does not affect the quality of the vendor's title, which is still subject to any defects which exist under the general law

Disadvantages when Compared to the Torrens System:

- Expensive investigation of title, requiring the conveyancing solicitor to look behind the current deeds to which the vendor is party to ascertain whether any fraud, prior encumbrance or other circumstance in the past affected any prior conveyance in the chain of the vendor's title
- Insecure title acquired by the purchaser – remained vulnerable to defeasance by anyone with an earlier claim over the same land

Torrens System

- System of title by registration, not registration of title – **s40 Transfer of Land Act 1958 (VIC)**.

Objectives:

- Improving the process of title investigation.
 - o Torrens proposed a system of independent titles whereby upon each conveyance, the land would be surrendered to the Crown which would then re-grant it to the purchaser. This removed the need to retrospectively investigate title and embraced the notion that each new title would confer indefeasibility upon the holder.
 - o The framework of the new system was that a single document evidencing title for each parcel of land, known as the certificate of title, would replace the old chain of title. This single document would be held by the Registrar-General and would be available for public inspection.
- Providing registered interest holders with a greater guarantee as to their security of title.

Characteristics:

- The Register:
 - o Records all parcels of land coming within its application.
 - o For each parcel of land, the Register creates a folio describing the land to which it relates and the estate or interest held in the land by the named proprietor or owner.
- Registered Proprietor: Person recorded for the time being in the Register as the owner of an estate or interest in Torrens land.

- Registerable Interests:
 - o Registration under the Torrens system is not compulsory.
 - o Include:
 - Fee simple and life estates.
 - Mortgages.
 - Easements.
 - o Cannot register an interest under trust.
 - o Legal title to an estate or interest in Torrens land (subject to some exceptions) is effectively
 - Divested from the registered proprietor transferring an estate or interest.
 - Vested in the transferee upon the Registrar of Titles registering the transferee as the new registered proprietor.
 - o Legal title to an estate or interest in Torrens land at any point in time is proved simply by searching the folio of the Register for that land
- Paramount Interests:
 - o Interest immune from the effects of registration:
 - Easements.
 - Rights acquired under adverse possession.
 - Tenants in possession.
 - Rates.
 - Taxes.

Indefeasibility of Title:

- Once a title holder is registered under the Torrens system, they will acquire an indefeasibility title.
- Indefeasibility of title: The registered holder acquires a conclusive and secure title subject only to other interests registered on the title, statutory fraud and other established statutory and non-statutory exceptions.
- The only circumstance in which a former registered proprietor can set aside the registered title of a current registered proprietor and so be restored on the register as registered proprietor, is where registration of the current registered proprietor was obtained by actual fraud on the current registered proprietor's part or by his or her agent.
 - o No other principle of law or equity applies to defeat the statutory title of a registered proprietor.
- A registered holder will not be affected by the doctrine of notice.
- **s42(1) Transfer of Land Act 1958 (VIC).**

Principles:

- Mirror Principle: The register mirrors accurately and completely the current state of the title - **s41 Transfer of Land Act 1958 (VIC).**
- Curtain Principle: Purchasers can rely on the register and need not investigate how the grantor acquired her registered title - **s43 Transfer of Land Act 1958 (VIC).**
- Insurance Principle: Indemnity given to anyone sustaining loss (whether by deprivation of land or otherwise) by reason of - **s110(1) Transfer of Land Act 1958 (VIC):**
 - o Land being brought under the Act;
 - o Amendments to the Register;
 - o Errors omissions or misdescriptions in the Register;
 - o Loss or destruction of documents at the titles office;
 - o Omissions, mistakes or misfeasance by the Registrar;
 - o Exercise of power by the Registrar (other than loss to a person who is party or privy to the application for the exercise of that power)
- Indemnity Principle: The state indemnifies loss caused by error or fraud in the operation of the system.

Statutory Indemnity and Compensation:

- Allocation of risk
 - o Purchasers have a high degree of protection under the Torrens System.
 - o Current registered proprietor's bear the risk of being disentitled through error, fraud or accident.
 - o State indemnifies person incurring loss by fraudulent or erroneous entries in the register or by the operation of the rules of the Torrens System.
- Action to enforce indemnity brought against the Registrar as nominal defendant – **s110(2) Transfer of Land Act 1958 (VIC)**.
- No indemnity if the loss was caused or substantially contributed to by the fraud neglect or willful default of the claimant's solicitor or agent or the solicitor or agent of the person from whom the claimant derives title (if the claimant is not a purchaser for value) – **s110(3) Transfer of Land Act 1958 (VIC)**.

Limit in Indemnity:

- **S110(4)(a) Transfer of Land Act 1958 (VIC)**
 - o Where the Register is not amended, the value of the estate or interest at the time when the error omission mistake or misfeasance which caused the loss was made.
 - o Addressed to situation where the Register does not accurately record an interest, and it cannot be rectified due to the principle of indefeasibility (IE: There is an interest overlooked due to error, omission, mistake or misfeasance without fraud).
 - **s5(1)(d) Limitation of Actions Act 1958:**
 - ❖ Action cannot be brought more than six years after cause of action accrues, which is when the Register was amended
- **S110(4)(d) Transfer of Land Act 1958 (VIC)**
 - o Where the Register is amended, the value of the estate or interest immediately before the time of amendment.
 - o Addressed to situation where the Register has been changed due to fraud (EG: Registration of a forged instrument), and the change cannot be rectified due to the principle of indefeasibility.
 - o The limit is the value of the interest at the time the Register was wrongly changed.
- **S110(4)(c) Transfer of Land Act 1958 (VIC)**
 - o In the case of a fraudulent mortgage where the mortgagee has complied with section 87A or 87B, the principal amount together with any interest, at a rate not exceeding the Bank Accepted Bills rate.
 - o ss.87A requires a mortgagee to take reasonable steps to verify the identity of the mortgagor –
 - If not, the mortgage is liable to be removed by the Registrar (and no indemnity for mortgagee).
 - If yes, and the mortgage is nonetheless a fraud, then the mortgage is enforceable, but the mortgagee cannot recover more than is provided for in s.110(4)(d) – cf s.87D & 87E (and indemnity for mortgagor, but subject to the limit in s.110(4)(d)).
 - o The upper limit is still the value of the interest at the time the Register was wrongly changed to record the fraudulent mortgage.

Breskvar v Wall (1971) 126 CLR 376

High Court of Australia

FACTS:

- Mr and Mrs Breskvar were the registered proprietors of certain land in Queensland. As a means of securing a loan of \$1,200 they executed a blank transfer and handed the duplicate certificate of title to the respondent Petrie.
- The transfer was void under the provisions of the Stamp Act 1894 (Qld). Petrie inserted Wall's name as transferee and registered the transfer.
- Wall, who was a party to Petrie's fraud, then sold the land to Alban Pty Ltd (the third respondent) which bought in good faith and without notice of the fraud.
- When the Breskvar's discovered Wall had become registered as proprietor, they lodged a caveat prohibiting further dealings with the land.
- Alban was, therefore, unable to register its transfer. The Breskvar's sought a declaration that the transfer to Alban as ineffective.

ISSUE:

- Could the Breskvar's have the transfer to Alban set aside to enable them to recover the land?
- Did Alban's later equitable interest defeat the Breskvar's earlier equitable interest?

HELD:

- As a consequence of registration, Wall obtained good title to the land as against the world, except the Breskvar's, who had an equity to have the registration set aside.
- Before the assistance of equity could be invoked, however, Alban as a bona fide purchaser in good faith, and for value, acquired an equitable interest in the land.
- Since the Breskvar's armed Petrie with the means of perpetrating the fraud (the blank transfer and duplicate certificate of title they lost their priority.
- As six years had elapsed since the cause of action had accrued, the Breskvar's were not entitled to compensation from the assurance fraud.

Frazer v Walker and Radomski [1967] 1 AC 569

Privy Council

FACTS:

- The Frazer's were the registered proprietors of farm land which was subject to a mortgage. Professing to act on behalf of herself and her husband, Mrs Frazer borrowed £3000 from Radomski, the second respondent. This loan was secured by a registered mortgage over the land, the earlier mortgage having been discharged.
- Mr Frazer's signature on the second mortgage was forged. Mrs Frazer failed to repay the loan to Radomski, and he exercised his power of sale, selling the property to Walker.
- Throughout these transactions, Radomski and Walker acted in good faith. Mr Frazer was alerted to the fraud when Walker registered his transaction. He sought possession of the property on the grounds that his signature was a forgery and that the mortgage and all subsequent transactions were void.

ISSUE:

- Could Mr Frazer recover possession of the property on the grounds that his signature on the mortgage was a forgery?

HELD:

- The action for recovery of possession did not fall within any of the recognised exceptions to indefeasibility of title in the Land Transfer Act 1952 (NZ).
- The appellants claim, therefore, was rightly dismissed.
- Nevertheless, the registered proprietor had acquired his interests under a void instrument (the forged mortgage), the registration of the transfer was effective to vest title in him.

Gibbs v Messer [1891] AC 248

Privy Council

FACTS:

- The registered proprietor of land, Messer, went away with her husband and left her certificate of title with her solicitor, Cresswell.
- Cresswell forged a transfer of the title in favour of a fictitious person called Hugh Cameron who was eventually registered as the proprietor of the land.
- Cresswell then borrowed money from the McIntyre's and secured it by way of mortgage which was fraudulently prepared from Hugh Cameron to the McIntyre's.
- The mortgage was registered and Cresswell absconded with the mortgage money.

ISSUE:

- Whether the McIntyre's held an indefeasible title in the mortgage given that the registration had occurred pursuant to a fraud involving a fictitious person.

HELD:

- Messer be reinstated as registered proprietor without the mortgage burden.