

# Topic 1. TORRENS TITLE: Indefeasibility & Exceptions

## 1.1 TORRENS TITLE

- Torrens title is the predominant system of land ownership throughout Australia. It is a creature of statute as it was created with the *Real Property Act 1862*, which is now replaced by the *Real Property Act 1900*.
- It is essentially about Title by registration. 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 have interests in the property.
- Contrasted to ‘Old system Title’ – whereby you may or may not choose to register that title, as you register title from the vendor who previously received it from their vendor and so on. This is the distinction between the two systems: *Breskvar v Wall (1971)*.
- Prima facie, **the person on the Torrens title register has immediate and indefeasible title to the property as the act of registration gives you title, pursuant to s 41** of the *Real Property Act* which states that you receive “title by registration”.

### 1.1.1 Priorities under Torrens Title System

- **Registered** v Registered
- **Registered** v Unregistered                      Unless one of the exceptions to indefeasibility applies
- Unregistered v **Registered**
- Unregistered v Unregistered
  - **Legal** v Legal
  - **Legal** v Equitable                      Unless the earlier party is guilty of postponing conduct
  - Equitable v **Legal**                      or the later party had notice.
  - **Equitable** v Equitable

### 1.1.2 Certificate of Title

Each property under the Torrens Title System has a Certificate of Title, which lists:

In the **First Schedule**:

- The Registered Owner → Note: Only one entry will be in the first schedule at any one time – either the vendor or purchaser's name - current owner.

In the **Second Schedule**:

- Easements
- Restrictive Covenants
- Mortgages
- Leases → However, the CT may not be an exhaustive list of interests in the property, since there may be unregistered interests.

### 1.1.3 *Exchange of Contracts*

1. Vendor **exchanges contract** with purchaser (**Contract of Sale**). The purchaser acquires an unregistrable, equitable interest in the property. This gives the purchaser the right to obtain an order for specific performance against the vendor to complete the contract in a Court of Equity. An exchange of contracts imposes onerous obligations on both parties of the contract to perform.
2. Purchaser **settles or completes contract** (**Settlement**). Hands over a signed transfer of the property. It is usual conveyancing practice for the purchaser to simultaneously hand over to the vendor a bank cheque for the balance of the proceeds of sale owed to the vendor. It is also normal conveyancing practice for the vendor to hand over the certificate of title as well as the executed transfer.
3. Having completed the contract for sale of land, a purchaser should **immediately lodge the transfer** (**Lodgment**), accompanied by the certificate of title with the Registrar-General. A dealing, when lodged, must be in registrable form. For instance, the name of the transferor in a transfer must be identical to the name of the registered proprietor in the first schedule. Furthermore, any leases, mortgages or easements must be registered in the second schedule.
4. Once the dealing has been lodged, the **transfer will be registered** (**Registration**). Now that all certificates of title in NSW are recorded electronically, registration should occur within 24 hours of lodgment. This is the key point in time: **s 41, s 42 & s 43 RPA** – **Indefeasibility comes after registration.**

## 1.2 INDEFEASIBILITY OF TITLE

There are three sections of the *Real Property Act* that are fundamental to the creation of Torrens Title in NSW. They are **sections 41, 42 & 43**.

- **Section (41)** that a person obtains title by registration.

- **Section (42)** that the title received at registration is indefeasible (undefeatable).
- **Section (43)** that, in the absence of fraud, a person who is taking interest in a particular property 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.

### Rules of Priority:

1. A person registered in the first schedule is subject to whoever is registered in the second: **(s41, 42)**
2. **S 36 (9) RPA** – according to the order of registration.
3. The registered person prevails over the unregistered: **(s 43)**.

### Mayer v Coe (1968)

- Illustrates indefeasibility/fraud of a third party (fraudulent party is not party to the contract).

**Facts:** Mrs Mayer left her certificate of title with her solicitor for safekeeping. Unknown to Mrs Mayer, her solicitor was dishonest. He forged Mrs Mayers signature on a mortgage in favour of the equally innocent Mr Coe, who, believing that he was lending the money to Mrs Mayer by way of mortgage advanced it to her 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 happened.

**Held:** It was held that **because Mr Coe had obtained registration**, and because **Mr Coe was not a party to any fraudulent activity** by Mrs Mayers solicitor, **Mr Coe was entitled to ‘indefeasibility’ immediately upon registration, even though** he had obtained registration by lodging a **forged mortgage**. Had Mrs Mayer intervened earlier to prevent Coe obtaining registration, he would have no interest in the land at all.

**Reasoning:** 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 upon *s 42 of the Real Property Act 1900 (NSW)* and assert indefeasibility of Title, even though the dealing by which they became registered was a forgery or otherwise procured by fraud.

❖ **INFEFEASIBILITY DEFERRED OR IMMEDIATE? IMMEDIATE**

- Does indefeasibility as provided by s 42 mean ‘*immediate indefeasibility*’ or ‘*deferred indefeasibility*’? *Mayer v Coe* demonstrated how immediate indefeasibility operates → the instant Mr Coe was registered; he immediately obtained indefeasibility in relation to his registered mortgage, even though it was a forgery.
- For some time, Australian courts, following *Gibbs v Messer [1891]*, adopted deferred indefeasibility: that is, title obtained under a defective dealing does not obtain immediate indefeasibility, and the registered proprietor’s title may be challenged. Indefeasibility is deferred until registration of one further dealing, affecting that interest. Registration then renders the earlier dealing indefeasible.

### **Gibbs v Messer [1891]**

- Deferred Indefeasibility case.

**Facts:** Mrs Messer, a registered proprietor, left her Certificate of Title with her solicitor, Cresswell. Cresswell fraudulently prepared, and forged Mrs Messer’s name, on a transfer to “Cameron”, a non-existent person. Cameron became the registered proprietor. Cresswell prepared a Mortgage from Cameron to the McIntyres, who were also his clients, as security for an advance from the McIntyres to Cameron. The Mortgage by Cameron to McIntyres was registered. Cresswell left with the money. Mrs Messer brought action to cancel the Certificate of Title and have a new one in her name issued, without the mortgage to McIntyres being noted as an encumbrance.

**Held:** The Privy Council **found for her and ordered that her name be restored to the Register.** The Mortgage to the McIntyres was held not to be an encumbrance on her Title. A number of reasons have been propounded to explain this decision. Whatever the reason, the Privy Council accepted that a bona fide purchaser from the McIntyres would have obtained an indefeasible Title. The lordships states the law as follows: “*Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed.*”

### **Clement v Ellis (1934)**

**Held:** Dixon J favoured s 43 over s 42 stating that, “a person obtaining registration must deal with the previous registered proprietor on the faith of the register to obtain indefeasibility.”

- However, since *Frazer v Walker*, the theory of immediate indefeasibility has been embraced: that is, the registered proprietor, on registration of the dealing transferring title to him or her of an interest in the land, has a guaranteed title which is effective even though there may have been deficiencies in the dealing.
- It follows that indefeasibility, as used in s 42 of the RPA means **immediate indefeasibility**.

### **Frazer v Walker [1967]**

**Facts:** Mr and Mrs Frazer were the registered proprietors of land. Mrs Frazer forged her husband’s signature to a Mortgage in favour of the Radonskis. Mrs Frazer failed to meet the Mortgage payments and the Radonskis, as registered mortgagees, sold, under their power of sale, to Walker. Walker became the registered proprietor and attempted to obtain possession. Mr Frazer claimed that the Mortgage to the Radonskis was a nullity because of his wife’s forgery. Mr Frazer sought orders that the Mortgage to the Radonskis and the interest of Walker be cancelled. Strictly it was not necessary for the Privy Council to consider immediate or deferred indefeasibility, as Walker was one transaction removed from the invalid documents (the forged Mortgage from the Frazers to the Radonskis), and, even if deferred indefeasibility applied, Walker, as a bona fide purchaser, would have defeated the Frazers.

**Held:** However, the Court held in favour of immediate indefeasibility, stating that the Title of the Radonskis, while on foot, was an indefeasible Title from the time of registration. The Radonskis had taken without fraud on their part. Even though the Mortgage was a void document at common law, it did not affect the indefeasibility of their Title. The Court’s decision did not overrule *Gibbs v Messer* but distinguished it on the basis that *Gibbs v Messer* involved a fictitious person.

- In NSW, a legislative attempt was made to overcome the difficulties in *Gibbs v Messer*, by amending the RPA in 2000 to include, in s 3(1)(a) a definition of “fraud”. That definition is, “*Fraud includes fraud involving a fictitious person*”. Most commentators do not believe that that amendment achieves its aim.

- The High Court in *Breskvar v Wall* accepted the principle of immediate indefeasibility.
- **Conveyancing practice point:** As *Gibbs v Messer* has not been over-ruled, ensure that vendor is not a fictitious person.

### **Black v Garnock [2007]**

- It follows that indefeasibility, as used in **s 42** of the *RPA*, means immediate indefeasibility.

**Facts:** This case involved the purchase of a rural property. On the day before settlement judgment creditors obtained judgment against the vendor. However, a writ of execution was recorded in the register on the day of settlement. This, however, was not revealed by a title search carried out by the purchaser's solicitor early on that day. Therefore, settlement took place, yet the transfer could not be registered due to the writ.

**Held:** On Appeal to the High Court it was held that **the writ took priority since it was registered**. By contrast the transfer was not. The Court found that it was irrelevant that exchange took place before the issue of the writ. The Court indicated that prudent conveyancing practice would require legal practitioners who act for purchasers to lodge a caveat between exchange and completion of contracts. Furthermore, just prior to the time of settlement a final search of the register should be performed.

### **Perpetual Trustees Victoria v English [2010]**

- The Supreme Court of NSW was required to consider the enforceability of a registered mortgage that had been fraudulently executed by a co-owner. Where a registered mortgage secures a forged loan agreement, the registered mortgage secures nothing.

**Facts:** The registered mortgagee, Perpetual Trustees Victoria (**Perpetual**), applied for an order for possession of land registered jointly to Mr and Mrs English. The application relied on a default in repayment of amounts said to be secured by the registered mortgage (**Mortgage**) in favour of Perpetual. The estranged wife, Mrs. English, denied any liability on the basis that her husband had forged her signature on the mortgage. There was no dispute between the parties that the registered mortgage conferred an indefeasible title in favour of Perpetual. However, the extent of the interest created by the mortgage was in issue. In order

to determine the extent of the interest, the court was required to consider the construction of the mortgage documentation.

**Held:** The mortgage contained an “All Moneys” clause, which referred to all amounts payable under a “Secured Agreement”. In interpreting the definition of “Secured Agreement”, the **Court of Appeal held that the Mortgage did not secure any monies due by Mrs English as there was no valid “Secured Agreement” due to the fact that the loan agreement required the signature of all persons to whom the offer was made.** Despite the findings in relation to Mrs English, the Court of Appeal held that it would be unfair for Mr English as the perpetrator of a forgery to escape liability on the basis that his forgery rendered the documents void. Consequently, Perpetual was able to access Mr English’s equity in the mortgage property.

#### ❖ AMBIT OF THE REGISTER

The concept of indefeasibility is far reaching. The following cases demonstrate this. Each of these cases would have been decided differently under the Old System Title, or under Torrens Title, in the absence of registration.

#### *Bursill Enterprises v Berger Bros (1971)*

**Facts:** The plaintiff’s land enjoyed the benefit of a right of way over the defendant’s adjoining land. A two storey building on the plaintiff’s land, extended above the right of way over the defendant’s land. A registered easement in favour of the plaintiff’s land had been recovered over the defendant’s land. In addition to making provision for the right of way, this easement gave to the predecessor in title to the plaintiff’s land, the right to possess all buildings erected over the right of way, together with the right to pull down such buildings and to rebuild others at a height of not less than 3.6 metres above ground level.

**Held:** The High Court held that **the plaintiff not only enjoyed indefeasibility in relation to the right of way, but also, in addition, had an indefeasible right to the airspace above the right of way** occupied by the building built over the right of way.