

Torrens Title

Essential features of Torrens

- **S 31B RPA** obliges the Registrar-General to create a separate folio or cert of title for each parcel of land that is governed by the act
 - Each separate folio has provision for a first schedule and for a second schedule
 - **First schedule:** Name of current registered proprietor
 - **Second schedule:** All other registered interest with respect to a particular property
 - Includes mortgages, leases, restrictive covenants and easement
- **S 41 RPA**
 - Provides that a person obtains title by registration
 - It is not a system of registration of title, but it is **a system of title BY registration** *Breskar v Wall (1971)*
- The interest acquired by a purchaser on exchange of contracts **is only** an equitable interest insofar as the purchaser is entitled to the equitable remedy of specific performance to compel performance of the contract *Tanwar Enterprises Pty Ltd v Cauchi [2003]*
- **Dealing must be lodged in registrable form**
 - Purchaser lodges the transfer, accompanied by the certificate of title with RG
 - Registration may be declined:
 - If the names are different
 - The interests do not align to that in record on the database (e.g. missing mortgage, easement)
 - A dealing must be expressed to be subject to all dealings
 - I.e. one cannot register a transfer, which is not subject to a registered easement or subject to a registered lease, if it is envisaged that upon registration of the transfer, any registered easement or registered lease is to remain on the Register

Indefeasibility of title

- **S 42 RPA**
 - States that title received at registration is indefeasible
- **S 43 RPA**
 - Provides that, in the absence of fraud, a person who is taking an interest in a particular property under the provisions of the **RPA** is to **assume the correctness of the Register** when dealing with the registered proprietor of any estate or interest in the property
- Indefeasibility obtained upon registration is immediate *Mayer v Coe (1968)*
 - Preferred in HCA *Leros Pty Ltd v Terara Pty Ltd (1992) 174 CLR 407*

Rules of indefeasibility

- Registered interests in the Second Schedule prevail over the registered person in the First Schedule
 - Owner is subject to whatever is registered in the second schedule
- As between two interests registered in the Second Schedule, the interest first registered has priority: **s 36 (9) RPA**
- Registered interests prevail over unregistered interests

Ambit of indefeasibility

- ***Bursill Enterprises v Berger Bros (1971) 124 CLR 73***
 - Facts
 - Case involving adjoining properties. There was a registered easement (from 1863) burdening the adjoining property. Dominant servient had right to demolish any building from a height of 3.6 meters and above
 - However, back then, there technically was no ability to convey airspace.
 - Finding
 - The easement still wins, because registered = indefeasibility
- ***Fels v Knowles (1906) 26 NZLR 604***
 - Facts
 - Lease with a clause that says, if during the duration of the lease, the tenant had the option to buy the property for \$x.
 - However, The landlord who created the lease was a trustee (but trustees have no power to sell)
 - Finding
 - The lease was registered, therefore, the register trumps the rights between trustees and beneficiaries
- ***Koteff v Gogdanovic (1988) 12 NSWLR 472***
 - Facts
 - Involved a house. Koteff was registered owner, entered into an arrangement with Bogdanovic. "If you look after me for the rest of my life, I will give you life estate over the property" Problem is that there was a Torrens title in his will for his son, as he transferred it to him as an executor of the estate, this was registered
 - Finding
 - Although the son had taken by gift the house, the registered right trumped the agreement with Bogdanovic
- ***State Bank v Berowra Waters (1986) 4 NSWLR 398***
 - Facts
 - Berowra Waters wants to pay out their mortgage with State Bank. After the discharge was registered, the bank realised that they were owed another y dollars.
 - Finding
 - A discharge had been registered, destroying the mortgage, State Bank had no more interest in the land

Exceptions to indefeasibility

- Used by the unregistered interests to defeat the indefeasibility granted to registered interests by the combined effect of ss 41, 42 RPA
- Exceptions:
 - Fraud
 - Personal equities
 - Prior folio
 - Omitted or misdescribed easement;
 - Omitted or misdescribed profit a prendre
 - Wrong description of boundaries
 - Short term tenancy
 - Other legislation inconsistent with RPA
 - Possessory title

Fraud

- Recognised by s 43 RPA
- Purely focuses on the fraudulent party's conduct. No requirement that fraud should be made to the vendor
- In order to establish fraud, it is necessary to prove that there has been 'some personal dishonest' or 'some moral turpitude' *Stuart v Kingston (1923) 32 CLR 309*
 - It need not involve a conscious decision before registration to defraud the person who holds the unregistered interest *National Commercial Banking Corporation of Australia Ltd v Hedley (1984)*
 - It is not fraud to not be aware of some legislative impediment, which should have disentitled the person now registered from becoming registered *the Assets Case [1905]*
 - Fraud must be actual or equitable (against conscience), but not constructive

Notice itself is not fraud *Wicks v Bennett (1921)*

- **Facts**
 - Vendor, Torrens Title registered, 1st schedule. Vendor was subject to an unregistered lease, tenant chose not to register the lease in the 2nd schedule. Later on, the vendor signs a transfer to a purchaser who pays the money. Purchaser now registered in 1st schedule. Purchaser knew about the unregistered interest.
- **Finding**
 - Court held that there was no fraud. Although purchaser had notice of unregistered interest, he did not agree to be subject to it

It is possible for fraud of agent to be imputed to principal **Breskvar v Wall (1971)** (c.f. **Schultz v Corwill Properties Pty Ltd (1969)**)

Breskvar v Wall (1971)

- **Facts**
 - Mr Breskvar registered proprietors of Torrens Title land. Borrowed money from Mr Petrie who persuaded them to execute a blank transfer (name yet to be filled in) as “security” for the loan. Mr Petrie proceeded to insert the name of his grandson (Wall), in the transfer, as the transferee. Wall later sells the property to a company.
 - The question is who wins between Breskvar (once registered), Wall (registered) or the company (awaiting registration)
- **Finding**
 - Wall had immediate indefeasibility, but he was subject to exceptions to indefeasibility → Court held that fraud of grandfather was imputed to the grandson, because the grandfather (Petrie) was ‘the agent’ of the grandson (Petrie acted on the behalf of Wall). The unregistered Breskvars prevailed, by reason of the fraud exception to indefeasibility and were entitled to be reinstated to the register.
 - And then step 2, ultimately found in favour of company. See below postponing conduct (holding out) of Breskvar

Schultz v Corwill Properties Pty Ltd (1969)

- **Finding**
 - Court held that Galea was acting on a ‘frolic’ of his own (he was acting for his own benefit, it might have been his mum’s company, but he was acting by himself for the benefit for himself). There was no fraud by Corwill

Making an assurance that is not intended to be kept is fraud **Loke Yew v Port Swettenham Rubber Co [1913]**

Loke Yew v Port Swettenham Rubber Co [1913]

- **Facts**
 - Eusope owned land, part of which he previously sold to Loke Yew. Loke Yew never bothered to register transfer. Eusope then negotiated with Port Swettenham to sell the rest of his land. Eusope explained that part of his **land** had previously been sold to Loke Yew. Managing director of Port Swettenham Rubber persuaded Eusope to execute transfer of all land (including block already sold to Loke Yew) to his company. Eusope was assured that the company would recognise Loke Yew’s interest, this assurance was fake
- **Finding**
 - Company had acted fraudulently, in making an assurance it never intended to keep. Accordingly, their registered interest was subject to the unregistered interest of Loke Yew
 - Can also be **personal equity**

There must be causation between the fraud and the dealing **Bank of South of Australia Limited v Ferguson [1998]**

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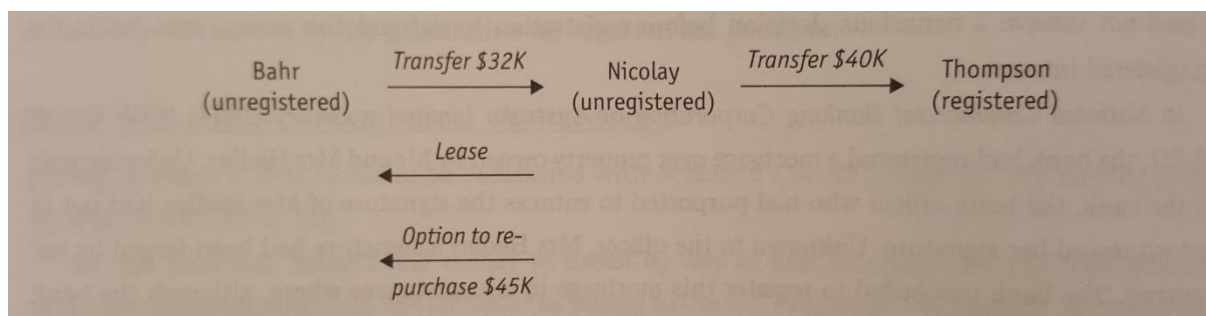
- **Facts**
 - Bank advanced Ferguson sum of \$400,000. Ferguson subsequently defaulted on the loan and the bank sought an order for possession, by this time, bank was owed \$509,169
 - Ferguson alleged that mortgage was void by what was said to be fraudulent conduct by officers of the bank who had overstated the financial position of Ferguson when obtaining head office approval for the loan of Mr Ferguson
- **Finding**
 - It cannot be said that the bank had defrauded him, the fraud that happened had no operative effect upon the decision of Mr Ferguson to grant the mortgage or to sign the facility agreement
 - When he signed the agreement, he thought he was mortgaging his house for x dollars, and what he thought was exactly what he signed. No causation at all

Personal equity

- Not recognised in the RPA, however, recognised by the courts in **Barry v Heider; Bahr v Nicolay**
- **Barry v Heider** for test of personal equity creation

Bahr v Nicolay

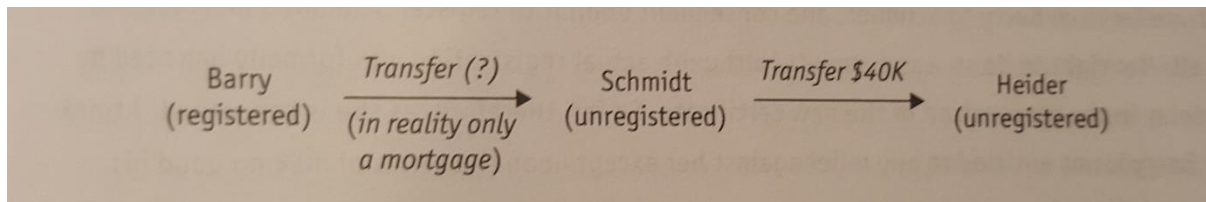
- Facts



- A condition of the contract of sale between Nicolay and Thompsons was that the Thompsons acknowledged the arrangement between Mr Nicolay and the Bahrs. Thompson had acknowledged this with the Bahr's too
- Finding
 - Trustee-beneficiary relationship was created between the Thompsons as trustees and the Bahrs as beneficiaries, when the Thompsons agreed with Mr Nicolay to take subject to the Bahrs' option to purchase. + acknowledgement with the Bahrs
 - Personal equity created

Barry v Heider

- Facts



- Registered proprietor (Barry) foolishly executed a transfer when intending to mortgage his property to Schmidt
- Schmidt, having CT and executed transfer, represented to Heider that he had bought property from Barry and then sold it to Heider
- Finding
 - High Court held that registered Mr Barry was subject to the unregistered Mr Heider, by reason of personal equity exception to indefeasibility. This exception arises where:
 - Registered person has created the unregistered interest; and/or
 - A registered person has engaged in conduct, which has contributed to the creation of the unregistered interest
 - High Court held that the conduct of Barry in executing a transfer, when not intending to sell, was conduct which had contributed to the creation of the unregistered interest

MMI v Gosper

- **Controversial case, not sure if decided property, awaits further decision**
 - However, now there is legislation that says financiers need to check the identity of the people they are lending money to **s 56C RPA**
 - C.f. **Grgic v ANZ Bank (1994)**
 - There was no pre-existing relationship between mortgagor (Grgic Senior) and mortgagee (ANZ), accordingly, there was no duty owed or breached by mortgagee vis-à-vis the mortgagor
- Facts
 - Mrs Gosper registered mortgage in favour of MMI, securing a debt of \$265,000. Unknown to Mrs Gosper, her late husband arranged for a further sum of \$285,000 being advanced by MMI to his business. This increased secured debt to \$550,000. Mr Gosper forged her signature on the variation of the mortgage, which was subsequently registered in the 2nd schedule
- Finding
 - Majority found that MMI (mortgagee) owed a fiduciary obligation to Mrs Gosper (mortgagor), due to a pre-existing relationship, not to use the certificate of title without the authority of Mrs Gosper
 - There was exception to indefeasibility