

Extent to which Indefeasibility attaches to registered documents

Curing defects of registered documents

MERCANTILE CREDITS V SHELL CO OF AUSTRALIA (1976) 136 CLR 326

Facts:

- The owner of the land granted lease (10 years plus three options to renew for 5 years) to respondent (shell) who registered the lease
- Later on, a mortgage was granted to MC and is registered.
- The term of the lease when then about to expire and the option was exercised – the extension was caveated
- The mortgage was then defaulted on.
- The appellant wanted to exercise power of sale, but free of the option.

Priority dispute:

- Between shell and MC
- By registering the lease, the 10 years was protected, but were the options to renew protected? **The caveat did not protect the second extension because it came after the registered mortgage.** How far did indefeasibility extend, did it extend to the options also?

Gibbs J :

- The lease term will have priority under section 53.
- **The appellant argued that the option was not integral to the lease and shouldn't be protected.**
- "The [TLA] would appear not to be intended to render indefeasible a personal right created by a covenant which... in no way affect the estate or interest in land in which the instrument deals".
- "The right of renewal is so intimately connected with the terms granted under the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease and on registration is entitled to the same priority as the term itself."
- An option to renew is a register-able document (considered a special covenant)
- The right of renewal is an incident of the lease because it directly affects the term of the lease
- Purely personal rights included in a document would not attract indefeasibility. (ie) option to purchase – is this integral to a tenancy interest and Gibbs said no. This is something quite different from what a lease is.

Registration of an instrument renders indefeasible only those rights that **effect, qualify or are connected with the state or interest in land which that instrument creates.** Therefore ask, does an option to renew in a lease, qualifies, effects or is connected with a leasehold estate? Yes

** This case did not involve a void lease. However courts refer to it. TRIVENTO says that an illegal (not just void) lease is not validated – in this case it was in direct contravention of the industrial arbitration act because it specified a penalty.

Registration of a void mortgage:

Two common provisions – term making the land the security for the debt and second, the debtor's personal covenant to pay the debt. What if a void mortgage is registered? Does registration validate those terms?

PT LTD V MARADONNA PTY LTD (1992) 25 NAWLR 643

Giles, 679 – said the terms intimately required to get the term mortgage registered.

“registration validates those terms which delimit or qualify the estate or interest or otherwise necessary to assure that estate or interest to the registered proprietors.”

Problems:

- What if a mortgage was registered over land (and the mortgagee was fake) – so the ‘actual’ mortgagee is subject to a fake mortgage.
- When the mortgagor sells the land, they might not recover the full price. Does this make the unlucky mortgagee subject to the personal covenant to pay the money?

PERPETUTUAL TRUSTEES VICTORIA LTD V TSAI [2004] NSWCA

Facts

- Tsai was the RP of land. Perpetual was the RP of a mortgage over the land.
- The mortgage was not a “traditional mortgage” that expressly stated the principal sum lent and an acknowledgement that the money had been lent.
- By clause 2.2, the mortgagor covenanted to pay the “secured money” – “all amounts payable at any time” by mortgagor to mortgagee under a ‘secured agreement’.
- A loan agreement, made the same day as the mortgage, provided that the mortgagee granted a facility to drawdown \$500K to be secured by a first mortgage.
- The mortgagee claimed the mortgagor had defaulted and claimed rights to possession of the property, principal, interest and costs.
- The mortgagor claimed it had not signed the mortgage or loan agreement and had not received the \$500K.
- The implication was that the monies had been advanced to an impersonator who had forged the documents.

Did the mortgagee have an indefeasible mortgage?

Young CJ

- The registration of the forged mortgage without fraud by the mortgagee, gave them an indefeasible title and this extended to the personal covenant.
- Young J explained this, by saying that the **personal covenant maps out the quantum of the mortgagees interest in the land** [17].
- What the title is indefeasible to depends on the term – in this case, the document was outside the register.
- There is conflicting evidence to suggest it was signed by an impersonator, hence there is no loan. The appellant could not be in default and the mortgagee is not entitled to possession.