

Topic 3 – Indefeasibility of Title

Indefeasibility of Title: statutory provisions

- Once a title holder is registered under the Torrens System they will acquire what has been described as an 'indefeasible' title
- Refers to the fact that the registered holder acquires a conclusive and secure title subject only to other interests registered on that title, statutory fraud and other established statutory and non-statutory exceptions
- Registered holder will not be affected by the doctrine of notice
- 'indefeasibility' is not expressly mentioned in statutory provisions

TRANSFER OF LAND ACT 1958 - SECT 42

Estate of registered proprietor paramount

(1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except—

(a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;

(b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

(2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to—

(a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;

(b) any rights subsisting under any adverse possession of the land;

(c) any public rights of way;

(d) any easements howsoever acquired subsisting over or upon or affecting the land;

(e) the interest (but excluding any option to purchase) of a tenant in possession of the land;

(f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-seven of the Local Government Act 1958 , section 158 of the Water Act 1989 or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette—

notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.

- Foundation of the Torrens system
- Registered holder acquires a guaranteed statutory title, subject to exceptions and other registered encumbrances
- Every time a title is registered, it is recreated anew and acquires a greater level of registered protection than it would have if it were not registered

- Registered land holders are not subject to the doctrine of notice and that mere notice of the existence of a prior interest will not constitute fraud – s 43 TLA

TRANSFER OF LAND ACT 1958 - SECT 43

Persons dealing with registered proprietor not affected by notice

Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

- Abolition of the doctrine of notice confers a greater level of protection and security upon registered title holders that is available under general law
- It allows a registered title holder to enforce their title, even in circumstances where they took that title with notice of the existence of a previous interest

TRANSFER OF LAND ACT 1958 - SECT 44

Certificate etc. void for fraud

(1) Any folio of the Register or amendment to the Register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.

(2) But nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of land on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

- Exception to the indefeasibility of fraud

Immediate and deferred indefeasibility

- Upon registration, a registered holder immediately acquires the protection of registration and an indefeasible title, subject to any statutory fraud which has been committed or brought home to the registered proprietor
- Australian courts have consistently upheld an immediate indefeasibility interpretation of the paramountcy provisions
- However, there are a number of instances where the 'deferred' indefeasibility interpretation has been favoured – fictitious person exception
 - Where a person transacts with a fictitious person, that is, a person who has been made up as a part of a fraudulent scam or a person who simply does not exist, any subsequent registered title will be deferred
 - The rationale is that the system will only confer protection on a person who has actually derived title from a real person existing on the Register

Gibbs v Messer

- Registered title holder, Messer, went away with her husband and left her certificate with her solicitor, Cresswell. Cresswell forged a transfer of the title in favour of a fictitious person described as Hugh Cameron who was eventually registered as the proprietor.
- Cresswell borrowed money from the McIntyres and secured it by way of mortgage which he fraudulently prepared from Hugh Cameron
- Mortgage was registered and Cresswell absconded with the mortgage moneys
- Did the McIntyres held an indefeasible title in the mortgage given that the registration had occurred pursuant to a fraud involving
- Those who deal, not with the registered proprietor but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and not for onerous consideration
- 'The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty.'
- Indefeasibility will be deferred where the transaction creating the registration is tainted by fraud
- Distinguished from by Privy Council

Frazer v Walker

- Mrs Frazer borrowed money and gave the mortgagees a security over the land by forging her husband's signature. Mr Frazer failed to meet the payments and the mortgagee exercised their power of sale and sold to the Walkers. Mr Frazer argued the mortgage was a nullity as his name had been forged on the mortgage documents.
- The Privy Council rejected Frazer's claims – the title as a registered bona fide third party purchase for value, was indefeasible
- Deferred indefeasibility and endorsed the immediate indefeasibility interpretation of the paramountcy provisions subject to the enforceability against registered title holder of in personam claims
- On the facts, it is clear that the mortgagee had passed the title onto an innocent third party purchaser who, upon becoming registered, necessarily acquired protection of the legislation
- This is an important aspect of the decision; where a mortgage has been tainted by fraud, but the mortgagee has passed title on to a bona fide third party purchaser, the Torrens legislation will protect the title of the innocent third party against the effects of the prior fraud

Breskvar v Wall

- At the time of the execution, the name of the purchaser was not inserted into the memorandum
The third party respondent was a bona fide purchaser for value of the land and took without notice of any of the matters concerning the appellants

The appellants lodged a caveat with the registrar-general against dealings with the land. The third respondent then lodged for registration for the memorandum, however this could not be affected due to the caveat

- The purchase by the third respondent bona fide for value without notice intervened before the equitable right of the appellants was fulfilled. The third respondent thus acquired an equitable interest in the land

- Each registration creates a new title
- Registration under the Torrens system has the power to cure defects that may have existed in the title prior to the registration
- Registration will not be affected by a fraud that the registered proprietor has not been personally involved in
- High Court confirmed this in *Leros Pty Ltd v Terara Pty Ltd*
 - Effect of registration of the subsequent dealing was to extinguish all prior unregistered estates or interests which, but for that registration, would have conflicted with the proprietor's estate unless the interest was protect by one of the recognised exceptions

Deferred v immediate

Deferred

- Followed in *Gibbs v Messer*
- If the instrument of the transferor is a nullity, the transferee is unable to defeat a claim by the true owner

Immediate

- Immediate followed in Australia (and not deferred)
- Followed in *Frazer v Walker & Breskva v Wall*
- Results in the owners loss of title despite no fault on their part
- The innocent purchaser trumps the interest of the previous RP