

TOPIC 2: TORRENS TITLE

(A) ELEMENTS

- ❖ Old system registration: good registration in land in order to get priority advantages. Interest in old system, register, take priority over that irrespective whether legal or equitable.
 - Did not validated any defect – registration does not cure forgery. If procure by fraudulent misrepresentation, not cured either.
 - Being on the register gives interest, legal interest derived under registration.
 - If on the register, has legal interest
 - Whether interest vulnerable guided by indefeasibility.
- ❖ Torrens Title [REAL PROPERTY ACT 1900 (NSW)]
 - Mirror principle: perfectly reflects state of title. (oppose old system whether it mirrors the title)
 - Curtain principle: interest in Torrens title need to search register and make no other enquiries.
 - Limitation in *Hanson v Luck* – relevant if off register. Inspection irrelevant. NO longer obliged to search chain of title
 - Insurance principle: max societal welfare by protecting title once on register and lowering transaction costs. If on register and forge signature, on sale to bona fide purchaser for value, the 3rd party has title.

Administration:

- ❖ Old System:
 - General Register: documents relating to properties and related in order they are received by register, not by individual parcel of land.
 - Registration copies: photocopies lodged. Drafted differently, lack of uniformity and simplicity.
- ❖ Torrens:
 - RPA **s31B**: Register - Folios, Dealings, kept in various mediums capable of having info recorded.
 - **Folio s32**: Description of land & proprietor; Particulars of estate & interest affecting land, distinctive reference.
 - Certificate of Title (s33):
 - Register General (RG) may issue for land comprised in any folio of register **[s33(1)]**
 - RG must endorse with distinctive reference allocated to relevant folio of register **[s33(3)]**
 - RG must cancel superseded Certificate of Title **[s33(4)]**
 - RG issue at written request of registered proprietor or registered mortgage **[s33(5)]**
 - New eCTs [ss 33AAA, AA, AB] right to deal and control of right to deal
 - Dealings
 - Effective when registered (accompanied by Certificate of Title), not before (s41 – legal interest once registered, before that no interest.)
 - Transaction evidence by dealing can give rise to equitable or common law interest.
 - May be registered: approved & registrable form, R-G has authority to use title **[s36(6)]**
 - Given distinctive reference when lodged **[s36(1A), (1B)]**
 - Registered when recorded in Register by R-G: **[s36(6A)]**
 - Priority given according to date of registration and not date of dealing **[s36(9)]**
 - When registered, has the effect of a deed duly executed by the parties who signed it **[s36(11)]**
- ❖ E-conveyancing across Australia: provide efficiency irrespective of state laws regarding land title. Make conveyancing cheaper.
 - Documents executed in electronic form. [electronic lodgement network]
 - **SECTION 43A**: transfer between date of transfer, common law interest, not legal
- ❖ **LEGAL CONSEQUENCE**
 - Old: CA **s184G**, registration gives priority but not validity [**Defeasible** title]
 - Torrens: Registration give validity and priority [**Indefeasible** title]

(B) INDEFEASIBILITY OF TITLE

❖ *Fazer v Walker [1967]*

- Facts: Frazer owners of land and wife wants to take out mortgage over the land. Forged husband signature, bank unaware, mortgage registered. Default on mortgage, bank sold to 3rd party and register. Husband argue did not execute, forged, not bound by it.
- Privy Council: Interest in Torrens title registered, require indefeasibility.
- **Doctrine of immediate 'Indefeasibility of title': immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys.** [system of registration] (*s45*)
 - RP is not protected against any claim, provisions which the entry he relies may be cancelled or corrected, or he may be exposed to claims *in personam* (cannot turn around personal promise). **But as RP & while he remains, no adverse claim (except as specifically admitted in the Act i.e. own fraud) may be brought against him.**
 - Indefeasible title free from attack subject to limited exceptions.
- Attaches to void instruments, registration is to effective to vest & divest title to protect the registered proprietor against adverse claims.

❖ *Breskvar v Wall (1971)*

- Facts: B registered proprietor of land in Qld, instead of getting mortgage to get loan from Petite, they executed an absolute transfer by leaving the purchaser blank. Qld legislation execute transfer in blank means instrument void. Not in default but Petite inserted fraudulently name of relative, Wall. Transfer registered. Wall was a party of P's fraud. Later contract to sell to another 3rd party, Breskvar want land free of 3rd party interest. Argue that although Wall is on register, no interest, under void instrument and party to fraud. Distinguish from Frazer, 3rd party cannot take interest.
- HELD: (HCA) Barwick CJ: The **Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration.** The title describes is not historical or derivative (does not describe current interest from predecessor). **It is the title which registration itself has vested in the proprietor.** Consequently, a registration which results from a void instrument is effective according to the registration. It matters not what the cause or reason for which the instrument is void.
- Menzies J: fraud or one of the other statutory exceptions to indefeasibility, a transferee does, by registration of a void transfer, obtain a '*defeasible title*'
 - Fraud creates an equitable interest on the part of the defrauded vendor, which is not barred by the legislation because there is an exception made for fraud. The vendor can thus cancel the registration of the purchaser. However, once the purchaser transfers his title to a third party (bona fide and good consideration), it becomes a question of [priorities](#).
- Once on the register, legal interest held, not deprived of having legal interest simply because of fraud, had legal interest whether or not party to fraud or innocent.

❖ RPA, **Section 42** [*'paramountcy' provision*]

- Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be **paramount or to have priority, the registered proprietor** for the time being of any estate or interest in land recorded in a folio of the Register shall, **except in case of fraud**, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, **but absolutely free from all other estates and interests that are not so recorded.**
 - Explain: Ignoring the priority under general law, registered proprietor recorded in folio, except in fraud, has interest subject to other estates and interest that are recorded in the folio, but take absolutely free of unregistered estate and interest, except categories of exceptions.
- Dimension of indefeasibility:
 1. Validation of defective instrument: when registered, defects are cured
 2. Priority over unregistered interest: Registered interests are not subject to lost in priority of unregistered interest by operation of general law priority rules, even if the registered interest taken by someone who had notice of previous interest.

❖ **Section 43(1)** ['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 registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or **shall be affected by notice direct 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.**
 - If on register, don't worry about the predecessor, acquire protection that is not diminished by direct or constructive notice of unregistered interest. Such knowledge is not itself fraud.

❖ **Section 45** ['protection']

- (1) Except to the extent to which this Act otherwise expressly provides, **nothing in this Act is to be construed so as to deprive any purchaser or mortgagee bona fide for valuable consideration of any estate or interest in land** under the provisions of this Act in respect of which the person is the registered proprietor.
- (2) Despite any other provision of this Act, proceedings for the recovery of damages, or for the possession or recovery of land, do not lie against a purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act merely because the vendor or mortgagor of the land:
 - (a) may have been registered as proprietor through fraud or error, or by means of a void or voidable instrument, or
 - (b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error, or by means of a void or voidable instrument, or
 - (c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error, or by means of a void or voidable instrument.

❖ **Section 118** ['ejectment']

- (1) Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, **except** as follows:
 - (a) – (c), enforcement of mortgage, lease etc
 - (d) proceedings brought by person **deprived of land by fraud** against registered proprietor:
 - (i) registered proprietor guilty of fraud OR
 - (ii) person deriving (apart of bona fide purchaser for value) from or through a person registered as propriety of land through fraud

❖ **Cassegrain v Gerard Cassegrain & Co Pty Ltd (2015)**

- Facts: Company transfer land to husband and wife as joint tenant, husband procured transfer by fraud. Later transfer interest to wife who now holds entire interest, went into administration and tried to get land back.
- HELD: Partially successful, *could not get wife initial half share as no exception of indefeasibility*. She has not registered through her own fault (s42) but the other half she got from the husband later the company could get back because of ***exception in s118(1)(d)***, she is a person not for value as she got it from gift and it was through her husband by his own fraud.

❖ Differing conceptions:

X --- (forged transfer) → Y (innocent) --- (valid transfer) → Z (innocent)

- **Immediate indefeasibility** [*Frazer v Walker; Breskvar v Wall*]
 - Y gets immediate indefeasible title
- **Deferred indefeasibility** [*Gibbs v Messer [1891]*]
 - Y took by fraud instrument, get defect transfer but later indefeasibility gets by Z. s43 paramount over s42.

Extend of Indefeasibility

- ❖ Registration does not validate all the terms and conditions of the instrument which is registered. It validates those which **delimit or qualify the estate** or interest or are otherwise necessary to assure that estate or interest to the registered proprietor. [*PT Ltd v Maradona Pty Ltd (1992)*]
 - Forged instrument, registered proprietor not guilty of fraud, what rights of the proprietor sheltered by indefeasibility umbrella?

(1) Leases

- ❖ if registered proprietor, someone forged signature on lease document, lease hold interest acquires indefeasibility of title for land on relevant term.
 - Right to receive rent is a term protect by indefeasibility, lease void, landlord right to rent is something protected by indefeasibility
- Karacominakis v Big Country Developments (2000)***
- Lease contains guarantee to rent is an essential and intimate part of the interest created upon registration but such guarantee (merely personal, does not affect estate or interest) not protected by indefeasibility.
 - Indefeasible interests such as a covenant for renewal will **expire** if the time for their exercise expires. For example, a tenant has a covenant for renewal after a lease, but has vacated the lease without exercising that option (the right has expired due to the passage of time). The covenant for renewal will be deemed as expired and not be counted as a registered interest that could affect a future purchaser or mortgagee.
- Option to renew:
 - Option made illegal by statute: *Travinto Nominees v Vlattas (1973)*
 - Valid option, question of priority: *Mercantile Credits v Shell (1976)*

(2) Forged Mortgage

- ❖ Rogue impersonates mortgagor, forges mortgagor's signature on mortgage documents and absconds with the advance (\$), leaving registered proprietor with covenant on land.
- ❖ Assume mortgagee is registered and no fraud, can sue registered proprietor?
 - Indefeasibility does not attach to personal covenant to pay. Mortgagee interest does attach to land if not guilty of fraud.
- ❖ Proprietary interest v Personal covenant to pay
- ❖ Enforcement against land: is any money owing under the forged document?
 - ***Provident Capital Ltd v Printy; Van den Heuvel v Perpetual Trustees Victoria Ltd***
 - Depends on type of document/ form of mortgage.
- ❖ **Traditional form** of mortgage
 - Principal amount secured stated in registered instrument: indefeasibility attaches, mortgagee can sell and take \$. (***Provident Capital Ltd v Printy***)
- ❖ **"All moneys" mortgage**; purports to secure money owing under unregistered collateral loan documents (forged): question of construction of mortgage document whether indefeasibility attaches
 - **SINGLE BORROWER/mortgagor**:
 - The mortgage secures the repayment of any money owing by the mortgagor to the mortgagee **under an agreement between the mortgagor and the mortgagee**.
 - Loan document forged, so there is no agreement between the mortgagor and mortgagee. The document purporting to be such an agreement is a nullity because it is unregistered (and unregistrable) and the "mortgagor's" execution was forged.
 - *Chandra v PTV (2007)*
 - *Printy v Provident Capital Ltd [2007]*: Based upon absence of a default in the payment *in accordance with the terms of the mortgage* or the default in the performance of a covenant *in the mortgage* as required by RPA, s 57(2).
 - "One consequence of this reading is to limit the debts which, although unenforceable under the general law, will engage the power of sale attracted to a registered mortgage,

to those identified in a covenant 'in the mortgage' or required to be paid 'in accordance with the terms of the mortgage'."

○ **JOINT & SEVERAL BORROWERS/ Mortgageors:**

- One spouse executes mortgage and loan documentation, forges the signature of spouse. Whether the mortgage binds the defrauded spouse's share of the land depends upon how the all moneys mortgage is drafted: if properly drafted, can be bound?
- Assumption:
 - (1) Loan Agreement imposes several liability on each borrower for repayment of all \$\$;
 - (2) the Mortgage charges each mortgagor's share in the land with the repayment of the liability incurred by either borrower under a Loan Agreement; and
 - (3) the Mortgage defines a Loan Agreement as an agreement between (a) the mortgagee and (b) any one or more of the mortgagors.
- **Van den Heuvel v Perpetual Trustees Victoria (2010)**
 - Facts: Husband signs, and forges wife's signature on a Mortgage & Loan Agreement. He is liable for all of the money advanced under the Loan Agreement. Under the Mortgage, the wife has charged her interest to secure repayment of what she or her husband owes under a Loan Agreement which either she or her husband is a party.
 - Mortgagee can enforce mortgage against both husband and wife's share in the land.
- Contrast position of innocent party in *PTV v English (2010)*
 - Mortgage secured what was under Loan Agreement, the purported Loan Agreement which the husband signed but the wife did not was not a Loan Agreement as defined by the Mortgage, which only caught agreements which both the husband and wife accepted by signature. The Mortgage was not enforceable against the wife's share in the land.

❖ **RPA Section 56C** [Protection to mortgagor – *confirm identity of mortgagor*] - **01/11/2011**

- Bank to get indefeasibility must be fraud and taken reasonable step to identify the identity of the mortgagor otherwise will be deregistered.

(1) **Mortgagee must confirm identity of mortgagor** Before presenting a mortgage for lodgement under this Act, the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf the mortgage was executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.

(2) Without limiting the generality of subsection (1), the mortgagee is to be considered as having taken reasonable steps to ensure the identity of the mortgagor under subsection (1) if the mortgagee has taken the steps prescribed by the conveyancing rules.

(6) **Cancellation of recordings in the Register** The Registrar-General may cancel, in such manner as the Registrar-General considers appropriate, any recording in the Register with respect to a mortgage if the Registrar-General is of the opinion:

- (a) that the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land, and
- (b) that the mortgagee: (i) has failed to comply with subsection (1), or (ii) had actual or constructive notice that the mortgagor was not the same person as the person who was, or was about to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.