

MLL325 LAND LAW EXAM NOTES

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GENERAL LAND LAW

- Relying on the general law framework
- Doesn't come under Torrens System – most land in Australia now does however come under the system.
 - **Some land still comes under old law – to prove ownership, must establish perfect complete unbroken chain.**
 - To verify general law title, **s 44 PLA** sets out only need to search back for the 'good root' of title. This amounts to documentary title apparent in the **previous 30 years.**
 - Purchaser is not affected by any title existing beyond this 30-year period: **s 44(6) PLA**
 - **All unconverted land prior to the Torrens legislation are regulated by the common law and equitable priority principles**

Deeds registration system

- DRS established a centralised register with the aim of recording instruments or dealings over land
 - Must be in writing (precluding oral leases): **s 52(4)**. If you want to enforce an interest and it's not in writing, **s 526 IA/statute of frauds** says that you cannot.
 - To acquire interest, a deed is required – creation of interest in **s 52(1) via deed or equity**
 - Can also register oral lease if reduced to part performance

- DRS does not abolish – simplifies the process of searching for a particular title. **Aim is to reduce BUT NOT ELIMINATE the risk that a person acquires an interest in land without knowledge of an earlier inconsistent interest** (hence oral leases still exist)
- Not going to apply to interests that aren't registered or not capable of being registered.

Publicity: the system aimed to make land dealings a matter of public record by creating a register, which a potential purchaser could search in public records

- First system to do so – only way used to be by way of actual/constructive notice/physical inspection and whatever information you received from other private transacting party
- System created a public record system for land dealings

Changed priority rules: where an instrument is executed bona fide and for valuable consideration and it is registered, it will take priority over an instrument which could have been registered but is not or which was registered at a later date

- Presumes interest is capable of being registered - if you haven't put it in writing, it is not capable of being registered.
- If your instrument is registered, time is a big issue; your interest will take priority irrespective of priority rules
- Priority between competing registrable interests is not dependent on the date of creation as is the case with general law; but rather on the date of registration
- This was the incentive to register dealings with land
- Priority between competing registrable interests is not dependent on the date of execution (creation) of interest, or upon nature of the interest, but rather on the date of registration
- **Registration was not compulsory; failure to register an interest under DRS will not render it void – it just means you did not get the priority benefit.**
- The **Transfer of Land (Single Register) Act 1998 (Vic)** amended the system and no further registrations under DRS are possible in Victoria:
 - Register is closed although searches may still be made
 - Registrar under obligation to bring all fee simple estates under Torrens

Deed: defined as the most solemn act a person can perform with respect to a particular property: *Manton*; formal written document where parties intend to be bound and recognised.

1. Both parties execute document that is designated to be a deed
2. Must be executed by the grantor in presence of instrumentary witnesses
3. Seal must be affixed to it **but not sufficient: s 73 PLA**
 - If deed expressed to be sealed it shall have the same effect as if it had been: **s 73A PLA**
 - Every instrument when registered shall have the same effect as if it were a deed under seal: **s 40(2) TLA**

If the conveyance was not by way of deed, common law would not recognise it (no legal interest in the property). Conveyance may nonetheless be enforceable in equity. The creation of equitable interest in land does not have to be through deed, but equity insists that it be expressed in writing.

Now, since Torrens Land System, all owner had to do was look at a title to prove ownership → **title by registration.**

- All vendor had to do to prove good title, was not try proving chain – must merely show title in his or her name.
- **BUYER NOT OBLIGED** to go behind that title; buyer entitled to assume person registered on title was in fact owner

TORRENS FRAMEWORK

- Dealt with in the Transfer of Land Act (TLA)
 - **System of independent title whereby upon each conveyance, the land would be surrendered to the Crown who would then re-grant it to the purchaser**
 - It is applicable to all land interests issued after the introduction of Torrens legislation and old title interests which have been converted into Torrens title interests.
 - TS also provides a mechanism for the protection of unregistered interests via the **caveat system**: caveat imposes a statutory injunction on the registration of inconsistent interest for a limited period of time
- **S 40**: no instrument (e.g. transfer, mortgage) will have effect until it is actually registered. A transfer or mortgage which has not been registered does NOT create an interest.
 - **Barry v Heider**: Justice Isaacs in reference to s 40: *'in denying effect to an instrument until registration does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered and that right, according to accepted rules of equity, is an estate or interest in land'*.
- **Mirror principle**
 - Subject to a number of recognised exceptions, interests relevant to title are identified by looking at it; **the cardinal principle of the Torrens statute is that the Register is everything**
 - **The Register (CT) fully and accurately mirrors the current facts about a person's title.**
 - **Curtain principle**
 - **Interests not recorded in title are generally irrelevant**; person is saved the trouble and expense of going beyond the register in order to investigate the history of their author's title and to satisfy themselves of its validity. Do not need to go behind the CT as it contains all the information about the title.
 - **No chain of title.**
 - In such a system, the true title may not be in fact what is revealed by the Register, indeed a person may know that the state of title is different from that recorded.
 - **Indemnity principle**
 - TS sets up a regime for the payment of compensation for any error or loss occurring as a result of the registration system under the **assurance fund** to:
 - either person who is deprived of interest, or
 - who relies on entry in register who suffers a loss
 - **If persons are adversely affected by the operation of the Torrens system a public funded assurance fund will compensate for their loss; it is ensured that no one whose interest is defeated by the above principles will have to suffer that loss**
 - Provides for the compensation of loss if there are errors made by the Registrar of Titles
 - The assurance fund warrants or guarantees the title against losses which may flow from the operation of the system of title by registration.
 - **In such cases we have a paradox: the principle of "indefeasibility" is replaced by that of "guarantee" - the one gives security against deprivation, while the other assumes the possibility of such deprivation and grants financial assistance if it occurs.**

Once an interest is registered, it receives full statutory protection, subject to a few exceptions → Registered proprietor is only subject to encumbrances noted on title and the statutory and non-statutory exceptions to indefeasibility

INDEFEASIBILITY PROVISIONS

- Once a title holder (purchaser OR a first mortgagee, it can include any others such as easement, right of way, lease) is registered under the TS, he/she will obtain an indefeasible title. **Title = indestructible, cannot be held to be invalid, cannot be defeated or annulled, unimpeachable.**
- Registered owner acquires conclusive and secure title subject only to
 - other interests that might be registered,
 - other statutory and non-statutory exceptions
- **Registered title holder will not be affected by the doctrine of notice – specifically abolished – SECTION 43 TLA– therefore notice itself does not amount to fraud. Registration confers indefeasibility even if RP took with notice of a prior interest – expression not used in the act**
- Every time the title is registered, it is recreated anew – every registration creates a new indefeasible title.
 - **Breskvar v Wall:** TS of registered title is not a system of registration of registration of title but a system of title by registration. Thus registration is a source of title – confers title that did not previously exist.
 - That which the CT describes is not the title which the registered proprietor formerly had. The title it certifies is not 'historical' or 'derivative' – it is a title which registration itself has vested in the proprietor
 - Registering under the TS is a creative process which ensures that the title is immunized against past defects
 - Purchasers, mortgagees searching the title can rely upon its accuracy
- **Primary section in the TLA (Vic) setting out indefeasibility is s 42(1) – s 42 sets out that registered proprietor is free of all encumbrances except:**
 - Those listed on the title;
 - Those claiming the land on a prior folio (s42(1)(a));
 - Where the land is included by wrong description on the part of the Registrar and the proprietor is not or has not derived title from a purchaser 'for value' (s 42(1)(b));
 - Paramount interests (s 42(2)(a)-(f)). These interests, although unregistered, are 'superior' to interests that are registered.
 - Section 42 ensures that a registered title holder acquires a guaranteed statutory title.
- **Indefeasibility of title covers all of the title as well as any attached rights e.g. option to renew (Leros v Terara, Ruthol v Mills, Mercantile Credit)**
- Protection is conferred upon registration but if not registered does not mean interest does not exist; Section 40(1) doesn't mean no interest can arise if not registered; it does not preclude equitable interests from arising
- **Barry v Heider:** in denying protection until registration – the underlying interest not affected
- Registration of an instrument does not give indefeasibility to every right which the instrument creates; **personal covenants which do not affect the estate or interest in the land, do not attract indefeasibility simply because they are in a registered document (in personam)**
 - A mortgagee's interest in the land and the right to exercise its power of sale are protected by indefeasibility once the mortgage is registered.
 - The concept of indefeasibility does not affect the personal obligations of the registered proprietor. The registered proprietor is subject to contracts he or she has entered into, and to trusts, whether express or implied, over the property.
 - **Example:** if the registered proprietor contracts to sell the land, the purchaser can seek specific performance of the contract if the registered proprietor declines to complete. Such an action cannot be defended by the registered proprietor arguing that his or her title is indefeasible.

- Example: If the registered proprietor is a trustee of the land for another person, that other person, the beneficiary, can probably enforce the trust against the registered proprietor.
- Protection only applies to registered interests. It will not apply to unregistered interests which are defeated by a subsequent registration. **Once an unregistered interest is defeated by a subsequent registration it is automatically extinguished and cannot be revived against a later proprietor: *Leros v Terara***

Mercantile Credit v Shell Co of Australia

- Shell given 5-year lease with option to renew and it registered the 1st renewal
- Before the 2nd renewal, RP mortgaged to Mercantile Credit. Before the 2nd renewal was registered, MC gave notice of intention to exercise power of sale.
- Shell lodged caveat forbidding registration unless subject to renewed lease
- Mercantile argued 2nd renewal not binding on it because registered protection did not include options
- **High Court held that an option to renew, contained in a registered lease, derived indefeasibility from the registration of the lease.**
- **The option to renew in the registered lease was a covenant that touched and concerned the land and it was not personal in nature.**
- Barwick CJ – TLA deals with 'registrable instruments' not registrable interests' – if right to renew is incorporated into the instrument it will receive same protection as underlying lease. Right to renew was incorporated into the instrument.
- **NOTE RE: LEASES**
 - Interest runs with the land meaning if one buys land with a lease, it is bought subject to the terms of that lease
 - Lease indefeasible and so are its terms
 - *Bahr v Nicolay*

Deferred indefeasibility

- **Deferred Indefeasibility**: invalidates such a title where it could be proven that the transaction through which the bona fide purchaser became registered, was obtained by fraud or is otherwise invalid
- Fraud must taint the transaction (may not have been committed by RP) for the title to be set aside.

Immediate indefeasibility

- **Immediate Indefeasibility**: confers absolute title by a bona fide purchaser
- RP must have committed the fraud or have had the fraud 'brought home to them' (e.g. via agent) for the title/the indefeasibility provision to be set aside
 - ***Gerard Cassegrain Pty Ltd v Cassegrain***: 'an indefeasible title is acquired by fact of registration and the fraud exception to indefeasibility operates only where the registration of a proprietor is obtained by fraud of the registered proprietor or its agent.'
- Purchaser has to be bona fide purchaser (acting in good faith). So long as this is true, registration confers immediate indefeasibility.
- Exception: *Gibbs v Messer* – still qualifies for immediate indefeasibility

Gibbs v Messer

- Mrs Messer left her CT with her solicitor for safekeeping; left power of attorney in favour of her husband
- The solicitor (Cresswell) forged the signature of the husband to a transfer of Mrs Messer's land to a fictitious person Hugh Cameron who became the owner