Lecture Week 4 – Indefeasibility provisions in the TLA

Indefeasibility of title
- Registered proprietor of Torrens title land hold indefeasible title
- ‘The expression…is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys’: Frazer v Walker [1967] per Lord Wilberforce

Section 42 TLA (Vic):
- Registered owner’s claim is superior to all other interests in the land other than the circumstances listed

Second reading speech:
- Sir Robert Torrens, as a member of the SA Parliament, identified the central principle of the system:
  - ‘That registered titles, except in cases where registration [is] procured by fraud, should be absolutely indefeasible’

The primary section in the TLA (Vic) setting out indefeasibility is s 42:

(1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in the 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 land whatsoever, except –
  a. The estate or interest of a proprietor claiming the same under a prior folio of the register (error)
  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 value consideration or deriving from or through such a purchaser

- Registered proprietor holds land subject to registered encumbrances, except in the case of fraud

Section 43 TLA – the doctrine of notice is abolished
- 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 purchaser 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 of itself be impugned of fraud
  - A person who dealt with registered proprietor (outside fraud) – you do not need to determine other interests

Section 44 TLA
(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
  - Statutory fraud and registered = will not gain indefeasible title (s 42) and registration will be void
  - Fraud makes title against those who were defrauded = void

(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
  - If registered proprietor who is bona fide purchaser for value – has taken from someone who is fraudulent – this is not going to impact on their title (new title even though previous defrauded party)

- Void if registered proprietor or mortgagee must have committed/been involved in fraud or impropriety

Section 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: s 42(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 interest (s 42(2)(a)-(f)) – these interests, although unregistered, are superior to interest that are registered

Core concepts or circumstances that can ‘penetrate’ the indefeasibility are:
- Fraud = where fraud is committed by the registered interest holder (principle of immediate indefeasibility) – express in act
- In personam = where it can be shown that there was some contractual promise or undertaking by the registered party vis-a-vis the unregistered party
- Inconsistent legislation = where legislation enacted after the Torrens legislation is inconsistent with the Torrens legislation, the latter will prevail
- Volunteer = where the registered party acquired the interest for no consideration (e.g. bequeathed in a will)

Indefeasibility of title:
- Registered title is created anew
- Registered title is not historical or derivative
- Registration confers indefeasibility even if registered proprietor took with notice of a prior interest – expression not used in Act
- Doctrine of notice specifically abolished
Immediate and deferred indefeasibility

- Refers to the interpretative scope of fraud
- **Immediate indefeasibility** = registered proprietor must commit the fraud for the title to be set aside; OR
- **Deferred indefeasibility** = fraud must taint the transaction (may not have been committed by registered proprietor) for the title to be set aside
- Modern courts prefer immediate indefeasibility

### Immediate indefeasibility

*Gibbs v Messer* (1891) PC

- Messer went away – left certificate of title with solicitor (Cresswell)
- C forged transfer to fictitious person – Hugh Cameron
- C forged a mortgage in favour of McIntyre’s from fictitious person
- Mortgage registered – C absconded

Lord Watson:
- No indefeasibility – fraud in transaction and dealt with forger not registered proprietor
- Fictitious person exception – because the person did not exist, the benefits of indefeasibility could not be imposed
- ‘The McIntyre’s 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’

Held:
- PC held that the protection which the Torrens system provides to persons transacting on the faith of the registered is restricted to those dealing with, and deriving a right from, a registered proprietor who is real and existing
- If the registered proprietor is fictitious, it cannot be said that the parties have transacted on the faith of the register
- Hence, on the facts, the mortgagees did not acquire an indefeasible title
- This case is probably best regarded as the fictitious person exception given its unusual facts

### Deferred indefeasibility

*Frazer v Walker* (1967) PC

- Registered proprietors – Mr and Mrs Frazer (co-ownership)
- Mrs Frazer forged the signature of Mr Frazer for a mortgage over property
- Mortgage registered and Mrs Frazer did not pay
- Mortgagee sale to Walker who became registered proprietor

Issue – could the mortgage be set aside?

Lord Wilderforce:
- Walker held indefeasible title
- If no fraud, then no intention was to confer full title on registered proprietor subject only to in personam obligations
- ‘Registration under the Land Transfer Act 1952 (Vic) confers on a registered proprietor a title to the adverse claims, other than those specifically expected. In doing so, they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam founded in law or in equity, for such relief as a court acting in personam may grant’

Held:
- The court concluded that immediate indefeasibility of title is central to the whole system of registration under the Torrens system and no adverse claim, except as expressly referred to, may be brought against a registered proprietor
- On the facts, as the mortgagees had not themselves committed the fraud, they acquired a valid and indefeasible title which could be passed on to Walker

**Breskvar v Wall** (1971) HC

- Petrie to retain certificate of title and incomplete transfer as security for loan he gave Breskvars
- Petrie fraudulently inserted his grandson’s name, Wall, into the transfer – transfer void per s 53(5) Stamp Act
- Wall become registered then sold to Alban Pty Ltd
- Before Alban registered, Breskvars lodged caveat
- Case really dispute between unregistered interests but good analysis of indefeasibility

Held:
- The HC held that whilst Wall’s registered title was subject to fraud (as the fraud could be brought home to Wall), the title that Wall received was capable of conferring valid title upon subsequent third-party purchasers
- Further, the purchase by the third parties was bona fide for value and without notice and it was acquired before the Breskvars could exercise their equitable right and set aside the registered title of Wall

Barwick CJ:
- In evaluating the objectives of the Torrens framework, concluded that the certificate of title is conclusive evidence of the registered proprietor within the Torrens system
- He noted that the Torrens system is a system of title by registration and not registration by title
  - Registration creates title (title is created by registration)
- This meant that the title was effectively created anew upon registration; it is not a historical or derivative title
- The new certificate of title describes the title which is created by registration. A registration which results from a void instrument will, subject to fraud, be effective according to the terms of the registration

Held:
- Equitable entitled of Breskvars as persons deprived of their land by fraud was postponed to equitable rights of Albans Pty Ltd
- Prior in time priority postponed because Breskvars armed Wall with means of placing himself on the register (approved *Abigail v Lapin*) – applied in *Rice v Rice* test, and approved by *Leros* HC