

III THE TORRENS SYSTEM

A Old System Title

- Under old system title, land could only be transferred by **deed**
 - A deed must be **signed** (by both parties), **sealed** (by wax) and **delivered** (given to the person acquiring the legal interest): s 23B CA
 - Wax seals are not needed anymore – if a printed document says ‘executed as a deed’ and is signed by both parties, **it is deemed to be sealed**: s 38(3) CA
- A deed is not a contract
 - A contract is used to effect the sale of the land (must be in **writing**: s 54A CA)
 - The deed **conveys the legal title**
- ‘**Chain of title**’ had to be established (**derivative title**)
 - **Nemo dat quod no habet**: you cannot give what you don’t have
- If the vendor did not lawfully possess the title (e.g. obtained it by fraud), the purchaser and every other purchaser down the line would obtain nothing despite payment of money
 - This was subject to a **limitation period** of **20 years**
- The vendor had to prove title up to the **Crown grant** (or at least **30 years of ownership through physical deeds and wills**)

1 Priority Rules and Competing Interests

- **Rules 1-3 are irrelevant to Torrens while rules 4-5 are still relevant**
 - Both the nemo dat and the bona fide purchaser for value without notice rules are irrelevant under Torrens

1	Earlier legal interest vs later legal interest	<ul style="list-style-type: none"> • Earlier legal interest wins if valid • If invalid, nemo dat rule applies
2	Earlier equitable interest vs later legal interest	<ul style="list-style-type: none"> • Bona fide purchaser for value for value without notice applies • Victim can still sue in contract
3	Earlier legal interest vs later equitable interest	<ul style="list-style-type: none"> • Legal owner would lose if they had been reckless with title deeds
4	Earlier equitable interest vs later equitable interest	<ul style="list-style-type: none"> • Earlier prevails unless there is postponing conduct

5	Earlier ‘mere’ equity vs later equitable interest	<ul style="list-style-type: none"> • Later equitable interest prevails if taken for value without notice of the earlier mere equity
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B Torrens Title

- System of land registration now used in all Australian states
- Object and purpose:
 - Provides ‘**security of title**’ and ‘**security of transaction**’ (also known as **static** and **dynamic security**)
 - Provides a register so that vendors and purchasers can discover all facts relevant to the title
 - Ensures that individuals dealing with land are not **adversely affected** by problems in the vendor’s title that are not listed on the register
 - Provides a **state guarantee** that the register is true and if it is not, **compensation is to be paid**
- Created and regulated by the *Real Property Act 1900* (NSW) (*‘RPA’*) – single most important source of land law in NSW
 - *Conveyancing Act 1919* (NSW) also important – includes provisions that relate to land generally (whereas *RPA* deals specifically with matters relating to registration of title)
- Every parcel of Torrens land is known as **lot** and is included on a **deposited plan** which is a ‘map’ of a particular area defining the boundaries of multiple parcels of land
 - Most common use for new DPs is when land is being subdivided
 - The DP is given a number known as a **folio identifier** (e.g. DP10487)
- The **folio** refers to the **Certificate of Title (CT)**
- There are two CTs:
 - The page in the register (the original copy), and
 - The duplicate copy given to the registered proprietor
- On a CT:
 - The first schedule records the **name of the fee simple owner(s)**
 - The second schedule records any **interest that affects the land**
- **Registration provides legal title**
 - It is the effect of the **instrument on the register** which is important not the shorthand that is on the CT

THE TORRENS SYSTEM - Strata and Stratum

- Process for selling land:
 - **Contracts** for sale of land (in writing: s 54A CA)
 - **'Settlement of the sale'**: parties exchange money for a signed transfer form and the duplicate CT
 - The purchaser must then lodge the forms at Land Titles Office

C Strata and Stratum

1 Strata and Community Plans of Subdivision

- In addition to ordinary plans of subdivision, there are also strata and community plans of subdivision
- Strata plans **subdivide airspace** into:
 - individual lots (eg apartments, offices), and
 - common property (eg halls, lifts, foyers)
- **Community plans of subdivision** are rarer but popular with developers who want to create 'exclusive' private communities or developments with multiple high-rises
- Registered plans of subdivision are extremely important because they **define the boundaries of a privately-owned lot property and common property**
 - Individual owners are responsible for their own lots
 - The 'body corporate' or 'owners corporation' (all owners) is responsible for common property

2 Stratum Plans

- Stratum (as opposed to strata) plans of subdivision are **deposited plans for volumetric subdivision** – ie to divide a building into **separate Torrens lots**
- Allows different land users to share a building without being in a common strata scheme together (ie all on same owners' corporation)

D Indefeasibility

- The registered proprietor holds the **title absolutely** subject **only to the interests recorded on the folio**: s 42(1) RPA

THE TORRENS SYSTEM - Indefeasibility

- These include the first schedule and second schedule

Real Property Act 1900 (NSW)

42 Estate of registered proprietor paramount

- (1) 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...

43 Purchaser from registered proprietor not to be affected by notice

- (1) 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.

- Note:
 - **Section 42** – indefeasibility provision
 - **Section 43** – notice of an unregistered title is irrelevant (abolishes BFPFVW/ON)
 - **Section 40** – the folio is conclusive evidence of title – it determines who the proprietor is for the purposes of **s 42**
- ‘Indefeasibility of title’ 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* [1966]

Frazer v Walker [1966] NZPC

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| Facts | <ul style="list-style-type: none">• Mr Frazer’s wife forged his signature to get a second mortgage on their farm• The law clerk did not witness the signature• When they defaulted, the mortgagee sold the farm to Walker (bought in good faith)• Walker registered, then commenced proceedings to gain possession from Mr Frazer |
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THE TORRENS SYSTEM - Indefeasibility

Issue	Was title transferred immediately or can it be deferred in cases of fraud?
Held	<ul style="list-style-type: none"> Walker's registration is valid – he acquired indefeasibility of title
Ratio	Confirmed doctrine of immediate indefeasibility; also confirmed in NSW by s 42 <i>RPA</i>

- **Immediate indefeasibility:** immediately a person obtains registration of title, they have good title, regardless if the CT was invalid
- **Deferred indefeasibility:** the first registered title holder's title procured by a registration of void or forged instrument will be defeasible and the original registered proprietor may seek to have it set aside
- Theory behind immediate indefeasibility is **as long as a purchaser is not involved in fraud, they can be confident that their title will be good**

Breskvar v Wall [1971] HCA

Facts	<ul style="list-style-type: none"> The Breskvards wanted a loan from Petrie and executed blank CT to Petrie Later, Petrie filled in the name on the transfer as his grandson, Wall (breaching the agreement between Petrie and the Breskvards) Wall registered the land in his name, then tried to transfer it to Alban who was BFPFV Before Alban could register, the Breskvards lodged a caveat (blocking registration) The Breskvards argued that Pretie and Wall were fraudulent purchasers because of the invalid transfer deed – therefore registration was invalid, and they had no title to pass on to Alban
Issue	Does a fraudulent purchaser still acquire title or is registration completely invalid?
Held	<ul style="list-style-type: none"> Torrens title is title by registration not registration of title – registration of void instrument is effective Breskvards lost equitable right because of their recklessness – thus Alban's later equitable interest prevails <ul style="list-style-type: none"> ○ Normally earlier equitable interest prevails over later but not where there has been 'postponing conduct' In the absence of fraud by transferee, indefeasible title can be attained by registering a void instrument
Ratio	Immediate indefeasibility is the correct doctrine – registration of void title makes it valid Title is acquired by registration

THE TORRENS SYSTEM - How Much of a Registered Dealing is Indefeasible?

E How Much of a Registered Dealing is Indefeasible?

- Difficulties arise when a dealing has **multiple provisions**, eg leases and mortgages
 - Terms of leases and mortgages can vary in their terms unlike fee simple
- If a lease is registered, are all the covenants (terms) of the lease indefeasible?

Mercantile Credits v Shell Co [1976] HCA

Facts	<ul style="list-style-type: none"> • Shell was a tenant who had a registered lease with options to renew • In Aug 1973, their landlord, Celtic, mortgaged the land to Mercantile Credits and registered • With their lease due to expire in March 1974, Shell told Celtic they wanted to exercise their second option to renew – agreed and signed in April 1974 • Before that lease could be registered, Celtic defaulted on its mortgage • Mercantile claimed they were entitled to sell the land free of the lease
Issue	Did the covenant for renewal, which was not separately registered but merely incorporated in the registered lease, take priority over the mortgage?
Held	<ul style="list-style-type: none"> • If the covenant is part of the interest in the land ('touches and concerns the land'), the priority will extend to the covenant – applied in this case • If the covenant is merely a personal one which in no way affects the estate or interest (eg covenant of guarantee), the priority will not extend • An option to renew attracts indefeasibility by virtue of the registration of the initial lease
Ratio	Terms are indefeasible if they are integral to the estate or interest and if they touch and concern the land

1 Leases

- Terms are indefeasible if they are **integral to the estate or interest** and if they **touch and concern** the land: *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976)
- A **right to renew** is indefeasible
- An **option to purchase** is indefeasible because of statute: s 53(3) *RPA*
- Covenant to **pay rent** is indefeasible: *Karacominakis v Big Country Pty Ltd* (2000)
- **Personal** rights are not indefeasible

THE TORRENS SYSTEM - Exceptions to Indefeasibility

- Indefeasibility will not extend to an **illegal covenant**: *Travinto Nominees v Vlattas* (1973)

2 Mortgages

- The indefeasibility of a registered forged mortgage **does not extend to personal rights**: *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976)
- Three different approaches for the **covenant to pay**:
 - **Full indefeasibility**: indefeasibility ‘plainly’ extends to the covenant to pay: *Pyramid Building Society v Scorpion Hotels* [1998]
 - **No indefeasibility**: security interest is indefeasible but covenant to pay is not: *Grgic v ANZ Banking Group Ltd* (1994)
 - **Partial indefeasibility**: covenant to pay enforceable only where it is necessary to make the mortgagee’s security interest effective: *Duncan v McDonald* (1997)
- Generally, the **charge** on the land is indefeasible, but the personal covenant to pay is not
- NB: If the mortgage document was forged, difficult questions arise (because while, so long as the mortgage is innocent, a forged mortgage is effective when registered; a forged contract is not enforceable) – can a registered mortgagee sue the mortgagor on the personal covenant if the registered mortgage and the mortgage contract were not signed by the mortgagor?
 - Case law complex and contradictory on this point but unlikely to be enforced: *Grgic v ANZ* (1994) – where Mr Grgic’s signature was forged by an impostor, personal covenant not enforced

F Exceptions to Indefeasibility

1 Fraud

- The primary exception to indefeasibility is fraud: s 42 RPA “except in the case of fraud...”
- **Refers to the fraud of the person claiming the benefit of the registration**
 - *Frazer v Walker* involved fraud but not of the person registering
- Question of whether a person has been fraudulent is a question of fact

THE TORRENS SYSTEM - Exceptions to Indefeasibility

- Concerns actual dishonesty on the part of the registered proprietor
- Type of fraud that comes within s 42 RPA is often referred to as ‘statutory fraud’ as opposed to equitable fraud (unconscionability)
- Notice of earlier equitable (unregistered) interest now **not considered fraud**: s 43 RPA

Loke Yew v Port Swettenham Rubber Company [1913] AC

Facts	<ul style="list-style-type: none"> ● Eusope was the owner of a particular lot of land in colonial Malay ● Loke Yew (P) acquired some title from Eusope but did not complete registration ● Eusope entered a contract to sell the rest of the land to Port Swettenham (D) who agreed that they were only buying the land not belonging to P ● Despite this agreement, D registered all the land in their name and became the registered proprietors of P’s land as well
Issue	Did D’s conduct (registering the land despite what was agreed) amount to fraud, meaning they did not enjoy indefeasibility under the Torrens system?
Held	<ul style="list-style-type: none"> ● Where a party, in order to induce another party into the transaction, promises that an unregistered interest will be preserved and then goes back on that promise, has committed fraud and will not enjoy indefeasibility
Ratio	A registered proprietor who has acted fraudulently (including by going back on a promise made to induce the transfer) will not enjoy protection given by indefeasibility

2 Knowledge of Others’ Fraud

- If a person **knows** the documents they have been given were forged by another person, but they register them regardless, they are guilty of fraud
- The fraud must be ‘**brought home to the person whose registered title is impeached** or to his agents’: *Assets Co Ltd v Mere Roihi* [1905] AC
 - **Wilful blindness** is sufficient - ‘If it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth... fraud may properly be ascribed to him’: *Assets Co Ltd v Mere Roihi* [1905] AC
 - The fact that the RP may have found out about the fraud if they made further inquiries is insufficient: *Assets Co Ltd v Mere Roihi* [1905] AC
- Australian courts have been very reluctant to find that a registered proprietor’s title is defeasible for fraud **because someone else’s fraud has arguably been ‘brought home**

to them’ or their suspicions were aroused but they did not inquire further for fear of learning the truth

Macquarie Bank v Sixty-Four Throne [1988] VR

Facts	<ul style="list-style-type: none"> • Kandy (a solicitor) fraudulently offered a property that belonged to his parents-in-law’s family trust as security for a loan • MB did not seek proof that Kandy had the right to deal with the property and their solicitors did not realise that the mortgage papers were signed by Kandy and his wife, not her parents
Issue	Was the fraud ‘brought home to’ Macquarie Bank?
Held	<ul style="list-style-type: none"> • No – MB was wilfully blind and reckless, but they did not have a dishonest intent – they did not dishonestly ignore the warning signs in order to become registered and can therefore not be guilty of statutory fraud
Ratio	A dishonest intent is required to meet the high threshold of statutory fraud

(a) Agents of the Registered Proprietor

- An **agency** arises when a principal expressly or impliedly appoints someone to act on their behalf, eg real estate agents, solicitors
- Whether the principal is liable to the person who has been defrauded for the acts of the agent?
 - The **actual knowledge** of the agent is imputed to the principal
 - **Constructive knowledge** on the part of the agent is **insufficient**
- Two views:
 - *Schultz v Corwill Properties P/L* [1969] NSWSC:
 - “An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests”
 - “The agent **must be normally acting within the scope of his actual or apparently authority for the principal to be responsible**”
 - *Dollars & Sense Finance Ltd v Nathan* [2008] NZ Supreme Court:
 - “Whether the agent’s acts were so connected to the tasks he or she was asked to do that they could be regarded as a mode of performing them
- *Schultz* is **arguably problematic** because:
 - Though Street J stated the test for fraud by the agent correctly, he erred in his restrictive application of the test to the facts in the Schultz case