

Real Property Exam Notes

1. Torrens Title

- Timeline
- Indefeasibility

2. Exceptions

- Unregistered interests – competing legal and equitable
- Priorities
- Fraud
- Prior folios, profits a prendre etc.
- Possessory Title

3. Notice & Unregistered Interests

- Postponing Conduct
- Unregistered Legal
- Dealing registrable s43A

4. Caveats

5. Co-Ownership

6. Mortgages

7. Easements

8. Covenants

Torrens Title

Torrens Title is a system of title by registration, title is obtained by registering your interest - *Breskvar v Wall* (1971).

It was first introduced in 1862, governed by the *Real Property Act 1900*.

S31B – Registrar General is responsible for maintaining the register and issuing certificates of title. These are comprised of:

1. First Schedule
 - a) Prior Vendor's name; which will be replaced by the
 - b) Current Purchaser
2. Second Schedule (1st is subject to these interests)
 - a) Mortgages
 - b) Leases
 - c) Easements
 - d) Restrictive covenants

Timeline of Torrens Title

1. Exchange of contracts (contract of sale) - this is where you get an interest in land:
 - There are two contracts: one signed by the vendor, given to the purchaser, one signed by the purchaser, given to the vendor.
 - Upon exchange of contracts, a purchaser obtains an unregistrable, equitable interest in the property.
 - Both the vendor and purchaser now have an equitable right to ask the NSW Supreme Court of Equity Division to compel the completion of the contract by way of specific performance - *Tanwar Enterprises Pty Ltd v Cauchi* [2013]
2. Settlement | Completion (transfer)
 - When the vendor delivers the purchaser an executed transfer of the property being sold. The Certificate of Title is also usually delivered at this stage.
 - No vendor should hand over the signed transfer before the purchaser pays the balance of the contract after the deposit.
 - The exchange of money is not technically relevant, only the transfer is necessary to satisfy this part.
3. Lodgement in registrable form
 - Once the contract for sale of land is completed, a purchaser should immediately lodge the transfer, accompanied by the Certificate of Title, with

the Registrar General. • Lodgement (transfer) must be in the registrable form or the Registrar will refuse to register the transfer. The components of registrable form are: - The name of the transferor, mortgagor or lessor must be the same as the name that is in the First Schedule. Even if the name on the First Schedule is John Smith, but the transfer is lodged for John James Smith, the Court will wait until it is confirmed they are the same person. - Where there is a registered lease or easement (or other interest in land) registered in the Second Schedule, the transfer must expressly state that it is subject to these.

- Usually will take 24 hours, but just because it is lodged today, it does not mean it is registered tomorrow. Do not assume registration is automatic – only believe so if there is certainty.

4. Registration - apply ss. **41, 42, and 43 of the Real Property Act 1900** (NSW)

- Once dealing has been lodged, transfer will be registered.
- Don't equate lodgement with registration for certainty's sake.
- Registration provides that the register trumps the First Schedule and the contractual rights of other parties. The emphasis of the importance of the written documents is because 54A of the Conveyancing Act stipulates that interests in land must be in writing.

Indefeasibility of Title

The registered proprietor has a title that is conclusive and that title cannot be defeated by previous claims of defectiveness.

Section 41:

Provides that a person only obtains Title by registration and no interests in land can be enforced until they are registered.

- Under TT, only the State grants Title – *Commonwealth v NSW* (1918)

Section 42:

Provides that Title received at registration is indefeasible and that the First Schedule proprietor is subject to the registered interests of those in the Second Schedule.

- Indefeasibility is immediate and not deferred under s42 – *Frazer v Walker* [1967]' *Breskvar v Wall* (1971)
- A person may assert indefeasibility of title by relying on s42 if they were neither fraudulent nor a beneficiary of fraud, even though the dealing by which they became registered was a forgery or otherwise procured by fraud – *Mayer v Coe* (1968)

Mayer v Coe (1968)

Facts:

- Mayer left her CT with her solicitor for safekeeping, but unbeknownst to her, the solicitor was dishonest and forged her signature on a mortgage in favour of Coe. Coe believed he was lending money to Mayer by way of mortgage and advanced the money to her solicitor who then misappropriated the money. After the mortgage was registered to Coe, Mayer found out.
- **Held:** Upon registration, Coe obtained indefeasible title as he had no knowledge of the forgery. Prior to registration however he had no indefeasibility. Mayer was however, entitled to damages from her solicitor.

Section 43:

Provides that, in the absence of fraud, a person who is taking an interest in a particular property, is to assume the correctness of the Register when dealing with the registered proprietor of any estate or interest in the property. Such a person does not need to be concerned with whether the person who is registered was actually entitled to be.

The Ambit of Indefeasibility

The concept of indefeasibility is far-reaching.

Bursill Enterprises v Berger Bros (1971) 124 CLR 73

Facts: property was connected by a wall. Under Old System Title, an easement was created, burdening one particular property to enable the neighbour to create a right of way to get rear access to his property. This meant that the owner of the property could not build their own property to the boundaries by the amount of the neighbour's easement. The easement also gave the neighbour the ability to build above the right of way, to the airspace, over the land of the owner's property. This was all allowed because the neighbour was registered under the Torrens Title.

Koteff v Bogdanovic (1988) 12 NSWLR 472

Facts: House owned by Koteff who entered into an arrangement with Mrs Bogdanovic to the effect of if she looked after him until he died, he would give his estate to her, and his