

## Real Property (70317)

### Autumn Session Notes

## TORRENS TITLE

### The Torrens System

- The Act which controls Torrens title is the Real Property Act 1900 (NSW)
- All grants of land made in NSW after 1 January 1863 are held according to the Torrens system and under the provisions of the *Real Property Act 1900*
  - Grants of land made before that date need to be converted from old system to Torrens
- Torrens is a system of titling based on registration
  - Titling is proof of ownership – proving ownership by registration
- Torrens was introduced in South Australia in 1858
- It was introduced as a new system of land titling and designed to replace what is known as OST - proving ownership and conveyancing
- **Old System Title (OST)** conveyancing relied on 'chains of title'
  - **Chain of Title** - title of transfers of title to a property from the present owner back to the original owner of the property
  - Required a 'good root of title' – needed to show that all the documents were present & validly signed (not forged)
    - Any problems would leave the purchaser vulnerable to someone else proving that they had a better claim to the estate or interest, or that the estate they had purchased was subject to another interest and they were therefore bound by that interest
- The Torrens System was designed to be a kind of 'one stop shop'
  - Idea is the purchaser does not need to investigate the history
  - You do not need to look behind the register (the 'curtain principle'): see *Gibbs v Messer* [1891] AC 248 at 254
- Register will show every interest that affects the land
  - Registered proprietor holds free of all other interests subject to a small number of exceptions
- Owner of a parcel of land was issued a 'certificate of title' which was an exact duplicate of a folio (or page) in the Register or titles kept by the Registrar of Titles
  - Folio updated and new matching CT issue when any dealings happened which affected that parcel

### The Register

The Register is central to the Torrens System. Each parcel of land is a folio.

#### **Section 31B RPA:**

- 1) The Registrar-General shall cause a Register to be maintained for the purposes of this Act.
- 2) The Register shall be comprised of:
  - a. folios,
  - b. dealings registered therein under this or any other Act.

### The Register and Folios

#### **Section 32(1) RPA:**

The Registrar-General creates a folio of the Register for land by making a record of:

- a) a description of the land and of the estate or interest therein for which it is created,
- b) a description of the proprietor for the time being of the estate or interest and the fact that any such proprietor is a minor if the Registrar-General knows that to be the case, and
- c) such particulars, as the Registrar-General thinks fit;

and by allocating a distinctive reference to the record so made.

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Land is considered to be registered in NSW on **creation of a folio for that parcel of land**. Folio does not mean 'residential, pretty, and in Glebe' or '23 Smith Street'. It refers to the unique identifier given to every folio. More than one estate can be recorded in a folio. Section 40 of the RPA states that manual and computer folios are evidence of title.

#### **Section 33 RPA:**

1. The Registrar-General may, if the Registrar-General thinks fit so to do, from time to time issue a certificate of title for the land comprised in any folio of the Register and may, for the purposes of subsection (4), require the production to the Registrar-General of any certificate of title.
2. A certificate of title shall be in an approved form.
3. N/A
4. When the Registrar-General issues a certificate of title, the Registrar-General shall cancel, wholly or partially as the case may require, any certificate of title thereby superseded and that has been produced, or is otherwise available, to the Registrar-General
5. Notwithstanding subsection (1), the Registrar-General shall issue a certificate of title for the land comprised in a folio of the Register upon the written request of:
  - a. the registered proprietor of that land, or
  - b. any registered mortgagee, registered chargee or covenant chargee of that land.

#### Certificate of Title

A Certificate of Title (CT) recites the details in the folio and is a copy of what is recorded in the relevant folio of the Register. A new CT is generated each time a transaction alters the Register. A CT is the most powerful document in Real Property.

- **First Schedule** – the **current** registered proprietor
  - **Type** of proprietary interest (e.g. joint tenant, co-owners)
  - Names of purchasers will be substituted **after registration** of sale
- **Second Schedule** – owners of first schedule hold free of **all interests except those recorded**
  - RPs take **interests subject to what is recorded** in this schedule
  - E.g. mortgages, leases, easements, restrictive covenants
- E-Certificates – section 33A of *RPA* now allows for eCTs
  - Some steps have been taken towards conversion to eCTs
  - Section 33AAA *RPA* – Registrar General can issue a notice to phase out paper certificates
    - No notice so far regarding this matter

#### Registration

- **Section 36(6A) RPA** – a dealing is registered when the **Registrar-General has made such recording in the Register** with respect to the dealing as the Registrar-General thinks fit.
- **Section 3(1)(a) RPA** - a dealing is any instrument (anything in writing) that is registrable or capable of being made registrable
  - Includes easements, mortgages, transfers, leases, contract for sale, will
  - In practice this means a dealing is registered when the computer record for that dealing is altered
- **Section 41 RPA** – a dealing is **not effectual until recorded** in the Register
  - Folio of the register is updated
  - Records are updated overnight and a new version of the CT is computer generated
- **Registered Proprietor** - person who is the registered owner of the estate or interest
  - You can be the registered proprietor of an estate in fee simple, but equally of a life estate, or of an interest which is not an estate: a mortgage; a lease; an easement
  - You have **indefeasibility** if you are the registered proprietor

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**Section 36 RPA – Order of Registration**

- 4) Where two or more dealings which affect the same land have been lodged and are awaiting registration, the Registrar-General may register those dealings in the order which will give effect to the intentions of the parties as expressed in, or apparent to the Registrar-General from, the dealings.
- 5) Subject to section 12A, where the intentions of the parties to dealings referred to in subsection (4) appear to the Registrar-General to conflict, the order of registration shall be the order in which the dealings were lodged in registrable form.
- 6) N/A
- 7) N/A
- 8) N/A
- 9) Dealings registered with respect to, or affecting the same estate or interest shall, notwithstanding any notice (whether express, implied or constructive), be entitled in priority the one over the other according to the order of registration thereof and not according to the dates of the dealings.

**Indefeasibility**

**Section 42 RPA**

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 except:
  - a. the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,
    - i. (a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,
  - b. in the case of the omission or misdescription of any profit à prendre created in or existing upon any land,
  - c. as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value, and
  - d. a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he or she was not protected:  
Provided that:
    - i. The term for which the tenancy was created does not exceed three years, and
    - ii. in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.
2. In subsection (1), a reference to an estate or interest in land recorded in a folio of the Register includes a reference to an estate or interest recorded in a registered mortgage, charge or lease that may be directly or indirectly identified from a distinctive reference in that folio.

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- Operates by virtue of **section 42 of the RPA**
- Indefeasible title is one that is conclusive and cannot be set aside due to a defect existing in that title prior to its registration
  - RP has indefeasibility registered
- Indefeasible estate or interest is held free from all other interests that are not on the Register
  - **Note:** unless an **exception** can be established.
- Can attach to any other interest

**Example:** Chris owns an estate in fee simple. He is the current RP. He sells the estate to Toby. Toby becomes the new RP. One year prior to the sale Chris had created a lease over the property in favour of Ben. Toby did not know this. Is Toby bound by the lease? Is the lease enforceable against Toby? According to section 42(1) RPA Toby has indefeasible title.

### Section 45(2) RPA

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.

### Immediate Indefeasibility

**Example:** Brian stole the certificate of title from Chris. He forged a transfer to Toby, inserting Chris' name into the transfer. Toby becomes the new registered proprietor. Toby did not know anything about this. Can Chris recover the property?

There is no exception that applies. Toby would take clear title. Just because Toby is the registered proprietor and he takes his title freely. Chris may have a remedy against Brian for the fraud (through equity) but he will not get the land back. **The Torrens system is not one of fairness. It is a system of certainty for purchasers.**

**Example:** Brian stole the certificate of title from Chris. He forged a transfer to Toby, inserting Chris' name into the transfer. Toby becomes the new registered proprietor. Toby did not know anything about this. Can Chris recover the property?

- We now understand from *Frazer v Walker* and *Breskvar v Wall* that Chris cannot recover the land. Toby holds indefeasible title by virtue of section 42, regardless of whether he gained that title through a void and forged instrument. Toby is not complicit in this situation and hence, he gains the land. What can Chris do?
  - He cannot get the land back. Chris can bring an action against Brian for fraud and most likely will get damages. He could also possibly seek some compensation from the Assurance Fund.
    - Assurance Fund is a central fund of the Torrens system that is set aside by the government for fraudulent circumstances.

This depends in part on how you understand indefeasibility.

- Immediate: indefeasibility is conferred immediately upon registration of the instrument. Even in cases of fraud/forgery (*Frazer v Walker*; *Breskvar v Wall*)

Compare with:

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- Deferred: the title of a purchaser who registers a forged instrument is 'defeasible'; that is, it can be set aside by a court if an action is brought by the original owner. However, if the purchaser on-sells the property to an innocent purchaser who registers in good faith, their title is indefeasible (*Gibbs v Messer*)

#### *Frazer v Walker*

**Facts:** Mr and Mrs Frazer were registered proprietors of a farm in Auckland. Mrs Frazer, who purported to be acting for both Mr Frazer (the appellant) and herself, negotiated a loan from a couple - the Radomski's (the second respondent) - of 3000 pounds. To secure the loan, Mrs Frazer gave the Radomski's a mortgage over the farm, forging her husband's signature in the process. She took the form to her solicitor's office, where she signed her own signature and the clerk witnessed both Mr Frazer and Mrs Frazer's signatures, despite not having seen Mr Frazer sign the document. The mortgage to the Radomski's was registered and appeared as a registered interest on the relevant folio. Mrs Frazer made no payment of either principle or interest under the mortgage. Eventually after receiving no payments, the Radomski's exercised their power of sale as mortgagees of the property and sold the property to Mr Walker (the first respondent). He became the new registered proprietor. Neither the Radomski's or Walker had any knowledge of the forgery. Once Walker was registered as the registered proprietor, he brought action against Mr Frazer for possession of the land. Mr Frazer claimed that until that time, he had not known what his wife had been up to. Mr Frazer counter-claimed against Mr Walker, seeking a declaration that the mortgage was null and void because his signature on the mortgage form was forged.

**Issue:** Did Walker get immediate indefeasibility? As he did not know of the forgeries, did registration confer immediate indefeasibility such that he took free of any claim by Mr Frazer? Could he become a valid registered proprietor with indefeasibility despite the transfer being void for forgery?

**Held:** This was the first Privy Council case to decide that even if you take a void document, you still get immediate indefeasibility. Although the case was decided in New Zealand, it is authority that is accepted all across the Commonwealth.

#### *Breskvar v Wall*

**Facts:** Mr and Mrs Breskvar executed a transfer to Petrie as security for a loan. Petrie fraudulently used the transfer and sold the property to his grandson Wall, who became the new registered proprietor. Wall sold to Alban Pty Ltd but before they could register their interest the Breskvars lodged a caveat which prevented the sale from being completed. The Breskvars sought a declaration that the transfer to Alban was invalid.

- **Key Fact:** Prior to registration the transfer was void. This was not because of forgery (the Breskvars signed the transfer), but because there was no transferee named and therefore it was void under the Qld *Stamp Act*.

**Held (Barwick CJ at 385-386):**

- Torrens is a system of **title by registration**
- Title which CT describes is the title which registration itself has vested in the proprietor
- A registration which results from a void instrument is **effective according to the registration**

**Held (Menzies J at 397):**

- *Frazer v Walker* establishes that indefeasible title **can be acquired by the registration of a void instrument**
  - Dependent on the **absence of fraud (or some other statutory ground for exception)** on the part of the **transferee**
- Indefeasibility **cures the defect** and a purchaser holds the title